

Articles

THE RISE OF “FRINGETECH”: REGULATORY RISKS IN EARNED-WAGE ACCESS

Nakita Q. Cuttino

ABSTRACT—By many accounts, the financial technology, or FinTech, sector appears to have developed an innovative solution to assist low-income workers with income shortfalls between standard paydays by displacing fringe financial service providers, namely payday lenders. Earned wage access programs facilitate early transfers of earned-but-unpaid wages to low-income workers through mobile platforms, algorithmic technology, and GPS tracking. To many, earned wage access programs represent a win-win for employees and employers. These programs are believed to be cheaper and safer alternatives to payday loans. Preliminary research also suggests these programs improve labor-retention rates for employers and help reduce financial distress for low-income employees. Consequently, a growing number of employers, including Walmart Inc. and Amazon.com, Inc., have partnered with earned wage access providers to offer these programs as an employee benefit. Employees may also use third-party providers that bypass employers to offer these programs directly through mobile-app stores. In less than a decade, this nascent market has impressively achieved national scale, hundreds of thousands of employer partnerships, millions of users, and billions of dollars in transactions.

Yet, notwithstanding and perhaps because of these early successes, these programs also have downsides that have been much less emphasized. In particular, although the gatekeeping role that employers may play when partnering with earned wage access programs has the potential to facilitate improved pricing and service terms in the fringe financial market, such a role also masks significant costs that are not fully disclosed to employees. Additionally, the earned wage access market creates detrimental regulatory

services. Earned wage access programs have largely operated with minimal legal constraints because they have generally been characterized as money-transmission services, rather than loan services like payday loans. Building on the FinTech literature, by analogy, this Article argues that this blanket characterization of earned wage access programs is a mistake. Earned wage

access programs have varying effects. In the absence of regulatory guardrails, some programs can perpetuate, and in some instances exacerbate, the very risks providers claim to eliminate when displacing short-term creditors like payday lenders.

This Article proposes a federal-level regulatory framework based on lending laws that addresses some of these unmitigated risks through the imposition of consumer-protection requirements such as uniform price disclosure, ability-to-repay rules, optional amortization mechanics, mandatory credit reporting, and a right-to-rescind assignment. In doing so, this Article aims to facilitate growth of the earned wage access market's functional improvements and prevent a mere shift to fringe FinTech, or "FringeTech," services.

AUTHOR—Visiting Assistant Professor, Duke University School of Law. Many thanks to Gina-Gail Fletcher, Aziza Ahmed, Abbye Atkinson, Mehrsa Baradaran, Laura Beny, Matthew Bruckner, Guy-Uriel Charles, Kevin Davis, Elisabeth de Fontenay, Deborah A. Demott, Lisa Fairfax, Jill E. Fisch, Pamela Foohey, Sara Sternberg Greene, Kristin Johnson, Nancy Leong, Veronica Root Martinez, Patricia McCoy, Usha Rodrigues, Robert B. Thompson, Andrew Tuch, and Rory Van Loo for helpful comments and conversations. I would also like to thank the participants at the 2019 Financial Regulation and Innovation Conference at Indiana University Maurer School of Law, the Information Society Project Lunch Speaker Series at Yale Law School, the Program on Ethics, Compliance, & Inclusion's Equity Roundtable at the Notre Dame Law School, and the 2020 Consumer Law Scholars Conference at UC Berkeley School of Law for their feedback and suggestions. In addition, appreciation is extended to the Association of American Law Schools (AALS) Section on Financial Institutions & Consumer Financial Services and the AALS Section on Business Associations for selecting this paper for presentation at the 2020 AALS Annual Meeting. Special thanks to Doo Hyun Nam, Rachel Klein, and Euijoon (David) Kim for invaluable research assistance and to Adam Sopko and the *Northwestern University Law Review* editorial staff for an exceptional editing process.

INTRODUCTION	1507
I. EARNED-WAGE PROGRAMS: A PRIMER	1518
A. <i>The Product</i>	1519
B. <i>The Market</i>	1523
C. <i>The Benefits</i>	1526
II. REGULATING EARNED-WAGE PROGRAMS	1527
A. <i>The Law of Nonbank Money Transmitters</i>	1528
B. <i>The Law of Nonbank Lenders</i>	1530
C. <i>The Law of FinTech: The FinTech Charter</i>	1535
III. THE EARNED-WAGE PROBLEM	1538
A. <i>Deferred Repayment Risks</i>	1538
B. <i>Payday Loans 2.0</i>	1542
C. <i>Unique Market Risks</i>	1554
D. <i>Warning Signs</i>	1558
IV. REGULATORY SHORTCOMINGS	1560
A. <i>The Law of Nonbank Money Transmitters</i>	1560
B. <i>The Law of Nonbank Lenders</i>	1561
C. <i>The Law of FinTech: The FinTech Charter</i>	1565
V. POLICY RECOMMENDATIONS AND IMPLICATIONS	1567
A. <i>Policy Recommendations</i>	1568
B. <i>Potential Concerns and Responses</i>	1574
CONCLUSION	1578

“The ingenuity of man has not devised a contrivance by which usury can be legalized . . . [F]or the name by which the transaction is denominated is altogether immaterial, if it appears that a loan of money was the foundation and basis of the agreement which is under consideration.”

—*Bank of Lumpkin v. Farmers’ State Bank*[†]

INTRODUCTION

Earned wage access programs, or “earned wage programs,”¹ are internet- and mobile-based platforms that have emerged in recent years to serve as safer alternatives to much-maligned payday loans. Payday loans are part of a nearly \$80 billion credit market that has long served the small-sum

[†] 132 S.E. 221, 221 (Ga. 1926) (syllabus by the court).

¹ These services are sometimes called “early wage access,” “on-demand pay,” “instant pay,” “daily pay benefit,” or “earned income access.”

credit needs of millions of primarily low- and moderate-income Americans,² much to the dismay of many scholars, lawmakers, and consumer advocates. These loans cost borrowers an average annual percentage rate (APR) of nearly 400%.³ They also have well-documented detrimental effects on borrowers' financial health.⁴ Earned-wage programs promise to reduce demand for payday loans by facilitating transfers of earned-but-unpaid wages to workers in advance of their standard periodic paydays. It is questionable, however, whether earned-wage programs offer consumers a meaningful reprieve from payday loans.

Consider two fictional employees that we will call Jack and Jill for illustrative purposes. Jack, the average Walmart employee, enjoys an employee benefit that allows him to transfer a portion of his earned-but-unpaid wages prior to his scheduled payday for a monthly subscription fee of \$6 that is subsidized by Walmart.⁵ And Jill, the average movie-theater employee, uses a similar program downloaded from her mobile-application store that does not charge her a fee at all but encourages her to tip for each transfer. These earned-wage programs promise to create “a more equitable financial system for the millions of people on the lowest rungs of the economic ladder.”⁶ Many providers claim to give employees greater autonomy in the timing of their pay without the need for expensive credit products.⁷ In other words, earned-wage programs are said to make earned

² See KAREN GRAHAM & ELAINE GOLDEN, 2019 FINANCIALLY UNDERSERVED MARKET SIZE STUDY 3, app. at 12 (2019), <https://s3.amazonaws.com/cfsi-innovation-files-2018/wp-content/uploads/2020/01/31170215/2019-Market-Size-Report.pdf> [<https://perma.cc/5P7L-B5EE>] (estimating annual loan volumes for credit products that are designed to be reimbursed in a one-time payment, including overdraft protection, pawn services, online and storefront payday loans, and refund-anticipation checks); see also Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 MINN. L. REV. 1, 3 (2002) (discussing the origins of payday loans in check-cashing locations in the early 1990s).

³ CTR. FOR RESPONSIBLE LENDING, THE DEBT TRAP OF TRIPLE-DIGIT INTEREST RATE LOANS: PAYDAY, CAR-TITLE, AND HIGH-COST INSTALLMENT LOANS (2019), <https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-finfairness-payday-mar2019.pdf> [<https://perma.cc/BE8B-AR57>] (noting that payday loans carry average APRs of 391%).

⁴ See *infra* notes 277–282 and accompanying text.

⁵ See Anne Tergesen, *Some Companies Offer a New Benefit: Payroll Advances and Loans*, WALL ST. J. (Sept. 2, 2019, 5:30 AM), <https://www.wsj.com/articles/some-companies-offer-a-new-benefit-payroll-advances-and-loans-11567416601> [<https://perma.cc/ZW8T-BXBP>] (“Employees pay \$6 a month to use PayActiv . . . [and] Walmart covers the cost for one month per quarter . . .”).

⁶ Gaby Del Valle, *How a Silicon Valley Startup Is Trying to Rebrand Payday Loans*, VOX (May 22, 2019, 4:50 PM), <https://www.vox.com/the-goods/2019/5/22/18636049/earmin-app-startup-payday-loans-fintech> [<https://perma.cc/X36L-PCM9>] (paraphrasing Earmin founder Ram Palaniappan).

⁷ See, e.g., Donna Fuscaldo, *Demand for Earned Wages Services Surging amid COVID-19*, FORBES (May 19, 2020, 3:11 PM), <https://www.forbes.com/sites/donnafuscaldo/2020/05/19/demand-for-earned-wages-services-surging-amid-covid-19/?sh=106305a34b71> [<https://perma.cc/STQ2-C324>] (quoting an

wages available on demand, like an ATM for your paycheck,⁸ rather than offer a costly cash advance to be repaid at a later time, as in the payday-loan context. However, a fundamental yet less explored question is whether Jack and Jill are better off with earned-wage programs as compared to payday loans.

Proponents of earned-wage programs assert that these programs represent a significant improvement over payday loans and are long-overdue innovations to a high-cost market that currently serves the small-sum liquidity demands of many American workers.⁹ Between 50% to 78% of Americans live paycheck to paycheck,¹⁰ and 40% cannot cover a \$400 emergency expense.¹¹ Add on the rising number of “gig economy” and freelance workers with volatile incomes,¹² and the fragility of U.S. household

industry executive, who said that “[i]f they get more access to their money[,] they don’t have to rely on short term financing”).

⁸ See, e.g., Jeff Kauflin, *VCs Bet \$40 Million on Money App for Those Living Paycheck to Paycheck*, FORBES (July 19, 2018, 11:00 AM), <https://www.forbes.com/sites/jeffkauflin/2018/07/19/payday-loans-be-gone-a-growing-set-of-startups-are-gunning-to-unseat-them/#18f219446850> [https://perma.cc/XRX3-ZKJ8] (quoting DailyPay CEO, who stated that “DailyPay is an ATM for earned or unpaid wages[:] . . . [j]ust like an ATM, a user accesses her money and pays a transaction fee”).

⁹ See, e.g., Dan Quan, *Don’t Sideline Earned Income Access*, AM. BANKER (June 3, 2019, 10:00 AM), <https://www.americanbanker.com/opinion/dont-sideline-earned-income-access> [https://perma.cc/9U5L-2TZE] (“For the first time, there is a viable market solution that has the promise of significantly lowering the cost of helping consumers manage short term cash flow needs and improving their financial lives.”).

¹⁰ The reported percentage of Americans living paycheck to paycheck varies—it is often between 50% and 78%, depending on the consumer survey. Ilyce Glink & Samuel J. Tamkin, *A Breakdown of What Living Paycheck to Paycheck Looks Like*, WASH. POST, <https://www.washingtonpost.com/business/2020/08/17/breakdown-what-living-paycheck-to-paycheck-looks-like/> [https://perma.cc/3YGY-6SH3]; see also, e.g., *NEW DATA: 60 Percent of US Consumers Now Live Paycheck-to-Paycheck*, PYMNTS (Apr. 9, 2020), <https://www.pymnts.com/coronavirus/2020/navigating-pandemic-consumers-paycheck-to-paycheck/> [https://perma.cc/M9YK-J5F7] (“[A]bout six out of 10 U.S. consumers now report living paycheck-to-paycheck”); Megan Leonhardt, *63% of Americans Have Been Living Paycheck to Paycheck Since Covid Hit*, CNBC (Dec. 11, 2020, 9:00 AM), <https://www.cnbc.com/2020/12/11/majority-of-americans-are-living-paycheck-to-paycheck-since-covid-hit.html> [https://perma.cc/3EZM-P8A2] (reporting 63%); Zack Friedman, *78% of Workers Live Paycheck to Paycheck*, FORBES (Jan. 11, 2019, 8:32 AM), <https://www.forbes.com/sites/zackfriedman/2019/01/11/live-paycheck-to-paycheck-government-shutdown/?sh=3295da0c4f10> [https://perma.cc/V4C3-2VV5] (reporting 78%).

¹¹ Amelia Barwise & Mark Liebow, *When Generosity Harms Health Care and Public Health*, 109 AM. J. PUB. HEALTH 997, 997 (2019).

¹² See, e.g., Penny Crosman, *The Challenger Banks Catering to Gig-Economy Workers*, AM. BANKER (Feb. 19, 2019, 12:05 PM), <https://www.americanbanker.com/list/the-challenger-banks-catering-to-gig-economy-workers> [https://perma.cc/K953-GPYT] (discussing high-earning self-employed workers, including attorneys and consultants, whose unpredictable earnings and cashflow shortfalls made them prime payday-loan candidates).

income simply cannot be overstated.¹³ The coronavirus pandemic has underscored the precarity of American household finances¹⁴ and amplified the already-high demand for immediate access to income.¹⁵ Yet, the dearth of low-cost, income-smoothing solutions available to low-income consumers makes the financial vulnerability of this consumer class more acute. Notwithstanding the risks of payday loans, which include heightened financial distress and insolvency,¹⁶ over 12 million¹⁷ primarily low-income individuals spend an estimated \$4.6 billion in fees on payday loans annually.¹⁸ The prevalence of payday loans, despite their negative attributes, suggests there are significant market and policy failures at play,¹⁹ which make the payday-loan market ripe for innovative, new entrants like earned-wage programs.

Earned-wage programs facilitate wage transfers not only through novel platforms but also through innovative business models and fee structures. Specifically, earned-wage providers utilize two broad business models: the employer-sponsored model and the third-party model. Employer-sponsored

¹³ See THEA GARON, ANDREW DUNN, KATY GOLVALA & ERIC WILSON, U.S. FINANCIAL HEALTH PULSE: 2018 BASELINE SURVEY RESULTS 3 (2018), https://s3.amazonaws.com/cfsi-innovation-files-2018/wp-content/uploads/2019/05/07151007/FHN-Pulse_Baseline_SurveyResults-web.pdf [<https://perma.cc/L7VZ-2CSP>] (finding that only 28% of Americans are “financially healthy”).

¹⁴ See David Harrison, *Lack of Savings Worsens the Pain of Coronavirus Downturn*, WALL ST. J., (Apr. 15, 2020, 11:48 AM), <https://www.wsj.com/articles/lack-of-savings-worsens-the-pain-of-coronavirus-downturn-11586943001> [<https://perma.cc/4HDT-YRZ2>].

¹⁵ See Kate Fitzgerald, *Earned Wage Access: A Coronavirus Fad or a Turning Point for Payroll?*, PAYMENTSSOURCE (June 10, 2020, 10:32 AM), <https://www.paymentssource.com/news/earned-wage-access-a-coronavirus-fad-or-a-turning-point-for-payroll> [<https://perma.cc/YT3G-4NQC>] (“Fintech firms specializing in employer-sponsored EWA services have seen exponential user growth during the pandemic, with the rising numbers of gig workers hired in health care, fast food and grocery sectors, and new EWA providers continuing to join the fray.”).

¹⁶ See *infra* notes 277–282.

¹⁷ See PEW CHARITABLE TRS., PAYDAY LENDING IN AMERICA: WHO BORROWS, WHERE THEY BORROW, AND WHY 4 (2012), http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2012/pewpaydaylendingreportpdf.pdf [<https://perma.cc/GJQ3-7KUH>].

¹⁸ The Consumer Financial Protection Bureau expressed this concern when announcing an amendment to 12 C.F.R. § 1041, known as the “Payday Rule.” See Payday, Vehicle Title, and Certain High-Cost Installment Loans, 85 Fed. Reg. 44,382, 44,384 (July 22, 2020); *CFPB Statement on Payday Rule*, CONSUMER FIN. PROT. BUREAU (Jan. 16, 2018), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-statement-payday-rule/> [<https://perma.cc/V7PJ-HQ6Z>].

¹⁹ See, e.g., Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 100 (2008) (finding that minimum product safety standards are noticeably absent in the regulations of payday loans, that payday loans are designed to obscure their risks and to exploit consumer misunderstanding, and that ordinary market mechanisms, such as competition and expert advisors, cannot fully correct these deficiencies); Alan M. White, *Behavior and Contract*, 27 LAW & INEQUALITY 135, 159 (finding that “[p]ayday loans . . . exploit[] the consumer’s optimism bias that predicts an ability to pay the loan in full at the next payday, and discounts the inevitable recurrence of the cash shortage that prompted the loan”).

providers partner with employers and human-resource firms to offer earned-wage programs as an employee benefit,²⁰ while third-party providers bypass employers to offer services directly to employees through the internet or mobile applications.²¹ Under each model, earned-wage programs collect payroll and timesheet data to estimate accrued net wages and make all or a portion of such wages available for a fee. Earned wage program fees are reflected as flat fees and their structures vary greatly.²² There are periodic fee structures, such as subscription and per-period fees, that allow for multiple transfers under a single fee ranging from \$5 to \$8.²³ There are per-transaction fee structures that charge a fee of \$2 to \$5 for each transfer.²⁴ There are also free models that do not charge a fee at all but instead encourage employees to pay tips as high as \$14 for each transfer.²⁵ Occasionally, employer partners subsidize the fees in part or in full. Consequently, the fees for any given transaction can amount to an APR in the wide range of 70% to 470%, depending on the program used and the timing of the transfer.²⁶ Earned-wage providers are typically reimbursed on the employee’s next payday through a preauthorized electronic funds transfer (EFT) from their personal bank account or, for some employer-sponsored providers, a payroll deduction.²⁷

The timing and design of earned-wage programs have facilitated the sector’s exponential growth. Marketed as the antithesis of the now-notorious payday loan,²⁸ earned-wage programs were a welcomed innovation in the

²⁰ See, e.g., *Frequently Asked Questions*, PAYACTIV, <https://www.payactiv.com/faq/> [<https://perma.cc/9YHS-P2L9>] (“PayActiv partners with employers to deliver financial wellness services to employees. Employer agrees to offer PayActiv as an employee benefit. No integration is needed, as the existing payroll and time and attendance system is leveraged.”).

²¹ See, e.g., *How Do I Create an Account and How Long Does It Take to Get Started?*, EARNIN (2020), <https://help.earnin.com/hc/en-us/articles/213412127-How-do-I-create-an-account-and-how-long-does-it-take-to-get-started-> [<https://perma.cc/7BGJ-3ZVV>] (explaining how this third-party provider offers services directly to employees through the internet); see also Samara Lynn, *Cash Advance Apps Like Dave, Earnin See Use Surge amid COVID-19*, ABC NEWS (Apr. 16, 2020, 10:05 AM) <https://abcnews.go.com/US/turn-payday-advance-apps-coronavirus-batters-economy/story?id=70118508> [<https://perma.cc/N7QQ-KU69>] (discussing Earnin and another third-party provider, Dave).

²² See *infra* notes 78–88 and accompanying text.

²³ See *infra* notes 80–82 and accompanying text.

²⁴ See *infra* note 79 and accompanying text.

²⁵ See *infra* notes 85–88 and accompanying text.

²⁶ See *infra* notes 89–91 and accompanying text.

²⁷ See *infra* notes 69–74 and accompanying text.

²⁸ Payday loans are rapidly declining in popularity due, in part, to increased regulation, public scrutiny, and shifts in consumer demand. See, e.g., Lisa Rowan, *Nebraska Becomes Latest State to Cap Payday Loan Fees*, FORBES (Nov. 4, 2020, 10:11 AM), <https://www.forbes.com/sites/advisor/2020/11/04/nebraska-becomes-latest-state-to-cap-payday-loan-fees/?sh=6fa1abb61150> [<https://perma.cc/KZU6-BRGV>] (reporting that over 80% of Nebraska voters approved a measure to cap short-term loan fees at 36%, joining a slowly growing list of states that effectively ban payday loans); PEW CHARITABLE

oft-overlooked fringe financial marketplace.²⁹ From an employee perspective, these programs appear safer than traditional alternatives like payday loans since they are marketed as inexpensive noncredit services. From an employer perspective, these programs seemingly help reduce labor costs associated with high turnover and low productivity amongst employees who may be financially distressed, without a need to increase wages.³⁰ And from a regulatory perspective, earned-wage programs are still novel enough in form that they have yet to be legally defined, creating low regulatory barriers to entry that are uncommon compared to competing services.³¹

Unsurprisingly, the market for earned-wage programs has grown rapidly over the last several years.³² While the precise size of the market

TRS., AMERICANS WANT PAYDAY LOAN REFORM, SUPPORT LOWER-COST BANK LOANS: RESULTS OF A NATIONALLY REPRESENTATIVE SURVEY OF U.S. ADULTS 2 (2017), <http://www.pewtrusts.org/-/media/assets/2017/04/americans-want-payday-loan-reform.pdf> [<https://perma.cc/9LVU-5KJC>] (finding “7 in 10 Americans, Borrowers Want Payday Loans to Be More Regulated”); Payday, Vehicle Title, and Certain High-Cost Installment Loans, 85 Fed. Reg. 44,382, 44,384 (July 22, 2020) (“Reports from several States and publicly traded companies offering payday loans show a shift from payday loans to small-dollar installment loans and other credit products.”).

²⁹ See, e.g., Chris Arnold, *Walmart and Others Offer Workers Payday Loan Alternative*, NPR (Aug. 16, 2018, 5:59 PM), <https://www.npr.org/2018/08/16/639236531/walmart-and-others-offer-workers-payday-loan-alternative> [<https://perma.cc/CNE3-SSSB>] (quoting proponents, including a small-business owner and a director at the United Way, referring to earned-wage programs as “a good idea,” “game-changing,” and “really exciting”).

³⁰ See, e.g., Todd H. Baker, *FinTech Alternatives to Short-Term Small-Dollar Credit: Helping Low-Income Working Families Escape the High-Cost Lending Trap* 56–57 (Harvard Kennedy Sch. M-RCBG Assoc. Working Paper Series, No. 75, 2017), https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/75_final.pdf [<https://perma.cc/ARZ4-H9CH>] (finding that surveyed firms provided low-cost income smoothing without significant credit risk to the FinTech firm or employer); Todd Baker & Snigdha Kumar, *The Power of the Salary Link: Assessing the Benefits of Employer-Sponsored FinTech Liquidity and Credit Solutions for Low-Wage Working Americans and Their Employers* (Harvard Kennedy Sch., M-RCBG Assoc. Working Paper No. 88, 2018) [hereinafter *HKS 2018 Study*], https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/working.papers/88_final.pdf [<https://perma.cc/UJC5-55G8>] (associating active use of earned-wage program with a 19% reduction in employee turnover and an anticipated \$110 million annual savings for employers).

³¹ For example, some earned-wage providers operate in states that prohibit substitutes like payday loans. See Penny Crosman, *A Payday Lender in Disguise? New York Investigates*, AM. BANKER (Apr. 3, 2019, 9:03 PM), <https://www.americanbanker.com/news/a-payday-lender-in-disguise-new-york-investigates-the-earnin-app> [<https://perma.cc/WL8F-FAHE>] (discussing Earnin’s operations in New York, a state that limits annual percentage yield rates to 25%, and describing how Earnin behaves as a payday lender).

³² See, e.g., *PayActiv Crosses \$1 Billion in Processed Funds for Timely Earned Wage Access to the Underserved and Underbanked Workforce*, PAYACTIV (Jan. 14, 2019), <https://www.payactiv.com/press/payactiv-crosses-1-billion-in-processed-funds-for-timely-earned-wage-access-to-the-underserved-and-underbanked-workforce/> [<https://perma.cc/47KG-NJ23>] (noting that PayActiv has advanced over \$1 billion to over 650,000 individuals); Cyrus Farivar, *Millions Use Earnin to Get Cash Before Payday. Critics Say the App Is Taking Advantage of Them.*, NBC NEWS (July 26, 2019, 3:41 AM), <https://www.nbcnews.com/tech/internet/millions-use-earnin-get-cash-payday-critics-say-app-taking-n1034071>

remains unknown, research suggests this is an impressive multibillion-dollar industry serving millions of customers. The largest third-party provider alone facilitates an estimated \$2.5 billion in earned-wage transfers annually.³³ A handful of employer-sponsored programs facilitated more than \$9.5 billion in 2020, which was approximately a 50% increase from 2019 and 200% increase from 2018.³⁴ These programs also boast partnerships with thousands of firms, including large employers and human-resource companies like Walmart Inc., ADP Marketplace,³⁵ and, most recently, Amazon.com, Inc.³⁶ And the market’s growth has not cratered in the midst of the coronavirus pandemic. To the contrary, one earned-wage provider more than doubled its employer partnerships during the five months of March to August in 2020, as compared to the entire year of 2019.³⁷ Another provider reported a 400% increase in users in the early months of the pandemic.³⁸ Earned-wage providers are also seeking to expand beyond predominately low-income employees to white-collar employees.³⁹

[<https://perma.cc/2NTV-KGLX>] (“Since 2015, the analysis firm Apptopia estimates that [Earnin] has been downloaded more than 12 million times. More than half of those downloads came within the last year.”).

³³ See Farivar, *supra* note 32 (“Earnin does not publicly disclose how much money it processes, but screenshots of an internal analytics website shared with NBC News by a current employee earlier this month show that the company moves an average of over \$212 million a month.”).

³⁴ LESLIE PARRISH, AITE GRP., MAKING ENDS MEET: ON-DEMAND PAY AND EMPLOYER-BASED LOANS 3, 17 (2021), <https://aitegroup.com/report/making-ends-meet-demand-pay-and-employer-based-loans> [<https://perma.cc/7T2J-SX56>].

³⁵ ADP Marketplace offers human-capital-management solutions to over 860,000 employers representing approximately 37 million employees. *Corporate Overview*, ADP (Oct. 2020), <https://www.adp.com/~media/Corporate%20Overview/ADP-Corporate-Overview.ashx> [<https://perma.cc/5Q73-L5XQ>].

³⁶ Lauren Kaori Gurley, *Amazon Launches Payday Advances for Its Most Precarious Warehouse Workers*, VICE (Oct. 15, 2020, 10:42 AM), <https://www.vice.com/en/article/93w95d/amazon-launches-payday-advances-for-its-most-precarious-warehouse-workers> [<https://perma.cc/FQ9T-C7XY>] (reporting that Amazon is now offering an earned-wage program called Anytime Pay to low-wage warehouse workers).

³⁷ Tara Siegel Bernard, *Apps Will Get You Paid Early, for a Price*, N.Y. TIMES (Oct. 2, 2020), <https://www.nytimes.com/2020/10/02/your-money/cash-advance-apps-paychecks.html>

[<https://perma.cc/VX2U-KL64>] (“In recent months, hundreds of companies—including Kroger, Wayfair, Dollar Tree, Staffmark, HCA Healthcare and Mercy Hospitals—have begun offering the apps to employees.”).

