CLICC
CALIFORNIA LOW-INCOME CONSUMER COALITION

www.lowincomeconsumer.org

CLICC Member Organizations

Bet Tzedek Legal Services (LA)

Centro Legal de La Raza

Community Legal Services in East Palo Alto

East Bay Community Law Center

Elder Law & Advocacy (San Diego)

Justice & Diversity Center (SF)

Legal Aid of Marin

Legal Aid Society of San Bernardino

Public Counsel (LA)

Public Law Center (Orange County)

Riverside Legal Aid

Santa Clara Law (Katharine & George Alexander Community Law Center)

UC Irvine Consumer Law Clinic

Watsonville Law Center

March 15, 2021

California Department of Financial Protection and Innovation
regulations@dfpi.ca.gov
Charles Carriere, Esq.
charles.carriere@dfpi.ca.gov

RE: California Low-Income Consumer Coalition (CLICC) Response to Invitation for Comments on Proposed Rulemaking Under the California Consumer Financial Protection Law (Pro 01-21)

To the California Department of Financial Protection and Innovation:

With the passage of Assembly Bill 1864, the Legislature and the Governor have directed the Department to sharpen its focus on consumer protection along with innovation. The DFPI has, in turn, issued a call for initial comments as it begins its process of rulemaking in response to AB 1864 (Limón) and the passage of the Consumer Financial Protection Law. As provided in the Assembly Floor Analysis, "AB 1864 will ... creat[e] a best-in-class state regulatory agency that will protect California consumers from unfair, deceptive, and abusive practices by financial services companies."[1] In interpreting AB 1864 and implementing the CFPL, that overarching purpose should guide the Department's decisions.

The California Low-Income Consumer Coalition (CLICC) comprises fourteen legal aid providers from around the state who are dedicated to ensuring that all people, regardless of their income or background, have their voices heard and their needs recognized by policymakers. CLICC and its members work to build a marketplace in which consumer rights and economic justice are fully recognized and firmly established. The birth of the DFPI provides an opportunity for California to finally realize the promise of opportunity, equality and prosperity for all residents of the Golden State.

In order to make that happen, the Department must provide increased guardrails and protections for the most vulnerable Californians. According to the Assembly Floor Analysis, the explicit purpose of the revamped Department is to provide "[a]n overhaul of DBO into a new mission-driven, consumer-focused agency" and to provide new and robust protection starting this year, when "the desperation of low-income Californians will be at its height, and the swindlers who prey upon them most ruthless."[2]

CLICC welcomes the Department's call for input. We look forward to providing more detailed comments on various issues raised in the Department's rulemaking as the process moves forward. Here we offer some preliminary, framing comments on aspects of the Department's request that are particularly salient to the low-income consumers whom we serve.

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[1] https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200AB1864
[2] *Id.*

I. (2.) ***Exemptions:*** **Although the List of Exemptions in Section 90002 is Comprehensive and Workable and Can Await Clarifying Rulemaking When the Need Arises, the Department Can and Should Adopt the Principle That It Is a Covered Entity's Activity Rather Than Its Status That Will Determine Whether an Exemption Applies.**

The list of exemptions in Financial Code section 90002 is well articulated, and likely would not benefit from specific definitional rulemaking at this time. Experience in applying the exemptions, and possible judicial interpretation of those exemptions, will benefit the Department in ultimately determining the specific boundaries of those exemptions.

The Department can and should, however, set out certain principles that will guide its interpretation of section 90002. First and foremost, the Department can make clear that the exemptions are intended to be narrow. The cost to businesses and to the government of overlapping jurisdiction between agencies is comparatively low; agencies can make room for each other's actions, and businesses have every incentive to make sure that they do. By comparison, the cost of jurisdictional lacunae – of regulatory vacuums – is high; consumers are left with nowhere to turn. If there is a question about the application of the CCFPL to a particular entity, it is much better to err on the side of coverage (i.e., narrow exemptions) in order to ensure more comprehensive and consistent consumer protection. And if there is an entity that is regulated by a different agency for one purpose, but not for another consumer purpose, the DFPI should be able to cover that entity for the uncovered purpose.

One example is for-profit colleges and vocational schools. For-profit schools fall within the jurisdiction of the state Bureau of Private Post-secondary Education (BPPE) for purposes of their provision of education services, but are not covered by BPPE for any financial products they originate or broker. The DFPI, with its financial expertise, is in a much better position than the BPPE to oversee loans that a for-profit school brokers or originates. If the DFPI has oversight over loans brokered or originated by for-profit schools, not only can the Department receive complaints about schools issuing loans, but it can also implement regulations and undertake enforcement actions when a for-profit school originates or brokers a predatory and/or unfair loan. Largely the same thing is true of bail bond companies that finance their clients' premiums. The bail contract itself falls within the jurisdiction of the Department of Insurance (DOI). But the premium financing agreement – a rarity until relatively recently, when bail bond amounts skyrocketed – is clearly a consumer financial product and as such should fall within the bailiwick of the Department. (That is, when making the loan, the bail bond company is not "acting under the authority" (Fin. Code 90002(b)) of its license from the DOI.)

This emphasis on conduct rather than status – on function rather than form – reflects the broad and protective nature of AB 1864 and the legislature's new charge to the Department.

Finally, we suggest that even where an entity *is* exempt from the CCFPL, the DFPI should still be able to accept complaints regarding the entity in order to identify patterns and practices that may be shared with other relevant state agencies and in order to track consumer protection issues more generally.

II. (3.) *Registration – and Enforcement*

A. *For What Industries Should the DFPI First Establish Registration Requirements Under Section 90009(a):* The Department Should, as Soon as Possible, Focus on Both Registration and Enforcement for Industries That Pose an Immediate Threat to Low-Income Consumers Because They Are Currently Effectively Unregulated in California.

