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June 21, 2022

Department of Financial Protection and Innovation
Attn: Sandra Navarro
300 S. Spring Street, Suite 15513
Los Angeles, California 90013

Subject: Comments on PRO 03-21

To Whom It May Concern:

This letter is submitted in response to the Notice of Proposed Rulemaking issued on May 20, 2022 regarding consumer complaints and inquiries under the California Consumer Financial Protection Law. This letter also serves as a follow-up to the comment letter I submitted on September 17, 2021 regarding DFPI PRO 03-21. I am heartened that the Department took many of the suggestions I made in that earlier letter. However, as noted below, I believe that the current proposed regulations continue to raise concerns and would benefit from further revision. The comments below are provided in chronological order. At the conclusion of this letter, I also offer the Department a general recommendation, applicable to this regulation and to other regulations intended to apply to all covered persons.

COMMENTS AND RECOMMENDATIONS SPECIFIC TO THE PROPOSED LANGUAGE

Proposed Section 1072: Complaint Processes and Procedures

- 1) Paragraph (7) of subdivision (a) prohibits covered persons from imposing a time limit for filing a complaint shorter than four years from the occurrence of the complained of act, omission, decision, condition, or policy. Four years is a very long time window, especially when combined with the requirement in Proposed Section 1072(f) that a covered person maintain a written record of each complaint for at least five years from the time is initially filed. When combined, these time periods could require covered persons to retain documentation about a consumer for up to nine years following the conclusion of a business relationship with that consumer. These time periods are without precedent and could create significant recordkeeping burdens on covered persons.

I request that the Department provide examples of other regulated entities under its jurisdiction whose recordkeeping requirements are as long as those proposed for covered persons. In the alternative, I recommend that the proposed time periods be shortened so

they are consistent with those applicable to other entities regulated by the Department.

- 2) Several provisions of proposed Section 1072 impose calendar day requirements on covered persons. In my earlier comment letter, I recommended that the Department switch to a business day requirement. Because the Department has not done so, I now recommend that the Department clarify how it expects covered persons to handle weekends and holidays in the context of its calendar day requirements. May a covered person provide the required response on the first business day following a required response deadline that falls on a weekend or a holiday? Clarity on this question will be critical to ensure that covered persons understand regulatory expectations.
- 3) Subparagraph (B) of paragraph (1) of subdivision (c), relating to complaints that require further investigation, requires covered persons to ascertain the cause of the issue by conducting a thorough review of relevant documents and individuals. These requirements suggest the need to identify an underlying cause for each complaint and to do background checks regarding employees of covered persons or their service providers. I believe this language would read more clearly if it was revised, as follows. “For complaints that require further investigation, the covered person shall conduct a thorough review of all relevant documents and of the acts, omissions, decisions, conditions, or policies that may have led to the complaint.”
- 4) Paragraph (1) of subdivision (d) requires a covered person to provide a consumer with “all target dates for further actions” by that covered person related to the consumer’s complaint. It would be far less burdensome on covered persons and equally as helpful for consumers if covered persons were required to provide the time period within which the covered person is required to issue the consumer an initial response and any subsequent responses, rather than the specific date(s) by which the responses are required. As the language is drafted now, covered persons are unlikely to be able to automate the response process, because each response will have to take weekends and holidays into account. If the fifteen calendar day period within which a final decision is due falls on a weekend or a holiday, that covered person will have to adjust its target dates to account for those weekends or holidays. To minimize the compliance burden of this requirement, I suggest revising the language, as follows: “The procedure must include a process for recording the status of a complaint and the time period within which the covered person is required to issue the consumer an initial response and any subsequent responses” ~~all target dates for further actions, including the issuance of a final decision.~~
- 5) Paragraph (2) of subdivision (d) requires the tracking to be provided to the Department upon request and in *any* electronic format requested by the Department. This paragraph has the potential to be burdensome on covered persons, if the Department requests this information in a format that is not widely used. This requirement could also expose the requested data to hackers, if the format requested by the Department is insufficiently

secure. At a minimum, I recommend adding the concept of reasonableness to this requirement, as follows: “The tracking shall be provided to the Department upon request and in any electronic format *reasonably* requested by the Department.

- 6) Subdivision (h) requires all covered persons to submit a quarterly complaint report to the Department. Not only is a quarterly reporting requirement likely to be burdensome on covered persons, but it is also likely to result in significant costs for the Department to review what are likely to be several thousand submissions every three months. As the proposed regulation is drafted, it applies to all covered persons, not just to those covered persons required to register with the Department. When legislation proposing to create the Department of Financial Protection and Innovation was being proposed and debated, the Department estimated that slightly over 9,000 covered persons would be subject to the new rules and based its proposed operating budget and staffing estimates on that number.

If the Department continues to believe that at least 9,000 covered persons are subject to its jurisdiction and will be required to comply with the quarterly reporting requirement it is proposing, the Department is likely to need additional staff with which to review the approximately 36,000 complaint reports this proposed regulation will require. For that reason, this regulation may warrant review by the budget committees of the Legislature.

