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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 01-21

To Whom It May Concern:

Thank you for the opportunity to comment on the proposed regulations regarding registration requirements under the California Consumer Financial Protection Law. My comments are organized by topic, immediately below.

RECOMMENDED REORGANIZATION TO MORE CLEARLY IDENTIFY RULES APPLICABLE TO DIFFERENT BUSINESS MODELS

As the proposed regulation is currently drafted, most of the sections are generic and can be applied to any and all entities required to register with the department. However, three of the sections (definitions, supplemental information, and annual reporting) attempt to cover four very different business models within the same section. This has the disadvantage of making it more difficult for someone wishing to know the rules applicable to a single business model to find those rules. It also has the potential disadvantage of delaying the entire rulemaking, if the language applicable to one of those business models proves controversial.

As discussed immediately below, I recommend that you reorganize your proposal to make it more modular. Specifically, I recommend that the department reorganize its proposal to include a generic definition section applicable to any and all entities required to register with the department and to add separate, supplemental definition sections applicable to individual business models (e.g., "supplemental definitions – debt settlement services," "supplemental definitions – student debt relief services," "supplemental definitions – education financing," and "supplemental definitions – wage-based advances."). In the same vein, rather than proposing a single section titled "supplemental information," which covers multiple business models, I recommend that the department propose four separate sections titled "supplemental information -- debt settlement services," "supplemental information – student debt relief services," "supplemental information – education financing," and "supplemental information – wage-based advances."

Finally, rather than proposing a single annual reporting section, I recommend four separate sections titled "annual reporting -- debt settlement services," "annual reporting – student debt relief services," "annual reporting – education financing," and "annual reporting – wage-based advances."

Reorganizing your regulations in this way will not only make it easier for those wishing to locate the rules applicable to a specific business model, but should also make it easier for the department to propose new rules for additional industries in the future. Rather than having to re-open existing regulatory language when the department wants to require a new industry to register, the department will be able to leave the generic sections untouched and propose a handful of new industry-specific sections (i.e., *new* industry-specific definitions, *new* industry-specific supplemental information, and *new* industry-specific annual reporting language).

TOPICS AND QUESTIONS THAT WOULD BENEFIT FROM CLARIFICATION

The proposed regulation raises several topics and questions that would benefit from clarification, as discussed below in chronological order.

Section 1(e): Definition of control. Under the proposed definition, 10% is used as the threshold to determine when one person controls another person. On its face, 10% appears to be a very low bar with which to define control (more commonly, control equates to 51% or more of the interests in a company). At a minimum, I recommend that the department provide a citation or point to a precedent for its use of 10% to designate control. However, I am not convinced that a definition for this term is needed within the regulation. Outside of Section 1(e), this term is used only twice, both times in sufficiently broad contexts that a definition should not be necessary.

Section 1(g): In the proposed regulation, education financing is defined as credit for the purpose of funding postsecondary education and costs of attendance at a postsecondary institution. However, the proposed regulation lacks definitions for the terms "postsecondary education" and "postsecondary institution." To minimize the possibility of confusion among prospective registrants, I recommend that the department add definitions for these terms to its regulations.

Sections 1(i), 1(j), and 1(k) refer to Nationwide Multistate Licensing System (NMLS) forms by version number and date. As the proposed regulation is drafted, any updates to these forms by the Nationwide Multistate Licensing System & Registry (NMLSR) will render the department's regulation out of date, because the version number and date of the updated form will differ from the version number and date of the form cited in the regulations. Unless there is a specific reason why the department does not wish to keep up with periodic changes to these forms by the NMLSR, I recommend that the department add "and any future revisions to that form" to its regulations in all locations where a specific NMLS form number and form date are listed.

Section (1)(r) includes providers of education financing among entities that will be required to register with the department. Several providers of education financing also service the student

loans they make and are therefore already subject to licensure by the department under the Student Loan Servicing Act (SLSA; Financial Code Section 28100 et seq.) and the Student Loan Borrower Bill of Rights (Civil Code Section 1788.100 et seq). As the proposed regulation is currently drafted, it is unclear if the department wishes to require persons licensed under the SLSA to additionally register as a providers of education financing. At a minimum, I recommend clarifying this point. However, I would also encourage the department to decide this question in the negative (i.e., to clarify that persons licensed under the Student Loan Servicing Act will not additionally be required to register as providers of education financing). Requiring entities that are licensed under the SLSA to additionally register would appear to provide no additional benefit to consumers (these entities are already subject to extensive oversight by the department under both the SLSA and the Student Loan Borrower Bill of Rights). It will, however, impose a significant regulatory burden on these entities (regulation fees on top of licensing fees, two potential examinations, two separate reporting requirements).