³⁸ *Id.*

³⁹ Chris Opfer, *‘Early Wage’ Apps Aim to Disrupt Payday Loans, Two-Week Cycle*, BLOOMBERG L. (Aug. 1, 2019, 5:15 AM), <https://news.bloomberglaw.com/daily-labor-report/early-wage-apps-aim-to-disrupt-payday-loans-two-week-cycle> [<https://perma.cc/6YSL-M4T3>] (“DailyPay’s [Jason] Lee and Jon Schlossberg, the CEO of Even, say they see the market also moving into the white-collar workforce.”); see also Michelle Rafter, *Increase Employee Job Satisfaction with Early-Pay Apps*, PCMAG (Oct. 4, 2019), <https://www.pcmag.com/article/371114/increase-employee-job-satisfaction-with-early-pay-apps> [<https://perma.cc/R5RD-EQDN>] (“At companies that give employees early access to their paychecks

Yet, as the earned-wage market continues to pick up steam, it has garnered critical attention from state regulators,⁴⁰ policymakers,⁴¹ and consumer-advocacy groups.⁴² Observers are increasingly suspicious of the earned-wage market's effect on employees like Jack and Jill. The primary question raised is often a legal one: whether earned-wage programs ought to be characterized as money-transmission services or loan services. If the former, these programs align payroll processes with the ever-increasing consumer demand for real-time transactions, albeit at costs borne by employees that possibly reduce real wages. If the latter, however, earned-wage programs violate a host of state and federal consumer-protection laws, including usury limits and uniform disclosure requirements. A federal class action sought to answer this question,⁴³ but a recent settlement likely will delay any definitive conclusion about the applicable legal framework for earned-wage programs.⁴⁴ The Consumer Financial Protection Bureau (CFPB) also recently weighed in with narrow responses. It issued an advisory opinion that certain no-fee employer-sponsored programs did not constitute loan services⁴⁵ and granted access to the CFPB's regulatory

through an app from startup DailyPay, 12 percent of those workers earn more than \$100,000 per year. . . .”).

⁴⁰ See, e.g., Dean Seal, *NY Leads Multistate Investigation of Payroll Advance Industry*, LAW360 (Aug. 6, 2019, 8:29 PM), <https://www.law360.com/articles/1185645/ny-leads-multistate-investigation-of-payroll-advance-industry> [<https://perma.cc/5R6Y-KX4D>] (announcing that New York regulators were joined by nine states and Puerto Rico in investigating possible state lending-law violations by certain earned-wage programs, including Earnin).

⁴¹ Yuka Hayashi, *Pay-Access Apps Face Regulatory Test*, WALL ST. J. (Sept. 2, 2019, 5:30 AM), <https://www.wsj.com/articles/pay-access-apps-face-regulatory-test-11567416602> [<https://perma.cc/QL7X-8JYP>] (discussing California's efforts to enact unprecedented earned-wage legislation).

⁴² The author participated on a panel discussion titled “Early Wage Access: Costs, Benefits, and Risks for Consumers” during the Consumer Federation of America's Financial Services Conference 2019. See *id.* (reporting concerns from the National Consumer Law Center that the market may “authorize[] a new category of payday loans that don't have to comply with interest-rate limits”).

⁴³ Complaint at 26–30, *Stark v. Activehours, Inc.*, No. 5:19-cv-7553 (N.D. Cal. Nov. 15, 2019) (claiming Earnin violated California's Unfair Competition Law and Deferred Deposit Transaction Law, among other state laws, and the Truth in Lending Act).

⁴⁴ In July 2020, the lawsuit was voluntarily dismissed in connection with a settlement in a separate lawsuit to which the plaintiff was an interested party. See Order Granting Plaintiffs' Unopposed Motion for Final Approval of Class Settlement & for Approval of Attorneys' Fees, Costs, & Service Awards, *Perks v. Activehours, Inc.*, No. 5:19-cv-05543-BLF (N.D. Cal. Mar. 25, 2021).

⁴⁵ Truth in Lending (Regulation Z); Earned Wage Access Programs, 85 Fed. Reg. 79,404 (Nov. 30, 2020) (to be codified at 12 C.F.R. pt. 1026), https://files.consumerfinance.gov/f/documents/cfpb_advisory-opinion_earned-wage-access_2020-11.pdf [<https://perma.cc/9B9P-LXWN>].

sandbox to one provider.⁴⁶ But these actions left the question unresolved with respect to the vast majority of the earned-wage market.

This Article, however, suggests that the current focus on whether earned-wage programs are money-transmission or loan services, or something entirely distinct,⁴⁷ misses an even more fundamental inquiry: whether and to what extent do earned-wage programs mitigate or exacerbate consumer risks that have long plagued the payday-loan market. Consumers who use payday loans have heightened risks of financial distress and insolvency as compared to similarly situated nonpayday borrowers.⁴⁸ Scholars often claim these risks arise from information asymmetries, inadequate bargaining power, and cognitive limitations that are exploited by payday lenders.⁴⁹ In response to these risks, the literature regularly considers solutions like disclosure rules and state-level consumer protections, which have mixed results,⁵⁰ and federal-level consumer protections, which have been scant.⁵¹ In responding to this fundamental inquiry, this Article examines the market not from the perspective of the supply side but that of the demand

⁴⁶ BUREAU OF CONSUMER FIN. PROT., APPROVAL ORDER 1 (Dec. 30, 2020), https://files.consumerfinance.gov/f/documents/cfpb_payactiv_approval-order_2020-12.pdf [<https://perma.cc/YL9U-BGJ4>] (approving Payactiv, Inc.’s application for access to the CFPB’s Compliance Assistance Sandbox).

⁴⁷ Notably, several state legislatures have considered industry-backed measures to carve out distinct licensing frameworks for earned-wage programs. *See, e.g.*, Stephen T. Middlebrook, *Earned Wage Access Bill Introduced in South Carolina*, NAT’L L. REV. (Feb. 25, 2021), <https://www.natlawreview.com/article/earned-wage-access-bill-introduced-south-carolina#:~:text=Earned%20Wage%20Access%20Bill%20Introduced%20in%20South%20Carolina&text=With%20regard%20to%20Earned%20Wage,on%20employer%20Dintegrated%20business%20models> [<https://perma.cc/WGL9-Y7VW>] (discussing recently proposed South Carolina bill); Stephen T. Middlebrook, *It’s a Jersey Thing: Earned Wage Access Bill Gets Amended*, NAT’L L. REV. (Oct. 27, 2020), <https://www.natlawreview.com/article/it-s-jersey-thing-earned-wage-access-bill-gets-amended> [<https://perma.cc/VNM6-HBPS>] (discussing legislative proposals in California, New York, and New Jersey); Kevin Wack, *The Derailment of California’s Payroll Advance Law*, AM. BANKER (Sept. 19, 2019), <https://www.americanbanker.com/news/the-derailment-of-californias-payroll-advance-law> [<https://perma.cc/3WKP-56CD>] (discussing ongoing legislative battles about regulating earned-wage programs in California).

⁴⁸ *See infra* Section III.B.2.

⁴⁹ *See generally* Bar-Gill & Warren, *supra* note 19 (arguing that consumer-credit markets, including the payday-loan market, require enhanced regulatory safeguards because of imperfect information sharing, imperfectly rational consumers, and the reality that the “informed minority” of consumers cannot alone drive the market).

⁵⁰ *See, e.g.*, Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 665–79 (2011) (discussing the prevalence of mandated disclosure rules despite their shortcomings, which include consumer misunderstanding and information overload); Heather L. Petrovich, *Circumventing State Consumer Protection Laws: Tribal Immunity and Internet Payday Lending*, 91 N.C. L. REV. 326, 341–46 (2012) (discussing the reasons state law is inadequate in protecting consumers from predatory payday-loan practices).

⁵¹ *See, e.g.*, Creola Johnson, *Congress Protected the Troops: Can the New CFPB Protect Civilians from Payday Lending?*, 69 WASH. & LEE L. REV. 649, 680–83 (2012) (discussing the failures of the federal government to enact protections for consumers despite how necessary they are).

side, disregarding the earned-wage program's novel form and focusing on its function to better understand and respond to its market effects.

In analyzing various earned-wage programs, this Article finds promise and peril in this nascent and lightly regulated market. Although employers may serve as promising gatekeepers to protect employees more effectively from the market failures present in the payday-loan context, their gatekeeping role may also impose material costs on consumers.⁵² Additionally, many earned-wage programs have features—such as relatively high costs, limited underwriting, and credit invisibility—that are associated with significant consumer risks in the payday-loan context.⁵³ Yet, the regulatory ambiguity of the earned-wage market means that employees are left increasingly vulnerable to these costs and risks, but they are unable to fully appreciate them. Such costs and risks are uncommon in traditional money-transmission transactions, and, therefore, the legal framework for money-transmission services neither contemplates nor mitigates them. Accordingly, this Article argues that earned wage access programs have varying effects, and in the absence of regulatory guardrails, some programs can perpetuate, and sometimes exacerbate, the very risks providers claim to eliminate when displacing short-term creditors like payday lenders. It calls for a long-overdue federal framework for small-sum liquidity solutions that contemplates the risky innovations of earned-wage programs but accommodates a dynamic, national marketplace.

In doing so, this Article contributes to a nascent literature on earned-wage programs with an arguably more critical view of the market. Contemporaneous scholarship by Professor Jim Hawkins has focused on how the data-collection methods and novel features of earned-wage programs allow providers to offer services that are superior to payday loans primarily by eliminating the risk of high fees.⁵⁴ However, by focusing on the consumer effects and regulatory gaps associated with earned-wage programs, this Article contends that these programs perpetuate not only the risk of high fees but also the related risks associated with deferred repayment, limited underwriting, and credit invisibility, which can lead to financially deleterious debt cycles. It expands on Professor Hawkins's

⁵² See *infra* Section III.C.2.

⁵³ See *infra* Section III.B.2.

⁵⁴ See generally Jim Hawkins, *Earned Wages Access and the End of Payday Lending*, 101 B.U. L. REV. (forthcoming 2021), <https://papers.ssrn.com/a=3514856> [<https://perma.cc/NN2M-T6SH>] (arguing that earned-wage programs are substantively superior to and have the ability to displace payday lenders, warranting a distinct regulatory framework that fosters the market's growth but curbs risks of future market abuses).

assessment that earned-wage programs may constitute “credit” or “loans” under existing regulatory definitions,⁵⁵ demonstrating that the risk-management goals of lending laws would most effectively mitigate the risks associated with earned-wage programs in comparison to other existing frameworks. With some complementary but many substantively distinct findings and proposals, this Article and Professor Hawkins’s work open a dynamic conversation that encourages ongoing scholarship on earned-wage programs.

The Article is organized as follows. Part I gives an overview of the earned-wage market. It identifies the various business models, fee structures, and payment mechanics used by the major market participants. It then details the market’s impressive growth in five years’ time and the demographic profile of its predominantly low-income consumer base, demonstrating the importance of a scholarly focus on this emerging sector. The Part then ends with a detailed explanation of why early adopters use or, for employers, partner with these programs.

Part II focuses on the regulatory gray area occupied by earned-wage programs. It identifies three potentially applicable legal frameworks derived from money-transmission law, nonbank-lending law, and the novel federal bank charter for nonbank financial institutions, known as the “FinTech charter,” and describes their relevant benefits and drawbacks. This Part highlights the fragmented nature of money-transmission and lending laws—bifurcated between federal and numerous divergent state frameworks—demonstrating that substantive consumer-protection regulations primarily exist at the state level and under numerous idiosyncratic frameworks. It explains that although the FinTech charter would preempt the patchwork of state laws that may stifle a national earned-wage market with inefficient compliance requirements, the charter fails to offer any consumer-protection regulations and is questionably viable in the long term.

Part III argues that earned wage access programs have varying effects that sometimes perpetuate, and in some instances exacerbate, the very risks providers claim to eliminate when displacing short-term creditors like payday lenders. The Part begins by describing the practical and legal implications for the delayed-repayment mechanism in most earned-wage transactions. It asserts that by commodifying the time value of money, earned-wage transactions present consumer risks associated with nonpayment, information asymmetry, and intertemporal decision-making that are more common to the loan context than the money-transfer context. It then offers case law to show how courts could find earned-wage transfers

⁵⁵ See *id.* at 33–41.

to constitute credit under certain lending laws. The Part lastly compares earned-wage programs to payday loans to illustrate how several of their similar features could exacerbate the risk of financial distress. It explains how risks may be heightened in the earned-wage context due to opaque pricing disclosure that inflates market rates and to employer-sponsored models that may result in inefficient contracts, notwithstanding the potential benefits of employer-gatekeepers.

Part IV discusses how the consumer risks associated with earned-wage programs are currently unmitigated and require regulatory intervention. Specifically, the Part highlights how money-transmission law is wholly inapt to address the risks presented by the earned-wage market, how the multifarious nature of consumer-protection regulation at the state level would undermine the development of the market, and how the FinTech charter is insufficient, demonstrating the importance of a novel framework.

Part V proposes a federal framework that would combine the consumer-protection regulations relating to service terms, which are common under state law, with the benefits of federal uniformity. It concludes by considering potential counterpositions, including state-level efforts to regulate earned-wage programs, and finds that the insufficiencies of state law combined with the need for nationwide business models bolster the attractiveness of the proposals recommended herein.

I. EARNED-WAGE PROGRAMS: A PRIMER

Earned-wage programs were developed by FinTech firms to revolutionize the market for small-sum liquidity solutions previously dominated by payday lenders and other high-cost creditors. Appearing for the first time in the mid-2010s,⁵⁶ this niche market has rapidly grown into a multibillion-dollar industry. This Part provides an overview of the earned-wage program product and its market.

⁵⁶ See, e.g., *Evolution of Pay*, PAYACTIV, <https://www.payactiv.com/evolution-of-pay/> [<https://perma.cc/L8VK-7F8E>] (showing that PayActiv founded its earned-wage program in 2012 and launched its first service in 2014); *The DailyPay Movement*, DAILYPAY, <https://www.dailypay.com/movement> [<https://perma.cc/WP47-GYLT>] (showing that DailyPay launched its first service in 2015); *Our Story*, EVEN, <https://even.com/why-even/our-story> [<https://perma.cc/MXA3-BRSA>] (showing that Even was founded in 2014); Sage Lazzaro, *This App Promises Easy Cash, but It's a Security Nightmare Waiting to Happen*, MEDIUM (Dec. 20, 2018), <https://medium.com/s/story/this-app-promises-easy-cash-but-its-a-security-nightmare-waiting-to-happen-9b5758f91d23> [<https://perma.cc/23QU-NKD9>] (showing that Earnin was launched publicly under the name ActiveHours in 2014).

A. *The Product*

Earned-wage programs are mobile- and internet-based services that enable users instantly to access cash from their earned-but-unpaid wages. This is accomplished by one of three methods. First, there are integrated employer-sponsored programs where providers are given direct access to the employer’s payroll system, enabling providers to automatically cull data from payroll and time-entry systems to calculate wages accrued to date.⁵⁷ Second, there are nonintegrated employer-sponsored programs in which providers are sent copies of time-sheet records by employers rather than having direct access to payroll systems.⁵⁸ Finally, there are third-party programs which do not partner with employers; instead, they collect records from the employee.⁵⁹ Such records include bank data, pay stubs, and, from salaried workers, mobile location tracking data to confirm daily work commutes.⁶⁰

In each case, the program analyzes payroll data using various algorithms to calculate the dollar value of accrued wages, often net of estimated payroll deductions (e.g., taxes and garnishments), in a given pay period.⁶¹ This value is the sole basis from which earned-wage programs set permissible transfer amounts. Some programs allow users to transfer the full amount of this value,⁶² while other programs set caps to avoid zero-dollar paychecks at the end of a scheduled pay period.⁶³ Some caps may be a percentage of earned wages,⁶⁴ while others are flat per-transaction or pay-period caps.⁶⁵ The program does not consider existing debt obligations or

⁵⁷ See, e.g., *Frequently Asked Questions*, *supra* note 20.

⁵⁸ See, e.g., *Terms and Conditions*, EVEN, <https://even.com/legal/basic-and-plus-terms> [<https://perma.cc/NHR5-J649>] (requiring documentation of employees’ hours worked during the wage period in question).

⁵⁹ See, e.g., Farivar, *supra* note 32 (“Earnin users verify their employment by sharing their GPS location and allowing the app to access their bank account, to show that they are working regularly and that paychecks are coming in. If the income is irregular, users may be asked for pay stubs.”).

⁶⁰ *Id.*

⁶¹ See *Demystifying Earned Wage Access*, EVEN (June 17, 2020), <https://www.even.com/blog/demystifying-earned-wage-access> [<https://perma.cc/Y764-R3CA>] (noting that the program “limit[s] how much of the available net pay an employee can advance, which ensures there’s a buffer for deductions and garnishments at the end of the pay period”).

⁶² *DailyPay Frequently Asked Questions*, ADP MARKETPLACE, https://d3bq19711ytoxn.cloudfront.net/app_resources/221925/documentation/719560_en.pdf [<https://perma.cc/C39Z-5PBG>].

⁶³ See Kauflin, *supra* note 8.

⁶⁴ Pete Isberg, *Early Access to Earned Wages vs. Payday Lending*, BLOOMBERG TAX (Aug. 26, 2019, 4:01 PM), <https://news.bloombergtax.com/payroll/early-access-to-earned-wages-vs-payday-lending> [<https://perma.cc/XX2N-GKWV>].

⁶⁵ See, e.g., *Frequently Asked Questions*, EVEN, <https://even.com/faq> [<https://perma.cc/NS8S-CKBP>] (stating that Even app users can take out up to 50% of their earnings at that point in the pay

credit score when setting transfer amounts. And such amounts can be near instantly available in a user's bank account, payroll card, prepaid debit card, or bill-pay recipient.⁶⁶

The funding source of earned-wage transfers are primarily the FinTech providers⁶⁷ and, in a minority of cases, the employers.⁶⁸ Earned-wage providers are fully reimbursed for transfers via automatic deductions that are assessed on the user's wages on the user's standard payday.⁶⁹ For some employer-sponsored programs, the employer facilitates reimbursement through a payroll deduction before transferring the balance of net wages to the employee.⁷⁰ Other programs may require the employee to set up direct deposit with a bank account⁷¹ or reloadable debit card⁷² issued by the program provider. That account is then automatically debited on the user's payday to reimburse the earned-wage program before making the balance of the direct

period); *How Much Money Can I Cash Out with Earnin?*, EARNIN, <https://help.earnin.com/hc/en-us/articles/223440348-How-much-money-can-I-cash-out-with-Earnin-> [<https://perma.cc/VM5N-72VN>] (showing that Earnin has a \$100–\$500 pay-period max).

⁶⁶ See, e.g., *DailyPay Instant Access to Earned Wages*, ADP MARKETPLACE, <https://apps.adp.com/en-US/apps/221925/dailypay-instant-access-to-earned-wages> [<https://perma.cc/S5LJ-ST6C>] (allowing employees to “transfer and receive their earnings immediately in their designated bank account or on any debit card or pay card”). Earned-wage providers often partner with credit-card-network providers to facilitate such real-time payment transfers. See, e.g., *Immediate Announces New Integration with Visa Making Earned Wages Available to Workers in Real-Time*, IMMEDIATE (Sept. 16, 2020), <https://www.prnewswire.com/news-releases/immediate-announces-new-integration-with-visa-making-earned-wages-available-to-workers-in-real-time-301132336.html> [<https://perma.cc/2MPG-SUPL>] (announcing the partnership between Visa and Immediate, a financial wellness company, which uses Visa Direct for its earned wage access services); Michael Moeser, *Clair Teams with Mastercard to Expand Earned Wage Access*, PAYMENTSOURCE (Feb. 9, 2021, 9:00 AM) <https://www.paymentsource.com/news/clair-teams-with-mastercard-to-expand-earned-wage-access> [<https://perma.cc/EH5R-4WMJ>] (reporting the partnership between Mastercard and Clair to facilitate the latter's earned wage access services).

⁶⁷ See *HKS 2018 Study*, *supra* note 30 (“PayActiv is reimbursed by the employer by deduction from the employee's next paycheck.”).

⁶⁸ Eric Dresdale, *Giving Employees Early Access to Their Earned Wages*, PAYMENTS J. (Nov. 29, 2017), <https://www.paymentsjournal.com/giving-employees-early-access-earned-wages/> [<https://perma.cc/9ZUU-CFRX>].

⁶⁹ *Id.*

⁷⁰ See *HKS 2018 Study*, *supra* note 30 (“PayActiv is reimbursed by the employer by deduction from the employee's next paycheck.”).

⁷¹ See, e.g., *Terms and Privacy*, DAILYPAY, <https://www.dailypay.com/legal/#terms-of-use> [<https://perma.cc/9Z2K-P5CV>] (“You will receive a DailyPay Routing and Account Number from us for an account that we establish for your participation in the DailyPay Program. You agree to make direct deposit arrangements with the Hiring Entity using your DailyPay Routing and Account Number as the account of record in the Hiring Entity's payment system. You agree to instruct the Hiring Entity to direct all of your net regular pay to that account, and you authorize us to convey such instructions to the Hiring Entity on your behalf.”).

⁷² See, e.g., Gurley, *supra* note 36.

deposit available to the employee.⁷³ For third-party programs, the user facilitates reimbursement on the user’s next payday via a preauthorized EFT from a linked, third-party bank account.⁷⁴ The reimbursement obligation is often not legally compelled, since many providers consider earned-wage transfers nonrecourse obligations.⁷⁵ However, some providers, such as DailyPay, make payroll deductions or preauthorized debits effectively irrevocable.⁷⁶ Other providers give users the right to revoke and delay authorizations, but users never exercise it.⁷⁷

Users and their employers have four different fee structures in earned-wage programs to consider.⁷⁸ First, there are per-transaction fees ranging from \$1.99 to \$5, which can vary based on the desired speed of the transfer.⁷⁹ Second, there are per-pay-period fees requiring a single charge of, in some instances, around \$5, which allows multiple transfers within one pay period.⁸⁰ Third, there are subscription fees, which range from \$6 to \$8 per month and incur a single monthly charge for multiple transfers within the

⁷³ See, e.g., *Terms and Privacy*, *supra* note 71.

⁷⁴ See, e.g., *Frequently Asked Questions*, *supra* note 65 (explaining that “either a deduction will come out of your next paycheck for the amount of the Instapay OR your connected bank account will be debited for that amount on your next payday”); *Terms and Privacy*, EARNIN, <https://earnin.com/privacyandterms> [<https://perma.cc/JR25-FAGJ>]; *How Does the App Work?*, EARNIN, <https://help.earnin.com/hc/en-us/articles/213412087-How-does-the-app-work-> [<https://perma.cc/T7JR-D2C7>] (instructing Earnin users to send earnings by sending an electronic timesheet or add earnings automatically via the app’s Automatic Earnings feature).

⁷⁵ An obligation is “nonrecourse” when the obligee is barred from taking legal action to collect any of the obligor’s assets in the event of a default. See Hayashi, *supra* note 41; see, e.g., *Terms and Privacy*, *supra* note 74 (“We will have no legal or contractual claim or remedy against you based on your failure to repay . . .”); *Terms and Privacy*, *supra* note 71 (“Our right to receive your Daily Earnings is non-recourse.”); *Branch Terms of Service*, BRANCH (Feb. 2021), <https://www.branchapp.com/terms> [<https://perma.cc/JBH7-TFB5>] (“Branch will not . . . engage in debt collection activities related to an [earned-wage access] that is not repaid . . .”).

⁷⁶ See, e.g., *Terms and Privacy*, *supra* note 71 (“You will not take any action or make any omission (including redirecting payments, or placing or allowing placement of a lien or security interest on any Daily Earnings) that has, individually or in the aggregate, an adverse effect on our ability to collect on or retain any Daily Earnings . . .”).

⁷⁷ Hawkins, *supra* note 54, at 22–23 (discussing an interview with representatives from Even).

⁷⁸ Fees are typically paid solely to the earned-wage provider. One can imagine a scenario in which a competitive market will result in kickbacks to employers to incentivize partnerships, which would raise significant labor-law concerns. Since such kickbacks do not appear to be the current practice, the likely risks related thereto are outside of the scope of this Article.

⁷⁹ See *Frequently Asked Questions*, DAILYPAY, <https://www.dailypay.com/frequently-asked-questions/> [<https://perma.cc/VZ8N-57C7>] (“We only apply a small fee when you request money ahead of your regular payday.”).

⁸⁰ LESLIE PARRISH, AITE GRP., EMPLOYER-BASED LOANS AND EARLY PAY: DISRUPTION REACHING SCALE 14 (2019) (reporting that PayActiv fees include “\$5 per biweekly pay period of active use”).

month.⁸¹ Subscription fee services are paid on an automatic schedule, meaning that if the service is not used for two months, some providers will cancel the automatic payments going forward.⁸² For employer-sponsored programs, employers can cover or subsidize the fees.⁸³ Some employers, like Walmart, cover the costs for a limited number of transfers annually.⁸⁴

Finally, there is a free service,⁸⁵ which does not compel payment but encourages users to “tip” the community.⁸⁶ The program will provide tip suggestions such as \$9 for a \$100 withdrawal, but users can voluntarily “tip” any amount up to \$14 for each transaction.⁸⁷ Though “voluntary,” opting out of a tip may result in more limited access, including a limit on the maximum amount that a user can transfer.⁸⁸

⁸¹ See, e.g., *Frequently Asked Questions*, *supra* note 65 (“Instapay allows you access to wages you’ve already earned, so you’re not borrowing. There are no taxes or interest - the only cost is our monthly Even Plus subscription.”).

⁸² Juliana Feliciano Reyes, *Why Some Workers Think Walmart’s Pay-in-Advance App Is a Lousy Deal*, PHILA. INQUIRER (Aug. 28, 2018), <https://www.inquirer.com/philly/news/walmart-pay-in-advance-app-fees-20180828.html> [<https://perma.cc/48DP-9ZNM>].

⁸³ See, e.g., *HKS 2018 Study*, *supra* note 30 (“According to [PayActiv], in over 50% of the cases the membership fee is borne or subsidized by the employers . . .”); see also Dresdale, *supra* note 68 (discussing the different payment models, which include mandatory employer payment (Instant Financial), mandatory employee payment (DailyPay), and optional employer payment (InstantWage)).

⁸⁴ See *Walmart Offers New Financial Wellness Services for Associates Nationwide*, WALMART (Dec. 13, 2017), <https://corporate.walmart.com/newsroom/2017/12/13/walmart-offers-new-financial-wellness-services-for-associates-nationwide> [<https://perma.cc/G5G8-6VDT>] (explaining that Walmart will pay for employees to use an early wage access program up to eight times per year).

⁸⁵ A recent trend that should be examined in future work is providers offering free earned wage transfer services to users that elect to link earned-wage transfers to provider-issued debit cards, which allow providers to generate revenues from interchange fees.

⁸⁶ See *How Does Earnin Make Money?*, EARNIN, <https://help.earnin.com/hc/en-us/articles/223329928-How-does-Earnin-make-money-> [<https://perma.cc/PUP8-ZX6H>] (“It is our community members, however, that we truly rely on to keep the app going. Earnin is 95% community-supported and mainly operates on the tips we receive from our community members.”).

⁸⁷ See Steve Nicastro & Annie Millerbernd, *Earnin App 2020 Review: Get an Advance on Your Paycheck*, NERDWALLET (Mar. 12, 2020), <https://www.nerdwallet.com/blog/loans/earnin-personal-loan-review/> [<https://perma.cc/FXD6-EWAA>] (“Earnin doesn’t charge interest or fees. Users can donate an optional ‘tip’ of any amount . . . [up to] \$14.”).

