



INITIAL STATEMENT OF REASONS
FOR THE PROPOSED ADOPTION OF REGULATIONS
UNDER THE CALIFORNIA CONSUMER FINANCIAL PROTECTION LAW
REGARDING COMMERCIAL FINANCIAL PRODUCTS AND SERVICES
PRO 02-21

As required under Government Code section 11346.2, subdivision (b),¹ the Department of Financial Protection and Innovation has prepared this initial statement of reasons for the proposed adoption of regulations under the California Consumer Financial Protection Law regarding commercial financing and other financial products and services to small businesses, nonprofits, and family farms.

PROBLEM TO BE ADDRESSED (§ 11346.2, subd. (b)(1))

In September 2020, Governor Gavin Newsom signed Assembly Bill 1864, which codified the California Consumer Financial Protection Law (CCFPL) in division 24 of the Financial Code and vested the Department with authority to administer and enforce its provisions.² Effective on January 1, 2021, the CCFPL expanded the Department’s regulatory authority to cover a broader range of financial products and services, including those previously not subject to the Department’s existing licensing laws.

In enacting the CCFPL, the California Legislature found that “[u]nfair, deceptive, and abusive practices in the provision of financial products and services undermine the public confidence that is essential to the continued functioning of the financial system.”³ The Legislature also found that “[r]obust consumer protections enable wealth building and promote a vibrant economy.”⁴ The CCFPL was intended to improve accountability and transparency in California’s financial marketplace and to protect California residents from abuses in that marketplace, among other purposes.⁵

To those ends, the CCFPL vests the Department with broad enforcement authority, including authority to take action against providers of financial products and services for unfair, deceptive, and abusive acts and practices. In addition to granting oversight and enforcement authority, the CCFPL gives the Department rulemaking authority to implement, interpret, and make specific its provisions. Financial Code section 90009, subdivision (e), authorizes the Department to define unfair, deceptive, and abusive acts and practices in connection with the offering or provision of commercial financing or other financial products and services to small businesses, nonprofits, and family farms. The statute, however, does not specify the standards, if any, that must be used in determining whether an act or practice is unfair, deceptive, or abusive. The statute also does

¹ All further statutory references are to the Government Code unless otherwise indicated.

² Assem. Bill No. 1864 (2019-2020 Reg. Sess.) §§ 4, 7; see generally Fin. Code, § 90000 et seq.

³ Fin. Code, § 90000, subd. (a)(2).

⁴ *Ibid.*

⁵ Fin. Code, § 90000, subd. (a)(1), (a)(4).

not specify the meaning of certain terms, which would clarify the scope of the law.

Financial Code section 90009, subdivision (e), further authorizes the Department’s rulemaking to include data collection and reporting on the provision of commercial financing or other financial products and services. The statute does not, however, specify who is covered by the requirements, what data must be provided in reports, and when reports must be filed.

ANTICIPATED BENEFITS (§ 11346.2, subd. (b)(1))

The benefits anticipated from this proposed regulation include an increase in consumer welfare, fair competition, and wealth creation in California.⁶ The proposed regulation will promote nondiscriminatory access to financial products and services that are not unfair, deceptive, or abusive.⁷ Protection from unfair, deceptive, and abusive conduct not only promotes the welfare of California residents but also fosters fair competition among businesses. The proposed regulation is also expected to increase accountability and transparency in the marketplace, which strengthens consumers’ confidence and financial stability, which is essential for building wealth.

PURPOSE AND NECESSITY OF EACH REGULATION (§ 11346.2, subd. (b)(1))

Section 1060. Definitions

Section 1060 defines terms and phrases used in the regulations. The purpose of section 1060 is to provide clarity and guidance on the meaning of terms used in the regulations. The definitions are necessary because they clarify the meaning of terms and phrases used in the regulations and ensure that they are understood consistently. The definitions also make the regulations more readable and easier for the public to understand.

Section 1060, subdivision (a), provides that “average” refers to the arithmetic mean. The purpose of this provision is to define a term used in the regulations. The CCFPL does not define the term and several types of mathematical and statistical means exist. This definition is necessary to clarify the meaning and prevent confusion.

