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NATIONAL COUNCIL OF INSURANCE LEGISLATORS (NCOIL)

Earned Wage Access Model Act

**Sponsored by Asw. Pam Hunter (NY) – NCOIL Vice President*

**Draft as of May 15, 2024. To be introduced and discussed during the interim meeting of the Financial Services & Multi-Lines Issues Committee on May 31, 2024.*

****Proposed Amendments submitted by Center for Responsible Lending and the National Consumer Law Center****

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Section 1. Title

This Act shall be known as the [State] Earned Wage Access Act.

Section 2. Definitions

As used in this Act, the following terms shall have the following meanings:

(a) "Consumer" means an individual who is a resident of the state of [State].

(b) "Debt collection activity" means the business of collection of any debts, directly or indirectly, owed or due or asserted to be owed or due another and the business of a buyer of debts who seeks to collect such debts either directly or indirectly, as well as the business of any creditor collecting its own debts if such creditor uses any name other than its own that would suggest or indicate that someone other than such creditor is collecting or attempting to collect such debts.

(c) "Earned but unpaid income" means wages or compensation that have been earned or have accrued to the benefit of a consumer but have not been paid by an obligor to that consumer for labor or services performed for or on behalf of an obligor.

(d) "Earned income access rate cap" means the limit on the amount that may be charged or received for an earned income access transaction ~~that~~. The "earned income access rate cap" is established by equal to the maximum amount permitted under [insert appropriate regulatory department citation to state's small dollar interest rate cap statute along with any provisions governing permitted or prohibited fees].

(e) "Earned income access transaction" means the payment of earned but unpaid income to a consumer at a time other than the consumer's regular payday or other regularly scheduled time on which the obligor pays to the consumer wages or compensation earned or that have accrued to the benefit of such consumer.

(f) "Earned income access provider" or "provider" means a person or entity that:

(1) provides, or offers to provide, on behalf of an obligor earned income access transactions to consumers earning wages or compensation from the obligor; or

(2) offers earned income access transactions to, or enters into earned income transactions with, consumers.

~~(g) "Exempt organization" shall mean any banking organization, foreign banking corporation licensed by the [insert appropriate regulatory department] to transact business in this state, national bank, federal savings bank, federal savings and loan association, federal credit union, or any bank, trust company, savings bank, savings and loan association, or credit union organized under the laws of any other state or any instrumentality created by the United States or any state with the power to make mortgage loans. Subject to such regulations as may be promulgated by the [insert appropriate regulatory department], "exempt organization" may also include any subsidiary of such entities.~~

(g) "Exempt organization" shall mean any person or entity exempt under [insert citation to exemptions in the state's small dollar loan statute].

(h) "Non-recourse" means the unavailability of any legal cause of action or remedy, including the right to re-present a failed payment or payroll deduction, against a consumer relating to an earned income access transaction.

(i) "Notice" means communication from the provider to the consumer in a clear and conspicuous manner.

(j) "Obligor" means a person or entity who is obligated to pay a consumer any sum of money on an hourly, project-based, piecework, or other basis for labor or services performed by the consumer for or on behalf of that person or entity. Obligor does not include the customer of an obligor or another third party that has an obligation to make any payment to a consumer based solely on the consumer's agency relationship with the obligor.

(k) "Fees" means any amount charged or received by a provider to a consumer for an earned income access transaction, including amounts ~~to be paid~~ voluntarily as described in paragraph (9) of subdivision two (b) of section 8 of this Act and indirect transaction fees as described in subdivision (d) of section 8 of this Act.

Commented [AK1]: This change is non substantive but instead flags that paragraph (i) of subdivision 2 of this Act does not exist (we believe this is intended to be paragraph (9) of subdivision (b)).

(l) "Proceeds" means funds received by a consumer pursuant to an earned income access transaction.

Section 3. License

(a) No person or entity, except for an exempt organization as defined in this Act, shall engage in the business of providing or offering earned income access transactions to consumers, or enter into an earned income access transaction with a consumer, without first obtaining a license.

(b) An application for a license under this Act shall be in writing, under oath and in the form prescribed by the [insert appropriate regulatory department].

(c) At the time of filing an application for a license, the applicant shall pay to the [insert appropriate regulatory department] an application fee.

