

EILEEN NEWHALL CONSULTING LLC

5720 River Oak Way, Carmichael, CA 95608
enewhall@newhallconsulting.com, (916) 666-0314

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Department of Financial Protection and Innovation
Attn: Sandra Sandoval, Legal Division
300 South Spring Street, Suite 15513
Los Angeles, CA 90013

Subject: Comments on PRO 03-21

To Whom It May Concern:

Thank you for the opportunity to comment on the proposed addition of Rules 90008.1 through 90008.6 to Title 10 of the California Code of Regulations. My comments and suggestions are provided in chronological order and are intended to be constructive in nature.

Draft Rule 90008.3: Complaint Processes and Procedures

- 1) First sentence: Paragraph (2) of subdivision (a) of Draft Rule 90008.3 speaks to the submission of both written and oral complaints, but the introductory language of Draft Rule 90008.3 does not clarify which types of complaints the section addresses. I suggest you clarify that you are referring to both written and oral complaints by making the following change to the first sentence of Draft Rule 90008.3: "A covered person shall respond to consumer complaints and shall develop and implement written policies and procedures for responding to complaints, including a process through which a complainant may submit a written or oral complaint to the covered person and receive a final decision."
- 2) Second sentence: Again for clarity and to ensure that the introductory paragraph is consistent with the language of the remainder of the draft rule, I suggest make the following change: "The Department may review the complaint process, including records of each complaint received, to assess the effectiveness of the policies and procedures established to respond ~~actions taken in responding~~ to complaints."
- 3) Paragraph (5) of subdivision (a) includes the phrase "and, if supported by the covered person, the complainant's preferred language" when describing the circumstances under which a covered person must make the complaint process available to a complainant in the complainant's preferred language. I suggest deleting the language quoted above for three reasons: first, it has the potential to lead to disagreements between the Department

and covered persons about whether and under what circumstances a particular covered person *should* support complaints in languages other than those in which the consumer's contract is written (a topic on which the draft regulations are silent and thus on which the Department is failing to provide covered persons necessary guidance); second, the language, while well-intentioned, is likely to actively discourage covered persons from offering alternative language support beyond the language of the contract, because doing so will place them in the Department's regulatory crosshairs; and third, the language does not represent an actual requirement – it is aspirational only.

- 4) Subdivision (b) requires a covered person to provide each complainant with the name, telephone number, and email address of a representative of the covered person who may be contacted regarding the complaint. This language implies the existence of a single point of contact (SPOC) requirement, despite the fact that the statute lacks a SPOC requirement. Because the language of the draft regulation goes beyond existing statute as currently drafted, I suggest that you revise the language as follows to better align the regulation and the law: "...including the date of receipt, a unique tracking number to identify the complaint in subsequent communications, and the telephone number and email address the complainant may use to contact the covered person regarding their complaint". ~~name, telephone number, and email address of the covered person's representative who may be contacted regarding the complaint.~~
- 5) Subparagraph (A) of paragraph (1) of subdivision (c) requires a covered person to document the name of the individual who decided not to investigate complaints deemed to require no further investigation and the reason an investigation was not needed. It is unclear, as drafted, if the Department is seeking the name of the (likely junior) employee who participates in the initial consumer intake, that individual's supervisor, or someone even more senior. It is also unclear, as drafted, whether an acceptable reason for failing to investigate further can be as simple as "policies and procedures did not require further investigation" or whether the Department is seeking which precise provision in the covered person's policies and procedures supported the decision not to investigate. Failure to clarify these points has the potential to lead to confusion among covered persons and to frustration on the part of the Department, when it finds different covered persons interpreting this requirement differently.
- 6) Paragraph (1) of subdivision (d) requires a covered person to provide a consumer with "all target dates for further actions" by that covered person related to the consumer's complaint. It would be far less burdensome on covered persons and equally as helpful for consumers if covered persons were required to provide the time period within which the covered person is required to issue the consumer an initial response and any subsequent responses, rather than the specific date(s) by which the responses are required. I suggest revising the language, as follows: "The procedure must include a process for recording the status of a complaint and the time period within which the covered person is required

to issue the consumer an initial response and any subsequent responses” **all target dates for further actions, including the issuance of a final decision.**