Section 1060, subdivision (b), provides that “commercial financing” has the same meaning as in Financial Code section 22800, subdivision (d). The purpose of this provision is to define a term used in the regulations. This definition is necessary because Financial Code section 90009, subdivision (e), explicitly refers to this statutory definition, and noting this reference in the regulations makes them easier to understand.

Section 1060, subdivision (c)(1), provides that “covered consumer” means a small business, nonprofit, or family farm whose activities are principally directed or managed from California. The purpose of this provision is to make the regulations more readable and easier for the public to understand. This definition is necessary because it allows the regulations to avoid frequent repeating of a lengthy phrase. Another purpose of this provision is to provide clarity and guidance on the scope of the regulations. This definition is necessary because it clarifies that the regulations cover providers of financial products and services to California-based recipients, just

⁶ Fin. Code, § 90000, subd. (b).

⁷ Fin. Code, § 90000, subd. (b)(2), (b)(3).

as the CCFPL defines “covered persons” to be providers of financial products and services to California residents.⁸

Section 1060, subdivision (c)(2), provides that for the purpose of determining whether activities are “principally directed or managed from California” within the meaning of subdivision (c)(1), a covered provider may rely on any relevant written representation by the small business, nonprofit, or family farm, including a business address provided in any application or agreement for commercial financing or other financial product or service. The purpose of this provision is to provide guidance on determining whether business activities are principally directed or managed from California. This provision is necessary because it provides clarity in circumstances in which a recipient has multiple business addresses.

Section 1060, subdivision (d), provides that “covered provider” means any person engaged in the business of offering or providing commercial financing or another financial product or service to a covered consumer. The purpose of this provision is to make the regulations more readable and easier for the public to understand. This definition is necessary because it allows the regulations to avoid frequent repeating of a lengthy phrase.

Section 1060, subdivision (e), provides generally that “family farm” means a business operation that produces agricultural commodities for sale and in which the operating family provides a substantial amount of the physical labor and management. The purpose of this provision is to define a term used in the regulations. The CCFPL does not define “family farm.” This definition incorporates the definition of “family farm” from federal regulations concerning the making and insuring of loans to family farms by the Farm Service Agency of the U.S. Department of Agriculture.⁹ The goal of the federal farm loan programs is to help farmers obtain commercial credit and start, purchase, or expand family farms.¹⁰ The Department is not aware of any farm loan programs under California law, nor of any definitions of “family farm” under California law in the context of providing financial assistance to small businesses in farming or agriculture. Because the federal definition occurs in this context, incorporating that definition is reasonably necessary.

Section 1060, subdivision (f), provides that “financial product or service” has the same meaning as in Financial Code section 90005, subdivision (k), except that “consumer” as used in that definition also includes organizations and legal or commercial entities and “consumer financial product or service” as used in that definition also includes a financial product or service that is offered or provided for use primarily for other than personal, family, or household purposes. The purpose of this provision is to define a term used in the regulations. This provision is necessary to address confusion that may arise because the CCFPL authorizes rulemaking in connection with financial products or services to small businesses, nonprofits, and family farms, which are organizations, but defines “financial products or services” using the term “consumer,” the definition of which does not refer to organizations.¹¹ In addition, confusion may occur because financial products or services to small business, nonprofits, or family farms are generally

⁸ Fin. Code, § 90005, subd. (f)(1).

⁹ 7 C.F.R. § 761.2(b); see 7 U.S.C. § 1921; 7 C.F.R. § 761.1.

¹⁰ See U.S. Dept. of Agriculture, Farm Loans Overview (Mar. 2020) <http://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdfiles/FactSheets/farm_loans_overview-factsheet.pdf> (as of Apr. 1, 2022).

¹¹ Fin. Code, § 90005, subds. (c), (k).

intended for business or commercial purposes, and whether a financial product or service is a “consumer financial product or service” under the CCFPL generally depends on whether it is intended “primarily for personal, family, or household purposes.”¹² But a financial product or service that is not intended for such purposes is not necessarily excluded from being a “consumer financial product or service”; the CCFPL also includes brokering of an offer or sale of a franchise, which is a financial service primarily for a commercial purpose.¹³ Thus, this provision is necessary because it harmonizes various CCFPL provisions with these regulations, clarifies whom the regulations apply to, and prevents confusion.

