



VOLUME NO. 59

OPINION NO. 2

MONTANA CONSUMER LOAN ACT: §§ 32-5-101 et seq.

MONTANA DEFERRED DEPOSIT LOAN ACT: §§ 31-1-701 et seq.

HELD: Earned Wage Access providers do not need to be licensed by the Montana Division of Banking and Financial Institutions under the Montana Consumer Loan Act and Montana Deferred Deposit Loan Act to provide Earned Wage Access products.

December 22, 2023

Matt Regier
Speaker
Montana House of Representatives
P.O. Box 9763
Kalispell, MT 59904

Speaker Regier:

[P1] You requested an Attorney General Opinion regarding whether certain income-based advance programs constitute loans under two Montana statutory schemes. In preparing this opinion I have considered the analysis in your legal memorandum accompanying your request and additional research on the topic.

[P2] By virtue of your office, you are entitled to request such an opinion pursuant to MCA § 2-15-501(7). Therefore, I have restated your question presented and provided a short answer as follows:

Question Presented: Whether an Earned Wage Access ("EWA") product meets the definition of: (1) "consumer loan" in MCA § 32-5-102(2)(a) requiring licensure by the Montana Division of Banking and Financial Institutions under MCA § 32-5-103; or (2) "deferred deposit loan" under MCA § 31-1-703 requiring licensure under MCA § 31-1-795.

Short Answer: No. So long as the EWA product is fully non-recourse; does not condition an income-based advance on any interest, fees, or other consideration or expenses; and limits income-based advances to income already earned by the consumer.

DEPARTMENT OF JUSTICE

215 North Sanders
PO Box 201401
Helena, MT 59620-1401

(406) 444-2026
Contactdoj@mt.gov
mtdoj.gov

[P3] I. Background

Nearly two-thirds of private employers use biweekly, semimonthly, or monthly pay periods. 85 Fed. Reg. 79404 (Dec. 10, 2020) (Consumer Financial Protection Bureau ("CFPB") advisory opinion on Earned Wage Access products).¹ This creates a lag between income earned and payment of that income. For some workers, this lag creates financial hardship because bills and expenses come due before the payment of earned income. 85 Fed. Reg. 79404 n.3. These workers also suffer from a lack of access to traditional lending—through banks or other non-payday lenders. Financial Technology: Products Have Benefits and Risks to Underserved Consumers, and Regulatory Clarity Is Needed, Report to Congressional Committees, GAO-23-105536 at 3–4 (March 2023) ("GAO").

[P4] EWA products provide customers access to income that has been earned but not yet paid. GAO at 6; *see also* 85 Fed. Reg. 79405. EWA consumers tend to be lower income individuals. GAO at 24. The GAO reported, for example, that between 75% and 97% of EWA consumers reported earning less than \$50,000 per year, with one EWA provider reporting that about 78% of its users earned less than \$25,000 per year. GAO at 24. EWA products, therefore, "have emerged as a potential solution to help consumers underserved by traditional financial institutions." GAO at 1. While EWA products contain some risks to consumers, GAO at 23–24, they provide an alternative to more costly services like payday loans to cover short-term liquidity issues. 85 Fed. Reg. 79405; GAO at 50, Table 5 (comparing consumer costs of EWA products to payday loans).

[P5] In general, an EWA product allows a consumer to access a portion of their earned income, either as a percentage of earned income or a set amount, prior to payday. On payday, the advance is then repaid through an employer payroll deduction or through debit from the consumer's bank account. GAO at 21. EWA products vary in fee structure, voluntary gratuities, upcharges, and disbursement of funds. GAO at 21, 50.

[P6] The GAO noted that the regulatory structure governing EWA products could use additional clarity. GAO at 35. Recently, other states have stepped in to provide that clarity either through legislation or agency opinions. *E.g.*, S.B. 290, 82nd Session (Nev. 2023); Ariz. Att'y Gen. Op. I22-005.

¹ The CFPB advisory opinion concerns whether EWA products constitute "credit" for the purposes of the Truth in Lending Act. 85 Fed. Reg. 79404. CFPB's opinion is limited to a set of assumed facts. *Id.* at 79405–06. As detailed below, Montana law does not depend upon an identical set of facts. As such, while CFPB's opinion provides persuasive arguments, this opinion should not be read as depending upon CFPB's advisory opinion.

[P7] II. Material Facts

This Opinion assumes the following material facts based on your memorandum:

- (1) The EWA product is fully non-recourse. See Memorandum at 1.²
- (2) The EWA provider does not condition access to advances on the payment of any mandatory interest, fee, or other compensation. See Memorandum at 2.
- (3) A consumer may not receive an advance with a cash value in excess of the consumer's accrued income.