From the perspective of advocates for low-income consumers, the Department needs to focus on a series of industries that now victimize our clients, seemingly without consequence. Some of these industries, like debt collectors, are not yet registered with the Department. Others are already required to register but require the Department's enforcement attention immediately. As attorneys for the state's low-income consumers, we see particular harm occurring in the practices of following industries: payday and small dollar lenders; debt collectors; check sellers, bill payers, and proraters (i.e., debt settlement companies); PACE program administrators; and student loan servicers. What we witness in all of the above industries are opportunities for consumers to be harmed because of a lack of education and insufficient protections and enforcement.

<u>Payday and Small Dollar Lenders</u>: We know from our clinical experience, and broader data, that payday and small dollar lenders, even the "responsible" ones, often target specific vulnerable communities. We see people of color, veterans, older adults, and those who can least afford it being targeted by loans that are often unaffordable and frequently lead our clients to spiral downwards into debt they cannot escape. That these purveyors are already required to be licensed by the Department does not mean that they are effectively regulated. To the contrary, these lenders – whether licensed under the California Deferred Deposit Transaction Law or the California Financing Law – not only continue to take advantage of the most vulnerable Californians but also in some cases work through partnerships with national banks or tribal entities to evade the specific anti-predatory lending measures (like 2019's AB 539) enacted by the legislature.

It is not, in other words, the Department's new registration authority under the CFPL that will bring these rogue actors to bay; it is use of the Department's full suite of regulatory powers, including the explicit authority under section 326 of the Financial Code (per AB 1864) to invoke and enforce the UDAAP provisions of the Dodd-Frank Act. The overarching principle, as the Department begins to exercise its new authority under AB 1864, is for the DFPI to make use of *all* aspects of that authority – whether in rulemaking, enforcement, supervision, market monitoring, or other activities.

<u>Debt Collectors</u>: The debt collection industry is one where the Department's new registration authority – in addition to the DFPI's new authority to act against unlawful, unfair, deceptive or abusive acts under the CFPL – may be usefully employed. Until next year, California will remain one of only eleven states that does not require debt collectors to be licensed. With the passage of SB 908 in 2020, there is a clear directive to require debt collector licensing. This change presents the opportunity to bring order to and establish guardrails for an industry that has routinely drawn more consumer complaints than any other.

As attorneys representing low-income consumers, we regularly defend debt collection lawsuits. And we have seen it all: lawsuits filed against the wrong person, on debts that had been reported as the result of identity theft, without sufficient documentation for the individual to even understand where the debt came from, and with no downturn whatsoever during the pandemic. In some of the areas of law that we practice, we can provide guidance and support to assist the client in representing themselves; debt collection is not one of those areas.

The debt collectors and their attorneys do not respond to the defendants and do not provide realistic solutions to resolving the defendants' issues. Too many times we have instructed our client to inform the collection attorney that they are an older adult, receive only protected benefits, and own no real property, only to see the collection attorney push ahead as aggressively as before. It takes intervention by a legal services attorney to get the case dismissed. One debt collector we encountered filed hundreds, if not thousands, of lawsuits in California *before* it was registered with the California Secretary of State. No state agency had any meaningful supervisory authority over that collector. With enormous numbers of Californians facing or soon to face catastrophic loss of income as a result of the pandemic, debt collection is an industry that is certain to grow, and one desperately in need of oversight.

With respect to rulemaking in particular, we urge the Department to exercise its full UUDAAP authority under AB 1864 and SB 908, and to recognize that the federal Fair Debt Collection Practices Act sets a floor rather than a ceiling. That is, "a State law is not inconsistent with" the federal act "if the protection [the state] law affords any consumer is greater than the protection provided by" the FDCPA. In other words, the final debt collection rule recently promulgated by the Trump Administration's CFPB is the *minimum*. We fully expect the Department to consider shortcomings in that rule, including but not limited to the number of permitted contacts, the revival of time-barred "zombie" debt, and the provision by collectors of return email addresses.

Check Sellers, Bill Payers, and Proraters (Debt Settlement Companies):
Another area where legal services attorneys see substantial fraud is among check sellers, bill payers and proraters: that is, among so-called "debt settlement" companies. It is common for our low-income clients, and particularly our clients over the age of 60, to have very strong opinions about their responsibility for their debts and not "taking advantage" of the bankruptcy system. This feeling leads clients to seek out alternatives to bankruptcy, including debt settlement companies. One client of CLICC member the Public Law Center in Orange County, a woman in her 80s, paid hundreds of dollars to a debt settlement company over the course of six months. Nothing was done to contact her creditors, and she was ultimately sued on one of the debts. Still nothing was done by the debt settlement company, and it refused to provide a refund. She contacted the Public Law Center, which was able to recover the client's money and successfully defend the collection lawsuit. But there are so many others who do not find legal services organizations and end up not only losing money to the debt settlement company, but also defending (and often losing) a lawsuit to collect on the debts the company was supposed to resolve.

Additionally, with the current recession caused by the pandemic, concern about debt settlement companies targeting moderate-income households facing temporary financial crisis is serious and growing. These consumers have arguably more to lose than even our low-income and elderly clients. The very model of debt settlement causes the consumer to incur the longest-lasting harms at the outset of the program—consumers are told to stop paying on their debts, on which they are often current, to force the debt into charge-off in order to bring creditors and debt collectors into negotiations. The default and resulting delinquencies result in drops in credit ratings which can last up to 7 years and impact the consumer's ability to qualify for housing and employment, not to mention the impact of lawsuits from those creditors. Debt settlement is too often a slow bleed that can leave the consumer worse off overall than even bankruptcy.

The Department may well need to implement a complete set of regulations to govern the debt settlement industry. In the meantime, we call on the Department to implement, as swiftly as possible, a well-designed data collection protocol for the debt settlement industry to determine (among other things) what percentage of people who sign up for debt settlement receive *any* overall financial benefit from the program, much less the financial benefits they were promised.