Section 1060, subdivision (g), provides that “nonprofit” means any organization not organized for profit and no part of the net earnings of which inures to the benefit of any individual or entity. The purpose of this provision is to define a term used in the regulations. The CCFPL does not define “nonprofit.” This definition incorporates principles from the Nonprofit Corporation Law,¹⁴ which generally provides that nonprofit corporations are not organized for the private gain of any person,¹⁵ and from the federal Internal Revenue Code, which provides that an organization qualifies as a tax-exempt nonprofit if it is not organized for profit and no part of its net earnings inure to the benefit of any private shareholder or individual.¹⁶ A grant program administered by the Department borrows similar language from the Internal Revenue Code in defining a nonprofit organization.¹⁷ This definition is necessary because it involves well-established and easily understood concepts.

Section 1060, subdivision (h), provides that “small business” has the same meaning as in Code of Civil Procedure section 1028.5. The purpose of this provision is to define a term used in the regulations. The CCFPL does not define “small business.” This definition incorporates the definition from Code of Civil Procedure section 1028.5, which provides that “small business” means a business activity that is independently owned and operated, not dominant in its field of operation, and does not exceed certain amounts in annual gross receipts or other criteria if the business activity is in an enumerated industry.¹⁸ Section 1028.5 aligns with the federal Small Business Act, which defines a “small-business concern” as a business that is independently owned and operated, is not dominant in its field of operation, and meets size standards established by the Small Business Administration.¹⁹ The federal size standards, however, are far more specific and detailed than those in section 1028.5, encompassing hundreds of types of business activities.²⁰ Moreover, the federal size standards consider whether a business of a specific size would be dominant in its field of operation on a national basis.²¹ Thus, incorporating standards specific to California is necessary.

Section 1060, subdivision (i), provides that all terms in the regulations that are defined in the

¹² Fin. Code, § 90005, subd. (e)(1).

¹³ Fin. Code, § 90005, subs. (e)(2), (k)(11).

¹⁴ Corp. Code, § 5000 et seq.

¹⁵ Corp. Code, §§ 5130, 9130.

¹⁶ 26 U.S.C. § 501(c).

¹⁷ Fin. Code, § 24001, subd. (b)(2).

¹⁸ Code Civ. Proc., § 1028.5, subd. (c).

¹⁹ 15 U.S.C. § 632(a).

²⁰ 13 C.F.R. §§ 121.101, 121.201.

²¹ 13 C.F.R. § 121.102(b).

CCFPL but not in the regulations have the meanings ascribed to them in the CCFPL. The purpose of this provision is to provide further clarity and guidance on the meaning of terms. Some terms in the regulations are defined in both the regulations and CCFPL. For terms in the regulations that are not defined in the regulations but are in the CCFPL, this provision is necessary because it provides clarity and guidance, by making explicit that the definition sections of the CCFPL continue to govern as well as those in the regulations.

Section 1061. Unfair, Deceptive, and Abusive Acts and Practices

Section 1061 defines and prohibits unfair, deceptive, and abusive acts and practices in the offering or provision of financial products and services to small businesses, nonprofits, and family farms. The purpose of section 1061 is to provide guidance to covered providers regarding unfair, deceptive, and abusive acts or practices. The provisions are necessary because they clarify the criteria used to determine whether a violation of law exists.

Section 1061, subdivision (a), provides that an unfair, deceptive, or abusive act or practice in the offering or provision of financial products or services to small businesses, nonprofits, and family farms is a violation of the law. The purpose of this provision is to clarify when a covered provider is in violation of the law. Only defining unfair, deceptive, and abusive conduct does not accomplish this purpose; it is necessary to prohibit such conduct as well.

Section 1061, subdivision (b), defines an unfair act or practice, as described in more detail below. The purpose of this provision is to provide guidance to covered providers on when an act or practice is unfair. This provision is necessary to clarify the criteria used to determine whether a violation of law exists.

