



July 5, 2022

Department of Financial Protection and Innovation
Attn: Ms. Sandra Navarro and Mr. David Bae
300 S. Spring Street, Suite 15513
Los Angeles, CA 90013

Re: Proposed Rule PRO 03-21 regarding Customer Complaints

I. Introduction

The American Fintech Council (AFC)¹ submits this comment letter in response to the request for comment by the California Department of Financial Protection and Innovation (DFPI or Department) regarding proposed changes to the California Consumer Complaints process and requirements (Proposed Rule).² We thank the DFPI for the opportunity to comment on the Proposed Rule.

AFC's mission is to promote an innovative, transparent, inclusive, and customer-centric financial system by supporting the responsible growth of lending, fostering innovation in financial technology (Fintech), and encouraging sound public policy. We believe that the provision of well-regulated, innovative, and responsible services and products by banks and Fintechs is critically important for the financial health of consumers and small businesses. This then creates a more inclusive financial system and contributes to a more competitive financial services landscape. AFC supports a fair financial services system where products are designed in compliance with applicable regulations, where the goal of sustainable access to credit should be present in all lending and servicing components, and where predatory conduct has no place. We believe that responsible innovation can drive fairer outcomes across the board for consumers and small businesses.

AFC members, some of which are headquartered in California, are at the forefront of fostering competition in consumer finance and pioneering ways to better serve underserved consumer segments and geographies. For instance, AFC has publicly supported 36 percent rate caps at state and federal levels, which is a key component of addressing responsible lending. Our members

¹ AFC's membership spans lenders, banks, payments providers, loan servicers, credit bureaus, and personal financial management companies.

² Notice of Proposed Rulemaking under the California Consumer Protection Law: Consumer Complaints and Inquiries (PRO-0321), available at <https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/05/PRO-03-21-Notice-of-Proposed-Rulemaking-5-17-22.pdf>.

are also lowering the cost of financial transactions, allowing them to help meet the demand for high-quality, affordable products.³

As demonstrated in recent studies by the Federal Reserve Bank of Philadelphia,⁴ the Federal Reserve Bank of St. Louis,⁵ the Federal Reserve Bank of San Francisco,⁶ and small business focused studies by New York University,⁷ and the US Government Accountability Office,⁸ Fintechs play an essential role in providing access to financial services to borrowers that would have otherwise been unfairly excluded, both before and during the current global pandemic. The structural exclusion of too many Americans, including communities of color, from traditional banking services makes it essential that other providers responsibly fill those gaps, including Fintechs, earned wage access providers, CDFIs, MDIs, credit unions, and small banks. In many cases it is partnerships between small banks and Fintechs that enable this expanded access and innovation.

AFC members share the DFPI's objective to strengthen consumer protections, including through robust and transparent complaints management. We agree that consumer complaints are a valuable tool for improving business practices, identifying pervasive issues, and detecting potential violations of consumer protection laws, and we welcome the DFPI's focus on fostering responsible practices. AFC supports transparent regulatory frameworks that foster responsible innovation in the banking industry, while avoiding unintentional stifling of the efficiencies and advancements that our members are able to provide. AFC respectfully submits the following comments to help achieve a transparent and balanced regulatory framework, critical to fostering and not stifling innovation, and we welcome the opportunity to assist the DFPI in refining the consumer complaint process to increase transparency in the regulatory framework and promote the welfare of consumers, particularly underserved populations.

Our response to the Proposed Rule offers suggestions to help the DFPI better achieve its stated objectives⁹ to develop reasonable procedures that enhance the quality of the customer service

³ For example, through a variety of business models, AFC members are refinancing higher interest rate credit cards, higher cost student debt, and higher annual percentage rate ("APR") auto loans into lower rate products to help consumers reduce their debt and improve their financial health.

⁴ Federal Reserve Bank of Philadelphia, Which Lenders Are More Likely to Reach Out to Underserved Consumers: Banks versus Fintechs versus Other Nonbanks (2021), available at <https://www.philadelphiafed.org/-/media/frbp/assets/working-papers/2021/wp21-17.pdf> at 29.

⁵ Federal Reserve Bank of St. Louis, Unsecured Personal Loans Get a Boost from Fintech Lenders (2019), available at <https://www.stlouisfed.org/publications/regional-economist/second-quarter-2019/unsecured-personal-loans-fintech>.