<u>PACE Program Administrators</u>:

Legal services providers have been on the front lines of litigating the issues of inappropriate projects, unsustainable financing, uninspected work, and other serious consumer harms resulting from the Property Assessed Clean Energy (PACE) program. The individuals represented by legal services providers are most frequently low-income older adults, individuals with disabilities, and people who speak a language other than English. Predatory sales tactics have been the norm – for example, a PACE contractor scrolling quickly through a detailed contract on a tablet and requesting a signature at the end to "authorize a quote," when in reality signing the contract would obligate the homeowner to pay a substantial sum of money over the course of many years through a mechanism that has proven profoundly difficult to unwind. CLICC's members have encountered so many of these cases over the past several years that many of our offices have had to close their intake to other clients.

As a result of AB 1284 (2017), the Department has been charged with developing a set of consumer protection regulations for the PACE program. Those regulations have taken years to finalize and are not yet in place. But the fact that the Department has been transformed from the DBO to the DFPI in that time may reflect a change in the agency's perspective with respect to the PACE program as well. The final rule on PACE should and will reflect, we believe, the Department's new *sine qua non*: consumer protection. Making use of its authority under Section 326 and the Dodd-Frank Act, the Department can ensure that the PACE rule – and more important its enforcement of that rule – is not directed primarily to smoothing the way for businesses to operate as they would prefer, but rather to ensuring that their practices do not harm consumers.

That is the fundamental charge of the new agency, and nowhere will its effect be more evident than in the Department's actions with respect to PACE. CLICC notes that, thus far, the DFPI's view of what should be considered unfair practices has seemed limited only to examples of the most egregious fraud – for example, cases with forgery and no work done. We urge the Department to take a much more expansive view in its determination of unfair, deceptive and abusive acts and practices to include where homeowners have been, among other things: mis-sold PACE as a free program; subjected to exorbitant pricing; duped through misrepresentations into signing contracts and completion certificates; and coached by contractors on phone calls with administrators. We also urge the DFPI to take measures to ensure that PACE administrators themselves are conducting sufficient oversight over their own transactions to ensure that homeowners are not victimized by the practices we have mentioned here.

With PACE we have seen our most vulnerable communities – the elderly and monolingual Spanish speakers, among others – targeted by unscrupulous contractors without any effective oversight by PACE administrators. The Department should gather information about this targeting, along with many other aspects of the PACE program, as part of its market monitoring and supervision functions.

The DFPI, now charged explicitly with prioritizing consumer protection, has the chance to address and reform this industry that has devastated the financial lives of so many of our low-income clients.

<u>Student Loan Servicers</u>:

Lastly, student loan servicers should be an area of focus for the Department as they are for CLICC's members. Senate Bill 376 (2020) provides additional consumer protections, adding substance to the required licensing of student loan servicers – and a source of authority for the Department.

As with other industries of particular concern to CLICC, student loan servicers are covered by a licensing scheme separate from the registration required for newly covered persons under the CFPL. But also like those other industries, the Department has considerable authority – here, under AB 376 and the Dodd-Frank Act – to ensure a level, fair and clean playing field through rulemaking, enforcement, market monitoring and supervision.

The data presented to support AB 376 provide the basis for making student loan servicers a priority for the Department. In California, more than 3.7 million borrowers owe nearly $125 billion in student debt – more than $33,000 on average. Among CLICC's legal services clients, borrowers have been improperly denied income-based repayment plans, have been denied disability discharges, and have been aggressively pursued in collection, including through lawsuits. It should not be necessary for a borrower to find a lawyer in order to enroll in a payment program based on the borrower's income. But student loan servicers have not readily offered that option when a borrower calls in to explain her inability to continue making existing payments. Student loan servicers have instead done everything they could to deny access to programs that would have assisted borrowers. And then they have sued.

Even then, when faced with a legitimate argument that the California statute of limitations has run, some servicers have argued that a different statute of limitations should apply because they are located in a different state.

In sum, the student loan servicing industry is in urgent need of the Department's attention.

B. ***For each industry, what data should the DFPI collect?:*** **The Department Should Emphasize Broad and Thorough Data Collection and Transparency in Its Market Monitoring Function.**

To state another principle for the Department's regulatory approach: Newly covered entities and entities already subject to the DFPI's authority should be monitored with similarly thorough and robust data collection requirements. For each of the industries mentioned in the prior section – whether they are newly covered persons or not – there is basic information that the Department should collect and maintain:

- NMLS registration
- Name of entity
  - All other entity names, trade names, DBAs, etc.
  - Affiliated entities (including law firms)
- Contact person(s)
  - Senior Officers and Directors
  - Managers information form (with verification of owner/manager's relevant experience)
  - List of agents
- Licensing/Registration fee
- Financial statements
- Disclosure questions (past legal history)
  - License ever suspended/revoked
  - License ever refused
  - Civil litigation arising out of business
  - Charged with committing fraudulent acts

- Training Materials for staff on the ground (collectors, agents, salespeople, etc.)
- Credit history
- Notification that license is not transferable or assignable
- Unique identifier (license #) displayed at physical business, on website, and on all communications/solicitations
- Surety bond, if warranted

For each of the industries we prioritized in the previous section, the information above is relevant to their business and is reflective of information that is gathered in the registration process in other states. We understand that, as the DFPI expands the entities that are licensed and registered, and learns what information is most useful, there will be adjustments from whatever list is initially adopted. As far as data collection is concerned, each entity should be required to provide an update of any changes in its basic registration data from the prior year's report.

In addition, each type of entity will have different data that will need to be tracked. While we offer some initial proposals below, these are by no means exhaustive, and will certainly be supplemented and/or amended as the Department develops its monitoring practice. We recognize that existing statutes and rules may already require many of the documents we list below.