⁸⁸ Complaint, *supra* note 43, at 23 (“[Plaintiff] believes that his limit was affected by the amount that he tipped. For example, his limit was once decreased from \$350 to \$250 in a single pay period, which followed a week when he had declined to pay a tip.”); Kevin Dugan, *Cash-Advance App Earnin Changes Its Tune amid NY Probe*, N.Y. POST (Sept. 1, 2019, 9:29 PM) <https://nypost.com/2019/09/01/cash-advance-app-earnin-changes-its-tune-amid-nys-probe/> [<https://perma.cc/57MR-RJMQ>] (reporting that the pay-to-play feature offered “as much as 10 times more in loans to users who voluntarily tipped,” but it was quietly disabled only after a state regulatory probe into possible violations of New York’s usury laws and only for New York users). *But see Why Did My Max Decrease?*, EARNIN, <https://help.earnin.com/hc/en-us/articles/226633287-Why-did-my-Max-decrease-> [<https://perma.cc/3XXP-V7AS>] (“Tipping does not affect your individual Cash Out Max, whether you decide to provide Earnin tips or not.”).

While each fee appears low, when converted into an APR to compare earned-wage programs to traditional loan products, earned-wage fees are extraordinarily high. For example, the per-transaction fee models can result in APRs between 145% and 365% or more if transfers are made closer to the user’s next payday.⁸⁹ Under the tip-based model, the \$9 recommendation results in an APR of 469% for a one-week advance.⁹⁰ Even the more affordable programs can result in APRs of around 73% with frequent use,⁹¹ which is more than double the rate of a typical credit-card service.⁹²

B. The Market

I. The Providers

The nascent market for earned-wage programs has grown rapidly and is occupied by several firms, including PayActiv, DailyPay, Even, and Earnin. Firms in this market are typically nonbank entities and thus hold no money for deposit.⁹³ However, many are well funded through multimillion-dollar venture-capital raises.⁹⁴ Such funding has supported a rapidly

⁸⁹ Notably, APRs are very difficult to pin down in this sector since it depends on the amount transferred and the number of days left until the user’s next payday. This range estimate assumes a two-week pay cycle and uses a \$100 transfer with repayment in five days.

⁹⁰ Kevin Dugan, *Popular Cash Advance App Earnin Operating in Payday Loan ‘Gray Area,’ Critics Claim*, N.Y. POST (Mar. 21, 2019, 10:05 PM), <https://nypost.com/2019/03/21/popular-cash-advance-app-earnin-operating-in-payday-loan-gray-area-critics-claim/> [<https://perma.cc/5G45-Q7TB>].

⁹¹ This calculation is based on the Even app, assuming a bimonthly pay period and \$150 transfers on day five and day twenty-five with payday following five days after each transfer date. Because the \$6 fee is for all transfers in the month, the first transfer is effectively amortized—\$150 is ultimately repaid in twenty days at a \$6 charge. *COVID-19 Update: Get Paid Weekly with Free Even Plus*, EVEN, <https://www.even.com/Walmart> [<https://perma.cc/T92S-38PV>] (noting Even Plus’s subscription fee is \$6 per month).

⁹² Lorie Konish, *This ‘Deal’ Could Cost You 27.5 Times More Interest. Here’s What to Avoid When Shopping This Season*, CNBC (Dec. 24, 2019, 10:00 AM), <https://www.cnbc.com/2019/12/24/deferred-interest-deals-and-store-credit-cards-could-cost-you-big-time.html> [<https://perma.cc/5GR7-9WDU>] (“The average store credit card has a 28.86% APR, according to WalletHub. In contrast, the average credit card APR for individuals with good credit is 20.94% . . .” (citing Alina Comoreanu, *Credit Card Landscape Report*, WALLETHUB (Oct. 17, 2019), <https://wallethub.com/edu/cc/credit-card-landscape-report/24927/> [<https://perma.cc/5PKP-QXYB>])).

⁹³ See, e.g., Lauren Perez, *How to Get Your Paycheck in Advance*, MAGNIFY MONEY (May 31, 2019), <https://www.magnifymoney.com/blog/banking/paycheck-advance/> [<https://perma.cc/P9KY-4KD9>] (explaining that “Earnin is not a bank account”).

⁹⁴ For example, Earnin has raised more than \$190 million in venture funding. *Earnin*, CRUNCHBASE, <https://www.crunchbase.com/organization/activehours> [<https://perma.cc/LE8Q-JLW7>]. DailyPay has raised over \$5 million. *DailyPay*, CRUNCHBASE, <https://www.crunchbase.com/organization/dailypay-inc#section-funding-rounds> [<https://perma.cc/DE8G-77C5>]. PayActiv has raised \$20 million. *PayActiv Raises \$20 Million to Expand Financial Wellness Offering for Millions of Financially Stressed Workers*, PAYACTIV (Oct. 10, 2018) [hereinafter *PayActiv Raises \$20 Million*], <https://www.payactiv.com/20->

expanding market. Earned-wage providers have secured partnerships with hundreds of thousands of firms, including direct partnerships with large-scale employers like Walmart⁹⁵ and Amazon,⁹⁶ and partnerships with large-scale human-resource management firms like ADP Marketplace,⁹⁷ Paycor,⁹⁸ and Kronos.⁹⁹ Despite the market's infancy, its activity is significant. PayActiv has alone settled more than \$1 billion in transfers¹⁰⁰ with a monthly transfer rate of over \$100 million.¹⁰¹ One market-research firm estimated that employer-sponsored programs collectively facilitated 18.6 million transfers amounting to over \$3.1 billion in 2018;¹⁰² this amount nearly doubled in 2019 and tripled in 2020.¹⁰³ Third-party programs have had similar success. Earnin has more than 10 million unique downloads¹⁰⁴ and an estimated 375,000 weekly active users.¹⁰⁵ And the market, although nascent, is dynamic, with business models varying beyond fee structures and degree of integration with employers. Earned-wage providers often offer users an array of financial-wellness tools, including discount programs, personal budgeting strategies,

million-series-b-funding-expand-financial-wellness-offering/ [https://perma.cc/GHQ2-AB45]. Even has raised \$40 million. Kaufin, *supra* note 8.

⁹⁵ Tergesen, *supra* note 5.

⁹⁶ Gurley, *supra* note 36.

⁹⁷ *DailyPay Instant Access to Earned Income*, ADP MARKETPLACE, <https://apps.adp.com/en-US/apps/221925/dailypay-instant-access-to-earned-wages> [https://perma.cc/2NH6-XTLW].

⁹⁸ Mayuri Chaudhary, *DailyPay Announces Partnership with Paycor*, HR TECHNOLOGIST (June 20, 2019), <https://www.hrtechnologist.com/news/performance-management-hcm/dailypay-announces-partnership-with-paycor/> [https://perma.cc/LEW7-EAN4].

⁹⁹ Kathryn Mayer, *Kronos, Even Partner to Offer Employees Access to Advance Payday*, EMP. BENEFIT NEWS (Oct. 17, 2018), <https://www.benefitnews.com/news/kronos-even-partner-to-offer-employees-access-to-advance-payday> [https://perma.cc/YY8X-JXTY].

¹⁰⁰ *PayActiv Crosses \$1 Billion in Processed Funds for Timely Earned Wage Access to the Underserved and Underbanked Workforce*, CISION (Jan. 14, 2019), <https://www.prnewswire.com/news-releases/payactiv-crosses-1-billion-in-processed-funds-for-timely-earned-wage-access-to-the-underserved-and-underbanked-workforce-300777678.html#:~:text=All%20Products-,PayActiv%20Crosses%20%241%20Billion%20in%20Processed%20Funds%20for%20Timely%20Earned,needs%20without%20adding%20additional%20debt> [https://perma.cc/CYJ8-HV6Y].

¹⁰¹ *PayActiv Raises \$20 Million*, *supra* note 94.

¹⁰² PARRISH, *supra* note 80, at 22.

¹⁰³ Bernard, *supra* note 37 (“Last year, workers tapped their paychecks through workplace providers an estimated 37 million times, gaining access to more than \$6 billion . . .”); PARRISH, *supra* note 34, at 3, 17.

¹⁰⁴ Dugan, *supra* note 90 (“More than 10 million people have downloaded the [Earnin] app since it was first made available in 2013 . . .”).

¹⁰⁵ Kate Clark, *Earnin Raises \$125M to Help Workers Track and Cash Out Wages in Real Time*, TECHCRUNCH (Dec. 20, 2018, 7:00 AM), <https://techcrunch.com/2018/12/20/earnin-raises-125m-to-help-workers-track-and-cash-out-wages-in-real-time/> [https://perma.cc/8VK9-VKZK].

and automated savings.¹⁰⁶ Some partner with payment-service providers to facilitate earned-wage transfers to reloadable debit cards.¹⁰⁷

2. The Users

Data is scant for user demographics and transfer behavior. However, the limited information available suggests the typical user is a low-income individual who uses the service regularly for small-sum transfers. Considering wages offered by employer partners, the average earned-wage user’s income likely ranges from \$20,000 to \$30,000 annually.¹⁰⁸ Average users transfer \$66 to \$165, depending on the program, up to three times in a biweekly pay period.¹⁰⁹ Employees report using the funds to cover nonemergency expenses, such as recurring bill payments, commuting expenses, and food.¹¹⁰ Providers of earned-wage programs explicitly target low-income individuals who rely on fringe financial services like payday loans.¹¹¹ While more data is needed on user demographics, the current data is at least consistent with the intended target market of earned-wage programs.

¹⁰⁶ See, e.g., Kauflin, *supra* note 8 (describing the Even app’s three main features as “budgeting—it links to consumers’ bank accounts, pulls in income and expenses, asks about upcoming bills and estimates how much money they have left to spend,” “automatic savings,” and “a flexible-pay or ‘earned-wage’ option”).

¹⁰⁷ See, e.g., Gurley, *supra* note 36 (“Warehouse workers who opt into [Amazon’s earned-wage] program, by signing up for a pay card with the software company Wisely, will have to pay fees at out-of-network ATMs to take out cash, and may be subject to other fines.”).

¹⁰⁸ See *McDonalds Full Time Salaries*, GLASSDOOR, https://www.glassdoor.com/Salaries/mcdonald-full-time-salary-SRCH_KO0,18.htm [<https://perma.cc/SRA7-JTGJ>] (estimating that most McDonald’s workers make just over \$20,000 annually); Cameron Albert-Deitch, *Time for That Pay Raise? Walmart Employees Now Make More than Minimum Wage*, INC. (May 9, 2019), <https://www.inc.com/cameron-albert-deitch/walmart-employee-compensation-report-minimum-wage.html> [<https://perma.cc/V9D6-8X6>] (stating that the average full-time Walmart associate makes \$14.26 per hour, which, calculated as a salary for forty hours per week, is \$29,660.80).

¹⁰⁹ See *Dailypay for ADP Workforce Now (Current) and ADP Vantage HCM & ADP Time-Clock (Future): Frequently Asked Questions*, ADP [hereinafter *Dailypay for ADP Workforce FAQs*], https://d3bql9711ytoxn.cloudfront.net/app_resources/221925/documentation/740545_en.pdf [<https://perma.cc/VZ6A-UGRV>]; PARRISH, *supra* note 80, at 13–14 (discussing user data for several earned-wage programs).

¹¹⁰ Rafter, *supra* note 39 (reporting that, according to a DailyPay executive, “the top four things that people take money out to pay for are essentials that they might fall short paying for before their next paycheck, including food, housing or rent, transportation or gas, and utilities”); see also Del Valle, *supra* note 6; Tergesen, *supra* note 5 (stating that a customer reports “typically us[ing] PayActiv once or twice per pay period, generally for bills due before her next paycheck arrives”).

¹¹¹ See, e.g., Insights Team, *The Truth About Payday Loans*, PAYACTIV (June 13, 2019), <https://www.payactiv.com/blog/the-truth-about-payday-loans/> [<https://perma.cc/K9T8-A8Y4>] (comparing the “vicious cycle and financial pitfall” that payday loans can cause employed persons “living paycheck to paycheck” versus the “responsible financial practices” fostered by an earned-wage program).

C. *The Benefits*

Preliminary research has found that earned-wage programs are win-win solutions for employers and low-income employees. For employees, earned-wage programs help manage income volatility by providing near-instant access to liquidity that would otherwise be held up by the employer until payday. Historically, low-income borrowers have placed a high premium on easy access to funds, flat fees, and privacy,¹¹² all of which are provided by earned-wage programs. So long as they have accrued wages, users are able to access the programs and funds from their mobile devices at any time of any day. Unlike some mainstream credit services like personal loans, earned-wage programs do not inquire about uses of funds. Users can quickly access cash without needing to rely on relatives or turning to mainstream financial institutions to resolve their financial shortfalls. Given that low-income borrowers tend to distrust mainstream financial institutions,¹¹³ they may be comforted by the fact that earned-wage programs are provided by nonbank FinTech firms. In short, earned-wage programs appeal to low-income consumers in many of the same ways that payday loans do.¹¹⁴ Moreover, earned-wage programs in many ways offer significant improvements over payday loans: they can be less expensive,¹¹⁵ they limit over-indebtedness by allowing transfers of only accrued wages, and they offer tools that help users self-manage their finances.¹¹⁶

These user benefits are then passed on to employers. Research shows that workers who are financially distressed are twice as likely to lose more than three hours per week of productivity.¹¹⁷ Such workers are also more than

¹¹² GREGORY ELLIEHAUSEN & EDWARD C. LAWRENCE, PAYDAY ADVANCE CREDIT IN AMERICA: AN ANALYSIS OF CUSTOMER DEMAND 51–53 (2001).

¹¹³ See FED. DEPOSIT INS. CORP., 2017 FDIC NATIONAL SURVEY OF UNBANKED AND UNDERBANKED HOUSEHOLDS 4 (2018), <https://www.fdic.gov/householdsurvey/2017/2017execsumm.pdf> [<https://perma.cc/T9JE-HXM5>] (“Almost one-third (30.2 percent) of unbanked households cited ‘Don’t trust banks’ as a reason for not having an account, the second-most commonly cited reason.”).

¹¹⁴ See Michael Kenneth, *Payday Lending: Can “Reputable” Banks End Cycles of Debt?*, 42 U.S.F. L. REV. 659, 670 (2008) (“[A]pproximately 60% of customers cited the easy process for obtaining funds as the most important reason for selecting payday loans over other potential sources of credit.”).

¹¹⁵ Baker, *supra* note 30, at 2; see also Tergesen, *supra* note 5 (“[A] medication technician . . . says PayActiv has helped her avoid late and overdraft fees of as much as \$80 a month.”).

¹¹⁶ Holly Johnson, *Is Walmart’s Early Pay Offer Good for Workers?*, POLICYGENIUS (Mar. 21, 2018), <https://www.policygenius.com/blog/walmart-offers-early-pay-feature-but-is-it-a-good-idea/> [<https://perma.cc/97GT-XVBH>] (listing the pros of receiving an early paycheck, which include avoiding more expensive loans and bank overdrafts and temporarily solving cashflow issues).

¹¹⁷ KENT E. ALLISON & AARON J. HARDING, PWC, EMPLOYEE FINANCIAL WELLNESS SURVEY 2017 RESULTS 5 (2017), <https://www.pwc.com/us/en/private-company-services/publications/assets/pwc-2017-employee-wellness-survey.pdf> [<https://perma.cc/X3DF-C3TQ>].

twice as likely to switch jobs.¹¹⁸ The combined loss of productivity and lower retention rates account for approximately 11% to 14% of a firm’s payroll expense, or almost \$500 billion for corporate America as a whole.¹¹⁹ According to the *HKS 2018 Study*, the regular use of earned-wage programs is strongly associated with reduced employee-turnover rates and significant cost savings for employers.¹²⁰ And in recent market surveys of earned-wage users, most respondents indicated that earned-wage access motivated them to pick up more shifts and would be a key factor in their retention.¹²¹ Thus, for the employer, earned-wage programs are a low-cost solution to labor inefficiencies. This win-win result for employers and low-income employees has reportedly led to some “employees rely[ing] less on payday loans and bank overdrafts,”¹²² though precise numbers on such product switches remain elusive. The growth of the earned-wage market stems not only from its appeal to employers and employees but also, as is discussed next, from a current lack of governmental regulation.

II. REGULATING EARNED-WAGE PROGRAMS

Currently, there are no regulatory frameworks for financial services that explicitly contemplate earned-wage programs. Consequently, the market operates in a regulatory gray area between the frameworks for money-transmission services and loan services. Though some service providers seek to create an entirely distinct financial service category,¹²³ most have elected to operate under the framework for money-transmission services. However, money-transmission law imposes minimal restrictions on the service terms offered by providers. Consequently, some lawmakers and consumer-protection groups argue that the more onerous frameworks for loan services, like nonbank-lending law, are more appropriate. This Part gives an overview of the three legal frameworks that potentially could apply to earned-wage

¹¹⁸ SALARY FIN., THE EMPLOYER’S GUIDE TO FINANCIAL WELLNESS 16 (2019), https://resources.salaryfinance.com/hubfs/Campaigns/USGuide19/Employers_Guide_to_Financial_Wellness_2019_Salary_Finance.pdf [<https://perma.cc/8Y4D-3VW8>] (citing *HKS 2018 Study*, *supra* note 30).

¹¹⁹ *Id.* at 4.

¹²⁰ *HKS 2018 Study*, *supra* note 30 (noting that, according to one model, such cost savings could amount to nearly \$110 million annually).

¹²¹ *New Study Reveals Strong Opportunity for Earned Wage Access*, VISA (Sept. 11, 2020), <https://www.hrdiver.com/spons/new-study-reveals-strong-opportunity-for-earned-wage-access/584917/> [<https://perma.cc/NM4D-KCKB>] (noting a DailyPay study which found that 56% of users reported being motivated to pick up more shifts due to having access to their service and a Visa study which found that 89% of workers would stay longer at a company that offered an earned-wage program as a benefit).

¹²² Tergesen, *supra* note 5.

¹²³ See Wack, *supra* note 47.

programs: the relatively-light-touch money-transmission law, the more onerous yet multifarious nonbank-lending law, and the nationally uniform yet substantively hollow FinTech charter.

A. *The Law of Nonbank Money Transmitters*

Many providers of money-transmission services are nondepository, or nonbank, financial institutions that perform payment services or facilitate the exchange of funds between two parties. Western Union is the classic example of a money-transmission firm, but FinTech firms have reconceptualized the market to potentially include digital wallets like ApplePay, peer-to-peer payment services like Venmo, and even cryptocurrencies like Bitcoin.¹²⁴ The law of money transmitters is designed primarily to protect consumer funds that are temporarily in trust with the money transmitters,¹²⁵ prevent money laundering,¹²⁶ and safeguard consumer data.¹²⁷ It does so in a highly fragmented fashion, with regulation and oversight bifurcated between federal and state laws. Such fragmentation results in a multitude of idiosyncratic definitions of money transmitters, compliance requirements, and registration or licensing fees.

1. *Federal Landscape*

At the federal level, the law of money transmitters focuses on preventing money laundering and protecting consumers' nonpublic information. Money laundering occurs when a person or entity attempts to conceal the origin of illicit funds through multiple complex money transfers.¹²⁸ Under the Bank Secrecy Act, money transmitters are required to register with the Financial Crimes Enforcement Network and comply with regular reporting, monitoring, and recordkeeping requirements to diligently

¹²⁴ See Kevin V. Tu, *Regulating the New Cashless World*, 65 ALA. L. REV. 77, 113–18 (2013) (discussing how many innovative payment services have remote risks of loss since fund transfers are not meaningfully held in trust by payment intermediaries as in the case of traditional money transmitters like Western Union).

¹²⁵ See *id.* at 115.

¹²⁶ See 31 U.S.C. § 5311; see also *FinCEN's Mandate from Congress*, FIN. CRIMES ENF'T NETWORK, <https://www.fincen.gov/resources/statutes-regulations/fincens-mandate-congress> [https://perma.cc/7SPB-R2UP] (“The Currency and Foreign Transactions Reporting Act of 1970 . . . requires U.S. financial institutions to assist U.S. government agencies to detect and prevent money laundering.”).

¹²⁷ See *Financial Institutions and Customer Information: Complying with the Safeguards Rule*, FTC (Apr. 2006), <https://www.ftc.gov/tips-advice/business-center/guidance/financial-institutions-customer-information-complying> [https://perma.cc/ZG3J-NG3Z].

¹²⁸ FIN. CRIMES ENF'T NETWORK, U.S. DEP'T OF TREASURY, MONEY LAUNDERING PREVENTION: A MONEY SERVICES BUSINESS GUIDE 2, https://www.fincen.gov/sites/default/files/shared/prevention_guide.pdf [https://perma.cc/H85Z-EG3N].

track sources of funds.¹²⁹ The definition of a money transmitter under the Bank Secrecy Act is broad,¹³⁰ but the Act explicitly carves out exceptions where the risk of money laundering is remote, such as, for example, when the transaction is simple and easy to trace or the parties are otherwise regulated. These exceptions include transmission services for the direct purchase of goods and services and transactions between institutions regulated under the Bank Secrecy Act and other heavily regulated entities like securities brokers.¹³¹

Money transmitters are also subject to financial-privacy and data-security regulations. Under the Gramm-Leach-Bliley Act of 1999, money transmitters must provide consumers with certain privacy disclosures and the ability to opt out of information sharing.¹³² And in accordance with the Safeguards Rule promulgated by the Federal Trade Commission (the Safeguards Rule), money transmitters must also establish and maintain safeguards to protect the security, confidentiality, and integrity of consumer information.¹³³

Federal law is otherwise silent on consumer protection with respect to domestic money transmitters.¹³⁴ Some money transmitters may be subject to certain disclosure requirements and compelled to assist consumers in recovering funds in unauthorized transfers, but such requirements are applicable only if the money transmitter stores consumer funds (e.g., prepaid debit cards).¹³⁵

2. *State-Level Landscape*

State law supplements the federal framework with consumer-protection regulation designed to protect consumers against loss by combating fraud and ensuring money transmitters are solvent. Money transmitters are required to obtain a license in each state where they operate, subject to carve-outs and exemptions determined by the definition of money transmission on

¹²⁹ See 31 U.S.C. § 5311; 12 C.F.R. §§ 21.11, 21.21 (2004).

¹³⁰ See 31 C.F.R. § 1010.100(ff)(5)(i) (2019) (describing any person that (A) “accept[s] . . . currency, funds, or other value that substitutes for currency from one person *and* the transmission of currency, funds, or other value that substitutes for currency to another location or person by any means” or (B) “engage[s] in the transfer of funds”).

¹³¹ *Id.* § 1010.100(ff)(5)(ii), (ff)(8).

¹³² 15 U.S.C. § 6801(a)–(b); 12 U.S.C. § 1843(k)(4)(A); 16 C.F.R. §§ 313.4–9 (2016).

¹³³ 16 C.F.R. § 314.3 (2019).

¹³⁴ The CFPB has amended the Electronic Fund Transfers Act with comprehensive consumer protections for remittance transfers sent by consumers in the United States to individuals and businesses in foreign countries. See 12 C.F.R. §§ 1005.1, 1005.30–36 (LEXIS through Fed. Reg. Dec. 10, 2020).

¹³⁵ 15 U.S.C.S. § 1693 (LEXIS through Pub. L. No. 116-220); 12 C.F.R. § 205.3 (LEXIS through Fed. Reg. Dec. 10, 2020).

a state-by-state basis.¹³⁶ Licensing forces money transmitters to undergo a vetting process that assesses, among other things, their financial responsibility and experience, competence and character, and general fitness.¹³⁷ Licensing also comes at a significant cost, with money transmitters paying an array of fees in each state where they operate.¹³⁸

In addition to the licensing process, money transmitters must comply with certain obligations to consumers. To ensure solvency, state law often requires that money transmitters provide a surety bond, satisfy a minimum-net-worth requirement, and/or maintain consumer funds in a minimum amount of permissible investments.¹³⁹ Money transmitters may also be required to file annual financial reports and submit to audits by state regulators.¹⁴⁰ Authorized distributors of money transmitters are often also subject to regulation meant to prevent consumer loss.¹⁴¹ These state requirements are reinforced by federal law, which makes it a criminal offense to conduct money-transmission services without an applicable state license.¹⁴²

B. *The Law of Nonbank Lenders*

Some nonbanks specialize in lending rather than (or sometimes in addition to) money-transmission services. Commonly known nonbank lenders include payday lenders,¹⁴³ but technological advances have expanded the concept of nonbank lenders to include a host of FinTech firms called marketplace lenders that offer mainstream lending services.¹⁴⁴ The law of nonbank lenders is designed to protect consumers against risks associated with over-indebtedness, undue loss, and privacy breaches. As with money transmitters, regulation of nonbanks lenders is fragmented across the federal and state level. However, nonbank lenders are subject to considerably less

¹³⁶ Tu, *supra* note 124, at 92. See *id.* at 86–91 for detail on the variance in state law definitions of money transmission and exemptions.

¹³⁷ *Id.* at 92.

¹³⁸ *Id.*

¹³⁹ *Id.* at 93.

¹⁴⁰ Judith Rinearson, *Regulation of Electronic Stored Value Payment Products Issued by Non-banks Under State “Money Transmitter” Licensing Laws*, 58 BUS. L. 317, 321 (2002).

¹⁴¹ Many states require contractual arrangements between money transmitters and authorized distributors to compel immediate delivery of proceeds to the money transmitter. *Id.* at 322.

¹⁴² 18 U.S.C.S. § 1960 (LEXIS through Pub. L. No. 116-220).

¹⁴³ See Jayne Munger, Note, *Crossing State Lines: The Trojan Horse Invasion of Rent-a-Bank and Rent-a-Tribe Schemes in Modern Usury Law*, 87 GEO. WASH. L. REV. 468, 472 n.16 (2019) (providing payday lenders, pawnshops, and rent-to-own stores as examples of nonbank lenders).

¹⁴⁴ John L. Douglas, *New Wine into Old Bottles: Fintech Meets the Bank Regulatory World*, 20 N.C. BANKING INST. 17, 26–27 (2016).

federal oversight than money transmitters and considerably more restrictions on their terms of service.

1. Federal Landscape

At the federal level, the law of nonbank lenders focuses on protecting consumers by regulating the process, or how loan services are offered. Nonbank lenders are thus subject to the Gramm-Leach-Bliley Act and the Safeguards Rule, as well as laws like the Truth in Lending Act (TILA), which requires lenders to provide full disclosure of the total finance charges and a calculation of the APR for each extension of credit.¹⁴⁵ TILA was intended to incentivize price competition not by setting rate caps but by enabling price comparisons between substitute credit products that were otherwise marketed along varying price schemes.¹⁴⁶ Prior to its enactment, the cost of credit was obscured by disparate price-disclosure requirements across lenders, resulting in anticompetitive fees to consumers.¹⁴⁷ TILA made more clear the true costs of lending services across competitors, resulting in a market-wide reduction in fees where the law was effectively implemented.¹⁴⁸ Other laws and regulations that affect the process of and access to lending services include those that prohibit lenders from discriminating on the basis of a protected class¹⁴⁹ and those that compel lenders to ensure the accuracy and completeness of information provided to credit bureaus.¹⁵⁰

¹⁴⁵ PAUL BARRON & DAN ROSIN, 1 FEDERAL REGULATION OF REAL ESTATE AND MORTGAGE LENDING § 10:7 (4th ed. 2020).

¹⁴⁶ See 15 U.S.C.A. § 1601(a) (Westlaw through Pub. L. No. 116-223) (“[C]ompetition among the various . . . firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him . . .”).