Section 1061, subdivision (b)(1), provides that an act or practice is unfair if it causes or is likely to cause substantial injury to covered consumers that is not reasonably avoidable by covered consumers and the injury is not outweighed by countervailing benefits to covered consumers or to competition. The purpose of this provision is to clarify the criteria used to determine when an act or practice is unfair. This provision is necessary because it addresses concerns raised by the public during the Department's preliminary rulemaking activities. This provision incorporates the standards under title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), also called the Consumer Financial Protection Act of 2010, which defines unfair acts or practices in connection with consumer financial products and services.²² The standards for determining unfair practices under the Dodd-Frank Act are the same as those for determining unfair practices in or affecting commerce under section 5 of the Federal Trade Commission Act ("FTC Act").²³ These longstanding standards are familiar to providers of financial products and services, including covered providers who would be subject to this regulation. Applying these familiar standards in the small-business context is sensible because although small businesses, nonprofits, and family farms are organizations, not individuals, they

²² 12 U.S.C. § 5531(c)(1); see Consumer Fin. Protection Bur., CFPB Supervision and Examination Manual (Mar. 2022) Unfair, Deceptive, or Abusive Acts or Practices, pp. 1-2 (hereafter CFPB Manual) <http://files.consumerfinance.gov/f/documents/cfpb_unfair-deceptive-abusive-acts-practices-udaaps_procedures.pdf> (as of Apr. 1, 2022).

²³ 15 U.S.C. § 45(n); CFPB Manual, *supra*, at p. 2, fn. 4; Fed. Trade Com., FTC Policy Statement on Unfairness (Dec. 17, 1980) <<http://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness>> (as of Apr. 1, 2022).

are managed and operated by individuals and are consumers of financial products and services just like individual consumers. Indeed, the vast majority of small businesses are sole proprietorships or very small employers, and these individuals, doing business as commercial entities, approach and understand commercial financing for their businesses in much the same way as they would their own personal financing.²⁴ The statute that authorizes this regulation reflects the California Legislature’s recognition that small businesses, nonprofits, and family farms are also consumers entitled to protection from unfair, deceptive, and abusive acts and practices.²⁵

Section 1061, subdivision (b)(2), provides that an act or practice is unfair if it is unfair within the meaning of Business and Professions Code section 17200, commonly known as the “unfair competition law” (UCL).²⁶ The purpose of this provision is to clarify the criteria used to determine when an act or practice is unfair. The UCL proscribes unfair competition, which includes any unfair business act or practice.²⁷ Claims of unfairness are frequently litigated in section 17200 actions involving consumers.²⁸ In deciding such claims, courts often turn to federal case law interpreting section 5 of the FTC Act as persuasive authority.²⁹ Thus, continued development of section 17200 case law will provide further clarity to the public, and it is reasonably necessary to incorporate this additional guidance in the regulations.

Section 1061, subdivision (c), defines a deceptive act or practice, as described in more detail below. The purpose of this provision is to provide guidance to covered providers on when an act or practice is deceptive. This provision is necessary to clarify the criteria used to determine whether a violation of law exists.

Section 1061, subdivision (c)(1), provides that an act or practice, including a representation or omission, is deceptive if it misleads or is likely to mislead the covered consumer, whose interpretation of the act or practice is reasonable under the circumstances, and the act or practice is material. The purpose of this provision is to clarify the criteria used to determine when an act or practice is deceptive. This provision is necessary because it addresses concerns raised by the public during the Department’s preliminary rulemaking activities. This provision incorporates the standards used by the federal Consumer Financial Protection Bureau (CFPB), which enforces title X of the Dodd-Frank Act, in determining deceptive acts or practices in connection with consumer financial products and services.³⁰ The CFPB’s standards incorporate and are informed

²⁴ Fed. Trade Com., Staff Perspective Paper on FTC’s Strictly Business Forum (Feb. 2020) pp. 2, 5 <http://www.ftc.gov/system/files/documents/reports/staff-perspective-paper-ftcs-strictly-business-forum/strictly_business_forum_staff_perspective.pdf>; U.S. Small Bus. Admin., Frequently Asked Questions About Small Business (Aug. 2017) pp. 1, 3 <<http://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2017-WEB.pdf>>; Fed. Reserve Banks, Small Business Credit Survey: 2022 Report on Employer Firms (2022) p. 25 <<http://www.fedsmallbusiness.org/medialibrary/FedSmallBusiness/files/2021/2022-sbcs-employer-firms-report>>.