<u>Payday and Small Dollar Lenders</u>

- Number of loans made
- Number of defaulted loans
- Number of loans within specific dollar ranges, and the average amount of the loan within that dollar range
- Average interest rate of loans within specific dollar ranges
- Number of lawsuits filed
- Number of default judgments entered in those lawsuits
- Number of internal consumer complaints (with information about nature of complaint, resolution, etc.)

<u>Debt Collectors</u>

- Number of lawsuits filed
- Number of default judgments entered in those lawsuits
- Number of affirmative cases (including cross-complaints) filed against the collector (and outcomes of those lawsuits)
- Number of allegations of disputed debt, designated by identity theft, coerced debt, forgery, etc. (and resolution of those allegations)
- Number of internal consumer complaints (with information about nature of complaint, resolution, etc.)
- Financial statement (confidential)
- Records to be maintained: clearly identify all payments collected or received from consumer debtors and all remittances made to creditors. Must be kept for no less than five years after date

of final entry. Maintain adequate records to comply with the FDCPA and/or the FDBPA, as applicable.

<u>Check Sellers, Bill Payers, and Proraters (Debt Settlement Companies):</u>

- Number of accounts opened
- Number of accounts closed & reason for closure
- Amount of money collected from consumers
- Demographics of those consumers (age, race/ethnicity, disability status, etc.)
- Amount of debt "settled" and amount of money paid to creditor (assuming this will not be the same thing)
- Number of internal consumer complaints (with information about nature of complaint, resolution, etc.)
- Number and percentage of those who sign up who complete the program
- Average and median amount saved per account and per person.

<u>PACE Program Administrators</u>

- List of agents/contractors working with the Program Administrator, including list of employees of each agent/contractor
- Number of new contracts entered into, including homeowner demographics (age, race/ethnicity, disability status, etc.)
- Number of existing contracts, including homeowner demographics (age, race/ethnicity, disability status, etc.)
- Number of internal consumer complaints (with information about nature of complaint, resolution, etc.)

<u>Student Loan Servicers</u>

- Number of accounts being serviced
- Number of loans in default
- Demographics of those being serviced and those in default

III. (4.) *Complaint Handling*:
The DFPI's System for Handling Complaints Should Be Upgraded to Reflect the Department's Enhanced Focus on Serving Consumers.

The Department requested comments about how to amend the DFPI's complaint system to best comply with Financial Code § 90008. The request was broken up into five subparts, each of which is separately addressed below.

A. The Department Should Include Automated Follow Up Prompts, Publicize Businesses' Delinquency Rates, and Investigate Businesses Which Regularly Fail to Timely Respond.

As part of the direct services they provide, CLICC members routinely help our clients file complaints with various agencies and regulatory bodies, and have directed thousands of additional people how to do the same. CLICC's members have thus amassed a good deal of observational data about what approaches appear to prompt a response from the business, what prompts a timely response from the business, and what agency behaviors discourage consumers from either informing the agency that the response was unsatisfactory or from filing complaints in the future.

The greatest deterrent to consumer participation in ensuring that a business complies with its obligations is the lack of any follow up or request for feedback from the agency. From the consumer's perspective, nearly every complaint that is filed with the Department (or most other agencies, but not the CFPB) simply vanishes into the void, leaving nothing behind but an instant automated message on the client's screen stating that the complaint has been filed. On occasion, an investigator will reach out to the consumer for more information, but that is largely the exception rather than the rule. Even agencies that do routinely reach out to consumers do so on a schedule that is not shared with the consumer, meaning that a person who files a complaint has no idea what comes next, what to expect from the process, or when to anticipate additional outreach. This has not only caused frustration from our clients, it has also repeatedly meant that clients are no longer trustful or communicative if and when the agency does eventually reach out for more information or detail, since further engagement feels like a waste of time and energy. The agency thus loses its most valuable means of ensuring that businesses remain responsive to complaints, while simultaneously decreasing the odds that consumers will file any complaints in the future.

One recent example of this negative feedback loop from the East Bay Community Law Center, a CLICC member, involves an elderly African-American homeowner who was victimized by the PACE program. She filed a complaint with the Department of Business Oversight in November 2020, but to date she has not received any update, outreach, or information from the Department, which has demoralized her. EBCLC assisted another client in filing a complaint with the DFPI just two weeks ago, since the client was unable to navigate the system on his own. Aside from the confirmation message, the client has not received any follow up, and is uncertain what, if anything, will come of it. EBCLC has spoken with dozens of other clients who have had similar experiences with the Department and other agencies, or who never received any callback or other form of contact, and who are reluctant to "waste time" filing additional complaints as a result.

To remedy this situation, we propose that the DFPI institute an automated system which will immediately inform the consumer about the business's deadline to respond, and a notice that the DFPI's system will reach out on a certain date or dates. It has been our experience that clients benefit tremendously from reminder calls before appointments; when we fail to make those reminder calls, appearance rates drop by double digits. In addition, partner organizations that utilize automated text and phone call reminders report that clients are less likely to miss appointments and generally more responsive. We believe that affirmatively reaching out to the consumer halfway through the business's period to respond, and again when the deadline to respond has passed (if the business has not responded at the time of that first check-in), will similarly improve consumer involvement, which in turn will improve businesses' timely and compliant responses. The follow-up would involve some simple yes/no questions, beginning with asking if the consumer has received a response from the business yet. If the business has responded, the system could follow up by asking if the response was satisfactory. If it was not, the system could prompt the consumer to submit an explanation for why the response was insufficient.

With the consumer's consent, all of this information could then be entered into a publicly available database. Making the database accessible to the public would serve several important functions, including encouraging the business to provide timely responses to complaints. The Consumer Financial Protection Bureau publishes most of its complaints online, which appears to have driven compliance. Marking businesses' compliance rate on the database – both in terms of timeliness of the response and the rate of consumer satisfaction with that response – in an easy-to-read manner will further incentivize businesses to comply. Many consumers already conduct some research into businesses before patronizing them. It is common for businesses to devote resources to responding to Yelp reviews, and even to boast about BBB ratings. A public database that allows consumers to research a business's dispute resolution history provides businesses with a powerful "carrot" to maintain good customer service and comply with the Department's complaint-response standards.