[P8] III. Montana Consumer Loan Act

A. Background

Whether an EWA provider is required to obtain a license from the Department of Administration to offer EWA products to Montanans is a matter of statutory interpretation. Courts interpret statutes by first looking at the plain language. *Mont. Sports Shooting Ass'n v. State*, 2008 MT 190, ¶ 11, 344 Mont. 1, 185 P.3d 1003. Where "the legislature has not defined a statutory term, [courts] consider the term to have its plain and ordinary meaning." *State v. Alpine Aviation, Inc.*, 2016 MT 283, ¶ 11, 385 Mont. 282, 384 P.3d 1035. There is no need to "interpret the statute further if the language is clear and unambiguous." *Mont. Sports Shooting Ass'n*, ¶ 11.

[P9] Montana regulates consumer loans through the Montana Consumer Loan Act. MCA §§ 32-5-101 et seq. "[A] person may not engage in the business of making consumer loans in any amount and contract for, charge, or receive directly or indirectly on or in connection with any loan any compensation, whether for interest, fees, other consideration, or expense, except as provided in and authorized by this chapter." MCA § 32-5-103(1). A "consumer loan" means "credit offered or extended to an individual primarily for personal, family, or household purposes, including loans for personal, family, or household purposes that are not primarily secured by a mortgage, deed of trust, trust indenture, or other security interest in real estate." MCA § 32-5-102.

[P10] The Montana Consumer Loan Act does not define "loan" or "credit." But, elsewhere, Montana law defines a "loan of money" as "a contract by which a person delivers a sum of money to another person and the other person agrees to return at a future time a sum equivalent to that which the other person borrowed." MCA § 31-1-101. "Whenever a loan of money is made, it is presumed to be made upon interest unless it is otherwise expressly stipulated at the time in writing." MCA § 31-1-103; see also MCA § 31-1-106 ("unless there is an express contract in writing fixing a different

² An EWA product is fully non-recourse where the provider obtains no legal or contractual right to repayment against the consumer, does not engage in any debt collection activities with regard to any unpaid balance, does not sell or assign any unpaid balance to a third party, and does not report non-payment to any consumer credit reporting agency.

rate or a law or ordinance or resolution of a public body fixing a different rate on its obligations, interest is payable on all money at the rate of 10% a year after it becomes due"). A loan, therefore, includes a right to repayment and a presumption that the loan carries interest, or other fees, as a condition of the loan of money.

[P11] The Department has not defined "loan" or "credit" within its administrative rules for consumer loan licensees. Mont. Admin. R. Chapter 2.59 Subchapter 3. But like the Montana Code Annotated, the Department did define "loan" or "extension of credit" elsewhere. See Mont. Admin. R. 2.59.116 (a "loan" or "extension of credit" means "a direct or indirect advance of funds to a customer made on the basis of any obligation of that customer to repay the funds or that is repayable from specific property pledged by or on the customer's behalf."). That definition also incorporates a right to repayment.

[P12] Finally, Black's Law defines "loan" as "an act of lending; a grant of something for temporary use" or "a thing lent for the borrower's temporary use; especially, a sum of money lent at interest." Black's Law Dictionary, at 947 (7th ed. 1999). This definition too incorporates a right to repayment as well as the presumption of interest.

[P13] Federal authorities provide persuasive guidance on whether an EWA product constitutes a "loan." In particular, the CFPB has specifically exempted EWA advances from its Payday Lending Rule. See Bureau of Consumer Financial Protection, 82 Fed. Reg. 54472 (Nov. 17, 2017) codified at 12 C.F.R. Part 1041. Although the Payday Lending Rule has been largely invalidated, portions of the original Rule remain in effect. In particular, the Payday Lending Rule explicitly exempts from coverage certain types of liquidity, including "wage advance programs" and "no-cost advances." 12 C.F.R. § 1041.3(d)(7), (8).

[P14] Specifically, "wage advance programs" are defined as:

Advances of wages that constitute credit if made by an employer, as defined in the Fair Labor Standards Act, 29 U.S.C. 203(d), or by the employer's business partner, to the employer's employees, provided that:

(i) The advance is made only against the accrued cash value of any wages the employee has earned up to the date of the advance; and

(ii) before any amount is advanced, the entity advancing the funds warrants to the consumer as part of the contract between the parties:

(A) 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

(B) 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.

12 C.F.R. § 1041.3(d)(7).

[P15] In promulgating the Rule, the CFPB explained 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. 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.

82 Fed. Reg., 54548, 54547.

[P16] Similarly, "no-cost advances" are defined as:

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:

(i) 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.

12 C.F.R. § 1041.3(d)(8).

[P17] In drafting this language, the CFPB noted its discussions with EWA providers 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....

