



July 5, 2022

Via email to: regulations@dfpi.ca.gov, [REDACTED]@dfpi.ca.gov

Department of Financial Protection and Innovation
300 S. Spring Street, Suite 15513
Los Angeles, CA 90013

Re: Notice of Proposed Rulemaking, PRO 03-21

Dear policymakers,

Lithic, Inc. (“Lithic”) appreciates the opportunity to provide input on the Department of Financial Protection and Innovation’s (“DFPI”) [proposed regulations](#) (“Proposal”) under California Consumer Financial Protection Law Section 90008, subdivisions (a), (b), and (d)(2)(D).¹ We are writing to identify certain concerns and recommendations we have regarding the Proposal. Our recommendations are largely based on operational best practices and industry standards for companies offering consumer financial services products.

I. About Lithic

Lithic is headquartered in New York City and maintains a distributed workforce that includes several dozen California residents. We launched our first product in 2014 as a direct-to-consumer virtual payment card offering named Privacy.com, which has since served millions of U.S. customers.

Starting in 2021, Lithic expanded its offerings to share our payment card issuing technology with other companies. Lithic’s API-based card issuing platform currently enables more than 100 companies to use payment cards for internal business purposes and with their own customers. Customers for our payment card issuing technology range from small startups to mature companies, and they have a wide variety of experience with FinTech, compliance and customer support matters. And several of our start-up customers are happily building in California.

Lithic and its Privacy.com team have built successful customer service and complaint management operations, as evidenced by the company’s A+ Better Business Bureau rating.

¹ Because we and our API customers act as service providers to national banks and banks in other states, it is not entirely clear that the rulemaking would apply to our companies. However, to help inform the Department, as well as to preserve our rights and abilities to challenge future rules, we are providing these comments.

II. Overview of Modern Customer Service Practices

FinTech companies like Lithic and our customers generally use modern tooling to run customer service functions. Customer support works to monitor customer sentiment across email, voicemail, physical mail, online chat and social media channels. While these channels are generally used to intake and resolve issues that our customers have with our products, they also serve to catch customer complaints. These channels generally operate as follows:

Email: FinTech companies generally post a “help” or “contact” email for customer support inquiries. This can generally be found in the product terms of service and at the bottom of each company’s Website. Privacy.com, run by Lithic, lists “Support” as a top header on our website as well as in our Website footers, making it easy for customers to contact our teams.

Customers who write to the company’s support email address have their messages routed into queues via software tools such as Zendesk or Salesforce. This allows the company’s customer support associates to review email requests and respond using pen names.²

FinTech companies need to offer stellar customer service, or else customers will churn for competing products. Privacy.com, for example, responds to 25% of email inquiries within 4 hours, whereas a small number (15%) take between 24 and 48 hours and a little more than 1% take more than 48 hours to receive a response. Importantly, email support is highly scalable and efficient. This is because modern tooling like Kenchi allows support teams to quickly trouble shoot customer problems and text expander allows customer support teams to quickly recycle common answers.

Phone and Voicemail: FinTech companies who rely on debit or registered prepaid cards need to offer a toll-free phone number for customer disputes. Companies at scale are generally able to offer phone support as part of their core offering, but even then many rely on IVR and other automated technologies to triage customer calls and try to reduce the number of calls that reach live agents.

Smaller companies generally use telephone support for request-a-call offerings. However, our experience at Lithic and Privacy.com has shown that customers generally do not avail themselves of this contact method and instead prefer to use email, chat or other asynchronous forms of communication. Privacy.com, for example, received 4,308 voicemails in 2021 but only a handful of those requests involved actual customers requesting a callback. There also wasn’t a consistent theme in the Privacy.com customers who requested a call, indicating that at least our customers are not looking for dedicated phone support for complaint purposes.

² Pen names are important tools for customer service, as companies sadly receive threats of violence against customer service associates and these associates are sometimes stalked if they use their real names.

Online Chat: Online chat is an increasingly popular tool for customer support. Customers can prefer chat support due to its real-time nature, and the customer's ability to communicate in writing vs. having to speak to someone over the phone. Chat, like email, is also fairly scalable as a communication tool. This is because chat tools allow managers to quickly support and triage complicated customer requests.

Social Media Channels: Increasingly customers seem to be ditching phone support for grabbing a megaphone on social media. Companies, in turn, are using tools like Brand24 to monitor for mentions of their products on social media apps and websites. These tools function like the email tooling mentioned above (e.g., Zendesk) and can create alerts and queues of messages for companies to review and respond to. The tools also helpfully categorize social media mentions into positive and negative, allowing companies to focus on complaints more quickly. We use these tools at Privacy.com and Lithic.