The DFPI should, conversely, wield a "stick" to use against businesses with a low response rate. The CFPB reports that 97% of the complaints submitted to the Bureau receive a timely response; it is reasonable for the DFPI to use that response rate as its goal; the Department can put any business that dips significantly below that rate – say, below 90% – into a probationary period during which the business will be given an opportunity to troubleshoot any problem that is interfering with its response rate (including but not limited to a complaint escalation process, similar to what mortgage servicers are required to provide), and then have DFPI staff scrutinize that business if it fails to make progress.

Finally, and related to earlier points about the importance of both the complainants' confidence in the complaint system as well as the value of consumers knowing they can use the database to research a business's behavior before patronizing that business, we believe it is important that the DFPI publicize any actions it takes as the result of complaints being filed. This could include directly notifying any consumer who filed a complaint, as well as informing the public at large about what the DFPI did to enforce the law, with a particular nod to the role played by its complaint system. We recognize that the notification process would need to account for the confidentiality of investigations, but as the Department showed in publicizing its subpoenas to debt collectors and MOUs with earned wage access providers earlier this year, no law prevents making the fact of an investigation public and there is much to be gained from the practice by way of public trust. Transparency, to the extent consistent with the investigative process, not only creates a positive feedback loop where more consumers use the complaint system, reactively and proactively, but it also puts businesses at large on notice that seriously responding to complaints is a necessity instead of an option.

We recognize that this procedure may constitute a change in current practice. But we urge the Department to consider the enormous benefit that might be conferred by a government agency committed to the principle of providing as much information and transparency about its efforts as it can. If the DFPI can develop and implement robust and uniform policies for handling complaints, the increase in public trust and support for the Department's work could be very significant.

This is not a hypothetical: we have repeatedly and directly observed that clients who file a complaint with an agency are much more likely to file additional complaints in the future if they see a response to their complaint. For example, one client had to be coaxed into filing a complaint with the Bureau of Automotive Repair. The BAR called the client, made it clear that it had actually investigated the matter, and consequently convinced the mechanic to offer the client a good settlement. As a result, when the client later encountered a different problem with another mechanic, she independently filed a new BAR complaint without the clinic's involvement. In addition, we have repeatedly observed companies that were obstinately refusing to make our clients whole become instantly more interested in resolving disputes after the client filed a complaint with the District Attorney's office. Experience has confirmed what common sense tells us: people are more likely to file complaints when they see an effect, and businesses are more likely to take complaints seriously when failure to do so invites regulatory attention.

Regarding whether the DFPI should institute different procedures based on whether the consumer submits a complaint directly to the business as opposed to the DFPI itself, we see no reason why written disputes directly to a business should be treated any differently than those submitted to the DFPI, save for two exceptions.

First, to the extent it lies within the DFPI's regulatory power, the DFPI should require businesses under its purview to forward any written complaint to the DFPI within ten days, and require those businesses to follow the same rules and procedures for resolving those disputes as it does for complaints that are filed directly with the DFPI.

Not only does this treat consumers' complaints as uniformly as possible, but it is also the most effective way to make sure that the DFPI is getting as complete a picture as possible of the industries it regulates. The vast majority of consumers are unfortunately unaware of how to file complaints with regulatory agencies, and often even of the existence of those regulatory agencies. CLICC's members have found that significantly less than one in twenty clients who had the right to file a complaint with a regulatory agency – such as the Bureau of Automotive Repair, the Contractors State License Board, or the Department – knew about this right when their intake began. Consumer ignorance of the complaint process was almost as common for more widely known law enforcement agencies: few of our clients know that the district attorney or attorney general's offices have a mechanism for receiving complaints. If the Department's complaint process is to achieve its intended purpose, it cannot wait for consumers to discover it, and to file their complaints directly with the DFPI. Consumers do often know to dispute issues directly with the business, and it is both just and logical not to penalize consumers for their ignorance of the DFPI's process by maintaining a two-track, inherently uneven system.

Second, if the DFPI does require businesses to automatically forward any relevant written complaint to the Department, it should also require the business to provide immediate written notice to the consumer, along with a notice for the consumer to opt out of this forwarding if desired, or to request that the DFPI not publish information about the complaint in its public database. There remain large populations who are leery of any official attention, or who desire privacy regardless of an agency's mission and discretion; allowing the consumer the right to opt out balances the Department's and general public's need to be as inclusive as possible with the individual's right to decide how public to make a dispute.

B. Businesses Should Generally Have Ten Days to Provide an Initial Response, and Thirty Days to Resolve Complaints. That Timeline Should Be Shorter For Time-Critical Issues Such as Wrongful Wage Garnishments or Bank Levies.

CLICC members have decades of experience assisting consumers with their legal issues. We cannot overstress the importance of swift resolutions. Most of our clients live paycheck to paycheck; those who come to us because of predatory lending problems earn even less. This is unsurprising, since up to half of all Americans would struggle to pay an unexpected $400 bill, according to the Federal Reserve.[3] For that reason, we propose that the DFPI provide businesses with ten days to respond to a consumer's complaint, and thirty days to resolve the issues raised.

[3] Board of Governors of the Federal Reserve System, *Report on the Economic Well-Being of U.S. Households in 2018* (May 2019), https://www.federalreserve.gov/publications/2019-economic-well-being-of-us-households-in-2018-dealing-with-unexpected-expenses.htm

This schedule represents a fair balance between the consumer's needs and the business's capacity. For our clients, thirty-day turnarounds might actually provide them with the refund or other relief that they need to pay next month's rent, utility bill, or car payment. Many of our clients, predominantly immigrants with families, already have living expenses that exceed their monthly income. Others have had housing, employment, or banking opportunities that have been threatened or even lost because an abusive business dragged its feet before correcting the consumer's credit report, providing the consumer with documents the consumer was entitled to, or otherwise correcting its unlawful behavior.

