FINANCIAL HEALTH NETWORK

California Department of Financial Protection and Innovation
300 S. Spring Street, Suite 15513
Los Angeles, CA 90013

Re; PRO 01-21, Invitation for Comments on Proposed Rulemaking Under the California Consumer Financial Protection Law

The Financial Health Network welcomes this opportunity to offer its input on how the Department of Financial Protection and Innovation (DFPI) should exercise its rulemaking authority to implement the California Consumer Financial Protection Law (CCFPL). The Financial Health Network is the leading authority on financial health. We are a trusted resource for business leaders, policymakers, and innovators united in a mission to improve the financial health of their customers, employees, and communities. Through research, advisory services, measurement tools, and opportunities for cross-sector collaboration, we advance awareness, understanding, and proven best practices in support of improved financial health for all.

As the DFPI considers how it might best use its rulemaking authority, we think it is useful to begin by focusing on the specific reasons why the CCFPL was enacted and the DFPI created. The California legislature found that in the absence of an agency like the DFPI, California consumers, and especially those "economically vulnerable consumers," were being subject to abuse.[1] The CCFPL was enacted to put an end to such practices. But beyond that, the legislature was quite clear that the purposes of the CCFPL are "to promote consumer welfare, fair competition, and wealth creation."[2] That defines the north star by which all of the DFPI's actions should be judged.

There are many rules that the DFPI could write to proscribe specific unfair, deceptive, and abusive acts and practices. Undoubtedly, the DFPI will receive a wealth of thoughtful and useful suggestions in that regard. The Financial Health Network submits this comment to urge the DFPI, at this formative stage of its development, to ask how it will know whether it is achieving the purposes for which it was created and to put measurement of consumer outcomes, and the data collection required for robust measurement, at the heart of its agenda.

Importantly, the CCFPI expressly authorizes the DFPI to require any financial service provider within its jurisdiction to file with the department "in the form and within a reasonable period of time as the department may prescribe by rule or order, annual or special reports … as necessary for the department to fulfill its monitoring, assessment, and reporting responsibilities." Section 90009(f)(2). With respect to those required to register with the DFPI, the Department is

[1] CCFPL § 9000(a)(1).
[2] CCFPL § 9000(b).

likewise authorized to "prescribe rules to facilitate oversight … and assessment and detection of risks to consumers." Section 9009(b)(1). The combination of those two provisions give the [3]DFPI ample rulemaking authority to obtain on a regular basis the data needed to measure the extent to which consumers are being harmed and to track progress towards enhancing consumer welfare.

Consumer Welfare Measurement Frameworks

The starting point for such a reporting regime would be to define what is meant by consumer "welfare" or, to use phrases more commonly used in connection with the provision of finance services, "financial health" or "financial well-being." There are a number of well-known and well-respected definitions of these, including one developed by the Consumer Financial Protection Bureau which defines financial well-being as the ability of a consumer to "meet current and ongoing financial obligations," "feel secure in their financial future," and "make choices that allow enjoyment of life."[4] The United Kingdoms' Financial Conduct Authority has added to that definition a fourth element: "the capacity to absorb financial shocks."[5] In our work on financial health, the Financial Health Network uses a simpler formulation, defining financial health as the ability to be financially resilient and to pursue opportunities over time.[6]

In the past few years, a number of tools have been developed to measure financial health as thus defined through responses to survey instruments. In 2015, the CFPB published one such scale[7]. In 2018, following a four-year research program, the Financial Health Network published a separate scale and launched its annual Financial Health Pulse survey, a nationally representative, longitudinal study designed to measure American's financial health.[8] Others have developed their own variants.[9]

More recently, the Commonwealth Bank of Australia, in collaboration with the University of Melbourne's Applied Economic and Social Research Institute, has developed an "observed financial wellbeing scale". This scale uses administrative data from providers of checking and

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4 CFPB, *Financial well-being: The goal of financial education* (2015), https://files.consumerfinance.gov/f/201501_cfpb_report_financial-well-being.pdf

5 Gladstone *et al., Understanding consumer financial wellbeing through banking data,* *https://www.fca.org.uk/publication/occasional-papers/occasional-paper-58.pdf*

6 Financial Health Network, *U.S. Financial Health Pulse 2020 Trends Report,* *https://s3.amazonaws.com/cfsi-innovation-files-2018/wp-content/uploads/2020/10/26135655/2020PulseTrendsReport-Final-1016201.pdf*

7 CFPB, *Measuring Financial Well-Being* (2015), https://files.consumerfinance.gov/f/201512_cfpb_financial-well-being-user-guide-scale.pdf

8 Financial Health Network, *U.S. Financial Health Pulse 2018 Baseline Survey Results,* *https://s3.amazonaws.com/cfsi-innovation-files-2018/wp-content/uploads/2019/05/07151007/FHN-Pulse_Baseline_SurveyResults-web.pdf*

9 *E.g.,* Netemeyer *et al.*, "H*ow am I Doing: Perceived Financial Well-being, Its Potential Antecedents, and Its Relation to Overall Well-Being*," 65 J. Consumer Research 68 (2017), https://s3.amazonaws.com/cfsi-innovation-files-2018/wp-content/uploads/2019/05/07151007/FHN-Pulse_Baseline_SurveyResults-web.pdf

savings accounts to measure financial health.[10] The researchers have demonstrated that the indicators they have identified are well correlated with subjective measures of financial health as determined through a separate, survey-based scale they designed.