¹⁴⁷ See Jeff Sovern, *Toward a New Model of Consumer Protection: The Problem of Inflated Transaction Costs*, 47 WM. & MARY L. REV. 1635, 1664–65 (2006) (noting that, prior to TILA, consumers could not compare rates calculated by varying pricing methods because the process required complex calculations, meaning that price shopping was difficult and lenders with the lowest rates failed to effectively communicate those rates to consumers).

¹⁴⁸ See *id.* at 1664–65, 1664 n.99 (explaining that TILA supplied information consumers needed to compare loan prices and thus lowered transaction costs).

¹⁴⁹ See Equal Credit Opportunity Act, 15 U.S.C. § 1691(a) (implemented by 12 C.F.R. § 202(m)) (prohibiting discrimination with respect to a credit transaction “on the basis of race, color, religion, national origin, sex or marital status, . . . [and] age,” the use of public assistance programs, or the exercise of any right under the Consumer Credit Protection Act of 1968).

¹⁵⁰ Lender compliance is indirectly compelled via legislation that requires credit-rating agencies to ensure consumer-credit reports are complete and accurate. See Fair Credit Reporting Act, 15 U.S.C. § 1681.

Federal law rarely places limitations on the specific terms of credit services, such as pricing, principal amounts, or collection terms. Indeed, despite the CFPB's broad authority to prevent "unfair, deceptive, or abusive . . . practice[s]"¹⁵¹ in the provision of loan services, regulatory proposals for small-loan services governing specific loan terms—i.e., service-term regulation—have faced significant opposition.¹⁵² CFPB rules aimed at heightening underwriting requirements, restricting collection practices, and limiting repeated use of loan services, were first delayed and then significantly scaled down; yet, even the narrow rule that focuses exclusively on collection practices continues to face legal threats.¹⁵³ Moreover, the CFPB is expressly barred from regulating pricing terms.¹⁵⁴ There are limited exceptions to this hands-off approach to service-term regulation, including restrictions on wage assignments,¹⁵⁵ maximum interest-rate limits that are tethered to state-established usury limits,¹⁵⁶ and usury limits specifically for loan services to military personnel and their dependents.¹⁵⁷ Otherwise, the regulatory burden and oversight at the federal level is relatively light for nonbank lenders.

2. *State-Level Landscape*

The light federal framework is nonetheless offset by the detail and variance of state law, which leads the charge on consumer-protection regulation related to loan-service terms. One of the oldest methods of protecting consumers from lenders is through usury laws that limit the

¹⁵¹ Dodd-Frank Wall Street Reform and Consumer Protection Act § 1031(a), 12 U.S.C. § 5531(a); *see also id.* § 1036(a)(1)(B), 12 U.S.C. § 5536(a)(1)(B) (making it unlawful for covered persons and service providers "to engage in any unfair, deceptive, or abusive act or practice").

¹⁵² See Katherine Kirkpatrick, Andrew Michaelson & Steven Miller, *Payday Lending May Face Greater CFPB Scrutiny Under Biden*, LAW360 (Feb. 8, 2021) <https://www.law360.com/transportation/articles/1349609/payday-lending-may-face-greater-cfpb-scrutiny-under-biden> [<https://perma.cc/HKH8-DBNW>] (summarizing the evolution of the Payday Rule, which was significantly scaled back under the Trump Administration and currently faces two federal challenges).

¹⁵³ *See id.*; *see also* Payday, Vehicle Title, and Certain High-Cost Installment Loans, 12 C.F.R. §§ 1041.7–1041.9 (2020) (prohibiting lenders from attempting to debit repayment amounts from borrower bank accounts after two failed attempts and requiring notice for certain debit attempts).

¹⁵⁴ *See* 12 U.S.C. § 5517(o).

¹⁵⁵ 16 C.F.R. § 444.2 (2014).

¹⁵⁶ *See* Racketeering Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961–1968 (establishes criminal charges and treble-damage awards for interest rates on credit services that are twice the legal rate set by applicable state or federal law).

¹⁵⁷ Military Lending Act, 10 U.S.C. § 987(b) ("[C]reditor[s] . . . may not impose an annual percentage rate of interest greater than 36 percent with respect to the consumer credit extended to a covered member or a dependent of a covered member.").

interest and fees lenders may charge for their loan services.¹⁵⁸ Usury laws initially operated to morally shame the practice of lending, but they were later adapted specifically to stigmatize high-cost lending.¹⁵⁹ Today, usury laws are intended to protect unsophisticated and vulnerable borrowers from unfair loan terms that lead to inescapable cycles of debt.¹⁶⁰ Each state has a usury statute, and no two statutes are the same. Interest-rate limits vary significantly, as do the types of fees regulated by each usury statute.¹⁶¹ Some states have no fee limits at all.¹⁶²

Many states also curb risks associated with habitual borrowing by restricting the number of high-cost loans that may be incurred within a short period of time.¹⁶³ States can even minimize the burden of loan agreements on consumers by regulating terms like prepayment penalties¹⁶⁴ and amortization.¹⁶⁵ In addition, states limit any undue risk of loss to consumers in the event of default by regulating late penalties,¹⁶⁶ the security that may be

¹⁵⁸ 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, 657 (2000) (“Usury laws are, at core, the earliest form of consumer protection law.”).

¹⁵⁹ See Kirby M. Smith, *Banking on Preemption: Allowing National Bank Act Preemption for Third-Party Sales*, 83 U. CHI. L. REV. 1631, 1642–43 (2016); see also John D. Skees, *The Resurrection of Historic Usury Principles for Consumption Loans in a Federal Banking System*, 55 CATH. U. L. REV. 1131, 1140–48 (2006) (discussing the history and purpose of usury laws).

¹⁶⁰ See Skees, *supra* note 159, at 1137–39; see also *First Nat'l Bank of Ada v. Phares*, 174 P. 519, 520 (Okla. 1918) (per curiam) (asserting that state usury laws exist “to protect those whom necessity compels to borrow against the outrageous demands oftentimes made and required by those who have money to loan”).

¹⁶¹ See CREDIT UNION NAT'L ASS'N, *GUIDE TO STATE USURY LAWS* (2014), https://www.cuna.org/uploadedFiles/Advocacy/Priorities/State_Government_Affairs/a-z_usury_lawguide.pdf [<https://perma.cc/3KZ9-NXBS>] (displaying tables of the usury laws in each state); Lindsay VanSomeren, *Usury Laws: What They Are and Why You Should Care*, CREDIT KARMA (Nov. 6, 2020), <https://www.creditkarma.com/personal-loans/i/usury-laws-what-you-need-to-know/> [<https://perma.cc/4WCL-S26U>] (explaining that usury “laws are mostly regulated by individual states, which means they can be drastically different depending on where you live”).

¹⁶² Richie Bernardo, *Usury Laws by State, Interest Rate Caps, the Bible & More*, WALLETHUB (June 20, 2014), <https://wallethub.com/edu/cc/usury-laws/25568/> [<https://perma.cc/292Z-ECT5>].

¹⁶³ COLIN MORGAN-CROSS & MARIEKA KLAWITTER, *EFFECTS OF STATE PAYDAY LOAN PRICE CAPS & REGULATION 3* (2011), <https://evans.uw.edu/sites/default/files/public/STATE%20PAYDAY%20LOAN%20PRICE%20CAPS%20%26%20REGULATION.pdf> [<https://perma.cc/VP2R-BM3H>].

¹⁶⁴ See, e.g., GA. CODE ANN. § 7-6A-5 (West 2020); CAL. FIN. CODE §§ 22400(a)(2), 22400(c), 22402 (West 2020).

¹⁶⁵ See, e.g., N.Y. BANKING LAW § 6-l(1)(2)(c) (McKinney 2012).

¹⁶⁶ Amy Loftsgordon, *If I'm Late on Mortgage Payments, What Fees Can the Lender Charge?*, NOLO LEGAL ENCYCLOPEDIA, <https://www.nolo.com/legal-encyclopedia/what-fees-can-the-lender-charge-if-im-late-mortgage-payments.html> [<https://perma.cc/5A79-8ZLZ>].

taken for loans,¹⁶⁷ collection practices,¹⁶⁸ confessions of judgment,¹⁶⁹ and wage garnishments and assignments.¹⁷⁰ In some instances, state efforts to protect consumers against fraud, over-indebtedness, undue loss, and privacy violations may be more restrictive for nonbank lenders that serve low-income consumers, like payday lenders.¹⁷¹

Similar to money transmitters, nonbank lenders must obtain a license in each state they operate in and comply with the oversight rules of the respective state regulators. State licensing requirements vary, with some states requiring a license for any consumer lending¹⁷² and others requiring a license only for consumer lending at certain interest rates,¹⁷³ principal amounts, or for certain types of consumer loans.¹⁷⁴ Many states have multiple license categories based on the type or size of loans. The conditions of licensing and ongoing compliance, including filing fees, recordkeeping, financial reporting, disclosure, minimum net worth, and surety-bond requirements, are similarly disparate.¹⁷⁵ In sum, nonbank lenders with multistate operations have the difficult and often costly task of monitoring their compliance with many regulatory regimes.

¹⁶⁷ Elizabeth R. Schiltz, *The Amazing, Elastic, Ever-Expanding Exportation Doctrine and Its Effect on Predatory Lending Regulation*, 88 MINN. L. REV. 518, 526 (2004).

¹⁶⁸ *Id.* at 526–27; *see also* N.Y. PERS. PROP. LAW § 422 (McKinney 2020).

¹⁶⁹ Schiltz, *supra* note 167, at 526–27; *see also* CAL. FIN. CODE § 22331 (West 2020) (“No licensee shall take any confession of judgment . . .”).

¹⁷⁰ *See, e.g.*, Bradley A. Hansen & Mary Eschelbach Hansen, *The Evolution of Garnishment and Wage Assignment Law in Illinois*, 32 ESSAYS ECON. & BUS. HIST. 19, 21–24 (2014) (exploring Illinois garnishment and wage-assignment regulations).

¹⁷¹ *See* Kelly D. Edmiston, *Could Restrictions on Payday Lending Hurt Consumers?*, FED. RSRV. BANK KAN. CITY ECON. REV. 31, 32 (2011) (discussing “the high cost of payday loans, the tendency for payday loans to contribute to consumer debt spirals, and the targeting of payday lending to financially vulnerable populations” as justification for additional regulation of payday lending).

¹⁷² *See, e.g.*, MO. ANN. STAT. § 408.510 (West 2020); MO. CODE REGS. ANN. tit. 20, § 1140-13.010 (2006).

¹⁷³ *See, e.g.*, ROSS SPENCE, SNOW FOGEL SPENCE LLP, USURY AND HOW TO AVOID IT: IMPACT OF NEW LEGISLATION ON COLLECTION PRACTICES 16 (noting Texas triggers its license requirement for lenders charging interest rates above 10%).

¹⁷⁴ *See, e.g.*, *Consumer Credit Licensing Information*, MO. DIV. OF FIN., <https://finance.mo.gov/consumercredit/licensing.php> [<https://perma.cc/QJX5-R368>] (explaining that licensing is required for “retail credit institutions, motor vehicle time sales creditors, consumer credit lenders, consumer installment lenders, lenders of \$500 or less (commonly called ‘payday lenders’)”).

¹⁷⁵ *See, e.g.*, THE SUR. & FID. ASS’N OF AM., SURVEY OF BOND REQUIREMENTS FOR MORTGAGE BROKERS AND LENDERS (2017), <https://suretyone.com/pdf/all-bonds/mortgage-broker-surety-bond-requirements-state-by-state.pdf> [<https://perma.cc/AA4N-C44S>] (describing the variegated surety-bond requirements for each state).

C. The Law of FinTech: The FinTech Charter

Some nonbanks may avail themselves of another regulatory framework designed specifically for FinTech firms. The law of FinTech seeks to regulate certain FinTech firms like banks by eliminating the need for compliance with differing state requirements in favor of more streamlined federal-level regulation. Specifically, the Office of the Comptroller of the Currency (OCC) established a special-purpose national-bank charter (the FinTech charter) for nonbank FinTech firms engaged in one of three activities constituting the “business of banking”: taking deposits, lending, and paying checks.¹⁷⁶ The FinTech charter was intended to facilitate innovative service offerings on a national scale, enabling federal-level supervision and regulation similar to that enjoyed by national banks.¹⁷⁷ The charter focuses on firm solvency, systemic risks, anti-money laundering, privacy, and credit risk management.¹⁷⁸ While the specifics of FinTech supervision remain vague, capital and liquidity requirements,¹⁷⁹ financial-inclusion requirements,¹⁸⁰ and safety-and-soundness standards¹⁸¹ are contemplated.

¹⁷⁶ OFF. OF THE COMPTROLLER OF THE CURRENCY, POLICY STATEMENT ON FINANCIAL TECHNOLOGY COMPANIES’ ELIGIBILITY TO APPLY FOR NATIONAL BANK CHARTERS (2018), <https://www.occ.gov/news-issuances/news-releases/2018/pub-other-occ-policy-statement-fintech.pdf> [<https://perma.cc/RLH2-GZ7K>]; see also OFF. OF THE COMPTROLLER OF THE CURRENCY, COMPTROLLER’S LICENSING MANUAL SUPPLEMENT: CONSIDERING CHARTER APPLICATIONS FROM FINANCIAL TECHNOLOGY COMPANIES (2018), <https://occ.gov/publications-and-resources/publications/comptrollers-licensing-manual/files/considering-charter-apps-from-fin-tech-companies.html> [<https://perma.cc/HV8R-RHL6>].

¹⁷⁷ *OCC Begins Accepting National Bank Charter Applications from Financial Technology Companies*, OFF. OF THE COMPTROLLER OF THE CURRENCY (July 31, 2018) [hereinafter *OCC News Release*], <https://www.occ.gov/news-issuances/news-releases/2018/nr-occ-2018-74.html> [<https://perma.cc/XH67-DCA3>].

¹⁷⁸ See OFF. OF THE COMPTROLLER OF THE CURRENCY, FISCAL YEAR 2020 BANK SUPERVISION OPERATING PLAN (2019), <https://www.occ.gov/news-issuances/news-releases/2019/2019-111a.pdf> [<https://perma.cc/257Q-26FU>] (setting forth bank-supervision operating plan for fiscal year 2020). While the specifics of FinTech supervision remain vague, the FinTech charter contemplates minimum capital and liquidity requirements and contingency-plan requirements, which are intended to protect against insolvency. FinTech firms would also be subject to narrowly tailored financial-inclusion requirements. See *OCC News Release*, *supra* note 177.

¹⁷⁹ See *OCC News Release*, *supra* note 177.

¹⁸⁰ *Id.*

¹⁸¹ OFF. OF THE COMPTROLLER OF THE CURRENCY, EXPLORING SPECIAL PURPOSE NATIONAL BANK CHARTERS FOR FINTECH COMPANIES 1–2 (2016), <https://www.occ.gov/topics/supervision-and-examination/responsible-innovation/comments/pub-special-purpose-nat-bank-charters-fintech.pdf> [<https://perma.cc/DN6W-GRPv>] (“Where a law does not apply directly, the OCC may, nonetheless, work with a fintech company to achieve the goals of a particular statute or regulation through the OCC’s authority to impose conditions on its approval of a charter, taking into account any relevant differences between a full-service bank and special purpose bank.”).

A FinTech charter would not single-handedly clarify whether money-transmission or lending laws apply to a chartered FinTech firm. The charter would, however, afford such firms the unique right to avoid the multitude of idiosyncratic state laws under the money-transmission or loan-services framework. Specifically, via the doctrine of preemption,¹⁸² chartered FinTech firms could be able to export the usury laws of the state where they are organized to any state where they conduct business.¹⁸³ They could also avoid state-by-state licensing requirements, process-specific regulations like disclosure rules, and service-term restrictions like loan-to-value ratios, payment schedules, and amortization.¹⁸⁴ Escaping state-level regulations would result in chartered FinTech firms being subject to very limited service-term regulations, in favor of more “light touch” or vague regulations, which may not adequately protect consumers.¹⁸⁵

* * *

As detailed above, earned-wage programs have in short order established a multibillion-dollar foothold in the market for small-dollar liquidity with minimal regulatory scrutiny. Proponents believe the “real time” wage-transfer model to be a superior alternative to high-cost credit like payday lending and an alternative that resolves employee liquidity crunches while improving employer bottom lines. And, perhaps most significantly, many proponents also believe this model to be legally distinct from such credit alternatives.

Notwithstanding the benefits earned-wage programs promise, an assessment of the market reveals risks that existing regulatory frameworks prove inapt to mitigate. The basic transaction is in many ways eerily similar

¹⁸² See Michael Marvin, *Interest Exportation and Preemption: Madden's Impact on National Banks, The Secondary Credit Market, and P2P Lending*, 116 COLUM. L. REV. 1807, 1811–14 (2016) (detailing how and why federal preemption of state law works to allow national banks to comply with the price-related lending laws of only the state under which they are chartered).

¹⁸³ Such flexibility was deemed necessary to facilitate the development of a “complex system of modern interstate banking.” *Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 312 (1978). Congress extended the exportation right to state-chartered banks. Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, § 521, 94 Stat. 132, 164–65 (codified as amended at 12 U.S.C. § 1831d).

¹⁸⁴ Preemption rights for national FinTech firms remain uncertain. However, if they are to be treated like banks under the FinTech charter, these privileges are likely to be afforded to them. See generally Jared Elost, *Dynamic Federalism and Consumer Financial Protection: How the Dodd-Frank Act Changes the Preemption Debate*, 89 N.C. L. REV. 1273, 1280–81 (2011) (explaining the OCC's enumerating lending regulations that would not apply to national banks).

¹⁸⁵ See *id.* at 1285–86 (arguing that such light-touch regulation is easily subverted by national banks).

to a payday loan, which has such significant consumer risks that payday lenders have been labeled modern-day loan sharks.¹⁸⁶ Payday borrowers have struggled to manage household expenses, maintain bank accounts, and even remain solvent.¹⁸⁷ These harms have led nearly one-third of states and Washington, D.C. to prohibit payday lending.¹⁸⁸ Federal law bans the issuance of payday loans to active military and their dependents.¹⁸⁹ Moreover, the CFPB recently enacted federal-level rules to curb some of the risks posed by payday loans offered to nonmilitary consumers¹⁹⁰ and is speculated to pass more robust rules in the coming years.¹⁹¹

Yet, earned-wage providers conveniently escape such rules and restrictions, and the heightened burden of their fragmentation, by operating as money transmitters. The question academics, regulators, and policymakers must ask themselves is twofold. First, if payday lenders are modern-day loan sharks, are earned-wage programs digital-era loan sharks? If so, consumers may be unduly exposed to the same risks these constituencies have endeavored to reign in for decades or worse—new, unimagined risks not previously addressed in the law. Second, if there is anything redeemable about the market, how should regulation be designed to effectively *and* efficiently protect consumers while fostering market competition and growth?

¹⁸⁶ See Johnson, *supra* note 2, at 3.

¹⁸⁷ See *infra* notes 275–282 and accompanying text.

¹⁸⁸ Aliyyah Camp, *Are Payday Loans Permitted in Your State?*, FINDER (Apr. 27, 2020), <https://www.finder.com/payday-loans-in-your-state> [<https://perma.cc/39P4-4SSU>]; see also Rowan, *supra* note 28 (identifying the maximum allowed rate charged by payday loans per state).

¹⁸⁹ See Military Lending Act, 10 U.S.C. § 987; see also Aliyyah Camp, *Can I Get a Short-Term Loan if I'm Active Duty or a Military Spouse?*, FINDER (Oct. 22, 2018), <https://www.finder.com/military-short-term-loans> [<https://perma.cc/3X8E-X8G4>] (explaining prohibitions on lenders making loans to military members and spouses under conditions usually used by payday lenders, including high interest rates and mandatory waivers of consumer-protection laws).

¹⁹⁰ See Payday, Vehicle Title, and Certain High-Cost Installment Loans, 12 C.F.R. §§ 1041.7–1041.9 (limiting consecutive attempts by lenders to withdraw repayment amounts from borrower accounts).

¹⁹¹ See, e.g., Andrew Ackerman & Orla McCaffrey, *Banks Brace for Tougher Rules Under Biden on Consumer Protection, Fair Lending*, WALL ST. J. (Jan. 30, 2021, 11:00 AM), <https://www.wsj.com/articles/banks-brace-for-tougher-rules-under-biden-on-consumer-protection-fair-lending-11612022400> [<https://perma.cc/6P76-9N6P>] (speculating that the CFPB under the Biden Administration is likely to impose tougher rules on payday lenders, including revising the ability-to-repay requirement that was removed from the Payday Rule).

III. THE EARNED-WAGE PROBLEM

This Part addresses the first of these questions. Legal scholars are only now beginning to critically analyze earned-wage programs.¹⁹² This Part identifies several risks of earned-wage programs by examining the key distinction between money transmissions and loans, the shared features of earned-wage programs and payday loans, and the practical effects of the employer-sponsored model. In doing so, it argues that some earned-wage programs can perpetuate, and in some instances exacerbate, the very risks providers claim to eliminate when displacing short-term creditors like payday lenders.

A. *Deferred Repayment Risks*

Unlike traditional money-transmission services, most earned-wage transactions are marked by a feature that has historically been associated with loans: deferred repayment.¹⁹³ In transactions that defer repayment, the

¹⁹² To date, the only scholars who have engaged with this phenomenon in depth are the author and Professor Jim Hawkins. See Hawkins, *supra* note 54. Another scholar has considered the programs as a symptom of employers' failure to pay wages more regularly. See Yonathan A. Arbel, *Payday*, 98 WASH. U. L. REV. 1, 4 (2020). This work is at the intersection of two areas of legal academic literature. It expands on the burgeoning financial technology scholarship that assesses the disruptive market and regulatory implications of innovative financial products. See generally, e.g., Chris Brummer & Yesha Yadav, *Fintech and the Innovation Trilemma*, 107 GEO. L.J. 235 (2019) (arguing that regulators are generally only able to accomplish two of three goals—providing clear rules, maintaining market integrity, and encouraging innovation—and proposing solutions to that “trilemma”); Kristin Johnson, Frank Pasquale & Jennifer Chapman, *Artificial Intelligence, Machine Learning, and Bias in Finance: Toward Responsible Innovation*, 88 FORDHAM L. REV. 499 (2019) (examining the technological innovations of FinTech firms, regulatory responses, and how to balance the benefits of FinTech against its dangers); Rory Van Loo, *Making Innovation More Competitive: The Case of Fintech*, 65 UCLA L. REV. 232 (2018) (arguing that current policies and regulations are stifling innovation in FinTech); Christopher K. Odinet, *Consumer Bitcredit and Fintech Lending*, 69 ALA. L. REV. 781 (2018) (describing how FinTech functions and the consumer protections regulating the market). It also builds on the consumer-law scholarship that assesses the market and regulatory effects of consumer credit for predominately low- and moderate-income consumers, which includes payday lending, title lending, and refund-anticipation loans. See generally, e.g., Ronald J. Mann, *Do Defaults on Payday Loans Matter?* (Columbia L. & Econ. Working Paper No. 509, 2014) (analyzing effect of failing to repay payday loans on borrower's credit scores); Nathalie Martin, *1,000% Interest—Good While Supplies Last: A Study of Payday Loan Practices and Solutions*, 52 ARIZ. L. REV. 563 (2010) (examining attempts at regulation and consumer misunderstandings about payday loans); Jim Hawkins, *Regulating on the Fringe: Reexamining the Link Between Fringe Banking and Financial Distress*, 86 IND. L.J. 1361 (2011) (disputing the assumption that “fringe credit” and financial distress are linked); Adair Morse, *Payday Lenders: Heroes or Villains?*, 102 J. FIN. ECON. 28 (2011) (examining the mitigating force of payday lenders after natural disasters and property crimes); Christopher L. Peterson, *“Warning: Predatory Lender”—A Proposal for Candid Predatory Small Loan Ordinances*, 69 WASH. & LEE L. REV. 893 (2012) (arguing that municipalities should require clear advertising of lending practices rather than eliminating payday lending altogether).

¹⁹³ See, e.g., Equal Credit Opportunity Act, 12 C.F.R. § 202.2(j) (2013) (defining consumer credit, in part, as a transaction to “defer payment of a debt, incur debt and defer its payment”).

cost and benefit occur at different times. In the case of earned-wage transfers, many programs float (or advance) funds to workers and are reimbursed at a later date. Thus, as a technical matter, the benefit (instant liquidity) can occur days or weeks before the cost (reimbursement from wages) is due.¹⁹⁴ The import of deferred repayment is that it results in repayment risks, information asymmetry, and intertemporal decision-making.

First, deferred repayment transactions commodify the time value of money, purporting to provide consumers with immediate use of their future income while compensating providers for the opportunity costs of deferring alternative uses of their own funds.¹⁹⁵ These transactions optimally operate as mechanisms for intertemporal and intrapersonal income redistribution for consumers (i.e., a cash trade-off with your future self) but only to the extent such future income contemplated under the terms of the transaction actually exists.¹⁹⁶ If such future income does not manifest and a consumer is unable to repay a transaction on its terms, the deferred-repayment transaction can result in providers extracting significant income and wealth from consumers.¹⁹⁷

Second, providers and consumers will ideally enter deferred-repayment transactions when the risk-adjusted expected return exceeds expected costs.¹⁹⁸ However, there are unique information asymmetries that can arise

¹⁹⁴ Many earned-wage providers might suggest this technicality is practically insignificant since they float earned income rather than income to be earned in the future. As such, the transaction might more closely mirror, for example, an ATM withdrawal after bank business hours or on the weekend. In such instance, the ATM advances funds that are later settled during business hours. However, this view assumes that consumers’ behavioral responses to the “settlement” of funds on hand (as in the ATM context) will be akin to the settlement of anticipated funds (as in the earned-wage context). Also, the settlement time in the earned-wage context can be significantly longer than in the ATM context, likely contributing to a change in consumer behavior in such transactions. Finally, this view also assumes ATM charges are above reproach. If consumers were compelled to use ATM services in a habitual manner at the risk of financial distress, then the similar consumer effect would certainly warrant review.

¹⁹⁵ Adam N. Hirsch, *Getting What’s Due: Prejudgment Interest in Illinois*, 98 ILL. BAR J. 412, 413 (2010).

¹⁹⁶ See Abbye Atkinson, *Rethinking Credit as Social Provision*, 71 STAN. L. REV. 1093, 1147–48 (2019) (“A fundamental assumption of credit as a productive lever is that [t]he borrower is borrowing from her much richer future self—a future self who is *made* much richer precisely because of the borrowed money.” (quoting MONICA PRASAD, *THE LAND OF TOO MUCH: AMERICAN ABUNDANCE AND THE PARADOX OF POVERTY* 238 (2012))).

¹⁹⁷ See, e.g., *id.* at 1102 n.34 (describing how payday loans are designed to maximize profits from the decision-making errors of economically vulnerable consumers).