- 7) Paragraph (2) of subdivision (d) requires the tracking to be in a format accessible to the Department upon request. This paragraph raises three issues. First, it is unclear, as drafted, what constitutes a format accessible to the Department. Second, it is unclear, as drafted, what safeguards the Department intends to utilize and what safeguards the Department expects covered persons to utilize to protect consumer's non-public personal information, if the Department requests that covered persons submit their complaint data to the Department. Third, this paragraph would be clearer if it were more grammatically correct (e.g., "The tracking shall be in a format accessible to the Department and shall be provided to the Department upon request.")
- 8) Paragraph (3) of subdivision (d) requires a covered person to provide a response within three calendar days to complainants who contact the covered person for a status update. Like the paragraph immediately above, this paragraph raises three issues. First, a three-calendar day requirement may be impossible during holiday periods or weekends; if the Department wishes to require a quick response, it should require a response within three *business* days. Second, as the language is drafted, it is unclear what type of response a covered person is required to provide (i.e., if a consumer contacts the covered person by phone, may the status update be provided by phone, and if a consumer contacts the covered person by email, may the status update be provided by email?). Finally, I suggest that the Department clarify that, for the three-day requirement to be triggered by receipt of a consumer's email, the consumer's email must be sent to the email address previously provided by that covered person to that consumer for contacting the covered person about their complaint. If a consumer uses a different email address to contact the covered person, it may take some time for that consumer's email to be routed to the correct person or division within the covered person's company. It is unfair to impose a three-day response requirement on a covered person to respond to an email that is sent to the wrong location within that company.
- 9) The time periods provided in paragraph (1) of subdivision (e) are likely far too short to allow a covered person to conduct a complete review of a complex issue and reach a final decision about that issue. At a minimum, I recommend substituting a business day requirement in lieu of the calendar day requirement in all three places where you cite requirements. However, I strongly suspect that requiring a final decision within fifteen days (thirty days if more information is required from a third party) is simply infeasible and is likely to impose a significant compliance burden on all covered persons, especially smaller-sized covered persons. I encourage the Department to consider the input it receives from covered persons regarding operational realities and compliance costs of its proposed requirements and to modify required response times accordingly.

- 10) The language of subparagraph (B) of paragraph (1) of subdivision (e) creates a loophole likely to be exploited to the detriment of covered persons. As drafted, it speeds up the likely unrealistic timeframes required earlier in subdivision (e) when a complainant claims financial hardship. Not only does your draft language fail to require any documentation on the part of a consumer claiming such hardship, but it also fails to define what the Department considers a qualifying financial hardship. It also takes a time period for response that is likely unrealistic as drafted and shortens it considerably, imposing a time burden likely to be impossible for covered persons to meet. I suggest deleting this subparagraph entirely.
- 11) Paragraph (3) of subdivision (e) requires a covered person to ensure that there is no adverse action taken against a complainant due to the filing of a complaint. This requirement would benefit from several clarifications. First, the Department should clarify that it does not consider a covered person's failure to satisfy the demands of a consumer who submits a complaint as an adverse action. Covered persons should be free to act on complaints as they see fit, after investigating those complaints. Second, I believe it is critical to clarify that the prohibition against adverse action refers to adverse action *by the covered person*. Failure to make this clarification will make the covered person liable for the acts of others outside its control. The following changes would implement the suggestions above: "A covered person shall not take adverse action against a complainant in retaliation for the filing of a complaint, provided, however, that failure of a covered person to resolve a complaint to the complainant's full satisfaction shall not represent an adverse action for purposes of this paragraph." **~~The covered person shall ensure that there is no adverse action taken against a complainant, including cancellation of the contract, due to the filing of a complaint.~~**
- 12) The time periods cited in subdivision (f) will require modification to refer to business days, if you make the changes suggested above.
- 13) Subdivision (h) requires all covered persons to submit a quarterly complaint report to the Department. Not only is a quarterly reporting requirement likely to be burdensome on covered persons, but it is also likely to result in significant costs for the Department to review what are likely to be tens of thousands of submissions every three months. In lieu of a quarterly reporting requirement, I suggest that the Department start with an annual reporting requirement, with the understanding that it may ask specific covered persons to submit complaint data more frequently (either semi-annually or quarterly), once it has had an opportunity to review the initial submissions. The submission of quarterly complaint data should be reserved only for those covered persons about which the Department has specific concerns related to complaints.
- 14) Paragraph (12) of subdivision (h) includes thirteen types of complaints. Several of the categories of complaints appear duplicative, and others are simply unclear. For example,

how does dissatisfaction with a [presumably third-party] service provider differ from dissatisfaction with a third party to whom the covered person referred the consumer or from dissatisfaction with a third party who brought the consumer to the covered person through lead generation? How does dissatisfaction with a covered person differ from more specific concerns about the actions of the covered person? Furthermore, what does it mean to have trouble during the payment process? Does that mean that a consumer is unable to pay the covered person or that a consumer's payment is not recorded by a covered person in a timely manner?