²⁵ Fin. Code, § 90009, subd. (e).

²⁶ *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 949.

²⁷ Bus. & Prof. Code, § 17200.

²⁸ See, e.g., *Davis v. Ford Motor Credit Co.* (2009) 179 Cal.App.4th 581; *Camacho v. Automobile Club of Southern California* (2006) 142 Cal.App.4th 1394.

²⁹ See *People ex rel. Mosk v. National Research Co. of Cal.* (1962) 201 Cal.App.2d 765, 772-773.

³⁰ See 12 U.S.C. § 5536(a)(1)(B); CFPB Manual, *supra*, at p. 5.

by the standards used by the Federal Trade Commission under the FTC Act.³¹ These longstanding standards are familiar to providers of financial products and services, including covered providers who would be subject to this regulation, and have been developed through case law. Applying these familiar standards in the small-business context is sensible because although small businesses, nonprofits, and family farms are organizations, not individuals, they are managed and operated by individuals and are consumers of financial products and services just like individual consumers. Indeed, the vast majority of small businesses are sole proprietorships or very small employers, and these individuals, doing business as commercial entities, approach and understand commercial financing for their businesses in much the same way as they would their own personal financing.³² The statute that authorizes this regulation reflects the California Legislature's recognition that small businesses, nonprofits, and family farms are also consumers entitled to protection from unfair, deceptive, and abusive acts and practices.³³

Section 1061, subdivision (c)(2), provides that an act or practice is deceptive if it is deceptive within the meaning of Business and Professions Code section 17200. The purpose of this provision is to clarify the criteria used to determine when an act or practice is deceptive. Section 17200 proscribes unfair competition, which includes any deceptive or fraudulent business act or practice.³⁴ Claims of deceptiveness are frequently litigated in section 17200 actions involving consumers, and in deciding such claims, courts often turn to federal case law interpreting section 5 of the FTC Act as persuasive authority.³⁵ Thus, continued development of section 17200 case law will provide further clarity to the public, and it is reasonably necessary to incorporate this additional guidance in the regulations.

Section 1061, subdivision (d)(1) and (d)(2), provide that an act or practice is abusive if it materially interferes with the ability of a covered consumer to understand a term or condition of commercial financing or another financial product or service or takes unreasonable advantage of any of three specified circumstances. The purpose of this provision is to provide guidance to covered providers on when an act or practice is abusive. This provision is necessary because it addresses concerns raised by the public during the Department's preliminary rulemaking activities. This provision incorporates the standards under title X of the Dodd-Frank Act, which defines abusive acts or practices in connection with consumer financial products and services.³⁶ These longstanding standards are familiar to providers of financial products and services, including covered providers who would be subject to this regulation. Applying these familiar standards in the small-business context is sensible because although small businesses, nonprofits, and family farms are organizations, not individuals, they are managed and operated by individuals and are consumers of financial products and services just like individual consumers. Indeed, the vast majority of small businesses are sole proprietorships or very small employers, and these individuals, doing business through a corporate form, approach and understand commercial financing for their businesses in much the same way as they would their own

³¹ CFPB Manual, *supra*, at p. 5; Fed. Trade Com., FTC Policy Statement on Deception (Oct. 14, 1983) <<http://www.ftc.gov/legal-library/browse/ftc-policy-statement-deception>> (as of Apr. 1, 2022).

³² *Ante*, fn. 24.

³³ Fin. Code, § 90009, subd. (e).

³⁴ Bus. & Prof. Code, § 17200.

³⁵ See *People ex rel. Mosk v. National Research Co. of Cal.*, *supra*, 201 Cal.App.2d at pp. 772-773.