82 Fed. Reg., 54472, at 54548.

[P18] Clarifying that no-cost advances are "likely to benefit consumers," the Bureau concluded that such products are "unlikely to lead to the risks and harms [associated with traditional payday loans]", such as "default, delinquency, and re-borrowing." *Id.* at 54548, 54554; see also 12 CFR part 1026, Supp. I, Cmmt 2(a)(14)-1.

[P19] The Federal Reserve Board of Governors has also concluded that credit is not extended when a consumer borrows against the accrued cash value of an insurance policy. 46 Fed. Reg. 20848, 20851 (Apr. 7, 1981). Under reasoning similar to that presented in the Payday Lending Rule, the accrued cash value of income is effectively the worker's own money and providing no-cost access to that income does not constitute a loan. 12 C.F.R. § 1041.3(d)(7), (8); 12 CFR part 1026, Supp. I, Cmmt 2(a)(14)-1; see also Ariz. Att'y Gen. Op. I22-005.

[P20] B. EWA products are not "loans" under the Montana Consumer Loan Act.

Subject to the assumed material facts, an EWA product does not meet the definition of loan under the Montana Consumer Loan Act. First, EWA providers do not possess a right to repayment for income-based advances. See *Firelight Meadows, LLC v. 3 Rivers Telephone Coop., Inc.*, 2008 MT 202, ¶ 22, 344 Mont. 117, 186 P.3d 869 ("the essential and characteristic feature of a loan is that the money must be absolutely returnable") (internal quotation omitted). Second, an EWA product grants consumers access to income already earned and thus does not qualify as a loan. See *Firelight Meadows, LLC*, ¶ 22 (A "loan ... must be a temporary letting of money for temporary use."); see also 85 Fed. Reg. 79404, 79406, n.24 (an EWA product "functionally operates like an employer that pays its employees earlier than the scheduled payday" not a loan). Finally, an EWA product does not condition the advance on any "interest, fees, other consideration, or expense" and thus falls outside MCA § 32-5-103(1).

[P21] 1. EWA products do not contain a right to repayment.

A "consumer loan," MCA § 32-5-103(1), for money carries a similar meaning to a "loan of money" under MCA § 31-1-101. A "loan for money" means "a contract by which one delivers a sum of money to another and the latter agrees to return at a future time a *sum equivalent* to that which he borrowed." *Firelight Meadows, LLC*, ¶ 22 (quoting MCA § 31-1-101) (emphasis in original). "[I]f the obligation to return is based on a contingency or on a certain condition which may or may not happen or occur, the transaction is not a loan." *Id.* (quoting *Rae v. Cameron*, 112 Mont. 159, 167, 114 P.2d 1060, 1064 (1941)). "The essential and characteristic feature of a loan is that the money must be absolutely returnable." *Id.* (internal quotation omitted).

A fully non-recourse EWA product does not meet this definition because the income-based advance is not "absolutely returnable." *Firelight Meadows, LLC*, ¶ 22; 85 Fed. Reg. 79407 (EWA "[p]roviders have no rights against the employee in the event of nonpayment"); 12 C.F.R. § 1041.3(d)(7), (8); supra n. 2. Without this essential characteristic, an EWA product cannot properly be considered a loan.

[P22] 2. EWA products do not extend credit because the income is already owed to the consumer.

A "loan ... must be a temporary letting of money for temporary use." *Firelight Meadows, LLC*, ¶ 22; see also Mont. Admin. R. 2.59.116; 85 Fed. Reg. 79406 n. 27; Black's Law Dictionary, at 947 (7th ed. 1999) (definition of "loan").

[P23] An EWA product that limits income-based advance amounts to income already earned, does not extend credit, or loan money, because it allows a consumer to access the consumer's own income. As the Board of Governors of the Federal Reserve System explained, "credit has not been extended because the consumer is, in effect, only using the consumer's own money." 46 Fed. Reg. 20848, 20851 (Apr. 7, 1981); accord *Firelight Meadows, LLC*, ¶ 22. EWA products do not, in this sense, temporarily let money or extend credit, since they grant a consumer access to income to which the consumer is already entitled. A no-cost, fully non-recourse EWA product simply has the effect of changing a worker's payday.

[P24] 3. EWA products are not conditioned on "interest, fees, other consideration, or expense."