At a minimum, I recommend that you group the types of complaints into two categories: 1) complaints about the covered person and 2) complaints about a third party other than the covered person. Within each of these categories, I suggest you offer a relatively small number of sub-categories: false or misleading statements or representations, including disclosures; imposition of inaccurate or improper fees or interest; failure to promptly credit consumer payments; attempts to collect debt not owed; dissatisfaction with customer service personnel or response times; and "other (please specify)." The descriptive categories should capture all or most of the most common types of complaints without resulting in confusion or double-counting, and the more generic "other" category will still allow consumers to describe and covered persons to document other types of complaints.

- 15) Finally, your draft Section 90008.3 excludes three important categories of potential complaints: 1) repeat, identical or nearly identical complaints from the same consumer about the same issue; 2) unique complaints sent by a third party on behalf of a consumer; and 3) multiple identical or nearly identical complaints sent by a third party on behalf of multiple consumers. With respect to the first category, I suggest the addition of language clarifying that, once a covered person has responded to an initial complaint from a consumer, it shall not be required to respond to subsequent, identical or nearly identical complaints from the same consumer about the same issue.

The second and third issues will require additional clarification. First, I suggest that the Department provide a way for third parties to submit complaints on a consumer's behalf, *subject to written approval from a consumer*, with guidance regarding whether the covered person's response should be sent to the third party, the consumer, or both. Second, I suggest you add language clarifying that, once a covered person has responded to an initial complaint from a third party on behalf of a consumer, it shall not be required to respond to subsequent, identical or nearly identical complaints from that third party regarding that same issue and that same consumer.

Draft Rule 90008.4: Inquiry Processes and Procedures

- 16) As drafted, it is unclear if the inquiry procedures apply to inquiries from *all* consumers, or only those posed by customers of a covered person. I recommend clarifying this point and further suggest that the rule be limited to persons who are either under contract with the covered person or have submitted complete applications to the covered person.
- 17) The time periods provided for in subdivision (b) raise the same concerns as those described above in connection with Draft Rule 90008.3. They are overly short for all covered persons, unlikely to be operationally feasible, and are likely to be very burdensome on smaller-sized covered persons. At a minimum, I recommend replacing all references to calendar days with references to business days. But, as noted earlier, I believe that even if a calendar- to business-day change is made, the response periods contained in the draft rule are likely to represent a significant compliance burden on covered persons, especially smaller-sized entities. I strongly encourage the Department to consider all operational feedback it receives from covered persons and revise its required response periods accordingly.
- 18) Subdivision (c) includes four categories of possible inquiry, which are not only unclear in places, but which also appear to contain significant overlap. At a threshold level, it is unclear if your categories refer to generic types of questions about the product or service offered by the covered person or to questions specific to the individual consumer making the inquiry. It is also unclear where one category stops and another starts. For example, how does a fee differ from the cost of a product or service? How is a question about accessing funds different from a question about how a product or service works? To resolve confusion, I suggest collapsing your paragraphs (1) and (2) into a single category titled “specific questions regarding the cost of the product or service to the consumer”, collapsing your paragraphs (3) and (4) into a single category titled “specific questions about how the consumer may use the product or service,” and adding two additional categories: “specific questions from a consumer about other topics (specify)” and “general questions about the cost or nature of the product or service.”
- 19) Beyond the need to align the time periods specified in paragraphs (3), (4), and (5) of subdivision (e) with the time periods specified in subdivision (b), the information sought by these three paragraphs represents a level of granularity whose value is unclear, either to consumers or to the Department. Inquiries are not complaints; they are simply questions, and (subject to further clarification by the Department) they may be posed by persons who are not customers of the covered person. Why is it important for the Department to know whether a covered person responds to an inquiry in less than three days, between three and seven days, or in more than seven days. I recommend that the Department choose a period of time within which it believes most simple inquiries should be answered (perhaps five business days) and ask covered persons to report on how many

were answered within that time period.