³⁶ 12 U.S.C. § 5531(d); see CFPB Manual, *supra*, at p. 9.

personal financing.³⁷ The statute that authorizes this regulation reflects the California Legislature’s recognition that small businesses, nonprofits, and family farms are also consumers entitled to protection from unfair, deceptive, and abusive acts and practices.³⁸

Section 1061, subdivision (e), provides that in any administrative action to enforce section 1061, the Department may include a claim for ancillary relief as set forth in Financial Code section 90012, subdivision (b). The purpose of this provision is to clarify the Department’s ability to enforce section 1061. This provision is necessary to address confusion that may occur because Financial Code section 90015, subdivision (e), authorizes the Department to seek ancillary relief in an administrative action against a person that violates a law, rule, order, or any condition imposed in writing, “with respect to consumer financial products.” Section 90015, subdivisions (d) and (f), however, which authorize the Department to issue desist-and-refrain orders and suspension and revocation actions, respectively, do not include the phrase. The CCFPL does not define “consumer financial products,” but it does not necessarily exclude financial products or services intended for commercial purposes from being a “consumer financial product or service.”³⁹ This provision clarifies that the connection to “consumer financial products” in Financial Code 90015, subdivision (e), does not limit the Department’s ability to seek ancillary relief in actions to enforce section 1061. This provision is necessary because it harmonizes various CCFPL provisions with these regulations.

Section 1062. Annual Report

Section 1062 requires covered providers to file with the Department annual reports containing information regarding their business activity. The purpose of section 1062 is to set forth a reporting requirement, who is covered by the requirement, the information required in the report, and other clarifying guidance. The provisions are necessary because they specify the procedures that covered providers must follow for the reporting of information about their provision of commercial financial products and services. These procedures are necessary to collect market data, which will enable the Department to identify and monitor market attributes such as size, growth, segmentation, anomalies, and trends.

Section 1062, subdivision (a), provides that section 1062 does not apply to covered providers meeting specified criteria. The purpose of this provision is to specify the ambit of the reporting requirement. This provision is necessary because it clarifies who is covered by the reporting requirement.

Section 1062, subdivision (a)(1), provides that section 1062 does not apply to covered providers who make no more than one commercial financing transaction to covered consumers in a 12-month period or that make five or fewer commercial financing transactions to covered consumers in a 12-month period that are incidental to their business. The purpose of this provision is to clarify who is covered by the reporting requirement. This provision incorporates the exemption language in division 9.5 of the Financial Code concerning commercial financing disclosures.⁴⁰ The California Financing Law, another law administered by the Department, also

³⁷ *Ante*, fn. 24.

³⁸ Fin. Code, § 90009, subd. (e).

³⁹ Fin. Code, § 90005, subs. (e)(2), (k)(11).

⁴⁰ Fin. Code, § 22801, subd. (e).

contains a similar de minimis exemption provision.⁴¹ Exempting covered providers that engage in de minimis financing activity is necessary because it avoids imposing regulatory burdens on insignificant market participants who pose minimal risk to consumers.

Section 1062, subdivision (a)(2), provides that section 1062 does not apply to a covered provider who, during the preceding calendar year, did not engage in any transactions with covered consumers involving commercial financing or “extending credit and servicing extensions of credit” as defined in Financial Code section 90005, subdivision (k)(1). The purpose of this provision is to clarify who is covered by the reporting requirement. This provision is necessary because the information required under section 1062 pertains only to commercial financing and credit. Thus, providers of financial products and services other than commercial financing and credit must clearly be exempted.

Section 1062, subdivision (b), requires covered providers, on or before March 15 of each year, to file with the Department a report containing information regarding their business activity during the preceding calendar year. The purpose of this provision is to specify the procedures that covered providers must follow for the reporting of information about their provision of commercial financial products and services. The March 15 due date is reasonably necessary because it is the same date by which annual reports must be filed under the California Financing Law.⁴² The annual report requirement is necessary because the data collected will enable the Department to identify and monitor market attributes such as size, growth, segmentation, anomalies, and trends. The data will also guide the Department in preparing its statutorily required annual reports to the public, which may include recommendations intended to result in improved oversight, greater transparency, or increased availability of beneficial financial products and services in the marketplace.⁴³

Section 1062, subdivision (b)(1), requires filers to provide their identifying and contact information. The purpose of this provision is to specify the information that covered providers must provide in the annual report. This information is necessary because it will allow the Department to identify and contact filers.