¹⁹⁸ See Thomas A. Durkin, Gregory Elliehausen & Todd J. Zywicki, *Consumer Credit and the American Economy: An Overview*, 11 J.L. ECON. & POL’Y 279, 280–82 (2015) (discussing how most consumers decide to use credit to acquire assets—such as a vehicle or household appliances—that provide value, or returns, over time that exceed their costs and lenders decide to issue credit when the expected finance charge, or interest, earned exceeds the benefit of an alternative, immediate use of their resources).

to the detriment of both the provider and the consumer to undermine efficient markets. For providers, they may lack complete insight into the consumer's risk of nonpayment; therefore, they use various sophisticated tools to better discern, mitigate, and price such risks, including consumer credit reports, financial records, alternative data, and collateral. For consumers, they often do not fully appreciate the costs of such transactions or the consequences of nonpayment.¹⁹⁹ Indeed, the comparative costs between two deferred-payment products often depend on sophisticated calculations involving the deferred amount, total fees, and repayment terms that vary innumerable between products. Consumers are often forced to rely on providers for clarity on costs; yet, opacity tends to benefit providers who are enabled to evade competing on price, resulting in inflated consumer costs.²⁰⁰ Similarly, the risks of nonpayment or delayed repayment are left to providers to disclose, but such terms are often not salient by design.²⁰¹ In the absence of effective information sharing between providers and consumers, markets with deferred payments are ripe for inefficiencies that can undermine consumer well-being.

Finally, even if information on deferred-payment products is effectively disclosed, consumers will have to exercise intertemporal decision-making—discerning tradeoffs among costs and benefits occurring at different points in time.²⁰² Consumers, however, often struggle to make optimal intertemporal decisions, leaving them susceptible to anticompetitive and predatory market forces.²⁰³ Specifically, consumers are often biased toward the present, valuing instant gratification too highly in comparison to delayed

¹⁹⁹ See Andrew T. Hayashi, *Myopic Consumer Law*, 106 VA. L. REV. 689, 691 (2020) (“Consumer debt often has a complex fee structure, opaque repayment terms, and default consequences that are hard to evaluate.”).

²⁰⁰ See, e.g., Elizabeth Renuart & Diane E. Thompson, *The Truth, the Whole Truth, and Nothing but the Truth: Fulfilling the Promise of Truth in Lending*, 25 YALE J. ON REGUL. 181, 192–98 (2008) (describing the complex interest pricing that consumers face); Lauren E. Willis, *Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending: Price*, 65 MD. L. REV. 707, 811 (2006) (describing the imbalance of access to information between lenders and “vulnerable borrowers”).

²⁰¹ See, e.g., Renuart & Thompson, *supra* note 200, at 196–97 (discussing how complex mortgage terms and superior lender knowledge regarding borrower default risk contribute to predatory lending that pushes borrowers into default and foreclosure).

²⁰² See Adam J. Levitin, *The Antitrust Super Bowl: America's Payment Systems, No-Surcharge Rules, and the Hidden Costs of Credit*, 3 BERKELEY BUS. L.J. 265, 302 n.157 (2005) (“Delayed charges that . . . are not apparent at point-of-sale, like many ATM fees, do not have the same effect on consumer decisions as charges presented at point-of-sale, when the consumption decision is made.”).

²⁰³ See Stephan Meier & Charles Sprenger, *Present-Biased Preferences and Credit Card Borrowing*, 2 AM. ECON. J. 193, 195 (2010) (discussing present-biased hyperbolic discounting in credit-card markets).

gratification or subsequent costs.²⁰⁴ Such present bias can be particularly acute for low-income consumers, who consistently face immediate and urgent consumption needs while simultaneously balancing economic scarcity against day-to-day survival.²⁰⁵ In such instances, demand for deferred-payment products is often driven not by the costs for deferment but by an immediate personal need for the underlying good or service ultimately purchased.²⁰⁶ Such demand can also contribute to consumer failure to shop for the least costly sources of credit, which leads to high-cost borrowing or overborrowing, causing future liquidity crises as demonstrated in the payday loan context.²⁰⁷ The disaggregation of costs and benefits in deferred-payment transactions also increases the likelihood that a consumer may incorrectly predict their ability to timely meet their obligation or to manage shocks to their future income and consumption.²⁰⁸ Consequently, consumers are likely to disregard, underappreciate, or miscalculate pricing, repayment, and default terms, and therefore, such terms often warrant more direct regulation than disclosure requirements.²⁰⁹

Irrespective of the form of the transaction, such disaggregation of costs and benefits has long been the de facto marker of a loan with accompanying loan-like risks.²¹⁰ For example, when payday loans were similarly claimed to

²⁰⁴ Bar-Gill & Warren, *supra* note 19, at 36; *see also* OREN BAR-GILL, SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS 21–22 (2012).

²⁰⁵ See Shmuel I. Becher, Yuval Feldman & Orly Lobel, *Poor Consumer(s) Law: The Case of High-Cost Credit and Payday Loans* 15 (Univ. San Diego Sch. of L. Legal Stud. Rsch. Paper No. 18-357, 2018), <https://papers.ssrn.com/a=3235810> [<https://perma.cc/NT6Q-ZFER>] (discussing how scarcity “directs people to further focus on present needs” in ways that are detrimental to their long-term interests).

²⁰⁶ See Hayashi, *supra* note 199, at 698 (“Preferences between goods and services at two different points in time are governed not by market rates of return but by the preferences of the individual herself. In contrast to preferences over cash flows, preferences over consumption at different points in time are unique to individuals and the goods and services under consideration.”); Scott Andrew Schaaf, *From Checks to Cash: The Regulation of the Payday Lending Industry*, 5 N.C. BANKING INST. 339, 344 (2001) (“Consumers are often convenience driven, not price driven, when choosing immediate consumption over delaying consumption.”).

²⁰⁷ See Schaaf, *supra* note 206, at 346 (describing overborrowing and eventual crises as loans aggregate).

²⁰⁸ Paige Marta Skiba & Jeremy Tobacman, *Payday Loans, Uncertainty, and Discounting: Explaining Patterns of Borrowing, Repayment, and Default* 2–3 (Vanderbilt Univ. L. Sch. L. & Econ. Working Paper No. 08-33, 2007), <https://papers.ssrn.com/a=1319751> [<https://perma.cc/8NUX-YKGM>]; Ronald J. Mann, *After the Great Recession: Regulating Financial Services for Low- and Middle-Income Communities*, 69 WASH. & LEE L. REV. 729, 746–47 (2012).

²⁰⁹ See Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 HARV. L. REV. 1593, 1641, 1660 (2014).

²¹⁰ See *Hurt v. Crystal Ice & Cold Storage Co.*, 286 S.W. 1055, 1056–57 (Ky. Ct. App. 1926) (noting that courts must “look beyond the form of a transaction” and determine that if there is a payment for “a loan or *forebearance* [sic] of money, [then] the parties are subject to the statutory consequences, no matter what device they may have employed to conceal the true character of their dealings” (emphasis added)).

be mere money-transmission services, specifically check-cashing services, courts relied on the inherent separation of costs and benefits in time to find that they were instead loans subject to TILA.²¹¹ TILA's disclosure requirements are applicable to consumer credit, which is defined as "the right granted by a creditor to [a natural person] to defer payment of a debt, [or to] incur debt and defer its payment,"²¹² primarily for "personal, family, or household purposes."²¹³ Another court noted that payday lenders were "disbursing funds . . . on the promise of repayment of the sum plus the 'service charge,' *at a later time*. If this is not an extension of credit, this Court finds it hard to imagine any transaction that is."²¹⁴ Even under state usury law, transactions where payment is delayed or the issuer otherwise forbears its right to collect payment constitute loans.²¹⁵ Thus, it is plausible that a court would find that the standard earned-wage transfer constituted consumer credit under TILA or a loan under many state usury laws.²¹⁶

But even for deferred-payment services that may be exempt from TILA or otherwise carved out from traditional concepts of loan services—such as bank overdraft protection and rent-to-own service contracts—the risks of repayment, information asymmetry, and intertemporal decision-making are well documented by scholars.²¹⁷ Thus, any regulation of earned-wage transfers should create safeguards to ameliorate these effects.

B. Payday Loans 2.0

While the deferred-repayment feature of earned-wage programs may resemble loans generally, earned-wage programs also contain features that more specifically align with payday loans. To appreciate the commonalities, it is important to understand what this Article refers to when discussing

²¹¹ Lisa Blaylock Moss, Note, *Modern Day Loan Sharking: Deferred Presentment Transactions & the Need for Regulation*, 51 ALA. L. REV. 1725, 1737–39 (2000).

²¹² Equal Credit Opportunity Act, 12 C.F.R. § 202.2(j) (2013).

²¹³ *Id.* § 202.2(h).

²¹⁴ *In re Miller*, 215 B.R. 970, 974 (Bankr. E.D. Ky. 1997) (emphasis added).

²¹⁵ See *Cashback Catalog Sales, Inc. v. Price*, 102 F. Supp. 2d 1375, 1379 (2000) ("[The defendant] must show that [the plaintiff] made 'a loan or forbearance of money, either express or implied.' By agreeing not to cash [the defendant's] checks until his payday, [the plaintiff] forbore its right to negotiate the checks." (citation omitted) (quoting *Hershiser v. Yorkshire Condo. Ass'n*, 410 S.E.2d 455, 457 (Ga. Ct. App. 1991))).

²¹⁶ For TILA purposes, the remaining open question would be whether the earned-wage provider constituted a "creditor." Because most providers offer earned-wage transfers as a core part of their services offerings, they would certainly meet the definition. See *Eby v. Reb Realty, Inc.*, 495 F.2d 646, 649–50 (9th Cir. 1974).

²¹⁷ See Renuart & Thompson, *supra* note 200, at 185, 196–97; Natasha Sarin, *Making Consumer Finance Work*, 119 COLUM. L. REV. 1519, 1552–56 (2019).

payday loans. A payday loan is an unsecured personal loan extended in principal amounts that generally do not exceed \$1,000.²¹⁸ Each borrower’s past pay-stub data is used to limit the principal of her loan to an amount not more than such borrower’s typical wages in a pay period.²¹⁹ Payday loans are nonamortizing term loans, which means they are one-time issuances payable in full with fees at maturity.²²⁰ Such loans mature within two to four weeks on the borrower’s next payday.²²¹ They are effectively secured by a postdated personal check or EFT preauthorization, pursuant to which the payday lender may unilaterally debit amounts owed from the borrower’s bank account at maturity.²²² Alternatively, a borrower can make the repayment in cash or, subject to an additional fee, extend or refinance the loan.²²³ The median fee for a payday loan and each related extension or refinancing is \$15 per \$100 borrowed, extended, or refinanced.²²⁴ Payday loans are typically issued within minutes since lenders forgo in-depth reviews of borrower financial records and credit data from mainstream credit bureaus for scant reviews of

²¹⁸ Chris Cirillo, *Payday Loan Regulation: Any Interest?*, 11 DEPAUL BUS. & COM. L.J. 417, 419 (2013) (“In a typical pay-day loan, a borrower borrows a principal of less than \$1,000.”).

²¹⁹ Hawkins, *supra* note 192, at 1394 (explaining the consumer paycheck is the cap on payday lending).

²²⁰ See PEW CHARITABLE TRS., PAYDAY LENDING IN AMERICA, REPORT 2: HOW BORROWERS CHOOSE AND REPAY PAYDAY LOANS 6 (2013), [https://www.pewtrusts.org/-/media/assets/2013/02/20/pew_choosing_borrowing_payday_feb2013-\(1\).pdf](https://www.pewtrusts.org/-/media/assets/2013/02/20/pew_choosing_borrowing_payday_feb2013-(1).pdf) [<https://perma.cc/5NYF-EKTY>] (describing payday loans as nonamortizing loans).

²²¹ *What Is a Payday Loan?*, CONSUMER FIN. PROT. BUREAU (June 2, 2017), <https://www.consumerfinance.gov/ask-cfpb/what-is-a-payday-loan-en-1567/> [<https://perma.cc/E469-255F>] (“A payday loan is usually repaid in a single payment on the borrower’s next payday The due date is typically two to four weeks from the date the loan was made.”).

²²² See Kelly J. Noyes, Comment, *Get Cash Until Payday! The Payday-Loan Problem in Wisconsin*, 2006 WIS. L. REV. 1627, 1629 (“Payday loans are short-term loans in which a consumer receives cash in exchange for giving the lender a postdated check or electronic access to the consumer’s bank account for the amount of the loan and a finance fee.”).

²²³ See *What Are the Costs and Fees for a Payday Loan?*, CONSUMER FIN. PROT. BUREAU (June 5, 2017), <https://www.consumerfinance.gov/ask-cfpb/what-are-the-costs-and-fees-for-a-payday-loan-en-1589/#:~:text=A%20fee%20of%20%2415%20per,Rollovers> [<https://perma.cc/T35D-LXKR>].

²²⁴ CONSUMER FIN. PROT. BUREAU, PAYDAY LOANS, AUTO TITLE LOANS, AND HIGH-COST INSTALLMENT LOANS: HIGHLIGHTS FROM CFPB RESEARCH (2016), https://files.consumerfinance.gov/f/documents/Payday_Loans_Highlights_From_CFPB_Research.pdf [<https://perma.cc/8MGF-KVB7>]; see also *What Does It Mean to Renew or Roll Over a Payday Loan?*, CONSUMER FIN. PROT. BUREAU (June 7, 2017), <https://www.consumerfinance.gov/ask-cfpb/what-does-it-mean-to-renew-or-roll-over-a-payday-loan-en-1573> [<https://perma.cc/4BHQ-9MH6>] (“If you roll over [a \$300] loan[,] [for example], you pay . . . the \$45 fee, and you have to repay the \$300 plus another \$45 fee [when the extension is over].”).

nontraditional credit history, including repayment history for rent, utilities, and other payday loans.²²⁵

Payday loans appeal to over 12 million consumers annually due to their ease of access, transparency of costs, and speed of funds.²²⁶ However, many policymakers, scholars, and consumer advocates fear payday loans create more harm than good. Over the past two decades, legal academics and other researchers have studied the effects of payday loans with varying conclusions. Some find that payday loans are a “better than nothing” liquidity solution with some positive effects despite their risks.²²⁷ Others find that payday loans have net-neutral effects on borrowers.²²⁸ Still, a significant body of work finds that payday loans exacerbate the financial woes of many borrowers.²²⁹ In this latter group, most of the negative consequences of payday loans are causally linked to or associated with three characteristics of payday loans: their high costs that drain limited resources, limited underwriting that results in repeated use, and credit invisibility that inhibits access to mainstream services. Because the earned-wage market features many of the same characteristics as payday loans, it is probable that the market exposes consumers to similar risks.

²²⁵ See Johnson, *supra* note 2, at 9 (finding that consumers only need to present a driver’s license, pay stub, bank statement, telephone bill, and checkbook to apply for a payday loan, and also showing that payday lenders advertise that consumers can obtain loans in minutes, without hassles or credit checks).

²²⁶ See M. Ray Perryman, *The High Costs of Payday Loans*, PERRYMAN GRP. (Dec. 16, 2015), <https://www.perrymangroup.com/publications/column/2015/12/21/the-high-costs-of-payday-loans/> [<https://perma.cc/R7LF-J846>] (stating that many borrowers are attracted to payday loans because of their ease of access); PEW CHARITABLE TRS., *supra* note 220, at 4 (reporting that more than three in four borrowers find payday loans appealing because they trust the lenders’ description of the product and need a quick cash infusion).

²²⁷ See Morse, *supra* note 192, at 42 (noting lower foreclosures following natural disasters); DONALD P. MORGAN & MICHAEL R. STRAIN, PAYDAY HOLIDAY: HOW HOUSEHOLDS FARE AFTER PAYDAY CREDIT BANS 26 (2008), https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr309.pdf [<https://perma.cc/5PGW-USU8>] (highlighting lower rates of bounced checks); Jonathan Zinman, *Restricting Consumer Credit Access: Household Survey Evidence on Effects Around the Oregon Rate Cap*, 34 J. BANKING & FIN. 546, 553 (2010) (describing improved subjective assessment of financial well-being); Neil Bhutta, Jacob Goldin & Tatiana Homonoff, *Consumer Borrowing After Payday Loan Bans*, 59 J.L. & ECON. 225, 256 (2016) (arguing that payday loans reduce incidences of involuntary bank-account closures).

²²⁸ See, e.g., Neil Bhutta, Paige Marta Skiba & Jeremy Tobacman, *Payday Loan Choices and Consequences*, 47 J. MONEY CREDIT & BANKING 223, 223 (2015) (arguing that payday loans have little to no long-term effect on consumers’ credit scores); Hawkins, *supra* note 192, at 1394–99 (discussing tenuous link to financial distress due to limited principal amounts of debt).

²²⁹ See *infra* Section III.B.2.

I. Similar Flaws

a. High costs

In comparison to mainstream credit options, such as credit cards and unsecured personal loans, which have APRs between 15% and 35%, payday loans are extremely expensive.²³⁰ The median payday loan fee of \$15 per \$100 borrowed translates into an APR of 391% on a two-week loan.²³¹ Some borrowers report paying fees exceeding an APR of 1000%.²³² As put by one scholar, “[t]he U.S. market is missing several rungs in the lending ladder” between mainstream credit services and payday loans.²³³ This wide gulf is often explained as an inevitable consequence of high default risk and high fixed costs notwithstanding the small sums of each of transaction.²³⁴ Some observers, however, suggest the high fees are likely anticompetitive as evidenced by the fact that pricing does not adjust based on changes in supply or demand.²³⁵ Payday lenders tend to charge the highest permissible rate established by applicable state law irrespective of market conditions.²³⁶ In states that have no interest-rate caps, payday loans are the most expensive.²³⁷

A close look at earned-wage programs reveals they are similarly priced. Ironically, the purportedly free service Earnin most readily demonstrates this similarity. Earnin has encouraged its users to pay a \$9 tip for a one-week loan of \$100,²³⁸ which would amount to an APR of 469%. Not only is this rate comparable to payday-loan fees, but this rate is illegal in Washington, D.C. and fifteen of the states where Earnin currently operates.²³⁹ Though users can technically opt out of leaving a tip, the voluntariness of such fees is questionable. In most other transactions, tips do not affect the range of

²³⁰ See Bill Fay, *Payday Lenders and Loans*, DEBT (May 22, 2020), <https://www.debt.org/credit/payday-lenders/> [https://perma.cc/WJZ7-Z7N3] (comparing payday loans’ 300%–500% APR with 15%–30% APR on credit cards and a 10%–25% rate for a personal loan from a bank or credit union).

²³¹ See *supra* note 224 and accompanying text.

²³² See Alain Sherter, *1,000% Loans? Millions of Borrowers Face Crushing Costs*, CBS NEWS (Apr. 25, 2016), <https://www.cbsnews.com/news/1000-loans-millions-of-borrowers-face-crushing-costs/> [https://perma.cc/T446-MEXX] (reporting incidents of payday loans that carry an APR of more than 1,000%).

²³³ Jonathan Zinman, *Consumer Credit: Too Much or Too Little (or Just Right)?*, 43 J. LEGAL STUD. S209, S212 (2014).

²³⁴ Ronald J. Mann & Jim Hawkins, *Just Until Payday*, 54 UCLA L. REV. 855, 864–65 (2007).

²³⁵ *Id.* at 883.

²³⁶ *Id.* at 882.

²³⁷ *Id.*

²³⁸ Dugan, *supra* note 90.

²³⁹ See Farivar, *supra* note 32 (“Payday lending is illegal in 15 states and Washington, D.C., but Earnin operates nationwide.”).

services available to customers. For example, being a bad tipper at a restaurant does not mean you cannot order a steak during your next visit. Yet, being a poor tipper as an Earnin customer has been found to limit the amount of transferable funds and access to other services otherwise available to the user. An Earnin user reported that he experienced a near-30% decrease in available funds in a single pay period following a week in which he declined to pay a tip.²⁴⁰ Earnin reportedly changed its algorithm for New York customers in anticipation of an investigation by the New York Department of Financial Services, but the change was not representative of its nationwide business model.²⁴¹

Earnin is not the only high-cost earned-wage program. The average DailyPay user transfers approximately \$66 1.5 times per week at a per-transaction fee of \$1.99 or \$2.99 (depending on the speed of transfer).²⁴² Such fees can in some instances amount to an APR between 221% and 330%.²⁴³ In comparison, providers like PayActiv and Even are relatively inexpensive, though still above some state usury limits. PayActiv's unsubsidized fees for a biweekly pay period may amount to an APR of about 197%, and employer subsidies could make the service even cheaper or free.²⁴⁴ PayActiv reports that over 50% of its users enjoy programs that are subsidized in full or in part by employers, although a more fulsome breakdown has not been publicly disclosed.²⁴⁵ The Even app, which uses a subscription-based fee model, would more impressively lead to average costs of about 73% APR for its

²⁴⁰ Complaint, *supra* note 43, at 23 (claiming available limit was once decreased from \$350 to \$250 following the user's failure to tip).

²⁴¹ Dugan, *supra* note 88 ("Earnin did away with the pay-to-play feature—which handed out as much as 10 times more in loans to users who voluntarily tipped, according to internal documents and a source close to the company—around the time of a March 28 subpoena from the New York Department of Financial Services, according to sources.").

²⁴² *Dailypay for ADP Workforce FAQs*, *supra* note 109 (listing a \$1.99 fee for next-day ACH payment and a \$2.99 fee for next-day instant payment).

²⁴³ APR is (i) the finance charge divided by loan amount, (ii) multiplied by 365, (iii) divided by the number of days to repayment, and (iv) multiplied by 100. These calculations assume a biweekly pay period with a transfer made five days prior to payday. This reasonably contemplates the 1.5-times-per-week transfers reported by DailyPay. *See id.*

²⁴⁴ This calculation assumes a biweekly pay period (which compelled a \$5-per-pay-period fee under PayActiv's 2019 pricing model) with a transfer of \$132 (to mirror DailyPay average usage) made seven days prior to payday. PayActiv's fee structures have, however, evolved significantly in recent months and now include free offerings that instead rely on interchange fees if consumers use a PayActiv-issued pay card. *See* PARRISH, *supra* note 34, at 11, 14 ("PayActiv charge[s] no fees to the employer or employee for EWA deposits to the provider's card—instead relying on interchange fee income generated from the digital wallet into which EWAs are loaded.").

²⁴⁵ *HKS 2018 Study*, *supra* note 30.

average advance.²⁴⁶ However, the Even subscription charge raises a unique concern in months when no transfers are made: what is the APR for a \$6–\$8 fee on a \$0 advance?²⁴⁷

On the one hand, some earned-wage programs show promise to fill in the pricing gaps that currently exist in the consumer-lending market.²⁴⁸ On the other hand, some programs easily rival or exceed the costs of payday loans notwithstanding potential market efficiencies, especially if users make routine use of the transfers.

b. Limited underwriting

Unlike most mainstream credit services, payday lenders do not assess a borrower’s ability to repay a loan by maturity. Lenders review recent pay stubs to set borrowing amounts, but they do not confirm that future wages will be similar through employment verifications.²⁴⁹ Lenders also do not confirm whether borrowers will be able to repay the loan by maturity and continue to meet their existing obligations. Such loans are based on the total amount of likely earnings rather than disposable income. Thus, the single balloon repayment at the end of the loan term often demands more of the borrower’s funds than is sustainable.²⁵⁰ Studies suggest that borrowers are reasonably able to contribute up to 5% of their take-home pay to service payday loans,²⁵¹ but payday-loan repayment schedules often demand more

²⁴⁶ This calculation assumes a bimonthly pay period and \$150 transfers on Day 5 and Day 25 with a payday following five days after each transfer date. Because the \$6 fee is for all transfers in the month, the first transfer is effectively amortized—\$150 is ultimately repaid in twenty days at a \$6 charge. See Kauffman, *supra* note 8 (reporting that users take out \$150 on average and pay \$6 to \$8 a month for access).

²⁴⁷ Notably, Even mitigates this concern by automatically unsubscribing users after two months of no transfer activity. See Reyes, *supra* note 82 and accompanying text.

²⁴⁸ In doing so, earned-wage programs may also raise doubts as to prevailing notions of fairness with respect to fees for short-term liquidity solutions. Since the lower fees remain above say an APR of 36%—even with employer intermediation and subsidies, effective amortization through periodic fees, and lower default risks and transaction costs—the market might be revealing the true costs that private solutions can bear.

²⁴⁹ See Payday, Vehicle Title, and Certain High-Cost Installment Loans, 12 C.F.R. § 1041.5(c)(2) (2020); see also Pete Isberg, *Early Access to Earned Wages vs. Payday Lending*, BLOOMBERG TAX (Aug. 26, 2019, 3:01 PM), <https://news.bloombergtax.com/payroll/early-access-to-earned-wages-vs-payday-lending> [<https://perma.cc/8X6X-DCHM>] (“Some firms merely rely on consumer confirmation or evidence of employment, such as a recent pay stub, instead of direct verification of available earnings through the employer’s payroll system.”).

²⁵⁰ See Atkinson, *supra* note 196, at 1147–52 (discussing the pitfalls of credit as a solution to the financial challenges low-income Americans face).

²⁵¹ PEW CHARITABLE TRS., PAYDAY LENDING IN AMERICA: POLICY SOLUTIONS 3 (2013), https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pcs_assets/2013/pewpaydayoverviewandrecommendationspdf.pdf [<https://perma.cc/CJ2C-YWSF>].

than 36% of the same.²⁵² Consequently, most borrowers are left with an impossible choice between timely repayment of payday loans and maintaining household expenses.²⁵³

More than 80% of borrowers instead extend via “rollover” or refinance their payday loans,²⁵⁴ choosing to pay additional fees until they have saved enough to make the repayment in full. The average payday borrower makes rollovers or refinances ten to twelve times annually,²⁵⁵ and the average \$325 loan generates interest and fees totaling \$520.²⁵⁶ Even borrowers who ultimately default will service five payday loans before doing so, having made interest payments equal to 90% of their original loan principal.²⁵⁷

In comparison, earned-wage programs offer slight improvements on payday underwriting but suffer from a similar flaw that can result in unanticipated costs for consumers. On the one hand, earned-wage programs utilize advanced employment-verification tools to set transferable amounts based on more precise estimates of future wages.²⁵⁸ Payday lenders issue loans based on an assumption that the past pay stub is representative of future work hours and pay rates—an assumption which can easily be upended if the user suffers a reduction in work hours, a demotion, or job loss. In contrast, earned-wage programs authorize transfers constrained by real-time

²⁵² See PEW CHARITABLE TRS., PAYDAY LOAN FACTS AND THE CFPB’S IMPACT 1 (2016), <https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/01/payday-loan-facts-and-the-cfpb-impact> [<https://perma.cc/3SUX-MR2R>] (reporting that the average payday loan consumes 36% of an average borrower’s gross paycheck).

²⁵³ See Lisa Blaylock Moss, *Modern Day Loan Sharking: Deferred Presentment Transactions & the Need for Regulation*, 51 ALA. L. REV. 1725, 1742 (2000) (“The high rates alone contribute to unmanageable levels of personal indebtedness among low and modest income households, sending many desperate consumers into a downward spiral of indebtedness which ultimately forces them into bankruptcy.” (footnote omitted)); CHRISTOPHER L. PETERSON, TAMING THE SHARKS: TOWARDS A CURE FOR THE HIGH-COST CREDIT MARKET 14 (2004) (“[Payday loans are] a trap [some debtors] cannot escape without missing rent, utilities, car payments, or food expenditures. These loans can create a biweekly cycle of income and expenses leaving only enough surplus income to pay the most recent accrual in interest and fees.”).

²⁵⁴ KATHLEEN BURKE, JONATHAN LANNING, JESSE LEARY & JIALAN WANG, CONSUMER FIN. PROT. BUREAU, OFF. OF RSCH., CFPB DATA POINT: PAYDAY LENDING 4 (2014), https://files.consumerfinance.gov/f/201403_cfpb_report_payday-lending.pdf [<https://perma.cc/NKE6-RMLD>].

²⁵⁵ Aaron Huckstep, *Payday Lending: Do Outrageous Prices Necessarily Mean Outrageous Profits?*, 12 FORDHAM J. CORP. & FIN. L. 203, 217 (2007).