(d) A license granted pursuant to this Act shall be valid unless revoked or suspended by the [insert appropriate regulatory department] or surrendered by the licensee.

Section 4. Action by [insert appropriate regulatory department] on Application

(a) After the filing of an application for a license accompanied by payment of the fees for license and investigation, it shall be substantively reviewed. After the application is deemed sufficient and complete, the [insert appropriate regulatory department] shall issue the license, or the [insert appropriate regulatory department] may refuse to issue the license if [insert appropriate regulatory department] shall find that the financial responsibility, experience, character and general fitness of the applicant or any person associated with the applicant are not such as to command the confidence of the community and to warrant the belief that the business will be conducted honestly, fairly and efficiently within the purposes and intent of this Act. For the purpose of this subdivision, the applicant shall be deemed to include all the members of the applicant if it is a partnership or unincorporated association, and all the stockholders, officers and directors of the applicant if it is a corporation. Such license to engage in business in accordance with the provisions of this Act at the location specified in the application shall be executed in

triplicate by the [insert appropriate regulatory department] and the [insert appropriate regulatory department] shall transmit one copy thereof to the applicant, file a copy in the office of the insert [appropriate regulatory department], and file a copy in the office of the clerk of the county in which is located the place designated in such license.

(b) If the [insert appropriate regulatory department] refuses to issue a license, the [insert appropriate regulatory department] shall notify the applicant of the denial, return to the applicant the sum paid as a license fee, but retain the investigation fee to cover the costs of investigating the applicant.

(c) Each license issued pursuant to this Act shall remain in full force unless it is surrendered by the licensee, revoked or suspended.

Section 5. License provisions and posting

(a) A license issued under this Act shall state the name and address of the licensee, and if the licensee be a co-partnership or association, the names of the members thereof, and if a corporation the date and place of its incorporation

(b) Such license shall be kept conspicuously posted in the office of the licensee and on the mobile application or website of the licensee and shall not be transferable or assignable.

Section 6. Grounds for suspension or revocation of license; procedure

(a) A license granted pursuant to this Act shall not be renewed, and shall be revoked or suspended by the [insert appropriate regulatory department] upon a finding that:

(1) the licensee has not complied with reporting requirements;

(2) the licensee has violated any provision of this Act, the act of Congress entitled "Truth in Lending Act" and the regulations thereunder, as such act and regulations may from time to time be amended or any rule or regulation lawfully made by the [insert appropriate regulatory department] under and within the authority of this Act;

(3) any fact of condition exists which, if it had existed at the time of the original application for such license, clearly would have warranted the [insert appropriate regulatory department] refusal to issue such license; or

(4) the licensee has failed to pay any sum of money lawfully demanded by the [insert appropriate regulatory department] or to comply with any demand, ruling or requirement of the [insert appropriate regulatory department].

(b) Any licensee may surrender any license by delivering to the [insert appropriate regulatory department] written notice that the licensee thereby surrenders such license, but such surrender shall not affect such licensee's civil or criminal liability for acts committed prior to such surrender.

(c) Every license issued hereunder shall remain in force and effect until the same shall have been surrendered, revoked, suspended, or shall have expired, in accordance with the provisions of this Act, but the [insert appropriate regulatory department] shall have authority to reinstate suspended licenses or to issue new licenses to a licensee whose license or licenses shall have been revoked if no fact or condition then exists which clearly would have warranted the [insert appropriate regulatory department] refusal to issue such license.

(d) Whenever the [insert appropriate regulatory department] shall revoke or suspend a license issued pursuant to this Act, the [insert appropriate regulatory department] shall forthwith execute in triplicate a written order to that effect. The [insert appropriate regulatory department] shall file one copy of such order in the office of the department, file another in the office of the clerk of the county in which is located the place designated in such license and forthwith serve the third copy upon the licensee, which order may be reviewed in the manner provided by article [xxxxx] of the civil practice law and rules. Such special proceeding for review as authorized by this section must be commenced within thirty days from the date of such order of suspension or revocation.

(e) The [insert appropriate regulatory department] may, on good cause shown, or where there is a substantial risk of public harm, without notice and a hearing, suspend any license issued pursuant to this Act for a period not exceeding thirty days, pending investigation. "Good cause", as used in this subdivision, shall exist only when the licensee has engaged in or is likely to engage in a practice prohibited by this Act or engages in dishonest or inequitable practices which may cause substantial harm to the persons afforded the protection of this Act.