Section 12 makes it a deceptive practice for a registrant to represent, directly or indirectly, that its acts, practices or business model have been approved by the commissioner or the Department of Financial Protection and Innovation. In the interest of clarity, I recommend that the department add examples of the types of statements that *are* appropriate. For example, is it acceptable to state that a person is "Registered as a debt settlement services provider/student debt relief services provider/provider of education financing/wage-based advance provider with the California Department of Financial Protection and Innovation"?

Section 20(b)(2) states that for purposes of a filing made through NMLS, a document is considered filed with the commissioner when all fees are received and the filing is transmitted by NMLS to the commissioner. It is unclear which entity (NMLS or the commissioner) must receive the fees in order for a document to be considered filed. I recommend that the department clarify this point.

Section 21(a)(5) requires each applicant to include an organizational chart with its application, identifying all of its direct and indirect owners. In the case of a publicly traded company, where each holder of a single share is an owner, or in the case of a private company with employee stock ownership, this requirement could represent an enormous compliance burden. Rather than requesting the identity of every single company shareholder, I recommend that the department require applicants to list the identities of those persons who hold at least a 10% ownership share in the applicant. Doing so will significantly reduce the compliance burden of this requirement, while still giving the department the identities of those persons who, by its own regulations, have the power to exercise control over the applicant.

Similarly, Section 21(a)(6)(A)(viii) requires applicants to provide a list of all individuals responsible for the conduct of the applicant's activities in this state, and Section 21(a)(7)(C) seeks the identity of any manager or other individual responsible for the applicant's offer or provision of a subject product in California. For large firms, these requirements could require listing in the range of one hundred or more individuals, a list that companies will be required to update any time one of these names changes. Rather than requiring applicants to list the name of

every individual who has any responsibility for the applicant's in-state conduct, I recommend that the department solicit the names of senior managers with *primary* or *lead* responsibility for the conduct of the applicant's product or service offerings and conduct in this state.

Section 22 requires an applicant for registration to submit specified information to the department by mail (presumably by the U.S. postal service or similar package delivery service). Given the department's increasing use of electronic portals to request information from licensees and permit holders, the reference to U.S. postal mail appears outdated. Unless there is a specific reason the department wishes to preclude electronic submission of this information in the future, I recommend that the department update this section to allow applicants to submit the required information *electronically or* via mail to the commissioner *to an email address or mailing address identified by the department*.

Section 23(i) includes language stating that if a registrant fails to pay its tax obligation, the department "may be required to suspend the registration." It is unclear on what basis the department would be required to suspend a registration. At a minimum, I recommend that the department include a citation to this requirement. In the alternative, I recommend that the department modify its language to state more simply that it "may suspend" a registration for nonpayment of taxes.

COMMENTS SPECIFIC TO WAGE-BASED ADVANCE (WBA) PROVIDERS

Interaction of Regulations With Memoranda of Understanding: As you know, several earned income access service providers have signed memoranda of understanding (MOUs) with the department. It is unclear how the proposed regulations for WBA providers are intended to interact with those MOUs. For example, are the regulations intended to supersede the MOUs once the regulations are finalized? Or are the regulations intended to overlay on top of the MOUs?

The answers to these questions will be critically important to clarify, because the MOUs contain valuable clarifications and protections for providers who have entered into them -- clarifications and protections that are currently absent from the proposed regulations. If the MOUs are intended to be superseded by the regulations, there would be great value in augmenting the regulations with some of the detail in the MOUs. However, it appears premature to offer specific suggested amendments to the regulations applicable to WBA providers until the department provides further clarification around its intent regarding the interaction between the regulations and the MOUs.

Applicability of Regulations to Earned Income Access Service Providers That Offer Advances Based on All Forms of Income, Not Just Wage and Salary Income: As the regulations are currently drafted, they are limited to wage-based advances; they do not cover advances based on other forms of earned income, such as public benefits. As you are aware, there is a broad continuum of business models currently in use among the earned income access service providers currently in operation. Some companies contract directly with employers, others

contract directly with employees or independent contractors, and others use a hybrid model. Furthermore, some companies offer advances based only on wage or salary income, and other companies look more broadly to all forms of income that are legally owed to a consumer, including public benefits. The department's proposed regulations appear to cover all companies that offer advances based on wage or salary income, a breadth of scope I highly commend. However, the proposed regulations are silent on companies that offer advances based on forms of income other than wages. For that reason, it is unclear if those companies are excluded from the regulations entirely, or if they are included, but only to the extent of the wage-based elements of their advances. In the interest of providing regulatory clarity, as well as ensuring a level playing field among all industry participants, I recommend that the department clarify how it proposes to oversee those earned income access business models that are not currently covered by its proposed regulations.

