

September 17, 2021

Commissioner of Financial Protection and Innovation
Attn: Sandra Sandoval, Regulations Coordinator
300 South Spring Street, Suite 15513
Los Angeles, CA 90013

Via Electronic Mail to: regulations@dfpi.ca.gov
cc: [REDACTED]@dfpi.ca.gov

Re: Comments on Proposed Rulemaking under the California Consumer Financial Protection Law: Commercial Financing to Small Businesses, Nonprofits, And Family Farms (PRO 02-21)

Dear Ms. Sandoval,

On behalf of the Electronic Transactions Association (“ETA”), the leading trade association for the payments industry, we appreciate the opportunity to provide comments on the Department of Financial Protection and Innovation’s (“DFPI”) proposed regulations related to commercial financing of small businesses, nonprofits, and family farms. In these comments, we have outlined areas we believe would be improved if DFPI justified and clarified definitions, as well as areas we believe should be changed to make the regulations more workable for industry.

General

The DFPI’s proposed regulations explicitly cover “commercial financing” products (as defined in subdivision (d) of Financial Code section 22800) as well as “other financial products and services”. The first category of covered products is clear and is tied to a defined term, so the industry can have certainty and clarity about what financial products are covered in order to formulate appropriate compliance policies and procedures. However, the category of “other financial products and services” is vague, undefined, and should be deleted. Leaving such catch-all language in the regulations could lead to confusion and inconsistent application and enforcement, given that the phrase “other financial products and services” could conceivably be (mis)interpreted to include even non-financing products and services, such as payment processing services and any and all other non-financing financial services that help businesses meet their cash flow needs. The regulations should be clear and crisp to relate only to “commercial financing” products, and thus the superfluous and potentially confusing language “other financial products and services” (and similar phrases) should be deleted.

Section X.90009.1(a)(1)(A)

ETA believes that subsection (A) is a broad overreach of DFPI’s enforcement authority as it would allow the department to bring an enforcement action against a company for violating any other law, even if that other law does not explicitly permit DFPI to bring an action against a business lender. Therefore, this subsection should be deleted to prevent the department from considering enforcement actions that fall outside of the department’s authority.

Section X.90009.1(a)(1)(D)

In order to ease compliance burdens and to avoid unnecessary confusion among regulated companies, DFPI should adopt subsection (D), which mirrors Dodd-Frank Act’s definition of “unfairness”, and strike subsections (A) – (C). Given that the federal Unfair, Deceptive, or Abusive Acts and Practices (UDAAP) do not encompass any of subsections (A) – (C), incorporating these subsections into DFPI regulations will only add to regulatory uncertainty for the department and especially for regulated entities, who will have to follow different standards at the federal level and at the state level.

Section X.90009.1(a)(2)

Subsection (a)(2) should be amended to align the definition of “deceptive act” with the federal standard established by Dodd-Frank. Under federal law, deceptive acts are defined as: 1) the representations, omissions, acts or practices misleads or is likely to mislead the consumer, 2) the consumer's interpretation of the act or representation is reasonable under the circumstances, *and* 3) the representation, omission, act or practice is material.¹

Section X.90009.1(a)(3)(A)

In order to align with the federal definition of “abusive” more closely, the word “materially” should be added at the beginning of subsection (A).

Section X.90009.2.

The requested commercial financing data will require significantly further definition for providers to be able to comply and to be able to provide information that can be consistently interpreted by the DFPI. The effective date in this section should be amended so that it does not go into effect until after the DFPI finalizes a reporting form with associated definitions for the requested commercial financing data. The DFPI should then publish a proposed reporting form with associated definitions for comment. Our comments below highlight just a few of the challenges with the undefined or vaguely defined terms within the current proposed text.

- Section X.90009.2(b)(1). The proposed regulations require annual reporting for commercial financing or other financial products, or services offered to a small business, nonprofit, or family farm. The proposed regulations state a “small business” is given the same meaning as in subdivision (c) of Code of Civil Procedure section 1028.5:

“Small business” means a business activity that is all of the following: (1) Independently owned and operated. (2) Not dominant in its field of operation. (3) Not exceeding the following annual gross receipts or other criteria in the categories of: (A) Agriculture, one million dollars (\$1,000,000); (B) General construction, nine million five hundred thousand dollars (\$9,500,000); (C) Special trade construction, five million dollars (\$5,000,000); (D) Retail trade, two million dollars (\$2,000,000); (E) Wholesale trade, nine million five hundred thousand dollars (\$9,500,000); (F) Services, two million dollars (\$2,000,000); (G) Transportation and warehousing, one million five hundred thousand dollars (\$1,500,000); (H) A manufacturing enterprise not exceeding 250 employees; (I) A health care facility not exceeding 150 beds or one million five hundred thousand dollars (\$1,500,000) in annual gross receipts; (J) Generating and transmitting electric power not exceeding 4,500 megawatt hours annually.”

This definition is problematic because it (1) requires providers to determine subjective criteria or criteria that may not be included in a credit application, *i.e.*, if a business is dominant in its field and if it is independently owned and operated, and (2) imposes various size standards across 10 different industries. Instead, DFPI should adopt a simpler approach for what constitutes a “small business.” Specifically, DFPI should define a small business as a business with gross annual revenue in the prior year of less than either \$1 million or \$5 million. This is the most straightforward approach for both providers and businesses to understand and effectively implement. It is also consistent with the CFPB’s recent proposed rules with respect to the reporting requirements of Section 1071 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“notwithstanding the small business size standards established by Small Business Act regulations, for purposes of subpart B, a business is a small business if and only if its gross annual revenue is \$5 million or less for its preceding fiscal year.”).

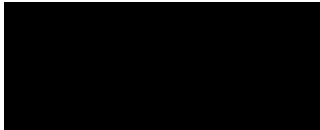
¹ https://files.consumerfinance.gov/f/documents/102012_cfpb_unfair-deceptive-abusive-acts-practices-udaaps_procedures.pdf

- “Type” of commercial financing is not defined. Providers may assume the DFPI is referring to the types set forth within Financial Code section 22800 et al., but guidance is necessary.
- “Other financial products or services” is not defined and many of the concepts within this section are unintelligible in the context of the many products or services that could be within the definition of that term in the CCFPL. If the DFPI wishes to request data about other financial products or services, it must specify which ones and then request data items that are relevant to those products or services.
- “Total dollar cost of financing” is not defined and there is no analogous concept within Financial Code section 22800 et al. that providers can use to infer the DFPI’s intent. Guidance is necessary here. When the DFPI better defines its request here, it should take into consideration the challenges of summing the total dollar cost of financing for open-end lines of credit with continuous draws and determining which size band within subsection (3) for open-end lines of credit.

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We appreciate you taking the time to consider these important issues. If you have any questions or wish to discuss any aspect of our comments, please contact me or ETA Senior Vice President, Scott Talbott at Stalbott@electran.org.

Respectfully Submitted,



Max Behlke
Director, State Government Relations
Electronic Transactions Association
202.677.7417 | mbehlke@electran.org



ETA is the world’s leading advocacy and trade association for the payments industry. Our members span the breadth of significant payments and fintech companies, from the largest incumbent players to the emerging disruptors in the U.S and in more than a dozen countries around the world.