²⁵⁶ Adam Tempkin & Christopher Maloney, *Expensive Loans to Desperate People Built this \$90 Billion Industry*, BLOOMBERG L. (Feb. 14, 2019, 7:17 AM), <https://www.bloomberg.com/news/articles/2019-02-14/expensive-loans-to-desperate-people-built-this-90-billion-industry> [<https://perma.cc/F7YY-QU5Q>] (quoting a senior research officer with the Pew Charitable Trust’s consumer-finance project).

²⁵⁷ Skiba & Tobacman, *supra* note 208, at 1.

²⁵⁸ See *supra* Section I.A.

employment data evidencing actual hours worked and rate of pay.²⁵⁹ Thus, earned-wage programs do a better job than payday loans at limiting a consumer’s risk of unmanageable loss.²⁶⁰ On the other hand, earned-wage programs similarly fall short of determining whether users can support full repayment and their existing obligations. Neither the transferrable amounts set by earned-wage programs nor reimbursements are limited to the user’s disposable income. Affordability can thus only be presumed if users have zero other expenses. In reality, full reimbursement can easily exceed 25% to 50% of payday earnings, which can severely inhibit a user’s ability to pay existing obligations.²⁶¹

Accordingly, it is likely that users of earned-wage programs will repeatedly use these programs, just as payday borrowers do with payday loans. Already, some users have been compelled to make back-to-back transfers because they are unable to “catch up” the cash-flow shortfall in one pay cycle.²⁶² To the extent fees are incurred on a per-transaction basis, the fees will have compounding effects similar to payday loans.²⁶³ Yet, as with payday loans, first-time users may not fully appreciate the likelihood of these compounding costs. To the extent fees are instead incurred on a periodic basis, like a subscription fee, the compounding effect is somewhat ameliorated since multiple transfers can be made under one fee like a line of credit. In each instance, however, the impact will be a relatively substantial drain on the already-limited resources of low-income borrowers.

c. Credit invisibility

Lastly, the effects of the high costs and limited underwriting attendant to payday loans are exacerbated by the fact that payday borrowers are in a perpetually weak bargaining position and lack access to low-cost alternatives. Most borrowers lack meaningful access to mainstream credit

²⁵⁹ See *supra* Section I.A.

²⁶⁰ Cf. Hawkins, *supra* note 192, at 1394 (explaining that payday lending is often capped at the employee’s biweekly salary).

²⁶¹ See *Dailypay for ADP Workforce FAQs*, *supra* note 109 (“Employees on average will receive 51.9% of their paycheck on payday.”).

²⁶² See Dugan, *supra* note 90; Sidney Fussell, *The New Payday Lender Looks a Lot Like the Old Payday Lender*, ATLANTIC (Dec. 18, 2019), <https://www.theatlantic.com/technology/archive/2019/12/online-banking-lending-earnin-tip/603304/> [<https://perma.cc/5SSX-Y2Y3>].

²⁶³ Cf. Michael A. Stegman & Robert Faris, *Payday Lending: A Business Model that Encourages Chronic Borrowing*, 17 ECON. DEV. Q. 8, 8–9 (2003) (noting that state legislatures allow payday lenders to charge fees that reach high amounts when compounded).

services because they are already highly credit constrained²⁶⁴ and tend to have poor credit²⁶⁵ or insufficient credit histories.²⁶⁶ With limited incomes that barely cover expenses, their dire financial circumstances often demand expediency and simplicity in liquidity solutions, both of which are lacking in mainstream services.²⁶⁷ Thus, payday lenders are their best, and often only, option.²⁶⁸ With such disproportionate bargaining power, payday lenders are not compelled to reduce costs or otherwise improve their service offerings.²⁶⁹ They are also not compelled to assist borrowers in accessing superior alternatives. Such access would follow if payday lenders reported positive repayment history to credit bureaus,²⁷⁰ but they do not. As put by one scholar:

A good credit record is like a coupon that borrowers can take to the (conventional) bank to get a discount on their loan purchases. Fringe borrowers with poor repayment histories are not directly nor immediately hurt by credit reporting. They simply are not offered the coupon, and therefore they have to keep paying the same high prices for their loan purchases.²⁷¹

²⁶⁴ Michael A. Stegman, *Payday Lending*, 21 J. ECON. PERSPS. 169, 173 (2007) (“[R]elative to all U.S. adults, three times the percentage of payday loan customers are seriously debt burdened and have been denied credit or not given as much credit as they applied for in the last five years.”).

²⁶⁵ See Bhutta et al., *supra* note 228, at 233–34 (noting that payday-loan borrowers had average and median credit scores below 520 versus the general population’s 680 and 703, respectively, and that borrowers failed to secure credit from over five attempts in the twelve-month period prior to taking out a payday loan); GREGORY ELLIEHAUSEN, AN ANALYSIS OF CONSUMERS’ USE OF PAYDAY LOANS 33 tbl.IV-8 (2009) (finding that 55% of payday borrowers had a credit request denied or limited in the preceding five-year period and nearly 60% chose payday loans over applying for traditional credit because they believed they would be denied for the latter).

²⁶⁶ Nearly 45% of individuals in low-income communities (with a disproportionate number being Black or Hispanic) lack sufficient credit records to access relatively cheap credit from traditional financial institutions. Kenneth P. Brevoort, Philipp Grimm & Michelle Kambara, *Credit Invisibles and the Unscored*, 18 CITYSCAPE 9, 18–19 exhibit 5 (2016).

²⁶⁷ See Stegman & Faris, *supra* note 263, at 13 (explaining that research of California payday borrowers found they preferred payday lenders to mainstream financial institutions because the former provide easier access to cash; transparent fees; accessible locations; better treatment of customers; greater trustworthiness; and better service because of the many useful products in one location, better hours, and more Spanish-speaking employees).

²⁶⁸ See Gregory Elliehausen, *Consumers’ Use of High-Price Credit Products: Do They Know What They Are Doing?* 34 (Networks Fin. Inst. at Indiana State Univ., Working Paper No. 2, 2006) (“The decision to use high-price credit typically is a result of the consumer’s situation rather than a lack of knowledge or information.”).

²⁶⁹ See THE YEARBOOK OF CONSUMER LAW 2009, at 162 (Deborah Parry, Annette Nordhausen, Geraint Howells & Christian Twigg-Flesner eds., 2008) (discussing a lack of incentive to compete for reasonable rates due to consumers’ unequal bargaining power).

²⁷⁰ Brevoort et al., *supra* note 266, at 9 (“Lenders use [credit bureaus’] records pervasively to assess creditworthiness when underwriting or pricing credit.”).

²⁷¹ Richard R.W. Brooks, Essay, *Credit Past Due*, 106 COLUM. L. REV. 994, 1013 (2006).

Likewise, earned-wage programs do not report reimbursement history to credit bureaus, which might be expected since these programs purport to be money-transmission services. It follows, then, that there is no debt obligation being repaid. Earned-wage programs are instead services in the cash economy, or at least that is how they are marketed. The reality, however, is that the function of an earned-wage provider funding transfers and later being reimbursed by the user is the quintessential function of any lender.²⁷² Additionally, there is a slim risk of nonpayment such as by withdrawing funds from accounts prior to scheduled preauthorized debits, terminating employment, or, even more rare, revoking a payroll-deduction authorization.²⁷³ Though low nonpayment risks are customarily tracked for mainstream credit services, low-income users are unable to build credit via liquidity solutions specifically tailored for them. As in the context of payday lending, earned-wage providers operate to keep low-income users on the fringes of the financial markets instead of fulfilling their promise of creating a more equitable financial system.²⁷⁴

2. *Similar Risks*

The similar flaws shared by payday loans and earned-wage programs—high costs, limited underwriting, and credit invisibility—extend beyond being expensive and suboptimal in comparison to mainstream services. There is substantial evidence that these features worsen the health and financial conditions of many payday borrowers.²⁷⁵ In the payday-loan context, high costs and limited underwriting work together to inhibit borrowers’ ability to pay important bills.²⁷⁶ Specifically, access to payday loans has been shown to increase household difficulties with paying mortgage, rent, and utility bills.²⁷⁷ Payday borrowers are also more likely to

²⁷² See *supra* Section III.A.

²⁷³ See Hawkins, *supra* note 54, at 40–41.

²⁷⁴ See, e.g., *Our Story*, *supra* note 56 (describing early-wage provider’s “mission of evening the playing field for creating a better life”).

²⁷⁵ See Brian T. Melzer, *The Real Costs of Credit Access: Evidence from the Payday Lending Market*, 126 Q.J. ECON. 517, 550 (2011) (“[Payday] loan access increases households’ difficulty in paying mortgage, rent and utilities bills . . . [and] increase[s] the likelihood of delaying needed medical care, dental care and prescription drug purchases.”); Jaeyoon Lee, *Credit Access and Household Well-Being: Evidence from Payday Lending 3* (Mar. 7, 2019) (unpublished manuscript), <https://papers.ssrn.com/a=2915197> [<https://perma.cc/KH92-XAB3>] (finding that access to payday loans increases suicide attempts by 10%).

²⁷⁶ Melzer, *supra* note 275, at 550.

²⁷⁷ *Id.* But see Morse, *supra* note 192, at 42 (finding that access to payday loans mitigates the likelihood of home foreclosures and larcenies after natural disasters).

close their bank accounts due to bounced checks.²⁷⁸ Other studies have found that payday borrowers are associated with higher personal bankruptcy rates than similarly situated nonpayday borrowers.²⁷⁹ Because the average person who files for bankruptcy is just \$26 per month short of meeting their expenses,²⁸⁰ the compounded costs of repeat payday loans might be the difference between solvency and bankruptcy for some borrowers. Ultimately, payday loans can increase stress over financial circumstances and decrease job performance.²⁸¹ Indeed, the U.S. military observed that payday lending decreased morale and readiness among troops,²⁸² and in response, Congress enacted a federal payday-loan ban to protect servicemembers.²⁸³ It is likely that the high costs and limited underwriting associated with payday loans have the same effect on civilian workers though no similar federal ban exists to protect them.²⁸⁴

²⁷⁸ Dennis Campbell, F. Asís Martínez Jerez & Peter Tufano, *Bouncing Out of the Banking System: An Empirical Analysis of Involuntary Bank Account Closures* 6 (Dec. 3, 2008) (unpublished manuscript), <http://papers.ssrn.com/a=1335873> [<https://perma.cc/8ENN-DFW6>] (finding that the presence of payday lending is positively associated with bank-account closures). *But see* Bhutta et al., *supra* note 227, at 227 (finding that payday-loan bans resulted in increased incidences of involuntary bank-account closures).

²⁷⁹ *See* Robert Mayer, *Payday Lending and Personal Bankruptcy*, 50 CONSUMER INTS. ANN. 76, 76–78 (2004) (finding that payday-loan debtors in Illinois, New Mexico, and Wisconsin declare bankruptcy more quickly than nonpayday-loan borrowers); *see also* Donald P. Morgan, Michael R. Strain & Ihab Seblani, *How Payday Credit Access Affects Overdrafts and Other Outcomes*, 44 J. MONEY CREDIT & BANKING 519, 524–26 (2012) (finding that Chapter 13 bankruptcy rates decreased after payday-loan bans were enacted while complaints against lenders and debt collectors increased); Paige Marta Skiba & Jeremy Tobacman, *Do Payday Loans Cause Bankruptcy?* 21 (Vanderbilt Univ. L. Sch. L. & Econ. Working Paper No. 11-13, 2011), <https://papers.ssrn.com/a=1266215> [<https://perma.cc/5RMW-8R3C>] (finding higher bankruptcy rates among individuals who took out payday loans); Noyes, *supra* note 222, at 1645 (“Wisconsin consumer bankruptcy filings establish that bankruptcy petitioners with payday loans go bankrupt sooner than other debtors . . .”). *But see* ROBERT SHAPIRO, SONECON, THE CONSUMER AND SOCIAL WELFARE BENEFITS AND COSTS OF PAYDAY LOANS: A REVIEW OF THE EVIDENCE 12 (2011), <http://www.sonecon.com/docs/studies/Report-Payday-Loans-Shapiro-Sonecon.pdf> [<https://perma.cc/88P7-EZWB>] (finding higher rates of bankruptcy after payday bans enacted than when permissive laws enacted); Lars Lefgren & Frank McIntyre, *Explaining the Puzzle of Cross-State Differences in Bankruptcy Rates*, 52 J.L. & ECON. 367, 391 (2009) (finding that the existence of payday loans has no effect on bankruptcy rates).

²⁸⁰ Mehrsa Baradaran, *It’s Time for Postal Banking*, 127 HARV. L. REV. F. 165, 167 (2014).

²⁸¹ Scott Carrell & Jonathan Zinman, *In Harm’s Way? Payday Loan Access and Military Personnel Performance*, 27 REV. FIN. STUD. 2805, 2808–09 (2014).

²⁸² U.S. DEP’T OF DEF., REPORT ON PREDATORY LENDING PRACTICES DIRECTED AT MEMBERS OF THE ARMED FORCES AND THEIR DEPENDENTS 35–36, 45, 86–87 (2006).

²⁸³ *See* Military Lending Act, 10 U.S.C. § 987(b) (2018) (codifying that “[a] creditor . . . may not impose an annual percentage rate of interest greater than 36 percent with respect to the consumer credit extended to [armed forces personnel or their dependents]” and effectively banning the payday-loan business model).

²⁸⁴ *See* Johnson, *supra* note 51, at 666–69.

Moreover, by not reporting positive repayment history to credit bureaus, payday lenders keep payday borrowers on the lowest rungs of the lending ladder. Such failure to report payment history also has detrimental effects on other aspects of payday borrowers’ lives. Credit reports are used for a host of other services, including to price auto and homeowners’ insurance premiums, establish utility accounts, rent housing and set deposit rates, and obtain employment benefits.²⁸⁵ Creditworthy payday borrowers lose out not only on improved access to affordable credit services but also access to more affordable goods and services and favorable employment decisions.

Although extensive studies have yet to be conducted on earned-wage programs, the documented effects of payday loans likely foreshadow the effects of earned-wage programs because the two products share similar features in function, if not in form. The *HKS 2018 Study* challenges this position, suggesting that earned-wage programs are beneficial because of lower relative costs for users and improved retention for their employers.²⁸⁶ However, the study was severely limited in three ways. First, its dataset was limited to users of PayActiv, an earned-wage program with a periodic fee structure that has many employer partners that subsidize costs.²⁸⁷ The study did not consider the effect of all fee structures available to earned-wage programs, many of which can result in significantly higher costs than PayActiv. Earned-wage programs are not created equally and should not be painted with a broad brush.²⁸⁸ Second, even with respect to PayActiv, the limited price simulation compared an earned-wage transfer to a two-week payday loan and a standard bank-overdraft transaction.²⁸⁹ The respective costs were not discussed in terms of APR,²⁹⁰ which would better reflect the comparative costs of a PayActiv transfer made just days before payday. Third, the study did not directly consider the effect of long-term use on *users*; rather, it determined long-term use resulted in reduced turnover rates for

²⁸⁵ Brevoort et al., *supra* note 266, at 9.

²⁸⁶ See *HKS 2018 Study*, *supra* note 30 (finding that PayActiv service fees were only 16.7% of payday-loan fees and 14.3% of bank-overdraft fees).

²⁸⁷ See *id.* The other service the study examined was a “short-term installment loan” service, not an earned-wage program. *Id.* For examples of PayActiv’s employer partners, see *Improve Employee Financial Wellness*, PAYACTIV, <https://www.payactiv.com/employers/> [<https://perma.cc/52UG-6NV5>].

²⁸⁸ See, e.g., *supra* Sections I.A, III.B.1.a (surveying the types and varying interest rates of earned-wage programs).

²⁸⁹ See *HKS 2018 Study*, *supra* note 30.

²⁹⁰ *Id.* (comparing respective costs in dollars, not APR).

employers.²⁹¹ The effect on employees remains an open question—one on which the payday-loan market likely proves instructive.

C. Unique Market Risks

1. Inflated Pricing

While earned-wage programs share many of the same risks as payday loans, they also pose risks unique to their transactions. For example, the market for earned-wage programs has a heightened risk of inflated pricing due to programs' disparate fee structures. It is well documented that price competition is inhibited when pricing disclosure is not uniform across substitute services.²⁹² This is because a mismatch in pricing units results in the majority of Americans being unable to discern the most cost-efficient options, thereby allowing providers to impose inflated pricing.²⁹³ And loan markets with ineffective price disclosures are associated with a 2% to 4% increase in loan costs compared to markets with effective price disclosures.²⁹⁴

The market for earned-wage programs is riddled with a variety of pricing models.²⁹⁵ There are programs with per-transaction fees, per-pay-period fees, monthly fees, and even voluntary tip structures.²⁹⁶ None of these models disclose prices in a manner that enables effective price comparison across competing programs. The lack of uniform disclosure also inhibits price comparison across would-be substitutes, such as payday loans,

²⁹¹ The study merely *speculated* that employees using PayActiv may “be able to take steps over time to improve their credit profile and rejoin the traditional financial system,” but it *concluded* “that active use of the PayActiv product by an employee is associated with a materially lower turnover rate.” *Id.*

²⁹² See Govern, *supra* note 147, at 1663–64.

²⁹³ Elizabeth Renuart & Diane E. Thompson, *The Truth, the Whole Truth, and Nothing but the Truth: Fulfilling the Promise of Truth in Lending*, 25 YALE J. ON REGUL. 181, 210 (2008) (noting that only 13% of adults have sufficient quantitative skills to compare the relative costs of competing services when computation is necessary).

²⁹⁴ See Victor Stango & Jonathan Zinman, *How a Cognitive Bias Shapes Competition: Evidence from Consumer Credit Markets 2–4* (Sept. 5, 2006) (unpublished manuscript), <https://pdfs.semanticscholar.org/20d9/a6464fe71466fa4d149a5237079bd9fe8fae.pdf> [<https://perma.cc/68US-7Z2T>] (finding that “rates are 200–400 basis points higher” for loans obtained from nonbank sources). One percentage point is equal to 100 basis points. See Simon Constable, *What Is a Basis Point and Why Is It So Important?*, WALL ST. J. (Sept. 4, 2013, 4:01 PM), <https://www.wsj.com/articles/SB10001424127887324823804579017141254359828> [<https://perma.cc/5NEN-TQWW>].

²⁹⁵ See Mark J. Ricciardi, *Is Payday the New Groundhog Day? What Bill Murray Can Teach Employers About New Pay Apps*, FISHER PHILLIPS (Mar. 1, 2018), <https://www.fisherphillips.com/pp/newsletterarticle-is-payday-the-new-groundhog-day-what.pdf?28082> [<https://perma.cc/EA7V-H348>] (discussing differences in fee structures); Chris Opfer, *‘Early Wage’ Apps Aim to Disrupt Payday Loans, Two-Week Cycle*, BLOOMBERG L. (Aug. 1, 2019, 5:15 AM), <https://news.bloomberglaw.com/daily-labor-report/early-wage-apps-aim-to-disrupt-payday-loans-two-week-cycle> [<https://perma.cc/6YSL-M4T3>] (discussing high pricing).

²⁹⁶ See *supra* Section I.A.

overdraft protection, or pawn-shop services.²⁹⁷ Consequently, the earned-wage market likely suffers from inflated pricing because users are unable to discern the most cost-efficient options and may inadvertently select more expensive services. Some earned-wage users have already demonstrated the danger of such opacity in pricing. On a service that purports to be free, users voluntarily pay tips in amounts equivalent to payday-loan rates.²⁹⁸ Such behavior is difficult to reconcile with anything other than an underappreciation of the similarity in costs. This is particularly problematic in the context of earned-wage programs since low-income users are already cash-strapped. Consequently, inflated pricing can be the difference between solvency and bankruptcy.²⁹⁹

2. *The Employer Effect*

The presence of employers as gatekeepers in the context of earned-wage programs could mitigate some of the foregoing concerns, but at what alternative costs? Employers may be more objective and better positioned than individual earned-wage users to negotiate optimal service terms. But with the “salary link,” where employers automate repayment to earned-wage programs via payroll deductions,³⁰⁰ employers also deprive their employees of the autonomy to efficiently manage their own finances.

a. *Benefit: employer-gatekeepers*

Employer-sponsored programs promise to provide the small-sum liquidity market with a rare demand-side gatekeeper: employers. Employers may negotiate better terms than individual consumers because they are likely more sophisticated shoppers and can wield the aggregate demand of their employees in negotiations.³⁰¹ Employers likely have the time and resources to price shop more effectively than cash-strapped employees with limited quantitative skills and impending repayment obligations. Employers are also

²⁹⁷ This Article conducts a comparative analysis between earned-wage programs and payday loans because these two programs explicitly tie advances to wages and are otherwise unsecured, as well as because providers in the earned-wage market explicitly sought to disrupt the payday lending market. However, open questions remain as to how earned-wage programs fare in the broader market for single-repayment liquidity solutions, which include overdraft protection and pawn services.

²⁹⁸ Farivar, *supra* note 32.

²⁹⁹ See Section II.A.

³⁰⁰ See *HKS 2018 Study*, *supra* note 30.

³⁰¹ Cf. Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, 881 n.57 (2013) (discussing a policy that shifted retirement investment risks to workers as odd because the employer “presumably was a more sophisticated investor (or had access to sophisticated investment advice) and could secure economies of scale in managing that risk,” while workers “could be expected neither to be sophisticated themselves nor to have access to the same quality of advice as would the employer”).

well positioned to negotiate *ex ante* service terms—e.g., transfer limits, repayment dates, and collection practices—that contribute to *ex post* consumer harms. In sum, with proper incentives, employer-gatekeepers may be able to protect vulnerable consumers from selecting unduly expensive or risky earned-wage products.

b. Drawback: inefficient contracting

Despite the potential benefits of employers as gatekeepers, recall that some employer-sponsored programs are reimbursed directly by the user's employer via a payroll deduction before wages are disbursed to the user. This salary link enables earned-wage programs to offer near-risk-free advances, which in turn allows for prices that can be lower than other short-term liquidity solutions.³⁰² The salary link effectively makes the earned-wage transfer a nondefaultable debt, in that providers will get paid so long as the borrower remains with the same employer.³⁰³ This payroll-deduction feature, however, runs afoul of several principles of contract and wage-assignment law that promote the efficient allocation of user resources.

Specifically, the salary link effectively collateralizes an earned-wage user's employment as well as a user's interest in future employment, the value of which is typically eight to nine times more than the principal amount of the advance.³⁰⁴ Earned-wage users are thereby bound by the inflexible pricing and repayment terms and would be, for example, unable to defer a balloon repayment, even if only by a few days, to avoid a home-mortgage default or to maintain utility services. Where payroll deductions are irrevocable, either explicitly³⁰⁵ or in practice,³⁰⁶ a program user's options for resolving a cash shortfall are to request another transfer (possibly for a fee) or to seek costly external credit solutions. Consequently, the findings of reduced employee turnover under the *HKS 2018 Study* could be telling a different story.³⁰⁷ Users may feel beholden to a job that never quite pays

³⁰² Todd H. Baker & Snigdha Kumar, *A Better Alternative to Payday Loans*, WALL ST. J. (May 13, 2018, 1:45 PM), <https://www.wsj.com/articles/a-better-alternative-to-payday-loans-1526233530> [<https://perma.cc/54Q9-YJY9>] (discussing how salary link allows for “markedly superior loan performance, with default rates running at less than 20% the rate predicted by [traditional] scoring”).

³⁰³ *Id.*

³⁰⁴ *Id.* (explaining how earned-wage users “who would otherwise default decide against leaving a job”).

³⁰⁵ See *supra* note 77 and accompanying text.

³⁰⁶ See Hawkins, *supra* note 54, at 22–23 (noting that for one program, users may not be aware of the right to rescind, which was supported by the fact that in the entire history of the business no user opted out of the payroll deduction).

³⁰⁷ Additionally, this preliminary study analyzed the price and effect of two FinTech services: SalaryFinance, an employer-based installment loan service, and PayActiv, a prominent earned-wage

enough as they endeavor to “catch up” to the reimbursement. The United States has seen this risk realized in its extreme form in the context of the company store.³⁰⁸ Indeed, the Supreme Court noted nearly a century ago, “From the viewpoint of the wage earner there is little difference between not earning at all and earning wholly for a creditor. Pauperism may be the necessary result of either.”³⁰⁹ Anti-wage-assignment laws aim to prevent such a result,³¹⁰ but earned-wage programs subvert these laws. Ultimately, the exacting terms of some employer-sponsored programs inhibit the efficient allocation of user resources by inhibiting employees from switching jobs when it best suits them or using their earnings to first pay obligations with greater economic benefit, such as a mortgage or utility services.³¹¹

Thus, on the one hand, by adding employers as gatekeepers, employer-sponsored programs promise to improve the bargaining positions of consumers toward their creditors. On the other hand, many of these programs create a nearly-risk-free business model for earned-wage providers while posing many risks to users. Such programs intertwine user choices regarding employment and financial obligations in a manner that leaves users caught between Scylla and Charybdis.³¹² The adverse effects on users are likely to

provider that utilizes the employer-sponsor model with a pay-period fee structure. *HKS 2018 Study*, *supra* note 30. In relevant part, the study found that a \$200 PayActiv transfer was approximately 85% cheaper for users than an equivalent two-week payday loan or bank overdraft. *Id.* It also analyzed the effect of long-term use of PayActiv, finding that employees who made two or more transfers had a 19% lower turnover rate than employees who enrolled in PayActiv but failed to use it as much. *Id.* However, the study’s pricing analysis is representative neither of the varied price structures in the earned-wage market nor of the PayActiv user who takes out \$200 just days before payday (rather than two weeks before). Also, while the benefit of long-term use that can accrue to *employers* is an important contribution, the study’s failure to assess the long-term economic effect on *employees* leaves open a critical question.

³⁰⁸ See William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 796–97 (“Debts to the company stores fastened workers to the mines and factories, and the stores’ monopolies enabled companies to charge above market prices for the groceries and other provisions they supplied.”); see also Note, *Payment of Advance Wages in Trade Checks on Company Store*, 40 YALE L.J. 1105, 1106 (1931) (describing employer effort to subvert regulations intended to nullify exploitative company-store transactions by instead offering wage advances, which operated as credit services but did not fall within the meaning of the regulatory restrictions).

³⁰⁹ *Local Loan Co. v. Hunt*, 292 U.S. 234, 245 (1934).

³¹⁰ Under federal law, wage assignments must be revocable, a preauthorized payroll deduction, or already-earned wages. See *Credit Practices*, 16 C.F.R. § 444.2 (2014). However, state law is more restrictive. Some states explicitly ban wage assignments except for employer advances. See, e.g., N.Y. LAB. LAW § 195-5.2 (2020). Other states require notice and/or grace periods before deductions, cap deduction amounts, and/or require that assignments be revocable. See, e.g., Illinois Wage Assignment Act, 740 ILL. COMP. STAT. 170 (2020).

³¹¹ See Robert L. Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 RUTGERS L. REV. 273, 284 (1970).

³¹² In Greek mythology, Scylla and Charybdis were mythical sea monsters that were stationed on opposite sides of the Strait of Messina. Each sea monster was a maritime hazard to passing sailors, as

be compounded if, in reliance on their employers' intermediation, users fail to effectively explore more competitive third-party liquidity solutions.