In the alternative, if the Department believes that the universe of covered persons is much lower than its original estimate of approximately 9,000, it may be appropriate for the Department to revise its future budget requests to the Legislature to reflect its lower workload.

In lieu of a quarterly reporting requirement, and to reduce the compliance burden on covered persons and the administrative burden on the Department, I recommend that the Department propose an annual reporting requirement, with the understanding that it may ask specific covered persons to submit complaint data more frequently (either semi-annually or quarterly), once it has had an opportunity to review the initial submissions. The submission of quarterly complaint data should be reserved only for those covered persons about which the Department has specific concerns related to complaints.

- 7) Paragraph (12) of subdivision (h) includes fourteen types of complaints. Several of the categories of complaints are duplicative of one another, and many lack clarity. Because of the way in which the complaint types are described, it is highly likely that a single consumer complaint about a single concern can be described using multiple complaint types. This, in turn, is likely to lead the Department to inflate complaint data when it reports on the number of consumer complaints received by covered persons.

In order to minimize over-reporting, I recommend either of two approaches: either

instruct covered persons to select a single complaint category that best describes each consumer complaint or significantly revise the list of complaint categories to remove duplication and overlap. I suggested an option for the latter approach in my comment letter dated September 17, 2021.

Proposed Section 1074: Processes and procedures for covered persons to provide a timely response to the Department

- 8) Given the manner in which subparagraph (A) of paragraph (1) of subdivision (a) is drafted, it appears that proposed section 1074 is intended to apply to inquiries from the Department following the provision of a final decision by a covered person to a consumer complainant. However, the introductory language of subdivision (a) does not limit the scope of this section. Instead, as drafted, proposed Section 1074 appears to cover requests from the Department regarding consumer complaints before, contemporaneously with, and after a covered person has responded to the consumers making those complaints. If the Department intends that proposed Section 1074 apply only after a covered person provides a final decision to a consumer complainant, I recommend clarifying this point in the introductory sentence of subdivision (a), as follows: “A covered person shall develop and implement written policies and procedures for responding to requests from the Department regarding ~~a consumer complaint~~ consumer complaints for which that covered person has provided the complainant a final decision.”

In the alternative, if the Department wishes to use proposed Section 1074 to cover requests from the Department regarding complaints a covered person is investigating, as well as complaints on which the covered person has provided a final decision, I recommend revising subdivision (a) to more clearly explain the Department’s expectations in both situations. If the Department elects this option, I strongly suggest that the Department simplify the process by requesting one of two responses from covered persons when it inquires about the status of a complaint or inquiry:

- a) For complaints on which the covered person has already issued a final decision to the consumer, the covered person should be required to provide the information described in subparagraphs (A) through (D) of paragraph (1) of subdivision (a).
- b) For complaints the covered person is still investigating, the covered person should be required to tell the Department it is still investigating and should be required to provide the Department with its final decision within the same time period described in paragraph (1), after it provides a response to the consumer.

Requiring any additional information from a covered person while they are looking into a complaint is likely to require the covered person to redirect resources away from its investigation into the complaint and into a Department response. Only if a complaint has gone unresolved for an unreasonably long period of time should a covered person be

required to provide more detail to the Department regarding why the issue remains open.

GENERAL COMMENTS AND RECOMMENDATIONS APPLICABLE TO THIS PROPOSED REGULATION AND OTHER REGULATIONS APPLICABLE TO ALL COVERED PERSONS

As the proposed regulations are drafted, they apply to *all* covered persons, not just those covered persons who will be required to register with the Department. For that reason, this regulation will apply to all persons subject to the California Consumer Financial Protection Law (CCFPL; i.e., all persons offering or providing consumer financial products or services in California, and their third-party service providers, unless those financial service providers or their third-party service providers are expressly exempt from the CCFPL). Although many financial service providers are already aware of the CCFPL and of their coverage under it, it is undoubtedly the case that many other financial service providers are unaware of that law, or are aware of the law but unaware that they are subject to it. For that reason, it is highly likely that a significant number of financial product and service providers and their third-party service providers will be unaware of this regulation and their responsibilities under it.

Certainly, all financial product and service providers have a legal responsibility to know the laws to which they are subject. However, many of these providers are small businesses that do not have dedicated regulatory compliance departments, and it is highly likely that a significant number of entities subject to the law are unaware of its existence. Once these regulations become final, I highly encourage the Department to do extensive outreach across a broad swath of consumer financial product and service providers operating in California, with the goal of ensuring that all entities subject to the regulations are aware of them and of their responsibilities under them. If these regulations are to achieve their goal of ensuring that all financial product and service providers in California have robust consumer complaint policies and procedures in place, extensive and continuing outreach by the Department to all consumer financial product and service providers operating in California will be critical.

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

Sincerely,

[REDACTED]

Eileen Newhall, Owner
Eileen Newhall Consulting LLC