For the business, thirty days is a reasonable period in which to investigate, respond to, and resolve a complaint.[4] In most cases, thirty days is already the statutory period to investigate and correct any legal violation. A violation of the Consumer Legal Remedies Act (Civil Code § 1750), for example, must be remedied within thirty days of a business's receiving notice. Similarly, businesses are provided thirty days to investigate and update consumers under the Fair Debt Collection Practices Act (15 U.S.C. § 1692), the Fair Credit Reporting Act (15 U.S.C. § 1681), identity theft statutes, and the Song-Beverly Consumer Warranty Act (Civil Code § 1790), among others. Most litigation deadlines, too, require a thorough investigation and response within thirty days. (*See, e.g.,* Code Civ. Proc. § 2024.020.) It is reasonable to expect that a business can and should be able to resolve consumer complaints within thirty days; as noted, many businesses are already legally required to handle disputes within that timeframe to avoid litigation or preserve their options.

Conversely, there are a handful of situations where a shorter amount of time should be required. Any time the situation is time-critical for the consumer, such as when the business has unlawfully taken property from the consumer that the consumer needs for support, the business should have to resolve the complaint more quickly than the thirty-day default period. The clearest examples of this are wage garnishments and bank levies that have taken money from the wrong person. CLICC members have unfortunately had to assist many clients over the years who were wrongly having money taken from their wages, or who had their bank account emptied by a bank or debt collector who was attempting to collect from the wrong person. We have also observed from multiple clients' paperwork situations in which the judgment creditor had previously levied money from another person's account, even though the judgment was against our client.

These clients need their money returned immediately. Several of our clients have had to miss a rent payment, had no money to buy diapers for their child, or entered into a debt spiral because of a bank levy which rightfully had nothing to do with the client. In fact, the need for immediate relief in these situations was so great that our Coalition spent three years working to change the relevant law to ensure that consumers both get to keep at least some of their money regardless of the judgment, and also to have an expedited means of challenging the levy itself. (*See* Senate Bill 616 (2019).)

The law for years provided these clients with only ten days to investigate the matter and put together enough information to file a claim of exemption, with the judgment debtor having an equal period of time to investigate the consumer's position and decide whether or not to contest the claim. It is therefore both reasonable and consistent for the DFPI to provide businesses with ten days to resolve issues where the complainant is informing the business that it has taken money from the wrong person.

In addition, if the consumer's complaint indicates that a housing or employment opportunity will be lost without prompt resolution, the DFPI should impose a shorter deadline on the business to respond and

[4] By comparison, see https://www.consumerfinance.gov/complaint/process/

resolve the issue. This can be done in various ways, including having a checkbox on the complaint which a consumer can mark to identify that there is a housing or employment opportunity at risk. We have repeatedly seen clients –many of whom were seniors, disabled, and/or unhoused – lose out on housing or jobs because of incorrect information on their credit report. Some of these clients had been waiting for months and even years for their turn on a housing wait list. These lost opportunities do not generally come around again, and it is important that the DFPI do what it can to help consumers resolve these issues before they lose a unique, life-altering opportunity.

C. The DFPI Can Encourage Businesses to Investigate and Correct Errors by Giving the Consumer the Power to Determine Whether the Business's Response Was Satisfactory, With the DFPI Scrutinizing Any Business That Is Consistently Ranked Poorly for Compliance.

The DFPI already has evidence available from the most knowledgeable and motivated person available when it comes to determining whether a business undertook a reasonable investigation into the complaint: the consumer herself. Regardless of what other requirements the DFPI establishes to ensure honest and rigorous compliance with the statute, the Department will never have the resources required to follow up on and ensure that all of the entities under its jurisdiction are complying with the letter and spirit of the rules. The consumer, however, is intimately familiar with the details of the case, and is highly motivated to hold the business to the standard required by Financial Code § 90008. For that reason, we propose that complainants be given the initial power to determine whether or not the business complied with its obligations.

This can be done in a number of ways, but perhaps one of the simplest would be a tweak to the CFPB's complaint model. Under the CFPB's complaint rules, the business responds to the consumer, and then selects one of a few categories from a drop-down menu to inform the public and the CFPB what resulted from the complaint. For example, the business chooses whether to categorize their response with the "closed with explanation" option or with the "closed with monetary relief" option. We believe the DFPI can do things better than the CFPB by putting that choice in the hands of the consumer. The consumer is in the best position to decide whether the complaint has actually been addressed, and whether the business's response is sufficient. The business can post its narrative and response to the database when it believes it has reached a resolution, at which point the consumer can be given a period of time to review the business' response, decide whether to make that response public, and/or to select from such potentially applicable codes as "Resolved to consumer's satisfaction (monetary relief)" and "Unsatisfactory response." The business can dispute any response with the DFPI, which may choose to review the posted evidence and amend the response at its discretion. If the consumer does not select any option within the relevant timeframe, the business may choose an option instead, with confirmation by the DFPI.

Following this process will ensure the maximum possible accuracy. Businesses will know that the consumer will be at least the initial judge of whether the investigation and redress were adequate, thus incentivizing thoroughness and clarity of response. Businesses will also know that, if they choose to dispute the consumer's characterization of the matter, they will have to "show their work" to a neutral DFPI employee, which also encourages the business to be thorough in its investigation and explanation. In short, businesses will always be aware that their response will be reviewed first by a party that has first-hand knowledge of the facts, and then possibly by a state officer; at no point does the business get to be its own judge/jury, thereby discouraging inadequate responses.