⁶ Federal Reserve Bank of San Francisco, Community Development Innovation Review, Fintech, Racial Equity, and an Inclusive Financial System (2021), available at <https://www.frbsf.org/wp-content/uploads/sites/3/fintech-racial-equity-inclusive-financial-system.pdf>.

⁷ New York University, Racial Disparities in Access to Small Business Credit: Evidence from the Paycheck Protection Program, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3939384 at 2-3.

⁸ Government Accountability Office, Paycheck Protection Program, Program Changes Increased Lending to the Smallest Businesses and in Underserved Locations available at <https://www.gao.gov/assets/gao-21-601.pdf>, see also Small Business Administration, Paycheck Protection Program (PPP) Report, Approvals through 6/30/2020, available at <https://www.sba.gov/sites/default/files/2020-07/PPP%20Results%20-%20Sunday%20FINAL.pdf>.

⁹ California Department of Financial Protection and Innovation, stated objectives were published by the DFPI, in its "[Initial Statement of Reasons](#)."

experience and consumer products offered. Our suggested changes to the Proposed Rule will balance the DFPI's interest in regulatory oversight of complaints procedures, while preserving flexibility for responsible non-bank platforms and service providers to respond to consumers, innovate and continue to use technology to improve customer service, and develop new and responsible products. This regulatory balance has been key in making California the hub of fintech innovation and economic growth that it is today.

We respectfully recommend DFPI to: 1) consider unintended negative consequences for both consumers and businesses of the Proposed Rule as currently drafted; 2) minimize the burden and costs our members anticipate will result if the rule is finalized as proposed; 3) clarify definitions and adjust the complaint process and inquiry requirements to be clearer; 4) allow for an officer designee for review of complaints; 5) allow for a cure period; and 6) make public certain quarterly reports instead of requiring public release of all quarterly reports with non-contextualized categories of all complaints, given the competitive consequences.

- II. While AFC supports the objective of stronger consumer protections resulting from the consumer complaint process, we urge the DFPI to consider the potential for unintended consequences for both the industry and consumers having to replace fair and well-established complaints systems with a new, unclear, duplicative, and untested process. AFC recommends the DFPI work with stakeholders to reduce the costs of unnecessary changes that do not benefit consumers.

Onerous requirements reduce efficiency and slow response time, raise costs for all consumers, and likely will not enhance consumer protection. For entities that have established policies and procedures, the Proposed Rule is both overbroad in its reach and is too prescriptive, creating undue burdens. The Department will benefit from allowing companies with established and effective complaint management programs to continue to improve their products and services through the insights provided through the complaint process, and these programs can generally be assessed in the supervision process. Our members, like other large national providers, have established robust complaint practices that include numerous channels in which to submit a complaint, such as telephone, mail, chat, email, and through the use of social media. Customers can also submit complaints to the Consumer Financial Protection Bureau (CFPB), banking regulators, the Federal Trade Commission (FTC), and the Better Business Bureau (BBB). AFC members would be pleased to work with you further to find reasonable ways to make this proposal advance the DFPI's core objective: to help covered persons identify problem areas that may need improvement.

As stated above, there are several provisions of the Proposed Rule that will be both burdensome to implement and to maintain. First, developing a process to allow after-hours voicemails will be a significant operational change. The key should be to ensure there are multiple channels for the customer to use – not mandating one channel such as voicemail. Also, formally taking complaints over the phone may result in human error, and we suggest these problems would be avoided by adapting the requirement to more closely align with the well-established oral disputes process under Regulation E, whereby institutions can require consumers to provide written confirmation of disputes first provided orally. Second, the timing around all communications is highly restrictive. From acknowledgements to investigations to responses, the time needed by a

company to diligently fulfil its obligations can range from one or two days, to somewhat longer, depending on the complexity of the complaint. Third, updating and maintaining a chart of complaint deadlines solely for the Department does not fulfill the purpose of the Proposed Rule and might conflict with tracking that currently exists to respond to complaints (as mandated by other regulators). Likewise, tracking complaint deadlines in a format that can be provided to the Department will be difficult, duplicative, and almost certainly not aligned with the business and needs of each company. Fourth, responding to duplicative complaints is onerous and takes valuable resources away from responding to actual customer complaints. Fifth, email acknowledgment should be allowed for all received complaints, including written complaints. Sixth, the Proposed Rule as drafted would force some disputes (unauthorized transactions, attempts to collect a debt, funds not owed, etc.) to come through this complaint process rather than the processes established by federal law. Seventh, quarterly complaints reporting is too frequent and costly. Lastly, specifying that the exact location of the link to the complaint form and instructions be at the top of a covered person's webpage is overly prescriptive and not necessary to ensure that the complaint process is easily accessible. Consumers are accustomed to visiting "contact us" or "help" pages to make complaints, and complaint disclaimers located at the top of product-oriented web pages may not be at all intuitive for consumers. As such, we recommend that the final rule consider other DFPI precedent to require that links should be (i) provided on the main webpage, (ii) easily accessible, and (iii) displayed in a clear and conspicuous manner.