Section 7. Investigations and examinations

(a) The [insert appropriate regulatory department] shall have the power to make such investigations as the [insert appropriate regulatory department] shall deem necessary to determine whether any provider or any other person has violated any of the provisions of this Act, or whether any licensee has conducted itself in such manner as would justify the revocation of its license, and to the extent necessary therefor, the [insert appropriate regulatory department] may require the attendance of and examine any person under oath, and shall have the power to compel the production of all relevant books, records, accounts, and documents.

(b) The [insert appropriate regulatory department] shall have the power to make such examinations of the books, records, accounts and documents used in the business of any licensee as the [insert appropriate regulatory department] shall deem necessary to determine whether any such licensee has violated any of the provisions of this Act.

(c) The expenses incurred in making any examination pursuant to this section shall be assessed against and paid by the licensee so examined, except that traveling and subsistence expenses so incurred shall be charged against and paid by licensees in such proportions as the [insert appropriate regulatory department] shall deem just and reasonable, and such proportionate charges shall be added to the assessment of the other expenses incurred upon each examination. Upon written notice by the [insert appropriate regulatory department] of the total amount of such

assessment, the licensee shall become liable for and shall pay such assessment to the [insert appropriate regulatory department].

(d) All reports of examinations and investigations, and all correspondence and memoranda concerning or arising out of such examinations or investigations, including any duly authenticated copy or copies thereof in the possession of any licensee or the department, shall be confidential communications, shall not be subject to subpoena and shall not be made public unless, in the judgment of the [insert appropriate regulatory department], the ends of justice and the public advantage will be subserved by the publication thereof, in which event the [insert appropriate regulatory department] may publish or authorize the publication of a copy of any such report or other material referred to in this subdivision, or any part thereof, in such manner as the [insert appropriate regulatory department] may deem proper.

Section 8. Compliance

(a) An earned income access provider shall not operate in this state unless:

(1) the provider is licensed pursuant to this Act, unless the provider is an exempt organization pursuant to this Act;

(2) in the event a provider takes custody of a consumer's earned but unpaid income before paying proceeds to the consumer, the provider ensures that the proceeds are held at an insured depository institution in such a manner that they are fully insured by the Federal Deposit Insurance Corporation at the consumer's individual account level;

(3) the provider complies with National Automated Clearing House Association rules, and when a debit is initiated to a consumer's account for a payment, and the debit is returned for insufficient or uncollected funds, the debit can be reinitiated or such other rules as apply to the payment method used, and repayment fails, repayment may be reattempted only in accordance with paragraph (4) of subdivision (b) of this section;

(4) the provider does not provide to any third party, including obligors, any non-public personal information about consumers except in compliance with applicable federal and state law, and the provider does not sell, share, or otherwise disclose personal information that the provider solicits or collects from consumers in connection with offering earned income access transactions or related services;

(5) the provider gives notice to the consumer of the full fees and costs of earned income transactions in accordance with rules established by [insert appropriate regulatory department]; and

(6) the provider, no less frequently than quarterly, delivers notice in writing to each consumer to whom it has paid proceeds in that quarter containing information to be prescribed by the [insert appropriate regulatory department], including but not limited to an itemization of transactions and costs, the total amount the consumer has paid in fees, information on how to report complaints to the provider and to the [insert appropriate

regulatory department], definitions of terms used in the notice, and an explanation of the costs of the services provided;

(b) It is a violation of this Act to conduct an earned income access transaction unless:

(1) the transaction is non-recourse;

(2) the provider ~~has a reasonable basis to believe~~ knows, based on an obligor's real-time time and attendance data, that the total amount of the proceeds and fees associated with the transaction does not exceed a percentage, to be set by the [insert appropriate regulatory department], of the consumer's earned but unpaid income;

(3) the provider does not engage in debt collection activity or retain the services of another to engage in debt collection activity in connection with the earned income access transaction and does not convey the debt itself;

(4) if repayment is to be made through a debit of a consumer's account, the provider presents the debit transaction only a single time. If the debit transaction is returned for insufficient or uncollected funds, the consumer must affirmatively initiate or re-authorize repayment to the provider; if repayment is made through payroll deduction, split direct deposit or another method through the employer and repayment fails, only one additional payroll deduction or other employer-based repayment may be attempted and only in accordance with rules established by the [insert appropriate regulatory department]; the event of administrative or technical errors.