In the event that a business receives too many negative resolution markers – more than 25% would seem cause for legitimate concern – it should be closely scrutinized by the DFPI, much like businesses that fail to respond to complaints. Any resulting enforcement actions should also be widely publicized, and any consumer who complained about the relevant business behavior should receive a notice from the DFPI of the enforcement, for the same reason that the DFPI should publicize enforcement actions against any business that consistently failed to file timely responses.

D. If the Department Mandates That Businesses Designate Specific Contact Points For Consumers to Send Complaints That Will Be Forwarded to the DFPI, It Should Still Require the Business to Forward All Other Complaints to the Department as Well.

We have repeatedly seen through our direct services that consumers are not generally aware of different internal business departments, nor are they often skilled at deciphering which unit or units they should contact. Clients instead are aware of whichever salesperson, agent, or other employee they spoke with when they purchased the good or service, and they are sometimes aware that many businesses have a separate Customer Service department which can also be contacted with complaints. It is rare for the consumer to know much more than this, nor should it realistically be required that a consumer navigate a business's byzantine internal structure to find the best person with whom to file their complaint. Many larger businesses are especially difficult in this respect; we have observed the same business to have a sales department, a customer service department, a dispute department, and a legal department, leaving outsiders at the mercy of the last person at the company with whom the consumer spoke. Clients in collections are often automatically routed to the collections department, which routinely make it incredibly difficult to speak to any other department in the company once someone is directed there.

We have observed clients having problems finding relevant contact information even when they know whom they are trying to contact, and we have experienced that frustration ourselves. We have even personally had arbitration cases where delays occurred because the arbitration clause mandated notice to an entirely separate department from the ones that we and the consumer had been speaking to throughout the dispute. And we are aware of problems that consumers and even experienced attorneys have encountered when trying to serve subpoenas on banks that have opted to designate a single agent for service of process, since that information is not widely shared by businesses.

It is instead much fairer and more logical to require that the business train its customer-facing employees to forward all relevant complaints to the DFPI. This ensures the DFPI gets the best possible perspective on what is happening in California, as well as that consumers and businesses enjoy the dispute resolution advantages of the DFPI's new complaint system. Nor would this be onerous for the business. Consumers never contact internal-facing employees such as accountants or logistics workers; rather, they contact employees who already receive training in how to interact with consumers. Such employees are already trained on how to escalate and transfer disputes with consumers, so compliance with this rule should not present a significant burden to the company. Compliance may also encourage covered entities to streamline their complaint processes, offering online complaint options or other tools to make it easier for a complaint to be taken and forwarded, which would be better for all involved.

E. Additional Rulemaking Will Likely Be Necessary to Define "Nonpublic or Confidential Information."

It has been our unfortunate but common experience that creative minds find creative definitions for information that they do not wish to share, even when they are compelled to by law. For example, CLICC's members have countless examples of debt collectors and especially debt buyers who refuse to produce assignment documents during litigation under the guise of attorney-client privilege, trade secrets, and other facially-inapplicable excuses. While that obstructionism is almost always overcome when brought before a judge, it does illustrate how not all of the businesses now under the DFPI's jurisdiction are naturally inclined to play by the rules as they are written. We confidently, if unfortunately, assert that the DFPI's mission will be hampered if it allows businesses to define what does and does not fall under any non-disclosure rules. In brief, the DFPI will need to carefully craft narrow definitions for any exception to the requirements of Financial Code § 90008, or it will swiftly find that the exceptions swallow the rule.

IV. (5.) *Unlawful, Unfair, Deceptive and Abusive Acts and Practices (Consumer):* The Department Should Ensure That Its Enforcement Tools Remain as Broad and Varied as the Acts and Practices That They Must Address.

The Department should maintain flexible enforcement tools. It should resist calls to define by rule terms that set the guardrails of the CCFPL. The prohibition on "unlawful, unfair, deceptive, or abusive act[s] or practice[s]" (Fin. Code 90005) echoes the state's Unfair Competition Law (Bus. & Prof. Code § 17200), which for almost a century has served the people of California as a broad and flexible statute able to adapt to new products and new practices. Just as the terms describing prohibited practices under the UCL have never been further defined by rule, so the Department should be vigilant in protecting the versatility and adaptability of the tools it has been provided.

Case law has of course developed the boundaries and core meaning of the operative terms, so businesses are already well aware of the general meaning of "unlawful,"[5] "deceptive," and "unfair." "Abusive" is a newer term but is explicitly defined in the federal Dodd-Frank Act and, identically, in Section 1788.101 of the Civil Code as part of the Student Borrower Bill of Rights.[6] In other words, there is no particular ambiguity about the terms; there is, instead, flexibility in their implementation.

That flexibility is necessary. As the California Supreme Court observed half a century ago with respect to the UCL, "the section was intentionally framed in its broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable new schemes which the fertility of man's invention would contrive."[7] The Court added that "given the creative nature of the scheming mind, the Legislature evidently concluded that a less inclusive standard would not be adequate."[8]

The Supreme Court's recognition of the importance of maintaining flexible and inclusive terms in an enforcement statute extends back to the 19th century: "No fixed rules can be established upon which to deal with fraud, for, were courts of equity to once declare rules prescribing the limitations of their power in dealing with it, the jurisdiction would be perpetually cramped and eluded by new schemes which the fertility of man's invention would contrive."[9] And it has continued through the century since: "[I]t would be impossible to draft in advance detailed plans and specifications of all acts and conduct to be prohibited since unfair or fraudulent business practices may run the gamut of human ingenuity and chicanery."[10]

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[5] Section 90003 prohibits covered persons from engaging in "unlawful" as well as "unfair," "deceptive" or "abusive" acts. Prohibiting conduct by a covered person invokes the Department's inherent authority to punish those violations.

[6] Available at https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=CIV&division=3.&title=1.6C.10.&part=4.&chapter=1.&article=

[7] *Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 112.