"[A] person may not engage in the business of making consumer loans in any amount and contract for, charge, or receive directly or indirectly on or in connection with any loan any compensation, whether for interest, fees, other consideration, or expense, except as provided in and authorized by this chapter." MCA § 32-5-103(1). "Interest means the compensation allowed by this chapter for the use, forbearance, or detention of money." MCA § 32-5-102(4). Consideration means "something of value (such as an act, a forbearance, or a return promise) received by a promisor from a promise." Black's Law Dictionary, at 300 (7th ed. 1999). Expense means "an expenditure of money, time, labor, or resources to accomplish a result." Black's Law Dictionary, at 598 (7th ed. 1999). And fee means "a charge for labor or services, especially professional services." Black's Law Dictionary, at 629 (7th ed. 1999).

[P25] The statute unambiguously links the receipt of interest, fees, consideration, or expenses to providing loans. For the reasons previously stated, an EWA product is not a loan. *Supra* Part.III.B.1–2.

[P26] Next, the definitions of "interest," "fees," "consideration," and "expense" do not include voluntary tips. First, voluntary tips are not interest because the tip does not grow commensurate with the length of time between the advance and the consumer's ordinary payday. Second, so long as the tip is not required to receive an advance, then

the tip is not part of an exchange for a promise, an expenditure of money to accomplish a result, or a charge for labor or services. The voluntary nature of the tip places it outside the type of compensation governed by the statute. The CFPB reached a similar conclusion in a recent advisory opinion. 85 Fed. Reg. 79407 ("The absence of interest and other fees demonstrates that [EWA] Providers are not taking on the type of credit risk characteristic of a typical credit transaction."). The CFPB Payday Lending Rule also supports this understanding: so long as the consumer "is not required to pay any charge or fee to be eligible to receive or in return for receiving the advance" then the provider is not extending credit. 12 C.F.R. § 1041.3(d)(8).

[P27] Certain ancillary service charges are also excluded from the definitions of "interest," "fees," "consideration," and "expense" under this reasoning. Where the consumer "is not required to pay any charge or fee to be eligible to receive or in return for receiving the advance," 12 C.F.R. § 1041.3(d)(8), then compensation rules do not come into effect because the income-based advance may be received regardless of payment. In other words, if the EWA product does not condition the amount of the advance, or the advance itself, on payment of an ancillary service charge, then the ancillary service charge is not compensation within the meaning of MCA § 32-5-103(1).

[P28] IV. Montana Deferred Deposit Loan Act

The Montana Deferred Deposit Loan Act requires a license to "engage in or offer to engage in the business of making deferred deposit loans." MCA § 31-1-705. A deferred deposit loan is defined as:

an arrangement, ... in which:

- (a) a person accepts a check dated on the date on which the check is written and agrees to hold the check for a period of days prior to deposit or presentment;
- (b) a person accepts a check dated subsequent to the date on which the check is written and agrees to hold the check for deposit or presentment until the date written on the check; or
- (c) a person accepts written authorization from a consumer to electronically deduct from the consumer's account on a specific date the amount of the loan and fees that are authorized under this part.

MCA § 31-1-703(5). Only MCA § 31-1-703(5)(c) is at issue here.

[P29] For reasons previously stated, subject to the assumed material facts, EWA products are not loans. See *Supra* Part.III. Non-recourse EWA products lack the essential characteristics of a loan and fall outside the scope of the Montana Deferred Deposit Loan Act. *Firelight Meadows, LLC*, ¶ 22. Further, as stated, voluntary tips and

voluntary ancillary services are not fees, interest, or other consideration. *Supra* Part.III.B.3.

[P30] The Act's purpose is to "protect consumers who enter into short-term, high-rate loans with lenders from abuses that occur in the credit marketplace when the lenders are unregulated." MCA § 31-1-702(1). No-cost, fully non-recourse EWA products provide an alternative to the types of loans the Act is designed to regulate. GAO at 50, Table 5 (EWA products cost consumers less than comparable payday loans). Fully non-recourse EWA products, *see supra* n. 2, avoid many of the abuses in the payday loan marketplace such as high interest rates, debt collection practices, credit reporting, and extensive sequences of reborrowing. The CFPB excluded EWA products from its Payday Lending Rule on this basis. 12 C.F.R. § 1041.3(d)(7), (8); *see also e.g., United Holdings Group*, Division of Banking and Financial Institutions Case No. M2014-25 (June 10, 2014) (deferred deposit loans and payday loans are synonymous). EWA products fall outside the type of payday loans the Montana Deferred Deposit Loan Act intends to regulate.

THEREFORE, IT IS MY OPINION:

Subject to the assumed material facts, EWA products are not "consumer loans" under MCA § 32-5-102 or "deferred deposit loans" under MCA § 31-1-703. As such, EWA providers whose products comply with the assumed material facts in this opinion do not need to be licensed by the Montana Division of Banking and Financial Institutions to provide EWA products under those acts.

Sincerely,

/s/ Austin Knudsen
AUSTIN KNUDSEN
Attorney General