Section 1062, subdivision (b)(2), requires filers to provide, by type of commercial financing or other financial product or service, the total number and total dollar amount of transactions with covered consumers. The purpose of this provision is to specify the information that covered providers must provide in the annual report. This information is necessary because it will give the Department a broad overview of the types of financial products and services that are being provided and the volume of activity.

Section 1062, subdivision (b)(3), requires filers to provide, by type of commercial financing or other financial product or service, the number of transactions with covered consumers for specified amounts financed, with the amount financed to be determined according to the definition of “amount financed” in the regulations adopted under Financial Code section 22804. The purpose of this provision is to specify the information that covered providers must provide

⁴¹ Fin. Code, § 22050, subd. (e); see also former § 22050.5, as amended, Stats. 2017, ch. 516, § 7, repealed by its own provisions, eff. Jan. 1, 2022.

⁴² Fin. Code, § 22159.

⁴³ Fin. Code, § 90018.

in the annual report. This information is necessary because it will help the Department understand a covered provider's size, market share, whether it targets certain market segments, and other characteristics. When aggregated, the data can illustrate market demand. Over multiple reporting periods, the data will help identify trends. Incorporating the definition of "amount financed" from the commercial financing disclosure regulations adopted under section 22804 in division 9.5 of the Financial Code is necessary because they clarify how to determine the amount financed for each of the broadly different types of financing arrangements included in the definition of "commercial financing" in section 22800, subdivision (d).⁴⁴

Section 1062, subdivision (b)(4), requires filers to provide, by type of commercial financing or other financial product or service and for each interval described in subdivision (b)(3), the minimum, maximum, average, and median total cost of financing expressed as an annualized rate, where the method of calculating the annualized rate for a given type of financial product or service is the same method used in complying with the regulations adopted under Financial Code section 22804. The purpose of this provision is to specify the information that covered providers must provide in the annual report. This information is necessary because it will help the Department better understand the cost of commercial financing and other financial products and services to covered consumers. When aggregated, the information will allow the Department to compare covered providers and the various types of commercial financing. Collecting this data will increase accountability and transparency regarding the availability and cost of credit. Over multiple reporting periods, the data will help identify trends. Allowing covered providers to use the same calculation method that they used in complying with the commercial financing disclosure regulations is necessary because it avoids imposing additional regulatory burdens on covered providers who are also subject to those requirements.

Section 1062, subdivision (c), provides that a covered provider who reports information to the commissioner under Financial Code section 22159 of the California Financing Law (CFL) shall not report that information to the commissioner under this section. The purpose of this provision is to specify the information that covered providers must provide in the annual report. This provision is necessary because persons licensed under the CFL are exempt from the CCFPL to the extent they are acting under the authority of their CFL license.⁴⁵ Covered providers who are CFL licensees and provide information about commercial loans or open-end credit plans in their CFL annual reports should not report that information in their annual report under this section because such activity is not subject to the CCFPL.

ECONOMIC IMPACT ASSESSMENT (§§ 11346.2, subd. (b)(2), 11346.3, subd. (b))

A. Creation or Elimination of Jobs

The Department has determined that this proposed regulation is unlikely to create or eliminate jobs within California. Covered businesses would not need to create jobs to comply with the prohibition against unfair, deceptive, and abusive conduct. Any burdens on time imposed by the data reporting requirement would be absorbable and would not require jobs to be created. The

⁴⁴ Commercial financing "means an accounts receivable purchase transaction, including factoring, asset-based lending transaction, commercial loan, commercial open-end credit plan, or lease financing transaction intended by the recipient for use primarily for other than personal, family, or household purposes."

⁴⁵ Fin. Code, § 90002, subd. (b)(2).

proposed regulation is unlikely to eliminate jobs because it would not restrict any lawful business activity.

B. Creation of New Businesses or Elimination of Existing Businesses

The Department has determined that this proposed regulation is unlikely to create new businesses or eliminate existing businesses within California. The proposed regulation does not provide any economic or other incentives to create new businesses. The proposed regulation is unlikely to eliminate existing businesses because it does not restrict any lawful business activity, and any direct economic burden imposed is minimal and not significant enough to the point of eliminating a business.