- 20) In a similar vein as the comments on draft Section 90008.3 above, your draft Section 90008.4 excludes three important categories of potential inquiries: 1) repeat, identical or nearly identical inquiries from the same consumer about the same issue; 2) unique inquiries sent by a third party on behalf of a consumer; and 3) multiple identical or nearly identical inquiries sent by a third party on behalf of multiple consumers. With respect to the first category, I suggest the addition of language clarifying that once a covered person has responded to an initial inquiry from a consumer, it shall not be required to respond to subsequent, identical or nearly identical inquiries from the same consumer about the same issue.

The second and third issues will require additional clarification. First, I suggest that the Department provide a way for third parties to submit inquiries on a consumer's behalf, *subject to written approval from a consumer*, with guidance regarding whether the covered person's response should be sent to the third party, the consumer, or both. Second, I suggest you add language clarifying that, once a covered person has responded to an initial complaint from a third party on behalf of a consumer, it shall not be required to respond to subsequent, identical or nearly identical complaints from that third party regarding that same issue and that same consumer.

Draft Rule 90008.5: Processes and procedures for covered persons to provide a timely response to the Department

- 21) It is unclear if the Department expects covered persons to respond to requests from the Department regarding consumer complaints and consumer inquiries before, contemporaneously with, or after responding to the consumers making those complaints and inquiries. It appears that the Department envisions two separate sets of time periods within which a covered person must provide a response: 1) the time periods that begin when the covered person receives a complaint or an inquiry from a consumer and 2) the time periods that begin when the covered person receives a request from the Department about that complaint or inquiry. Tracking two separate sets of time periods for the same complaint or inquiry represents a significant burden on covered persons and complicates the process unnecessarily.

I strongly suggest that the Department simplify the process by requesting one of two responses from covered persons when it inquires about the status of a complaint or inquiry: 1) for complaints on which the covered person has already issued a final decision to the consumer and for inquiries for which the covered person has already responded to the consumer, the covered person shall provide a copy of its decision or response to the Department (this is what you are proposing in paragraph (1) of subdivision (b) and paragraph (1) of subdivision (c); 2) for complaints and inquiries the

covered person is still investigating, the covered person should be required to tell the Department it is still investigating and should be required to provide the Department with its final decision or its response to the inquiry within the same time period described in paragraph (1), after it provides a response to the consumer.

Requiring any additional information from a covered person while they are looking into a complaint or inquiry is likely to require the covered person to redirect resources away from its investigation into the complaint or inquiry and into a Department response. Only if a complaint has gone unresolved or an inquiry has gone unanswered for an unreasonably long period of time (perhaps 45 business days for a complaint and 30 business days for an inquiry) should a covered person be required to provide more detail to the Department regarding why the issue remains open.

Draft Rule 90008.6: Consumer requests for nonpublic or confidential information – Definitions.

- 22) Your draft language requires anyone reading the draft rule to go to Financial Code Section 90008 to look up what subparagraph (D) of paragraph (2) of subdivision (d) says. It would be far clearer and more user-friendly if you led with what that subparagraph says and clarified that the language of 90008(d)(2)(D) describes one circumstance in which a covered person is not required to respond to a consumer. I suggest the following revision: Notwithstanding Rule 90008.4, a covered person shall not be required to make available to a consumer confidential commercial information, including an algorithm used to derive credit scores or other risk scores or predictors; information collected by the covered person for the purpose of preventing fraud or money laundering; information collected by the covered person for the purpose of detecting or making any report regarding other unlawful or potentially unlawful conduct; information required to be kept confidential by any other provision of law; or nonpublic or confidential information, including confidential supervisory information. **For purposes of subdivision (d)(2)(D) of Financial Code Section 90008**
- 23) For clarity, I also recommend that you move your definition of “nonpublic or confidential information” to its own subdivision (b). Paragraphs (1) through (3) of subdivision (a) speak to what nonpublic or confidential information *is*. It would be clearer to use a separate subdivision to describe what nonpublic or confidential information *is not*. I also recommend that you add the word “legal” before the word authority in the definition for clarity, as follows: “(b) ‘Nonpublic or confidential information’ does not include information contained in records made publicly available by the Department or information that has otherwise been publicly disclosed by an employee or agent of the Department with the *legal* authority to do so.”

Thank you for the opportunity to comment on the proposal. Please don't hesitate to reach out to me at enewhall@newhallconsulting.com or (916) 666-0314 if you have any questions regarding this letter.

Sincerely,



Eileen Newhall, Owner
Eileen Newhall Consulting LLC