D. Warning Signs

The above demonstrates that the answer to the opening question of this Article is a disconcerting one. Recall Jack, who used an employer-sponsored program with a monthly subscription fee subsidized by Walmart, and Jill, who used a third-party program with per-transaction tips. The foregoing analysis suggests that Jack is better off than Jill, who may be saddled with snowballing expenses characteristic of existing credit products; but for Jack, the benefit of his subsidized program costs him his already-limited bargaining power. Their predicaments demonstrate how the average consumer is not necessarily better off with earned-wage programs.

The earned-wage market's biggest proponent is time because arguably not enough time has passed to evidence the above scenarios. However, like a canary in a coal mine, some early adopters have signaled the widespread financial harms that could result from this marketplace. Two class action lawsuits were filed in federal court in California against Earnin, a third-party program provider. In the first case, the plaintiffs asserted that the exacting repayment terms of the program result in burdensome overdraft fees, notwithstanding the program's insight into their insufficient bank account balances.³¹³ They alleged Earnin violated state law by failing to disclose its repayment practices and the likelihood of bank overdraft charges.³¹⁴ In the second case, the named plaintiff asserted that he initially used the program to overcome a financial rough patch, but "his initial use of Earnin began a regular pattern of use" and "a cycle of advances that he has found difficult to escape."³¹⁵ He also claimed he was unaware of the true cost of the "tips" he paid to the program.³¹⁶ He alleged Earnin violated various state laws and the TILA by, inter alia, lending without a proper state license, engaging in usurious lending, and failing to disclose the APR and the true "loan" nature of its product to customers.³¹⁷

avoiding one meant passing too closely to the other and the risks posed by it. See HOMER, THE ODYSSEY 278–85 (Robert Fagles trans., 1996). The phrase "between Scylla and Charybdis" has come to be an idiom meaning "having to choose between two evils."

³¹³ Complaint at 2, *Perks v. Activehours, Inc.*, No. 5:19-cv-05543 (N.D. Cal. Sept. 3, 2019).

³¹⁴ *Id.* at 3.

³¹⁵ Complaint, *supra* note 43, at 22.

³¹⁶ *Id.* at 23.

³¹⁷ See *id.* at 24, 27–28.

A scan of hundreds of consumer reports suggests these plaintiffs are not alone. Several consumers report having insufficient funds when repayment was due, thus resulting in excessive overdraft charges.³¹⁸ Other reports reflect dependency on the transfers such that a decrease in the available transfer amount was perceived as withholding their earnings or the customer otherwise losing money.³¹⁹ One user, ironically a debt collector familiar with payday lending, viewed the earned-wage program as distinct from payday loans and a harmless way to take out money. However, he found himself regularly paying tips that amounted to an APR of 469%, in a \$350 deficit due to overdraft fees, and “dependent on [the program] to get [his] money out before payday.”³²⁰

Multiple states are investigating the earned-wage market for possible violations of state lending laws.³²¹ Yet, these regulatory interventions are moving, as they often do, slowly. And though the California lawsuits offered an opportunity for legal clarity, their settlement indefinitely delayed answers that would resolve the underlying uncertainty.³²² In the interim, due to shortcomings in existing money-transmitter laws, a growing number of consumers are vulnerable to these outcomes as they rush to download third-party apps and their employers push such services as new employee benefits. However, alternatively applying lending laws may leave customers vulnerable to some risks unique to the earned-wage market and may unduly stifle the market’s expansion even after given the proper guardrails.

³¹⁸ While in some instances the repayment was prematurely withdrawn by Earnin, in many cases it appears the consumer lacked sufficient funds when repayment was due. *See Complaints: Earnin*, BETTER BUS. BUREAU, <https://www.bbb.org/us/ca/palo-alto/profile/mobile-apps/earnin-1216-642613/complaints> [<https://perma.cc/6VRC-FLAG>].

³¹⁹ *See id.* One consumer noted: “My max was lowered this week again now to [\$]200 . . . [I]f I am giving you 250 dollars and only being able to get [\$]200 back[,] I’m losing money . . .” *Id.* Another consumer complained: “They abuse their consumers financially. They amp up the amount you can [withdraw] and then on the next payday they reduce it greatly. I have been credited with [\$]175 and on my next payday [it] will be reduced . . . to [\$]100.” *Id.*

³²⁰ Dugan, *supra* note 90.

³²¹ Stephen T. Middlebrook & Tom Kierner, *What Employers Need to Know About Advance Wage Payment Products*, NAT’L L. REV. (Aug. 8, 2019), <https://www.natlawreview.com/article/what-employers-need-to-know-about-advance-wage-payment-products> [<https://perma.cc/7NB9-KKR9>].

³²² *See* Order Granting Plaintiffs’ Unopposed Motion for Final Approval of Class Settlement & Approval of Attorneys’ Fees, Costs, & Service Awards, Perks v. Activehours, Inc., No. 5:19-cv-05543-BLF (N.D. Cal. Mar. 25, 2021); *see also* Emilie Ruscoe, *Earnin Users Seek OK for \$12.5M Settlement Deal*, LAW360 (July 28, 2020), <https://www.law360.com/articles/1295949/earnin-users-see-ok-for-12-5m-settlement-deal> [<https://perma.cc/W67E-U9G8>] (reporting that both California lawsuits are pending dismissal subject to court approval of a \$12.5-million settlement agreement).

IV. REGULATORY SHORTCOMINGS

This Part begins the inquiry into efficient and effective regulation. When treated as money-transmission services, earned-wage programs are not effectively regulated to curb the risks described in the foregoing Section. This Part demonstrates that the risks attendant to earned-wage programs are in more ways explicitly contemplated by the regulatory frameworks for lenders, both nonbanks and banks, than those for money transmitters. Yet, even the laws applicable to lenders fall short of mitigating some significant risks and operate to stifle expansion of the market's more positive features. This Part, thus, reveals that despite their undue risks, earned-wage programs uniquely lack meaningful regulatory guardrails.

A. The Law of Nonbank Money Transmitters

As applied to earned-wage programs, the law of money transmitters is a complete mismatch. The fragmented framework likely creates operational challenges for earned-wage providers that offer services nationally.³²³ Yet, the most significant flaw of this framework is that the law of money transmitters focuses on risks that are typically not present in earned-wage transactions and is not responsive to the many risks that do exist. To be sure, federal laws such as the Gramm-Leach-Bliley Act and the Safeguards Rule that both protect consumer data are appropriate in the context of earned-wage programs,³²⁴ which collect personal employment records and even GPS data. However, the remaining risks combatted by the law of money transmitters are not significant in the context of earned-wage programs. Take, for example, money laundering, which requires that an individual (or entity) make a series of transfers to different parties.³²⁵ In contrast, most earned-wage programs facilitate transfers between up to three parties that are all readily identifiable: the provider, employer, and user. It is nearly impossible for users to launder funds through an earned-wage program, making any emphasis on money laundering misplaced.

The risk of loss targeted by state regulation is also remote in the context of earned-wage programs. In a traditional money-transmission service, such as Western Union, the provider collects funds from a consumer who pays a

³²³ Benjamin Lo, Note, *Fatal Fragments: The Effect of Money Transmission Regulation on Payments Innovation*, 18 YALE J.L. & TECH. 111, 131–41 (2016) (“A nationwide licensing program could cost up to one-third of the startup's available funds. Even worse, this figure simply covers application and financing costs, and does not include legal fees and any other professional fees needed to meet licensing requirements, such as developing an AML program or auditing financial statements.”).

³²⁴ See *supra* notes 132–133 and accompanying text.

³²⁵ See *supra* Section II.A.1.

fee for those funds to be transmitted to another party or returned in a different form (e.g., prepaid debit cards). In such instances, the state has an interest in protecting consumers from losing their funds in the event the provider fails to deliver according to the agreement after taking possession of consumer funds.³²⁶ Indeed, providers could simply take consumer funds without ever intending to perform.³²⁷ In contrast, earned-wage providers typically perform first by transferring their own funds to users for later reimbursement.³²⁸ Thus, the provider, rather than the user, bears the greater risk of loss in the transaction. If the earned-wage program never pays, wages will simply be transferred on each user’s regular payday. However, under business models where earned-wage providers first receive funds from employers that are later transferred to users,³²⁹ there is a stronger argument that state money-transmission law applies. In these transactions, employers entrust funds to earned-wage providers in much the same way as consumers do with traditional money transmitters.³³⁰ Consequently, such earned-wage transactions could result in loss to the employer if the earned-wage provider is insolvent or intentionally fails to honor its obligation.

The gravest flaw is that the law of money transmitters fails to address the main risks actually posed by earned-wage programs. The risks of loss associated with earned-wage programs—i.e., the depletion of future income, unduly punitive default risk, and difficult access to low-cost services—are not contemplated by the law of money transmitters. Users remain subject to high costs, underwriting policies, and repayment terms that make timely repayment difficult.³³¹ Accordingly, the law of money transmitters is a mismatch for earned-wage programs.

B. The Law of Nonbank Lenders

The law of nonbank lenders more appropriately addresses the risks posed by earned-wage programs. However, the most effective regulations narrowly apply to lenders and loans. If earned-wage programs are in fact money transmitters, many of these regulations—e.g., TILA, state usury laws, and borrowing restrictions—do not apply.³³² Moreover, the state-by-state nature of lending regulation creates its own inefficiencies that can be unduly

³²⁶ Tu, *supra* note 124, at 115.

³²⁷ *Id.*

³²⁸ *See supra* Section I.A.

³²⁹ *See supra* Section I.A.

³³⁰ *See Dresdale, supra* note 68.

³³¹ *See supra* Section III.B.1.

³³² *See supra* Section III.A.

burdensome for most earned-wage providers that offer services in multiple states.

1. *The Pros*

The law of nonbank lenders contemplates many of the risks associated with earned-wage programs. TILA was specifically created to remedy inflated pricing that results from obscure and disparate pricing disclosures that characterize the earned-wage market.³³³ If a law like TILA applied to earned-wage programs, FinTech providers would be compelled to compute their fees, whether subscription, transaction-based, or recommended tips, into APRs or another uniform metric that could be compared across substitute services.

The risks of high costs and repeat use associated with earned-wage programs could also be ameliorated under the law of nonbank lenders. Under federal law, third-party programs would not be able to charge or recommend tips to military members and their dependents that exceed the 36% federal usury limit.³³⁴ Under state law, fees or tips that result in triple-digit APRs would be prohibited in several states where earned-wage programs are currently offered.³³⁵ With respect to repeat use, some state law mitigates this risk via amortization requirements and cooling-off periods.³³⁶ Under such laws, earned-wage programs could be compelled to give users the option to amortize reimbursement over several pay periods at no additional cost.³³⁷ Alternatively, earned-wage programs could be prohibited from authorizing back-to-back transfers. Additionally, the law of nonbank lenders contemplates some of the risks of undue loss that result under the salary-link model.³³⁸ State and federal law place limitations on collection practices, including the timing and amount of wage assignments.³³⁹ Such laws could easily apply to restrict the nondefaultable transfers that result from automatic and guaranteed reimbursement out of wages.

³³³ See *supra* Section II.B.1 (“[TILA enabled] price comparisons between substitute credit products that were otherwise marketed along varying price schemes.”).

³³⁴ See Military Lending Act, 10 U.S.C. § 987(b).

³³⁵ E.g., Megan Leonhardt, *California Passes New Rules that Cap Personal Loan Interest at 36%*, CNBC, <https://www.cnbc.com/2019/09/13/california-passes-new-rules-that-cap-payday-loan-interest-at-36percent.html> [<https://perma.cc/X8RP-YN9E>] (Sept. 17, 2019, 4:46 PM) (discussing California state law which prohibits lenders from charging more than 36% on consumer loans of \$2,500 to \$10,000).

³³⁶ E.g., *Payday Loan Laws in Indiana*, PANTALASSA LOAN, <https://www.pantalassaloan.com/indiana-payday-loan-laws.html> [<https://perma.cc/DVF7-Y5MG>] (describing Indiana lender laws that include cooling-off periods and a 15% cap on lender interest rate).

³³⁷ PEW CHARITABLE TRS., *supra* note 251, at 1.

³³⁸ See *supra* Section III.C.2.b.

³³⁹ See *supra* Section II.B.

2. *The Cons*

Although seemingly a good fit, the fragmented nature of the law of nonbank lenders presents many drawbacks. First, whether the framework effectively regulates the risks posed by earned-wage programs entirely depends on where the services are offered, as some states are more restrictive than others. Some laws would be so restrictive as to ban earned-wage programs,³⁴⁰ while others would be so broad as to subject consumers to all risks.³⁴¹ Neither outcome would be ideal. Second, the state-by-state licensing regime and compliance burden would subject most earned-wage providers to the laws and oversight of more than fifty jurisdictions. Traditional nonbank lenders like payday lenders and pawn shops historically operated intrastate, making fragmented regulation more tolerable. However, FinTech firms, like earned-wage providers, utilize technology to facilitate borderless transacting. Their profitability is often contingent on scaling,³⁴² which a state-by-state regulatory regime greatly inhibits, if not prohibits altogether.

In the past, nonbank lenders have attempted to gain access to streamlined regulation by partnering with a bank or Native American tribe. Under bank-partnership models, the nonbank lender conducts the advertising, underwriting, and loan-issuance decisions.³⁴³ The bank partner issues the loan and subsequently transfers the loan to the nonbank that services the loan.³⁴⁴ Under tribal-partnership models, Native American tribes have a nominal economic interest in the loan business that is primarily operated by a nonbank lender.³⁴⁵ Nonbank lenders are thus indirectly able to benefit from federal preemption under bank partnerships and from tribal sovereign immunity under tribal partnerships. The result is that nonbanks may offer uniform services and escape the burden of state-by-state regulatory compliance and licensing. These partnerships also allow nonbanks to offer

³⁴⁰ See, e.g., N.Y. GEN. OBLIG. LAW § 5-501 (McKinney 2020) (detailing New York state law essentially banning payday lenders due to the 6% interest-rate cap in this statute).

³⁴¹ See, e.g., WYO. STAT. ANN. §§ 40-14-362–367 (2021) (discussing Wyoming state law that includes broad definitions and limits, such as a one-month maximum term, that places almost all risk on the borrower).

³⁴² See Brian Knight, *Federalism and Federalization on the Fintech Frontier*, 20 VAND. J. ENT. & TECH. L. 129, 131 (2017).

³⁴³ See Zane Gilmer, “*True Lender*” *Litigation on the Rise: Recent Litigation and Enforcement Actions Challenge Traditional Bank Partnership Model*, STINSON LLP (Apr. 2, 2018), <http://dodd-frank.com/2018/04/02/true-lender-litigation-on-the-rise-recent-litigation-and-enforcement-actions-challenge-traditional-bank-partnership-model/> [<https://perma.cc/Q2AS-8SKV>].

³⁴⁴ *Id.*

³⁴⁵ See Nathalie Martin & Joshua Schwartz, *The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?*, 69 WASH. & LEE L. REV. 751, 777 (2012) (noting that some tribes receive 1%–2% of payday profits to partner with nontribal payday lenders).

loans with interest rates and terms that may violate state consumer-protection laws.³⁴⁶

However, the ongoing viability of these partnerships is questionable in light of significant state opposition. A growing body of case law finds these arrangements to be invalid based on the true lender doctrine.³⁴⁷ The true lender doctrine disregards the form of the transaction to find the nonbank lender as the true lender given its “predominant economic interest” in the loan being issued.³⁴⁸ As the true lender, the lender cannot benefit from federal preemption³⁴⁹ or tribal sovereign immunity.³⁵⁰ In the bank-partnership context, a minority view holds that the transfer of a loan from a bank to a nonbank lender causes the loan to lose its entitlement to federal preemption.³⁵¹ Ultimately, the shaky grounds on which earned-wage programs might be able to enjoy federal preemption are likely insufficient to overcome the operational hurdle of state-by-state compliance for the market should nonbank-lender law apply.

Several more drawbacks exist under the law of nonbank lenders. The law does not compel nonbank lenders to disclose customer information to credit bureaus; rather, the law only requires that disclosure be accurate and complete if volunteered by the lender.³⁵² Additionally, in the context of small loans, the law takes a roundabout approach to regulating repeat use (e.g., amortization requirements and cooling-off periods) rather than tackling the root cause: the absence of an ability-to-repay analysis. The CFPB attempted to remedy this gap in the law with a federal ability-to-pay rule for most small-sum lenders but reversed its position in 2018 to the dismay of consumer interest groups.³⁵³ This rule, however, was drafted to explicitly exempt employer-sponsored programs that facilitate nonrecourse transfers and any programs with tip-based compensation models on the assumption that such

³⁴⁶ See *id.* at 764–67 (noting that some lenders claim tribal sovereign immunity to evade state usury laws and payday bans).

³⁴⁷ See John Hannon, *The True Lender Doctrine: Function over Form as a Reasonable Constraint on the Exportation of Interest Rates*, 67 DUKE L.J. 1261, 1280–83 (2018).

³⁴⁸ *Consumer Fin. Prot. Bureau v. CashCall, Inc.*, No. CV 15-7522-JFW (RAOx), 2016 WL 4820635, at *5–6 (C.D. Cal. Aug. 31, 2016), *appeal denied*, No. 17-80006 (9th Cir. Apr. 20, 2017).

³⁴⁹ See *id.* at *9.

³⁵⁰ See *People ex rel. Owen v. Miami Nation Enters.*, 386 P.3d 357, 375–79 (Cal. 2016) (holding that tribal sovereign immunity did not apply where tribes did not maintain operational control of payday business).

³⁵¹ See *Madden v. Midland Funding, LLC*, 786 F.3d 246, 255 (2d Cir. 2015).

³⁵² See Fair Credit Reporting Act, 15 U.S.C. § 1681.

³⁵³ See Kate Berry, *CFPB to Scrap Key Underwriting Portion of Payday Rule*, AM. BANKER (Jan. 14, 2019, 12:38 PM), <https://www.americanbanker.com/news/cfpb-to-scrap-key-underwriting-portion-of-payday-rule> [<https://perma.cc/CS82-S4AK>].

programs do not pose similar risks.³⁵⁴ Thus, even were the CFPB to implement the rule as contemplated, many earned-wage programs would not be subject to it.

Finally, the law of nonbank lenders in material respects applies exclusively to lenders and loans. For example, TILA explicitly applies to entities that provide “consumer credit” extended over “more than four installments” or in exchange for a “finance charge.”³⁵⁵ Usury laws that restrict fees narrowly apply to “loan[s] or [the] forbearance of any money, goods, or things in action.”³⁵⁶ Laws that restrict repeat use apply specifically to small-sum loans.³⁵⁷ The same is the case with laws applicable to amortization and prepayment terms.³⁵⁸ Thus, to the extent that earned-wage programs are money-transmission services, these rules would not apply.

C. The Law of FinTech: The FinTech Charter

The primary benefit of a FinTech charter from the OCC is that it promises more streamlined regulation for efficient operations and nationwide scaling. However, the charter has numerous shortcomings, including its questionable long-term viability, onerous compliance requirements, as well as its failure to clarify applicable laws for earned wage access programs, offer adequate consumer protections, and regulate substitute services.

Specifically, the OCC’s FinTech charter faces substantial legal opposition which calls into question its future. A recent federal district court decision found that, in the absence of congressional action authorizing the FinTech charter, the OCC may issue national bank charters only to depository institutions.³⁵⁹ Although the decision is stayed pending appeal,³⁶⁰

³⁵⁴ See Payday, Vehicle Title, and Certain High-Cost Installment Loans, 85 Fed. Reg. 44,382, 44,413 (July 22, 2020).

³⁵⁵ Truth in Lending (Regulation Z), 12 C.F.R. § 1026.1 (2018).

³⁵⁶ N.Y. GEN. OBLIG. LAW § 5-501 (McKinney 2020); *see also* GA. CODE ANN. § 7-4-2 (West 2020) (using similar language).

³⁵⁷ *See, e.g.*, FLA. STAT. ANN. § 560.404(18)–(19) (West 2019) (prohibiting rollovers and requiring twenty-four-hour cooling period between consecutive loan issuances); 815 ILL. COMP. STAT. ANN. 122/2-5, 2-30 (West 2019) (prohibiting rollovers and requiring seven-day cooling period between forty-five-day lending period).

³⁵⁸ *See, e.g.*, IND. CODE ANN. § 24-4.5-7-401(4) (West 2018) (requiring that after three consecutive loans, the lender must offer a four-installment repayment plan at no additional cost).

³⁵⁹ *Vullo v. Off. of Comptroller of Currency*, 378 F. Supp. 3d 271, 292 (S.D.N.Y. 2019) (noting that the “business of banking” used in the National Bank Act “unambiguously requires receiving deposits as an aspect of the business”).

³⁶⁰ *See* Brief for Appellee, *Lacewell v. Off. of Comptroller of Currency*, No. 19-4271 (2d Cir. July 23, 2020). In connection with this appeal, the author of this Article joined thirty-two other legal scholars

the legal uncertainty likely contributes to why no firm has applied for a FinTech charter.³⁶¹ Additionally, the FinTech charter contemplates significant compliance requirements that are not only discouragingly onerous³⁶² but also aimed at risks that are extremely remote for the earned-wage market. Systemic risk concerns would be misplaced for such a small, relatively inconsequential segment of the financial market, and, as previously noted, money-laundering concerns would be misplaced given the nature of earned-wage transactions.³⁶³

Importantly, the FinTech charter provides no greater clarity as to which laws—lending or money transmissions—govern earned wage access programs. It simply assigns the OCC as regulator without specifying the framework within which the OCC will regulate.³⁶⁴ The OCC historically has not imposed or enforced comprehensive, service-term regulations of the kind required to adequately protect against the risks identified herein. Indeed, the CFPB was established in part to take such regulatory oversight away from the OCC and other federal regulators that focus on solvency and systemic risks.³⁶⁵ There is no reason to believe the OCC would be equipped or inclined to take on such responsibility with respect to the earned-wage market. Finally, the OCC does not supervise substitute service providers like traditional payday lenders and state-chartered institutions offering small-dollar liquidity solutions. Inconsistent regulation and supervision of

in an amicus brief supporting the position that the OCC lacks authority to issue FinTech charters. *See* Brief of Thirty-Three Banking Law Scholars as Amici Curiae in Support of Appellee, *Lacewell v. Off. of Comptroller of Currency*, No. 19-4271 (2d Cir. July 29, 2020).

³⁶¹ Rachel Witkowski, *Google and PayPal Explored OCC's Fintech Charter, then Walked Away*, AM. BANKER (June 16, 2019, 9:50 PM), <https://www.americanbanker.com/news/google-and-paypal-explored-occs-fintech-charter-then-walked-away> [<https://perma.cc/M697-NH8N>] (“Google and PayPal, as well as several others, have since backed off over fears that they could harm existing relationships with state regulators and concerns about whether the OCC will prevail in a legal challenge to its authority to create the fintech charter.”).

³⁶² *Id.* (“[P]eople that have come in and talked to [the OCC] realize [it] expect[s] real capital, real liquidity, solid risk management programs and profitability That’s not an easy bar to get over.” (quoting former Comptroller of the Currency Joseph Otting)).

³⁶³ *See supra* Section IV.A; *see also* *History of Anti-money Laundering Laws*, FIN. CRIMES ENF’T NETWORK, <https://www.fincen.gov/history-anti-money-laundering-laws> [<https://perma.cc/S5SU-7MS7>].

³⁶⁴ *See generally* OFF. OF THE COMPTROLLER OF THE CURRENCY, COMPTROLLER’S LICENSING MANUAL SUPPLEMENT: CONSIDERING CHARTER APPLICATIONS FROM FINANCIAL TECHNOLOGY COMPANIES (2018).

³⁶⁵ *See The Bureau*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/about-us/the-bureau/#:~:text=The%20CFPB%20was%20created%20to,was%20divided%20among%20several%20agencies> [<https://perma.cc/LKN8-DZA2>]. This approach borrows from the “twin peaks” model of regulation common in other countries. Hilary J. Allen, *Putting the “Financial Stability” in Financial Stability Oversight Council*, 76 OHIO ST. L.J. 1087, 1140 (2015) (describing the twin-peaks model used in some countries).

substitute services could have the negative effect of influencing consumer decisions based on the “degree of regulation rather than on their relative economic benefits.”³⁶⁶

* * *

In the absence of regulatory clarity and effective risk management, many earned-wage users may be exposed to risks from which their policymakers and regulators otherwise endeavor to protect them. Indeed, military members may unwittingly find themselves dependent on a service their military superiors would otherwise believe contributes to their reduced morale and readiness, as in the payday-loan context. Still, other users may be at risk for the very type of cyclical use, high fees, and overdraft charges that their home states similarly seek to limit. And, probably most alarming, customers who consciously avoid the ills of payday lending may fall victim to earned-wage programs by viewing them as harmless money transmissions. Yet, even if users successfully navigate the earned-wage market, they may find it difficult to access cheaper traditional credit products. In such instances, remaining perpetually entangled in the market’s services means it could only be a matter of time until such users fall victim to the market’s risks.

V. POLICY RECOMMENDATIONS AND IMPLICATIONS

The preceding Parts III and IV demonstrate that earned-wage programs pose significant risks to consumers that the existing legal framework for money transmitters—the classification preferred by earned-wage providers—wholly fails to mitigate. However, Part IV also proves there are shortcomings even for the more restrictive legal framework for lenders, including its failure to curb certain risks unique to earned-wage markets and its inability to provide uniform regulation for borderless transacting. This Part explores solutions that can facilitate the earned-wage market’s growth

³⁶⁶ Robert L. Clarke & Todd J. Zywicki, *Payday Lending, Bank Overdraft Protection, and Fair Competition at the Consumer Financial Protection Bureau*, 33 REV. BANKING & FIN. L. 235, 237 (2013); see also DEP’T OF TREASURY, FINANCIAL REGULATORY REFORM: A NEW FOUNDATION: REBUILDING FINANCIAL SUPERVISION AND REGULATION 69 (2009), http://www.treasury.gov/initiatives/Documents/FinalReport_web.pdf [<https://perma.cc/JY8G-26C3>] (“Fairness, effective competition, and efficient markets require consistent regulatory treatment for similar products.”).

via uniformity without sacrificing consumer protection.³⁶⁷ It then considers the implications of these proposals and addresses potential concerns.

A. Policy Recommendations

Banning a small-sum liquidity solution does not eliminate consumer demand; rather, it directs consumers to substitutes that could be better or worse.³⁶⁸ For this reason, it would not be ideal to ban earned-wage programs altogether because, in some ways, they are improvements on payday loans and similar substitute products. The earned-wage market adds lower price points to the broader small-sum liquidity market, particularly when earned-wage programs are subsidized by employers.³⁶⁹ Earned-wage programs help limit overexposure to debt since the programs more precisely assess expected income flows.³⁷⁰ The ability to access funds via mobile and internet applications can save time, costs, and inconvenience associated with travel to brick-and-mortar storefronts that offer payday loans and similar solutions. Moreover, increased competition in the market by FinTech providers could even improve the quality and costs of the products and services offered by traditional payday lenders and other substitute providers.³⁷¹

Accordingly, the most effective policy will allow the market to grow but in a way that minimizes consumer risks. As was the case for the earliest

³⁶⁷ As this market is rapidly developing, so too is the legal landscape. Policymakers at both the state and federal level are currently exploring incremental steps to enable, monitor, and lightly regulate the nascent market with narrow safe harbors, sandboxes, memoranda of understanding, and distinct licensing regimes for earned-wage programs. *See supra* notes 45–47 and accompanying text; *see also The DFPI Signs MOUs Believed to Be Among the Nation’s First with Earned Wage Access Companies*, CAL. DEP’T FIN. PROT. & INNOVATION (Jan. 27, 2021), <https://dfpi.ca.gov/2021/01/27/the-dfpi-signs-mous-believed-to-be-the-among-the-nations-first-with-earned-wage-access-companies/> [<https://perma.cc/JFF3-YZBL>]. The recommendations in this Part should be considered in connection with any long-term policy plan.