(5) the provider charges or receives a fee for the earned income access transaction that does not exceed the earned income access rate cap or charges or receives no fee for such a transaction;

(6) no portion of the earned but unpaid income to be paid as part of the earned income access transaction is used ~~before receipt by the consumer~~ to settle or pay down an obligation arising from a prior earned income access transaction, and no proceeds roll over or are structured in any way to create any continuing obligation to the provider on the part of a consumer;

(7) the provider undertakes reasonable efforts to ensure that the consumer receives the proceeds no less than one business day after the consumer's request and no less than one business day prior to the next regularly scheduled date on which the obligor is scheduled to pay earned wages or income to such consumer;

(8) before a consumer enters into the earned income access transaction, the provider gives the consumer notice, in writing, of all fees associated with the earned income access transaction and the full cost of the transaction, including the cost expressed as an annual percentage rate;

Commented [AK2]: Consumer advocates strongly support this provision. Given the high rate of repeat usage seen with these products, consumers should get periodic disclosure about the overall cost of using these services per quarter.

Commented [AK3]: Consumer advocates strongly support this provision. Many providers misleadingly advertise their transactions as having a 0% APR even if users are paying fees on that transaction.

(9) if the provider offers consumers the opportunity to pay an additional amount for an earned income access transaction voluntarily, such as a tip or donation,

(i) the provider gives notice to the consumer in writing that paying such additional amount is not required for the consumer to receive the proceeds or to have full, unfettered access to all services associated with the account,

(ii) the provider does not suggest an amount to the consumer by, for example, offering amount options from which the consumer may select or pre-filling an amount in any form used in the transaction process, or otherwise using a transaction process designed to require the consumer to take affirmative action to avoid or opt out of paying such additional amount, and

(iii) such voluntary payment amounts do not, when added to the total cost of the transaction, cause the total fees for the earned income access transaction to exceed the earned income access rate cap;

(10) the provider does not charge a late fee or prepayment penalty on the earned income access transaction;

(11) the provider does not pull a credit report or otherwise assess credit risk of the consumer prior to, during, or after the earned income access transaction except that the provider may verify the consumer's source of income as part of determining the amount of the proceeds;

(12) the provider does not report on the earned income access transaction to a consumer reporting agency prior to, during, or after the transaction;

(13) the provider does not require a consumer to waive the right to class action to engage in an earned income access transaction;

(14) the provider gives a consumer written notice of any amendment to the contract or terms of service for earned income access transactions, and the consumer agrees to such amendments before proceeding with an earned income access transaction to which such amendments would apply; and

(15) the consumer is eighteen years of age or older.

~~(e) Transactions made in accordance with this section shall not be subject to usury laws.~~

(d) If a provider charges or receives indirect transaction fees, such as fees to receive proceeds more quickly, such fees, together with other fees, shall not exceed the maximum allowable amount as set by the [insert appropriate regulatory department]-earned income access rate cap.

Commented [AK4]: Consumer advocates strongly support this provision. Borrowers should have to affirmatively choose to tip, rather than being pressured or led into tipping through behavioral economics tactics.

Commented [AK5]: Consumer advocates strongly support this provision. Any tips should be part of the calculation to determine compliance with the rate cap.

Commented [AK6]: Consumer advocates strongly support this provision.

Section 9. Advertising

(a) No advertisement for an earned income access transaction service shall be misleading or otherwise deceptive.

(b) An advertisement for earned income access transaction service shall clearly and accurately disclose the costs of the service to consumers.

(c) The [insert appropriate regulatory department] shall adopt rules governing advertising of earned income transaction services consistent with the purposes of this section.

Section 10. Regulations and rulings

The [insert appropriate regulatory department] is hereby authorized and empowered to make such rules and regulations, conduct hearings and make such specific rulings, orders, demands and findings as may be necessary for the proper conduct of the business authorized and licensed under and for the enforcement of this Act.

Section 11. Changes in control

(a) It shall be unlawful except with the prior approval of the [insert appropriate regulatory department] for any action to be taken which results in a change of control of the business of a licensee. Prior to any change of control, the person desirous of acquiring control of the business of a licensee shall make written application to the [insert appropriate regulatory department] and pay an investigation fee. The application shall contain such information as the [insert appropriate regulatory department], by rule or regulation, may prescribe as necessary or appropriate for the purpose of making the determination required by subdivision (b) of this section.