[8] *Id.*

[9] *American Philatelic Soc. v. Claibourne* (1935) 3 Cal.2d 689, 698, quoting *Weinstock, Lubin & Co. v. Marks* (1895) 109 Cal. 529, 539.

[10] *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163 181.

The California Attorney General's Office would almost certainly concur.[11]

The flexibility that the legislature has provided in the UCL and the CFPL mirrors that provided by Congress in the Dodd-Frank Act. Although the CFPB was created in immediate response to the mortgage crisis of 2007-08, Congress knew that "creating an agency that only had the authority to address the problems of the past, such as mortgages, would be too short sighted. Experience has shown that consumer protections must adapt to new practices and new industries."[12]

In other words, the Department should vigilantly maintain the flexibility and breadth of the authority that it has been granted.

None of this precludes the Department, of course, from specifying that for its own enforcement purposes a certain practice will be considered unfair (or unlawful or deceptive or abusive). The key is to maintain flexibility in the words themselves.

Maintaining flexibility of definition will permit the Department to meet the Legislature's charge to "ensur[e] that DFPI can hold any financial service providers accountable for treating a California consumer unfairly, deceptively, or abusively."[13] That can only happen if the Department is as nimble, creative and flexible as the businesses it regulates.

V. (6.) *Unlawful, Unfair, Deceptive and Abusive Acts and Practices (Commercial):* The Department Should Prioritize Rulemaking to Protect Small Businesses That Are No More Sophisticated Than Individual Consumers.

Although the vast majority of our work is with low-income *consumers*, some CLICC members do operate small business clinics that provide legal services to low-income business owners.

We suggest, as an overarching principle, that unsophisticated business owners facing sophisticated business lenders are in largely the same position as unsophisticated consumers. Except that the problem can be even worse because there is almost no regulatory apparatus protecting small businesses from abusive practices like those in the "merchant cash advance" industry. The Department should treat the rulemaking pursuant to SB 1235 as a downpayment on further rulemaking under AB 1864 to scope the range of and need for regulation of the small business lending space.

VI. *Economic Impact*: Use a Broad Definition of "Benefit" When Weighing Costs and Benefits.

The economic impact of the Department's rules on businesses can of course play a role in determining how extensive the DFPI's routine document or information production demands should be. But the "benefit" side of the equation must be addressed with a broad and creative – rather than reductionist – view of who may benefit from a rule and how they might benefit. That is the overarching principle for

[11] *See, e.g.,* Brief of the Attorney General as Amicus Curiae, *Yabsley v. Cingular Wireless* (2008) No. B198827, 2008 WL 5545089 ("For decades, courts have recognized that unfair business practices may run the gamut of human ingenuity and chicanery and have construed section 17200 accordingly").
[12] S. Rep. No. 111-176, at 11 (2010) (report of U.S. Senate Housing, Banking, and Urban Affairs Committee).
[13] Assembly Floor Analysis of Assembly Bill 1864 (Aug. 25, 2020), *available at* https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200AB1864

the DFPI to set forth from the outset. See, for example, the broad definition promulgated by the Department of Finance in 2011.[14]

VII. *Transparency*: The DFPI Should Exercise Its New Authority in a Way That Maximizes Transparency and Builds Public Trust.

As a final overarching principle, we urge the Department to maintain transparency in its operations to the maximum extent possible. Agencies are often disproportionately influenced by the industries they regulate – not out of ideology or corruption, but simply because that is who they hear from on a daily basis. One way to make sure that the influence of industry and consumer advocates is more balanced is to call attention to the imbalance. Just surfacing the issue and making people conscious of the patterns they have fallen into can be valuable. Another way to effect balance is to consciously reach out to consumer advocates any time that there is a project on which industry has weighed in.

As a general principle: the Department should not make rulings on ambiguous issues or take action based on industry's opinion on a subject without also soliciting the opinion of and consulting consumer advocates – or vice-versa. It is not appropriate to make private rulings at industry's behest, or to determine even informal policy questions asked by industry without consulting the consumer advocacy community as well. In the interest of trust and transparency, the Department should make public the existence and (to the extent possible) the text of any letters it sends in response to industry inquiries. If the Department makes rulings on particular questions of law – for example, whether a particular product should be considered "credit" – that is a document that should be made fully public to the extent possible. The recent MOUs with earned wage access providers were encouraging, because the Department made them public, but also discouraging – because they were entered into without any input from consumers or consumer advocates. The Department will be establishing practices in the coming months that will guide it for years if not decades. Among the critical features of all of those practices should be balance and transparency.

Conclusion

We thank the Department for the opportunity to share our preliminary thoughts, and look forward to continuing the conversation as the rulemaking proceedings get formally under way.

To reiterate the overarching principles that we believe should guide the DFPI's rulemaking and other activities from this point forward:

- A covered entity's activity, rather than its status, should determine whether it comes within the Department's ambit.
- The scope of the Department's authority is broad. Any exceptions to that authority should be interpreted narrowly.
- The Department should make use of the authority it derives from all sources, not just the CFPL, in its rulemaking as well as other enforcement, supervision, market monitoring, and other activities.
- Newly covered entities, and entities already subject to the DFPI's authority, should be treated with equivalence wherever possible.

[14] *See* https://pifc.org/wp-content/uploads/2020/08/Notice-6-28-2013Final.pdf

- As far as possible and appropriate, unsophisticated business owners facing sophisticated business lenders should be treated largely the same way as unsophisticated consumers.
- The "benefit" side of any cost-benefit analysis should be defined broadly, to avoid the blinders (and strictures) that such analysis now places on worthwhile government activity.
    - Transparency, openness and balance should be watchwords in all the Department's actions.

Again, we greatly appreciate the opportunity to comment. Thank you in advance for your work on these critically important topics.

Please do not hesitate to contact us if we can provide further input.

Sincerely,

[redacted]

Ted Mermin
Director
California Low-Income Consumer Coalition
ted.mermin@lowincomerconsumers.org
(510) 393-8254