



September 15, 2021

SENT VIA EMAIL: regulations@dfpi.ca.gov cc: [REDACTED]@dfpi.ca.gov
cc: [REDACTED]@dfpi.ca.gov

Commissioner of Financial Protection and Innovation
Attn: Sandra Sandoval, Regulations Coordinator
300 South Spring Street, 15th Floor
Los Angeles, CA 90013

Re: Notice of Draft Regulations Related to Title 10, Chapter X, California Code of Regulations, Section X.90009.1. Unfair, Deceptive, or Abusive Acts and Practices

Dear Ms. Sandoval,

The Innovative Lending Platform Association (ILPA) appreciates the opportunity to provide comments on the California Department of Financial Protection and Innovation's (DFPI) draft regulations for the California Consumer Financial Protection Law. ILPA applauds DFPI's goal of ensuring that commercial financing providers may not engage in unfair, deceptive, or abusive acts and practices.

As you know, ILPA is the leading trade organization for online financing and service companies serving small businesses. Our member companies¹ share a commitment to the health and success of our nation's small businesses. They are dedicated to advancing best practices and standards that promote responsible innovation and access to capital.

While we generally support DFPI's draft regulations, ILPA offers several recommendations outlined below.

Comments and Recommendations:

Section X.90009.1.(a)(1)-(3): The draft regulations provide a different and significantly broader definition of deceptive acts or practices than provided under the federal Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). While it is only focused on consumer financing, Dodd-Frank provides a helpful roadmap for defining unfair, deceptive, and abusive acts and practices. Dodd-Frank defines an act as unfair when:

- (1) It causes or is likely to cause substantial injury to consumers;
- (2) The injury is not reasonably avoidable by consumers; and
- (3) The injury is not outweighed by countervailing benefits to consumers or to competition.

Dodd-Frank defines an act as deceptive when:

- (1) The representation, omission, act, or practice misleads or is likely to mislead the consumer;

¹ A10 Capital, BFS Capital, Biz2Credit, BlueVine, Fundbox, Funding Circle, Kabbage, Lendio, Mulligan Funding, OnDeck, PayNet and The Business Backer

- (2) The consumer's interpretation of the representation, omission, act, or practice is reasonable under the circumstances; and
- (3) The misleading representation, omission, act, or practice is material.

Dodd-Frank defines an act or practice as abusive when it:

- Materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service or
- Takes unreasonable advantage of:
 - A lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;
 - The inability of the consumer to protect its interests in selecting or using a consumer financial product or service; or
 - The reasonable reliance by the consumer on a covered person to act in the interests of the consumer.

In contrast, the draft regulations offer a completely different definition of unfair acts and practices. First, it defines an act or practice that violates another law as unfair. The definition ignores the intent of the violation of another law and would pull dozens of acts that have no impact on commercial financing recipients into DFPI's under the guise of unfair and deceptive practices. Further, the draft regulations would include acts or practices that "offends an established public policy, or the act or practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to a person." Again, simply offending an established public policy does not necessarily mean an act or practice is unfair, and this completely ignores intent. In addition, most of the terms in this definition are incredibly broad, ill-defined, and entirely subjective. Some might think an interest rate of even 5% is immoral and oppressive.

The draft regulations would define an act as deceptive if a recipient of commercial financing is "likely to be deceived by the act or practice." This ignores both the reasonableness and material standard set out in Dodd-Frank.

Lastly, the draft regulations ignore the material standard in its definition of an abusive act or practice.

We request amending the definitions to align with the federal Dodd-Frank definitions.

Section X.90009.2.: DFPI has noted that it is specifically seeking feedback on whether the draft language in this section duplicates any other reporting requirements. ILPA believes that, in light of forthcoming similar, although not identical, federal data collection and reporting requirements for commercial financing to small businesses, the requirements of this section could unnecessarily increase our members' compliance burden by requiring our members to comply with a patchwork of state and federal regulation.

As you may know, the Consumer Financial Protection Bureau (CFPB) recently issued proposed regulations implementing Section 1071 of Dodd-Frank, which requires covered financial institutions to collect and report data related to applications for credit from small businesses². The proposed data points, which are more expansive than those contained in DFPI's proposal, that would be required to be collected include, but are not limited to, the application date; the application recipient; credit types; credit purpose; the application amount;

² The CFPB is proposing to define "small business" by reference to the definitions of "business concern" and "small business concern" as set out in the Small Business Act and Small Business Administration (SBA) regulations. However, in lieu of using the SBA's size standards for defining a small business concern, the Bureau's proposed definition would look to whether the business had \$5 million or less in gross annual revenue for its preceding fiscal year.

the amount approved or originated; the action taken on the application; the date of the action taken; and pricing information, including interest rate, total origination charges, broker fees, initial annual charges.

Further, data points on gross annual revenue; NAICS code; number of workers; length of time in business; minority-owned business status; women-owned business status; ethnicity, race, and sex of principal owners would also be collected.

Similar to Home Mortgage Data Act data, the CFPB would make this data publicly available, giving DFPI the ability to extrapolate the data on commercial financing to small businesses it seeks in Section X.90009.2. Given this, we recommend DFPI tailors the types of entities to which loans are provided that are covered under Section X.90009.2. Tailoring the regulations to only require data collection and reporting on commercial financing provided to nonprofits and family farms would appropriately “right-size” the regulation and ensure that commercial financing providers operating in California are not burdened complying with a patchwork of similar state and federal data collection and reporting requirements.

However, if DFPI decides to move forward with the proposal as written, the ILPA notes that the draft regulations’ requirement in Section X.90009.2.(b)(3)-(4) that commercial financing providers report the minimum, maximum, average, and median total dollar cost of the financing at each interval outlined in paragraph (3) would provide DFPI with incomplete data. For example, the cost of financing between a \$50,000 and a \$99,999 product can vary significantly depending on the financing type, APR, and length of the financing. This data collection method ignores the time value of capital, making certain products (those with longer terms or open-ended products) seem disproportionately more expensive than others.

We recommend DFPI reconsider the data report requirements in Section X.90009.2.(b)(3)-(4). It is unclear what the draft regulations are trying to achieve. The total cost of capital is an important metric when evaluating the financing price, but taken in a vacuum provides incomplete data. We recommend collecting more data, the financing amount, cost, and term will present a more complete picture of the financing.

We look forward to continuing to work with the DFPI on this critical rulemaking process. If you have any questions, please do not hesitate to contact me at scott@innovativelending.org.

Best regards,

Scott Stewart, CEO
Innovative Lending Platform Association