(b) The [insert appropriate regulatory department] shall approve or disapprove the proposed change of control of a licensee in accordance with the provisions of subdivision (a) of this section.

(c) For a period of six months from the date of qualification thereof and for such additional period of time as the [insert appropriate regulatory department] may prescribe, in writing, the provisions of subdivisions (a) and (b) of this section shall not apply to a transfer of control by operation of law to the legal representative, as hereinafter defined, of one who has control of a licensee. Thereafter, such legal representative shall comply with the provisions of subdivisions (a) and (b) of this section. The provisions of subdivisions (a) and (b) of this section shall be applicable to an application made under such section by a legal representative.

(d) The term "legal representative", for the purposes of this section, shall mean one duly appointed by a court of competent jurisdiction to act as executor, administrator, trustee, committee, conservator or receiver, including one who succeeds a legal representative and one acting in an ancillary capacity thereto in accordance with the provisions of such court appointment.

(e) As used in this section:

(1) the term "person" includes an individual, partnership, corporation, association or any other organization, and

(2) the term "control" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a licensee, whether through the ownership of voting stock of such licensee, the ownership of voting stock of any person which possesses such power or otherwise. Control shall be presumed to exist if any person, directly or indirectly, owns, controls or holds with power to vote ten per centum or more of the voting stock of any licensee or of any person which owns, controls or holds with power to vote ten per centum or more of the voting stock of any licensee, but no person shall be deemed to control a licensee solely by reason of being an officer or director of such licensee or person. The [insert appropriate regulatory department] may in the [insert appropriate regulatory department] discretion, upon the application of a licensee or any person who, directly or indirectly, owns, controls or holds with power to vote or seeks to own, control or hold with power to vote any voting stock of such licensee, determine whether or not the ownership, control or holding of such voting stock constitutes or would constitute control of such licensee for purposes of this section.

Section 12. Violations and Penalties

(a) Any person, including any member, officer, director or employee of a provider, who violates or participates in the violation of any provision of this Act, or who knowingly makes any incorrect statement of a material fact in any application, report or statement filed pursuant to this Act, or who knowingly omits to state any material fact necessary to give the [insert appropriate regulatory department] any information lawfully required by the [insert appropriate regulatory department] or refuses to permit any lawful investigation or examination, shall be guilty of a misdemeanor and, upon conviction, shall be fined not more than [xxxxx] or imprisoned for not more than six months or both, in the discretion of the court.

(b) No provider shall make, directly or indirectly, orally or in writing, or by any method, practice or device, a representation that such provider is licensed under the banking law except that a licensee under this chapter may make a representation that the licensee is licensed as an earned income access provider under this chapter.

Section 13. Books and records; reports

(a) The provider shall keep and use in its business such books, accounts and records as will enable the [insert appropriate regulatory department] to determine whether such provider is complying with the provisions of this Act and with the rules and regulations lawfully made by the [insert appropriate regulatory department] hereunder. Every provider shall preserve such books, accounts and records for at least six years after making the final entry in respect to any earned wage access transaction recorded therein; provided, however, the preservation of photographic reproductions thereof or records in photographic form shall constitute compliance with this requirement.

(b) By a date to be set by the [insert appropriate regulatory department], each provider shall annually file a report with the [insert appropriate regulatory department] giving such information as the [insert appropriate regulatory department] may require concerning the business and operations during the preceding calendar year of the provider within the state under the authority of this Act. Such report shall be subscribed and affirmed as true by the provider under the penalties of perjury and be in the form prescribed by the [insert appropriate regulatory department]. In addition to such annual reports, the [insert appropriate regulatory department] may require of providers such additional regular or special reports as the [insert appropriate regulatory department] may deem necessary to the proper supervision of providers under this Act. Such additional reports shall be in the form prescribed by the [insert appropriate regulatory department] and shall be subscribed and affirmed as true under the penalties of perjury.

Section 14. Severability

If any provision of this Act or the application thereof to any person or circumstances is held invalid, the invalidity thereof shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

Section 15. Effective Date

This Act is effective [xxxxxxx].