³⁶⁸ *See* Bhutta et al., *supra* note 227, at 225 (finding that consumer demand shifts to substitute services like pawnshop services, bank overdrafts, or bounced checks when payday loans are banned, thereby arguing that regulation of payday loans in isolation may be ineffective or counterproductive).

³⁶⁹ *See supra* Section III.B.1.a.

³⁷⁰ *See supra* Section III.B.1.b.

³⁷¹ *See, e.g.,* Inbal Lavi, *The Rise of Robo-Advisors: How Banking and Wealth Management Is Changing with Technology*, MARTECH SERIES (Oct. 26, 2018), <https://martechseries.com/mts-insights/guest-authors/the-rise-of-robo-advisors-how-banking-and-wealth-management-is-changing-with-technology/> [<https://perma.cc/FQ3J-NNJK>] (discussing FinTech’s pressure on traditional loan services to provide lower costs for higher functionality); Zelle: *The Banking Industry’s Response to Fintech Disruptors*, MOTLEY FOOL (Sept. 5, 2018, 11:19 AM), <https://www.fool.com/investing/2018/09/05/zelle-the-banking-industrys-response-to-fintech-di.aspx> [<https://perma.cc/ANL9-HC8A>] (describing peer-to-peer payment service Zelle as “the banks’ answer to Venmo,” a mobile peer-to-peer payment system, thereby highlighting FinTech driving traditional bank innovation to meet consumer demand).

banks established in the United States, the interstate nature of most earned wage service models urges uniform regulation and oversight.³⁷² However, uniformity should not sacrifice the ability to curb identified risks to consumer financial welfare through service-term regulations, including uniform price disclosures, ability-to-repay rules, optional amortization mechanics, mandatory credit reporting, and the right-to-rescind assignment.

I. Small-Sum Liquidity Law

The most effective regulation would apply consistently to earned-wage programs and similar small-sum liquidity solutions like payday loans. Application of the legal framework should be determined based on the substantive similarities in transactions between consumers and providers rather than technology, terminology, or context. Accordingly, the proposal described herein, the Small-Sum Liquidity Law (the Small-Sum Law), should broadly apply to institutions that offer liquidity to consumers in exchange for a fee with reimbursement paid at a later time. The Small-Sum Law should include five basic consumer-protection provisions intended to curb the risks identified in this Article: uniform price disclosures, ability-to-repay rules, optional installment-repayment mechanics, mandatory credit-score reporting, and right-to-rescind mechanics.

First, the law should compel all providers to make uniform price disclosures. This particular proposal is likely the path of least resistance since mandatory disclosures are oft-used policy tools for mitigating against information asymmetries and incentivizing better consumer decision-making.³⁷³ Notwithstanding, the academic literature is extremely skeptical of the effectiveness of mandatory disclosure, especially under TILA.³⁷⁴ The critiques, however, are rarely that mandatory disclosure inherently has zero efficacy;³⁷⁵ rather, the effectiveness is likely to be severely diminished when disclosures are too numerous, complex, lack material data points, or are

³⁷² Cf. *Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 310–18 (1978) (reflecting the Court's reluctance to limit national banks' flexibility to export interest rates among the states without specific congressional intent given the complexities of the national modern banking system supported by the National Banking Act).

³⁷³ See Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 653–54, 659 (2011) (discussing the pervasiveness of disclosure rules for credit services, including payday loans and mortgage lending, and for overdraft fees, noting that “[a]ttempts to protect low-income borrowers often prompt disclosure requirements”).

³⁷⁴ See, e.g., *id.* at 679–727.

³⁷⁵ See Richard Craswell, *Static Versus Dynamic Disclosures, and How Not to Judge Their Success or Failure*, 88 WASH. L. REV. 333, 354 (2013) (noting that studies with negative findings for disclosure effectiveness could nonetheless be read as demonstrating that disclosure is positively impacting information access and outcomes for 10%–30% of consumers).

proffered when consumers are unable to respond to such information.³⁷⁶ The Small-Sum Law's disclosure requirement is likely to avoid several of these shortcomings because it will be simple and comprehensive. The law should require earned-wage providers to prominently disclose uniform price conversions, akin to an APR,³⁷⁷ for all fees, whether flat, subscription, or tip based.³⁷⁸ This should be a relatively straightforward calculation since earned-wage programs involve simple fee and transaction structures. Admittedly, however, the disclosure requirement is not intended to shift consumer behavior for would-be payday borrowers. Instead, this requirement is intended to help consumers who are price- or information-sensitive, such as the debt collector who avoided payday loans but inadvertently found himself exposed to earned-wage risks.³⁷⁹

Second, the law should establish an "ability to repay" (ATR) rule applicable to all providers. Repeat use and its negative consequences are likely to result regardless of whether an earned-wage program is third-party or employer sponsored since both models have high pricing and balloon-repayment terms that fail to consider users' other expenses. Consequently, there is no need for a carve-out for the latter model. The ATR rule should involve a two-part inquiry. First, the law should create an ATR presumption wherein a specified percentage of take-home pay per pay period, or an "ATR cap," is deemed affordable without further inquiry. The ATR cap should

³⁷⁶ See Ben-Shahar & Schneider, *supra* note 373, at 666 (discussing TILA); see also Lauren E. Willis, *Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending: Price*, 65 MD. L. REV. 707, 767–68 (2006).

³⁷⁷ To be clear, the pricing metric need not be an APR. It need only be a uniform metric that reflects typical usage patterns. More data on usage trends are, therefore, key to better understand the degree of financial risk and to establish the most appropriate disclosure metric. A recent report published simultaneously with this Article suggests that on average, earned-wage users make transfers consecutively for at least six semimonthly periods, or in every pay period for three months. Thus, a pricing metric based on quarterly percentage rates may be appropriate for the market. See DEVINA KHANNA & ARJUN KAUSHAL, FIN. HEALTH NETWORK, EARNED WAGE ACCESS & DIRECT TO CONSUMER ADVANCE USAGE TRENDS 8–9 (2021).

³⁷⁸ It is not enough that providers must comply with TILA, because certain small-sum liquidity services (e.g., bank-overdraft protection) are currently carved out of TILA requirements. See CTR. FOR RESPONSIBLE LENDING, COMMENTS TO THE CONSUMER FINANCIAL PROTECTION BUREAU, IMPACTS OF OVERDRAFT PROGRAMS ON CONSUMERS 19 (2012), <https://consumerfed.org/pdfs/Comments.CFPB.Overdraft.CRL.CFA%20.NCLC6.29.12.pdf> [<https://perma.cc/Q86Y-YCJB>]. The SSLL will enhance price competition amongst all similar providers. See DEP'T OF TREASURY, FINANCIAL REGULATORY REFORM: A NEW FOUNDATION: REBUILDING FINANCIAL SUPERVISION AND REGULATION 69 (2009), http://www.treasury.gov/initiatives/Documents/FinalReport_web.pdf [<https://perma.cc/9LJJ-5T3T>] (“[S]imilar disclosure treatment for similar products enables consumers to make informed choices based on a full appreciation of the nature and risks of the product and enables providers to compete fairly and vigorously.”).

³⁷⁹ See *supra* note 320 and accompanying text.

draw from empirical work, such as recent studies that demonstrate payday borrowers can afford to apply only 5% of take-home pay toward payday-loan servicing.³⁸⁰ Second, should a provider’s repayment schedule exceed the ATR cap, the law should compel the provider to conduct a more narrowly tailored assessment of the user’s ability to repay. This two-part ATR rule would reasonably ensure that users do not fall into costly cycles of use that are difficult to escape. The simple ATR rule would also avoid imposing prohibitive underwriting costs on providers.

Third, the law should establish that providers must offer installment repayment options to consumers. While more flexible terms might result from the ATR rule, the law should be explicit to mandate installments where necessary to ensure affordability. State laws bar balloon repayment in several contexts to protect consumers from undue financial strain. Installment requirements exist in the payday-lending context in some states,³⁸¹ even when employers directly issue payroll advances or accidentally overpay employees.³⁸² The installment requirement should align with the ATR rule such that installment payments in any pay period do not exceed the ATR cap.

Fourth, providers should be compelled to report consumer repayment history. Admittedly, this significant intervention would set providers of small-sum liquidity solutions apart from mainstream lenders who are not compelled by existing regulation to report to credit bureaus. Nonetheless, mainstream lenders feel pressure to report credit information to continue accessing credit-bureau systems.³⁸³ Mandatory credit reporting under the Small-Sum Law is a necessary intervention since providers do not rely on credit-bureau reporting systems. Mandatory credit reporting could be an escape valve for consumers who are trapped by poor or limited credit histories—a true bridge to increased access to credit. It would also force providers of small-sum liquidity solutions to improve services to maintain consumer relationships. Although negative credit history would be included, such history is in many instances already reported when defaulted

³⁸⁰ PEW CHARITABLE TRS., *supra* note 251, at 2.

³⁸¹ *See, e.g.*, WYO. STAT. ANN. § 40-14-366(a) (2021) (“[A] consumer who is unable to repay a post-dated check or similar arrangement when due may elect once every twelve (12) months to repay the post-dated check or similar arrangement by means of an extended payment plan.”); N.M. STAT. ANN. § 58-15-17(3)(H) (2020) (“A lender shall not make a loan [for less than \$5,000] unless the loan is an installment loan . . .”).

³⁸² *See, e.g.*, *Barnhill v. Robert Saunders & Co.*, 177 Cal. Rptr. 803, 805–06 (1981) (holding that a balloon payment on separation of employment to repay employee’s debt to employer is an unlawful deduction); *Cal. State Emps.’ Ass’n v. State*, 243 Cal. Rptr. 602, 605 (1988) (holding that it is unlawful to deduct from current payroll for past salary advances that were in error).

³⁸³ *Brooks, supra* note 271, at 1019–20.

obligations, even within the payday-loan context, are transferred to collection agencies.³⁸⁴ This proposal would improve the accuracy of credit scoring. Additionally, it is an opportunity for providers to share with users the benefit of the low default rates associated with these products.

Finally, employers and earned-wage providers must give users the right to rescind or delay payroll deductions for earned-wage transfers, and such right must be effectively disclosed. This would eliminate the collateralization of employment, freeing users from feeling bound to a position as a result of perpetual liquidity shortfalls. It would also give users the right of efficient breach that is inherent in most consumer transactions. In a movement toward Pareto optimality, the requirement would encourage efficient allocation of user resources with respect to their employment and debt management.³⁸⁵

2. *Supervision and Enforcement*

a. *Federal level*

The Small-Sum Law would ideally be enacted and enforced by a federal regulator to ensure that there is uniform and efficient regulation of largely nationwide services. Specifically, the CFPB is experienced in developing and ensuring compliance with consumer-protection laws—it was created for that very purpose. It has institutional knowledge based on internal research regarding the risks associated with consumer lending generally and small-sum lending in particular.³⁸⁶ The CFPB has taken enforcement actions against payday lenders³⁸⁷ and proposed rules to regulate the small-sum loan market.³⁸⁸ Moreover, it has full examination and supervisory authority over a host of financial service providers, including payday lenders.³⁸⁹

³⁸⁴ See Kelly Anne Smith, *How to Respond When Your Debt Is Sent to Collections*, FORBES (Feb. 26, 2020, 9:38 AM), <https://www.forbes.com/advisor/personal-loans/accounts-in-debt-collection/#how-does-it-affect-your-credit-score> [<https://perma.cc/X2Y6-K74E>] (“An account in collections is one of the biggest blows to your credit score.”).

³⁸⁵ See Birmingham, *supra* note 311, at 284 (explaining how certain types of breach of contract should be encouraged as it “is a movement toward Pareto optimality”).

³⁸⁶ See, e.g., *Data and Research*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/data-research/> [<https://perma.cc/88N5-7URS>] (listing CFPB’s research databases).

³⁸⁷ See, e.g., *Think Finance, LLC*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/policy-compliance/enforcement/actions/think-finance-llc-formerly-known-think-finance-inc/> [<https://perma.cc/2Y95-7A9U>] (discussing a case the CFPB brought against payday lender Think Finance, LLC).

³⁸⁸ *Consumer Financial Protection Bureau Proposes Rule to End Payday Debt Traps*, CONSUMER FIN. PROT. BUREAU (June 2, 2016), <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-proposes-rule-end-payday-debt-traps/> [<https://perma.cc/VBZ9-NHUD>].

³⁸⁹ *Institutions Subject to CFPB Supervisory Authority*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/policy-compliance/guidance/supervision-examinations/institutions/>

Accordingly, the CFPB is best positioned to be the federal regulator of a small-sum liquidity sector that includes earned-wage programs.

An important threshold question is whether earned-wage providers fall under the CFPB’s supervisory authority. Under the Dodd-Frank Act, the CFPB has authority to examine and supervise depository institutions and credit unions with assets exceeding \$10 billion,³⁹⁰ mortgage lenders,³⁹¹ student-loan lenders,³⁹² payday lenders,³⁹³ designated “larger participant[s]” of a particular consumer-finance market segment,³⁹⁴ and certain high-risk market participants.³⁹⁵ Of these categories, there are two on which the CFPB could rely to supervise earned-wage providers. First, earned-wage providers could constitute payday lenders if the services are deemed to be extensions or advances of credit. Such a determination may lead to judicial intervention and statutory interpretation similar to that required in the early years of payday lending.³⁹⁶ Alternatively, and as a potentially more efficient approach, the CFPB could consult with the Federal Trade Commission to issue a rule designating certain earned-wage providers as “larger participants” in the earned-wage market.³⁹⁷ While this rule would not capture all earned-wage providers, it would likely capture the major participants identified in this Article and avoid the uncertainty and lengthy timeline of a final judicial determination of whether earned-wage transfers constitute credit.

b. State level

Although the Small-Sum Law should be implemented and enforced at the federal level, practicality may require individual states to act first. State

[<https://perma.cc/2FT6-4DCA>]; *see also* 12 U.S.C. § 5514(a)(1)(A) (stating general categories of entities that fall under the CFPB’s supervision).

³⁹⁰ 12 U.S.C. § 5515(a).

³⁹¹ *Id.* § 5514(a)(1)(A).

³⁹² *Id.* § 5514(a)(1)(D).

³⁹³ *Id.* § 5514(a)(1)(E).

³⁹⁴ *Id.* § 5514(a)(1)(B).

³⁹⁵ *Id.* § 5514(a)(1)(C) (authorizing supervision of a market participant upon reasonable determination of risks that participant poses to consumers based on a collection of consumer complaints and notice to market participant with opportunity for that participant to respond).

³⁹⁶ *See, e.g.,* *Hamilton v. York*, 987 F. Supp. 953, 956 & n.4 (E.D. Ky. 1997) (“It is hard to imagine how charges for exchanging money today for more money at a later date could be classified as anything but interest on a loan when the transactions do not include a sale of property.”); *In re Miller*, 215 B.R. 970, 974 (Bankr. E.D. Ky. 1997) (“[Defendants] are disbursing funds to people like the plaintiff on the promise of repayment of the sum plus the ‘service charge’ If this is not an extension of credit, this Court finds it hard to imagine any transaction that is.”); *Cashback Catalog Sales, Inc. v. Price*, 102 F. Supp. 2d 1375, 1379 (2000) (“A reasonable trier of fact could conclude that [Defendant] made loans to [Plaintiff] By agreeing not to cash [plaintiff’s] check until his payday, [Defendant] forbore its right to negotiate the checks.”).

³⁹⁷ 12 U.S.C. § 5514(a)(1)(B).

regulators could act to implement state-level small-sum liquidity laws like the one described above. However, the states should not cripple the earned-wage market or other FinTech entrants with bifurcated and innumerable regulatory requirements. Accordingly, it would be highly preferable for the states to adopt a uniform model law.

B. Potential Concerns and Responses

The Small-Sum Law aims to benefit consumers by facilitating the expansion of the earned-wage market's better side and curbing its downside risks with increased competition among substitute services as well as improved transparency, affordability, and bargaining power for consumers. Yet, the proposal is not without potential concerns. This Section addresses three such concerns and demonstrates why the Small-Sum Law is nonetheless the best option for regulating the earned-wage market.

1. Federalism

The existing small-sum liquidity market, including payday lending and earned-wage programs, is within the primary jurisdiction of state (rather than federal) lawmakers. Proponents of the bifurcated nature of financial regulation might champion state-level regulation over federal-level regulation as less at risk for regulatory capture and more effective in driving robust consumer protections. However, the fragmented regulatory framework for payday loans is a cautionary tale about the ineffectiveness of state-based regulation in the small-sum loan market.³⁹⁸ State regulation allows for gaping and inconsistent holes in base-level protections on a state-by-state basis. Providers are able to circumvent regulations by offering services close to the borders between permissive states and restrictive states³⁹⁹ and to exploit federal regulatory loopholes more explicitly by offering services where otherwise prohibited.⁴⁰⁰ Earned-wage programs are

³⁹⁸ See Johnson, *supra* note 2, at 122 (“State-by-state efforts at regulation are inadequate and inefficient because, as explained below, the rent-a-bank practice circumvents state laws designed to protect consumers, and many states do not afford consumers a base level of necessary protections.”).

³⁹⁹ See, e.g., Anne Fleming, *Federal Regulation of Payday Loans Is Actually a Win for States’ Rights*, WASH. POST (Oct. 9, 2017, 5:00 AM), <https://www.washingtonpost.com/news/made-by-history/wp/2017/10/09/federal-regulation-of-payday-loans-is-actually-a-win-for-states-rights/> [<https://perma.cc/B77R-66KR>] (“Lenders in permissive states may continue to lend to borrowers in restrictive states in violation of state law.”).

⁴⁰⁰ See, e.g., SUSANNA MONTEZEMOLO, CTR. FOR RESPONSIBLE LENDING, PAYDAY LENDING ABUSES AND PREDATORY PRACTICES 8 (2013), <https://www.responsiblelending.org/state-of-lending/reports/10-Payday-Loans.pdf> [<https://perma.cc/338B-M9HZ>] (“[B]anks offering open-ended payday loans are able to circumvent the MLA.”); Shen Lu, *How Payday Lenders Get Around Interest Rate Regulations*, MAGNIFY MONEY (Aug. 22, 2018), <https://www.magnifymoney.com/blog/news/how->

likely to be even more effective at evading or inadvertently violating regulation through borderless internet and mobile platforms than payday lenders that operate primarily out of brick-and-mortar locations. Moreover, as seen with payday regulation, state regulation in the broader small-sum credit market does not foster a “race to the top” in reigning in market risks. There is no reason to think regulation of the earned-wage market is going to illicit a different state response. While state-based regulation has a long history of failure in this sector, it is too early to tell whether federal-level reforms would be counterproductive. To the contrary, uniform federal-level consumer protections have historically been the solution when state law falls short.⁴⁰¹

2. *Regulatory Experimentation*

Proponents of state-level regulation might also be concerned that the Small-Sum Law might quell necessary regulatory experimentation that is otherwise likely to occur with varied state regimes in a nascent market. Indeed, state-level policymakers are already considering different approaches to regulating earned-wage programs. Some states are considering distinct licensing frameworks for certain earned-wage programs. Other states have entered into memoranda of understanding that allow market participants to operate freely, subject to heightened reporting requirements. Still others might consider subjecting earned-wage programs to restrictive lending laws or take a “wait and see” approach to earned-wage concerns.

However, while fostering regulatory innovation, such disparate state-level regimes might actually stifle market innovation and improvements in the FinTech era.⁴⁰² The operational hurdles of state-by-state licensing schemes and regulatory oversight disadvantage new market entrants with high start-up costs that can be prohibitive for their profit model.⁴⁰³ Also, such bifurcated regulation may in effect disenfranchise citizens in certain states if market regulation is driven primarily by a minority of large, powerful states.⁴⁰⁴ Uniformity in regulation does not have to sacrifice experimentation. Federal-level frameworks can facilitate experimentation, including, for example, through regulatory sandboxes. When borderless transacting is an

payday-lenders-get-around-interest-rate-regulations/ [https://perma.cc/V3R2-U7FT] (discussing that payday lenders evade regulation by operating as loan brokers instead of direct lenders, or by offering installment loans or lines of credit instead of single-payment loans).

⁴⁰¹ See, e.g., Civil Rights Act of 1968, 7 C.F.R. § 1901.203; Securities Act of 1933, ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C. § 77a–77m).

⁴⁰² See Knight, *supra* note 342, at 185–86.

⁴⁰³ *Id.* at 186.

⁴⁰⁴ *Id.* at 195.

essential element to improved costs and service offerings in a marketplace, borderless regulatory regimes should be created to facilitate its growth.

Moreover, not all experimentation is ideal. As states consider ways to regulate earned-wage programs, they should be cautious not to adopt certain features of early, unsuccessful efforts to reign in the earned-wage market.⁴⁰⁵ First, state policymakers should not reflexively adopt common policy prescriptions like fee caps and transfer limits to curtail financial distress. These prescriptions fail to appreciate that several features of earned-wage programs work in concert (rather than independently) to make repayment difficult and lead to habitual use. Second, policymakers should not narrowly focus on limiting late fees; doing so risks ignoring the likelihood that users will simply make additional transfers after a timely repayment, which has the same effect of imposing a fee for a term extension. Third, policymakers should not be satisfied that earned-wage programs' loan-like repayment risks are sufficiently curbed if services are nonrecourse or payments are not reported to credit bureaus. Such an approach ignores the practical enforcement mechanisms that can be more threatening than a potential lawsuit. For employer-sponsored programs, it would be the need to find other employment to avoid payment. For third-party programs, it would be the need to endure bank nonsufficient-fund fees to avoid payment. Moreover, eliminating the risk of a potential lawsuit over nonpayment is not worth the trade-off of making the service credit invisible, especially since the service is currently designed to be nearly default-proof in many contexts. Finally, policymakers should refrain from barring payday lenders and earned-wage providers from obtaining licenses under the same state licensing frameworks. Such fragmented regulation fails to incent competition necessary for broader market improvements and is likely to result in a selection of market winners and losers based on policy effects rather than optimal consumer services.

3. *Market Contraction*

Lastly, regulation is not without costs. The Small-Sum Law is likely to impose compliance costs on earned-wage providers that must be weighed against any potential returns for providing services. Consequently, there may be some concern that the proposal will have the unintended effects of eradicating the earned-wage market despite demand, thereby forcing

⁴⁰⁵ This critique is derived from a review of the first state proposal for a distinct earned-wage licensing framework, which was proposed by the state legislature in California but failed to be passed into law. *See generally* S. 472, 2019–2020 Leg., Reg. Sess. (Cal. 2019).

consumers to seek out inferior and nefarious substitutes.⁴⁰⁶ However, the proposal focuses on solutions that are low cost (e.g., price disclosure), already exist in the market to some degree (e.g., installment requirements and rescission rights), or are arguably necessary for consumer welfare while giving providers flexibility to set terms (e.g., ATR requirements). In other words, the Small-Sum Law is a moderate proposal that likely facilitates safer innovations within the market while curbing downside risks.

Further, to limit the risk of inferior substitutes, the Small-Sum Law is designed to broadly apply to a particular class of financial products based on their risk profile rather than their form so that earned-wage programs, payday loans, and innovations yet conceived are regulated under the same framework. Thus, at best, the consequence might be to force innovation for improved consumer services because arbitrage is not easily achievable; at worst, the consequence might be a broader market contraction so significant that the majority of consumers in this market are unable to lawfully meet their basic needs. In this worst-case scenario, the market response raises a set of fundamental questions. First, should the law facilitate a market that is inherently incapable of offering affordable liquidity solutions to the most financially vulnerable consumers?⁴⁰⁷ Second, is government involvement required to develop sustainable options given the limits and failures of the private market? Reality probably lies somewhere between the best- and worst-case scenarios. Consequently, with the implementation of the Small-Sum Law, policymakers should be clear-eyed about optimizing private-market solutions to address select small-sum liquidity concerns and to facilitate efficient allocation of limited public resources for those consumers the private markets cannot serve.

* * *

In sum, there are no regulatory frameworks that effectively mitigate the risks of earned-wage programs while simultaneously fostering the development of a robust small-sum liquidity market in the FinTech era. The ideal framework consists of streamlined oversight and consumer protections related to both process and service terms, including price-disclosure rules, ability-to-repay requirements, optional amortization mechanics, mandatory credit scoring, and the right to rescind assignments. While such a framework

⁴⁰⁶ Cf. Atkinson, *supra* note 196, at 1109 (summarizing the debate over the Payday Rule, noting that opposition to payday-loan regulation includes a concern that such regulation would cause payday loans to “dry up” and force low-income borrowers “to seek credit . . . from unseemly credit providers”).

⁴⁰⁷ See *id.* (examining whether credit is even an appropriate mechanism as a substitute for social provisions to low-income consumers).

would most efficiently work at the federal level under the statutory authority of the CFPB, it could also be implemented via a state-level uniform model law.

CONCLUSION

This Article develops a nascent conversation to encourage ongoing scholarship on earned-wage programs. Important questions—including whether these programs cause users to fall into cyclical debt traps or become more financially distressed—are outside its scope but should be studied empirically. Notwithstanding, this Article undertakes a deep-dive assessment of the earned-wage market to make five contributions to legal scholarship. First, it provides a taxonomy of the business models and fee structures in the earned-wage market. Second, it explains that money-transmission and loan services are differentiated by the latter's deferred repayment-feature mechanics, which introduce behavioral gaffes associated with intertemporal decision-making and heighten nonpayment risks. Third, it demonstrates that earned-wage programs and payday loans share features that have been associated with financial harm to consumers in the latter context. Fourth, it identifies certain features—the multiple fee structures and the salary link—as raising financial-harm concerns that are unique to the earned-wage market. Finally, it analyzes the strengths and weaknesses of money-transmission law—under which earned-wage programs currently operate—nonbank-lender law, and the FinTech charter to curtail the risks presented by this multibillion-dollar market. In doing so, this Article demonstrates how earned-wage programs pose risks that are not only substantially similar to those posed by payday loans but also potentially heightened in the context of earned-wage programs due to unique market and product features and the regulatory laxity these programs currently enjoy.

Thus, regulatory intervention is necessary but should be tailored to simultaneously protect consumers and incentivize the development of a robust small-sum liquidity market in the FinTech era. The flaws in the current system are largely rooted in the fact that federal law lacks effective consumer-protection policies, and the patchwork of state regulations inhibits the nationwide business models of nonbank, FinTech firms. Therefore, this Article proposes that a comprehensive small-sum liquidity law—Small-Sum Liquidity Law—be enacted at the federal level and enforced by the CFPB. In doing so, it appreciates that inconsistent regulation typically results in anticompetitive markets and is likely to push unsuspecting consumers towards potentially more harmful products. While this Article does not detail every aspect of the proposed law, it identifies five features that are critical to the success of any such framework: uniform price disclosure, ability-to-

repay rules, optional amortization mechanics, mandatory credit reporting, and the right to rescind assignments. A competitive and robust small-sum liquidity market should emerge to bring solutions to low- and moderate-income consumers that are wealth enhancing. If earned-wage programs are to replace the dominant payday lenders in the fringe financial sector, it is imperative that they function as the expansion of access to low-cost and mainstream services rather than the rise of fringe FinTech, or FringeTech, services.