Requests for Supplemental Information: Section 22 (Supplemental Information) appears to contain duplicative and overlapping requirements for WBA providers. For example, Section 22(c) requires the submission of "any standard enrollment materials or applications the applicant provides to California residents in connection with the offer or sale of the subject product." Section 22(g) requires WBA applicants to provide "images documenting the process by which California residents request and repay wage-based advances and any standard notifications provided to the California residents during the request and repayment." It is unclear whether the information the department is requesting under 22(c) is any different than the information the department is requesting under 22(g). I recommend that the department further clarify the information it is seeking.

Annual Reporting (definition of advance): In its annual reporting requirements for WBA providers, the department seems to be focused primarily on how frequently workers obtain advances. At a minimum, I recommend that the department clarify whether it considers an advance to mean the total dollar amount advanced by a provider to a worker across a single pay period, or whether it considers each individual transfer of money from a provider to worker to be an advance. Beyond that clarification, I encourage the department to look beyond the frequency with which money is advanced when seeking to fully understand these wage-based advance products. The frequency with which a product or service is used can and often does reflect the value and utility of that product or service to a consumer. The department would be mistaken if it equated frequency of use with an unhealthy dependence, unless the department has *independent* evidence supporting the existence of such dependence.

Annual Reporting (granularity of data reporting): In Section 51(e)(3), the department is requesting WBA providers to submit data for each month and each quarter of the calendar year. Requiring companies to document multiple metrics on a monthly basis can represent a significant recordkeeping burden. I recommend that the department delete its monthly data tracking requirement in favor of a quarterly requirement.

Annual Reporting (additional metrics): Finally, I recommend that the department solicit the following additional information from WBA providers to gain a fuller picture of the provision of WBA services in California:

1) The total number of times proceeds (i.e., the sum of advances to a single worker during a pay period) were remitted to workers, for which the WBA provider did not receive repayment of any outstanding proceeds.

2) The total dollar amount of transactions described in paragraph (1).

3) The total number of transactions in which proceeds were remitted to workers, for which the WBA provider received partial repayment of outstanding proceeds.

4) The total dollar amount of transactions described in paragraph (3) and the total dollar amount of unpaid, outstanding proceeds attributable to those transactions.

5) The total number of transactions in which outstanding proceeds were repaid after the original, scheduled repayment date.

6) The total dollar amount of transactions described in paragraph (5).

TECHNICAL SUGGESTIONS AND RECOMMENDATIONS

Finally, the proposed regulations would benefit from some technical and clarifying edits, which are listed below in chronological order. None of the recommended changes below are intended to be substantive; they are simply intended to improve the clarity and readability of the regulation.

1) Section 1(c), grammatical correction to definition of "charges": Add the word "of" after the word enforcing, to read: "guaranteeing, making, servicing, collecting, and enforcing *of* a wage-based advance or education financing."

2) Clarification that the regulation applies to providers of products *or services*, not just to providers of products: Add the words "or services" after the word "subject product" or "subject products" in proposed Section 1(c)(2), 1(r), 11(a), 21(a)(2), 21(a)(7)(C), 21(a)(8), 21(a)(8)(A), 21(a)(8)(B), 22(b), 22(c), 50(a) – two locations, 50(c), and 51(f).

3) Clarification: Revise Section 1(c)(2) as follows: "For all subject products *or services* other than wage-based advances and education financing, all amounts contracted for or received by a person, as consideration for, or in recognition of, the person's provision of ~~a~~ *the subject* product or service.

4) Clarification: Several of the definitions applicable to education financing refer to periods of time, but the definitions do not include the word "period." Add the word "period" as follows: Section 1(h) should be education forbearance *period,* Section 1(m) should be "income-based repayment *period*" (and "mean" should be "means"), and Section 1(w)

should be "repayment *period*" or "in repayment *period*".

5) Clarification. Revise Section 1(h) as follows: "Education forbearance *period*" means a period during which an education financing recipient's obligation to make payments under ~~the~~ *an* education financing *agreement* is suspended, in whole or in part...."

6) Clarify that persons may be both employees and independent contractors: Revise Section 1(y) as follows: "Worker" means, with respect to wage-based advances, a natural person who has earned wages or compensation in this state as an employee, ~~or~~ an independent contractor, *or both*.

7) Add a reference: Section 23(c), add "California" before "Consumer Financial Protection Law."

8) Clarification: Section 23(i), strike "the" and insert "a" to read: "In the event ~~the~~ *a* state tax obligation is not paid by a registrant..."

9) Updated citation: Section 51(d)(2)(C), strike "Regulation Z" and insert "the Truth in Lending Act, 15 U.S.C. Section 1601-1667f."

10) Correction of incorrect reference in Section 51(e)(1), strike "applicant" and insert "registrant."

Thank you for the opportunity to comment on the proposal. Please don't hesitate to reach out to me at enewhall@newhallconsulting.com or [redacted] if you have any questions regarding this letter.

Sincerely,

[redacted]

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