Over time, the DFPI may want to develop -- or collaborate with other regulators in developing -- its own tool that it can use, and that the covered persons within its jurisdiction can use, to measure financial health. As Todd Baker and Corey Stone have explained in a recent paper,[11] such a tool could be a game-changer in making financial services regulation a more effective force for driving improvements in financial health or welfare -- the very purpose for which the DFPI was created.

Near Term Recommendations

More immediately, we recommend that the DFPI define a set of what Baker and Stone term "outcomes related to financial health" and, by rule, require covered persons to report on these outcome metrics at periodic intervals. Baker and Stone provide one illustrative example: requiring banks to report how much their customers pay in overdraft fees and the frequency with which they take their accounts negatively. One can easily imagine other equally relevant outcome-based metrics:

- The percentage of applicants for a checking account are declined
- The percentage of checking accounts closed by the bank at the bank's initiative
- By product and credit tier, the frequency with which consumers credit scores increase by more than x points and the frequency with which credit scores decrease by more than x points.
- For any given credit product and given credit tier, the distribution of borrowers by debt to income ratio
- For any given credit product and credit tier, the frequency with which consumers become more than 30 or 60 days delinquent and the frequency with which consumers who are behind on their payments granted forbearance or an accommodation that enables them to avoid default
- For any given credit product and credit tier, the frequency with which consumers roll over a loan or an outstanding balance on a loan into a new loan.
- For any given lender and credit tier, the frequency with which auto loans end in auto repossession and the frequency with which the lender thereafter seeks a deficiency judgment.
- For debt collectors working any given category of debt, the frequency with which the debt collector files a debt collection lawsuit, the frequency with which the collector

[10] Botha *et al., Developing a Short-Form Version of the Commonwealth Bank-Melbourne Institute Reported Financial Wellbeing Scale,* *http://www.suejon.com/__data/assets/pdf_file/0003/3403722/CBA-MI-Technical-Report-No.-5.pdf*
[11] Baker & Stone, *Making Outcomes Matter: An Immodest Proposal for a New consumer Financial Regulatory Paradigm,* 4 Business and Finance Law Review 1 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3607308

obtains a default judgment, and the frequency with which the collector garnishes wages or bank accounts.

The foregoing list is intended as illustrative and is surely not exhaustive. The overarching point is this: by defining outcome metrics that are related to financial health such as those listed above, the DFPI can require covered persons over a certain size threshold to conduct regular measurements and report them to the Department. These can then be used by the DFPI to target its supervisory and enforcement efforts and to identify areas where regulatory interventions may be needed. The DFPI may choose to use these reports on a comparative basis to publicly identify firms producing superior and inferior results. And, over time, the DFPI will be able to track its progress -- and the progress of the industry -- in improving outcomes and thus furthering overall consumer welfare.

It probably would not be feasible initially to adopt outcome metrics across all the product markets that the DFPI regulates or to expect all covered persons to collect and report, and the DFPI to analyze, metrics across all these markets. Thus, the DFPI may want to begin by selecting two or three markets and defining outcome measures to be reported on for those markets, perhaps with either an exemption or delayed effective date for smaller entities. In doing so, however, we recommend that the DFPI articulate its long-term vision for measurement so that stakeholders are on notice of what will be expected over time.

Incorporating Equity Metrics

As important as such a program would be in tracking progress in the aggregate, it would not be sufficient to achieve the DFPI's mission. As noted at the outset, in enacting the CCFPL the legislature was focused on the "financial victimization of economically vulnerable consumers." Tragically, all too often that means victimization of people of color. Consequently, we believe that to realize its full potential, any system of outcome metrics should require reporting disaggregated by race and national origin.

This raises the question of whether covered persons can be required to seek to collect data on the race and ethnicity of their customers in order to provide more meaningful reporting. As to non-credit products, there is no room for doubt as to the DFPI's authority to do so. But with respect to credit products, Regulation B, which implements the Equal Credit Opportunity Act (ECOA), prohibits creditors from inquiring about, e.g., the race or national origin of applicants or customers.[12]

Importantly, that prohibition is not found anywhere within the ECOA itself and thus it is unclear whether it is entitled to preemptive force. The ECOA authorizes the Consumer Financial Protection Bureau (CFPB) to make such preemption determinations and provides that "the Bureau may not determine that any State law is inconsistent with any provision of [the ECOA] if the Bureau determines that such law gives greater protection to the applicant."[13] Accordingly,

[12] 12 C.F.R. § 1002.5(b).
[13] 15 U.S.C. § 1691e(f).

we urge the DFPI to seek a determination from the CFPB that would allow the DFPI to require covered persons to ask consumers for information on their race, national origin, sex, age, and sexual orientation in connection with credit transactions (with the understanding, of course, that any individual consumer may elect not to provide the information requested). Absent such a determination, the DFPI should require covered persons to use a recognized proxy methodology to submit reports disaggregated by race, national origin, and sex.

In sum, we believe that the DFPI has the authority to approach its work with a focus on consumer outcomes and that doing so will best enable the DFPI to achieve its mission over time. A rulemaking to define an initial set of outcome metrics and reporting requirements would be an important step in that direction.

Respectfully submitted,

[redacted]

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