We urge the DFPI to consider a separate rulemaking to establish procedures for inquiries, as the Proposed Rule requires much needed focus to avoid unintended consequences of high costs and compliance burdens that would distract from our ability to service customers and address actual complaints. The DFPI's proposed inquiry regulations are overly broad and significantly more expansive than those applied in any other state or by any federal agency. Prescribing procedures to monitor, track, and report all ordinary-course consumer inquiries is not reasonable. Also, there is no support for the assumption that sorting inquiries related to general customer support processes will materially add to the benefits to consumers that will accrue from sorting and analyzing complaints, while increased regulatory and compliance burden to categorize and examine inquiries will be significant.

Our members also firmly believe that the cost estimates of these processes may not apply the same way to every business. The Department provided an estimate of \$2,500 as an initial cost to implement and \$4,000 ongoing cost once implemented.¹⁰ It is not clear what the Department is basing these estimates on, but for larger, more sophisticated entities, those costs are underestimated. Conservatively, some of our members estimate initial costs would be at least \$50,000 to \$150,000. In addition, the ongoing cost associated with the requirements of this Proposed Rule would be substantial. To support the procedures being mandated by the DFPI for complaints and inquiries, and to bring down costs, the DFPI should set up a secure, web-based complaints portal similar to that in use by the CFPB to ensure consumer privacy and the confidentiality of companies' responses to consumers. Our members welcome an open channel with DFPI to address cost estimates and other reasonable adjustments that can be made to the

¹⁰ Notice of Proposed Rulemaking, *supra* note 2.

complaints and inquiries process in the Proposed Rule to bring the DFPI’s proposals in line with its estimates.

- III. If the DFPI finalizes Proposed Rule with minimal changes, we strongly recommend much needed clarifications on definitions and other technical assessments to help streamline the compliance process and to avoid customer confusion.

AFC recommends DFPI clarify some of the processes and requirements to reduce confusion. First, the complaint submission form needs additional identifying information from customers for a covered person to be able to investigate and respond and to be in compliance with California and federal privacy requirements. At a minimum, customers should be required to provide the last 4 digits of their social security numbers or last 4 digits of their account numbers as well as dollar amounts, and any other specifics in order for a covered person to conduct a meaningful investigation. The goal of the complaint process should be to address actual errors experienced by the customers as opposed to general policies or processes the customer does not like. Second, an effective date should be established with sufficient time to adjust processes. The effective date of the Proposed Rule, if adopted, was not contained in the proposal. Given the scope of the Proposed Rule, it will take considerable time to establish the suggested processes, procedures, and reports in addition to adding additional staff to support the process. We would like to respectfully request a year from the date the regulation is promulgated for it to be effective. Third, the Proposed Rule states that the annual and quarterly reports need to be filed with the Department without specifying where to send the reports. Please provide a contact person including an email address to submit the reports to.

Our members are also concerned about potential conflict with the California Consumer Privacy Act (CCPA)¹¹. The requirement to allow customers to file complaints up to 4 years after the event occurs may interfere with the ability to comply with CCPA and the rights of California residents regarding declined applications and the right to be forgotten. The statute of limitations set out in the regulation should align with the rights afforded in CCPA.

Our members would also like clarification on several definitions, including the definition of the individual who must review complaints and inquirers from the business side. Most platforms are cross-functionally developed and managed. A complaint will rarely fall squarely within one line of the business. Our members often don’t designate a specific person or division handling all aspects of a financial product or service for each customer. Flexibility is needed to allow covered entities the discretion to choose the appropriately trained individual to review the complaint and inquiry if it does not fall squarely within one division of the business.

DFPI should also clarify definitions, in particular for “complaints” and “inquiries”, to focus upon complaints and inquiries from and communications directed to California residents, who lie at the heart of DFPI’s mandate. While the “covered person” definition provides that the Proposed Rule covers “[a]ny person that engages in offering or providing a consumer financial product or service *to a resident of this state*,”¹² appropriate California-focus is not otherwise included in the

¹¹ California Consumer Privacy Act, 2018 Cal. Legis. Serv. Ch. 55 (A.B. 375) (WEST) [2] § 1798.198(a).