C. Expansion of Businesses Currently Doing Business

The Department has determined that this proposed regulation is unlikely to expand businesses currently doing business within California. The provisions defining unfair, deceptive, and abusive conduct will deter a business's unlawful activities but is unlikely to affect its lawful activities. The data reporting requirement does not provide an economic incentive to expand business.

D. Benefits to Health and Welfare of Residents, Worker Safety, and Environment

The Department has determined that this proposed regulation may benefit the health and welfare of California residents. The proposed regulation may benefit the welfare of California residents who operate small businesses, nonprofits, and family farms by protecting them from harmful business practices of providers of financial products and services. The proposed regulation will not benefit or adversely affect worker safety or California's environment.

TECHNICAL, THEORETICAL, OR EMPIRICAL STUDIES (§ 11346.2, subd. (b)(3))

The Department relied on the following technical, theoretical, or empirical studies, reports, or similar documents in proposing this regulation:

1. Federal Reserve Banks, Small Business Credit Survey: 2022 Report on Employer Firms (2022) <<http://www.fedsmallbusiness.org/medialibrary/FedSmallBusiness/files/2021/2022-sbcs-employer-firms-report>>.
2. Federal Trade Commission, Staff Perspective Paper on FTC's Strictly Business Forum (Feb. 2020) <http://www.ftc.gov/system/files/documents/reports/staff-perspective-paper-ftcs-strictly-business-forum/strictly_business_forum_staff_perspective.pdf>.
3. U.S. Small Business Administration, Frequently Asked Questions About Small Business (Aug. 2017) <<http://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2017-WEB.pdf>>.

The Department also relied on comment letters from the following interested parties, including those who would be subject to the proposed regulations, during preliminary public discussions under section 11346.45:

1. California Community Banking Network, dated September 13, 2021.
2. California Financial Service Providers, dated September 17, 2021.

3. Electronic Transactions Association, dated September 17, 2021.
4. Eileen Newhall Consulting LLC, dated September 17, 2021.
5. Innovative Lending Platform Association, dated September 15, 2021.
6. NextGear Capital, Inc.; AFC CAL, LLC; XL Funding, LLC, dated November 3, 2021.
7. Law Offices of Paul Soter, dated September 17, 2021.
8. Responsible Business Lending Coalition, dated September 17, 2021.
9. Revenue Based Finance Coalition, received September 17, 2021.
10. Small Business Financial Solutions, LLC, doing business as RapidAdvance, dated September 16, 2021.
11. Strategic Funding Source, Inc., doing business as Kapitus, dated September 17, 2021.
12. Third Party Payment Processors Association, dated September 17, 2021.

CONSIDERATION OF ALTERNATIVES (§ 11346.2, subd. (b)(4))

A. Reasonable Alternatives Generally (§ 11346.2, subd. (b)(4)(A))

The Department has involved parties that would be subject to the proposed regulation in preliminary public discussions in accordance with section 11346.45 and considered and incorporated recommended alternatives that are less burdensome and equally effective in achieving the purposes of the regulation. No other reasonable alternatives have been proposed to the Department.

B. Reasonable Alternatives Relating to Small Business (§ 11346.2, subd. (b)(4)(B))

No reasonable alternative considered by the Department or that has otherwise been identified and brought to its attention would lessen any adverse impact on small business because the proposed regulation would not adversely impact small businesses within the meaning of section 11342.610. On the contrary, small businesses within the meaning of section 11342.610 that receive commercial financing or other financial products or services would derive a benefit from the enforcement of the proposed regulation. And the proposed regulation would not affect small business to the extent that commercial finance companies are not small businesses as provided in section 11342.610, subdivision (b)(1).

ECONOMIC IMPACT ON BUSINESS (§ 11346.2, subd. (b)(5))

The Department has initially determined that this proposed regulation will not have a significant adverse economic impact on business. In making this determination, the Department relied on comment letters from interested parties during preliminary rulemaking activities. These letters are identified above in the “Technical, Theoretical, or Empirical Studies” section.