¹² Notice of Proposed Rulemaking, *supra* note 2.

Proposed Rule. If this is not corrected, the Proposed Rule will increase consumer confusion because, for instance, the Proposed Rule will require that instructions on filing complaints with the California DFPI are included in written communications to residents of other states. Also, complaints and inquiries that covered persons receive from other regulatory authorities (e.g., the CFPB and states) should be explicitly excluded from these defined terms.

Additionally, if the DFPI moves forward to include “inquiry” in the Proposed Rule, then the definition of “inquiry”, should be further limited to exclude any question or request for information, interpretation, or clarification submitted by an inquirer regarding a financial product or service where the response to the inquiry is already provided in publicly-available information or the customer’s individual documentation concerning the product or service; this would incent covered persons to clearly and fully disclose information to consumers, both publicly and individually. As it stands, the definition of inquiry in the Proposed Rule would apply to nearly every ordinary course interaction initiated by a consumer to a covered person, which is not reasonable.

While we agree with the DFPI’s objective of providing consumers easy-to-read, easy-to-find guidance on filing complaints and making consumers aware that complaints may be submitted to the DFPI, it is not feasible to apply these requirements to “all written communications.” For simplicity and clarity, we recommend that disclosure of complaint procedures be required on a covered person’s website, in initial written communications with the consumer, and in periodic written statements specifically directed to California residents. Alternatively, in addition to text messages, the requirement should exclude written communications that, in the words of DFPI, “are subject to character limitations and generally [are] not the primary mode of communicating important information with consumers.”¹³ Written communications should also exclude those not in control of a covered person.

- IV. AFC recommends allowing an officer’s designee to review complaint trends, a cure period, and a public DFPI quarterly report instead of public release of complaint categories through an annual report.

AFC recommends that the Proposed Rule provide that the relevant officer of a covered person be allowed to direct a designee to perform the activities specified, as it is not feasible for a single person at the officer-level to perform the specified activities, including to review all third-party complaints. The relevant officer should ultimately be accountable for the effective operation and governance of the complaints program. However, the officer should be able to direct its designee or other members of senior management on the performance of complaint processes. The time and thoughtfulness required of such an officer will be difficult for smaller companies and new entrants to the market. A designee would be a practical solution for smaller companies and not put them at a competitive disadvantage to larger companies with larger teams of senior executives.

Also, given the monetary consequences of non-compliance, a cure period of 30 days would be appropriate before monetary violations may be assessed. Again, given the nature of smaller startups and new entrants to the market, compliance will be a shared objective. But new

¹³ California Department of Financial Protection and Innovation, stated objectives, *supra* note 9.

operations and processes will always require updates to procedures to ensure maximized efficiency. Plus, given that a number of our members operate in several states, having a process that is unique to just one state will be most time-consuming for smaller companies. Allowing for a 30-day cure period will allow for the most compliance possible.

Finally, startups and smaller Fintechs and banks engage in an incredibly competitive market. The quarterly reporting required in the Proposed Rule will provide observers of the full report with a clear and comprehensive picture of complaints and resolutions. However, the categories of complaints can be and will be easily used by competitors, without the resolution context. Several AFC members operate in California, but not all of their competitors will operate in-state, particularly our members who require third party agreements or business integration. Our members are mission-driven and compete with other similarly mission-driven Fintechs and banks. A quarterly public report may create an unfair competitive disadvantage to covered entities who are complying with the regulations and resolving complaints without incident. A better source of truth for California consumers would be to establish a complaints portal consistent with the CFPB approach referenced above and to require public release of DFPI quarterly reports for those companies that fail DFPI established thresholds. Similar to other industries, this could consist of companies that are repeatedly non-compliant with the regulations or of companies that receive a large number of complaints compared to their number of customers.

V. Conclusion

AFC believes that the goal of sustainable access to credit should be present in all lending and servicing components, and that innovation can be a driver of fair and responsible access to credit. We welcome the DFPI's focus on fostering responsible practice, and fair lending in consumer financial markets. Consumer complaints are a valuable tool for improving business practices, identifying pervasive issues, and detecting potential violations of applicable consumer protection laws. Our members hope to have more opportunities to work with DFPI as the Proposed Rule is finalized to ensure that it can meet its stated objectives in a manner both reasonable and practicable for consumers and financial services providers alike.