Physical Mail: Companies also regularly respond to physical mail sent to their corporate addresses. This mail can often contain BBB and Attorney General complaints, as well as ordinary-course customer communications.

III. Concerns and Recommendations for the Proposal

Sections 1072 and 1073 should be revised to take a principles-based approach

We share the DFPI's goals of having effective customer service functions, however the Proposal goes beyond the scope called for in Cal Fin Code Section 90008. As the Department is aware, Section 90008(a) directs the DFPI to create "reasonable procedures" governing how covered persons respond to consumer complaints. Section 90008(b) allows the DFPI to require covered persons to respond to the Department with information about how it is addressing specific customer complaints. The other Sections of 90008 generally pertain to the obligations or rights of the covered persons, and use qualifiers such as "timely manner."

The intent of the legislature in these sections appears to have been to create a more formal version of the existing California Attorney General complaint process. Under that process, consumers may file a complaint directly with the California Attorney General. Similar to Cal Fin Code 90008(b), persons implicated in complaints to the AG's office are required to respond to the AG with information about how the person is handling the matter.

Sections 1072 and 1073 of the Proposal appear to stray from the statutory direction that the Department write "reasonable" requirements by dictating what will be an expensive and rigid approach to customer complaints, including by mandating specific Website designs and placement and requiring anachronistic intake channels that consumers no longer show a preference for such as phone support. The Proposal also strays from the "timely manner" statutory references, such as by requiring companies to respond to telephone-based complaints within 24 hours and without regard to weekend or holiday staffing.

To align the Proposal with the relevant statutory text, we respectfully recommend the department move to a principles-based rule that:

- Allows flexibility for companies to select their complaint intake channels. Specifically, offering email intake should be sufficient for smaller companies, while larger companies could be required to offer at least two intake channels.
- Replaces the rigid Website requirements with a “clear and conspicuous” standard, allowing companies to address complaints via ordinary course “contact” or “help” Webpages and intake channels.
- Replaces the rigid response requirements with a requirement to timely acknowledge the customer’s complaint, and timely respond to the customer.

One example of where the Proposal’s requirements are not reasonable and will almost certainly lead to personal harm is found in Section 1072(c)(1)(A), which requires companies to name the responsible individuals who decide not to investigate a complaint. As mentioned above, customer support teams almost always use pen names to protect their personal safety. At Lithic we are aware of several instances of attempted harassment and violence against FinTech customer support teams, including one customer-complainant attempting to perpetuate a mass shooting due to not liking a company’s response and another instance where an employee was stalked and sexually harassed online by a hostile customer.

Another example where the Proposal falls short of the statutory “reasonable” standard relates to Section 1073’s direction to complete investigations and respond to complainants within 15 days. If a complaint uncovers material operational issues, companies may not be able to fully diagnose the internal problems and respond within 15 business days. Here, a better standard would be to direct covered persons to respond within a timely manner commensurate with the scope of the issue uncovered by the complaint. The 15-day investigation and response timeline also does not account for complaints that are received over holidays or weekends, which would eat substantially into the company’s time allotted to review the complaint and formulate a response.

Based on these and other experiences we’ve had with customer support operations, we urge the DFPI to move to a principles based approach that requires companies to promptly respond to valid customer complaints and issues, but otherwise affords covered persons the flexibility to operate in a cost-effective manner and allows us to preserve the safety of our employees.

The DFPI should eschew its One-Size-Fits-All approach and adopt exemptions for smaller companies

California’s financial regulators, especially the prior DBO, have always shown a willingness and interest in creating flexible and fair regulations, including waiving or suspending certain requirements that were highly onerous for smaller licensees. The Proposal, in contrast,

takes a one-size-fits-all approach that breaks with this historical precedent by requiring companies to comply with all requirements from dollar-zero, regardless of the actual benefit to consumers in the state. The state's legislature has given the DFPI the ability to adopt exemptions for smaller companies due to the statutory "reasonable" standard, and we encourage the department to use it to keep California as the best state to start and scale FinTech companies.

As discussed further below, we expect the costs to smaller companies to be substantially above what the state estimates in the Proposal. This will be especially true for startups and smaller businesses that do not yet engage in much commerce in California. We respectfully remind the Department that startups are not profitable out of the gate, and will not be profitable until they hit some meaningful scale. Therefore, heavy process and data reporting requirements are an undue burden that will more than likely cause smaller companies to choose between ignoring the requirements and choosing to block California consumers from using their offering.

This already happens today in the consumer and commercial lending markets, with startups that have zero-interest and zero-fee products regularly being advised by law firms to launch in states other than California that do not have strict licensing requirements.³ As a result, California consumers and small businesses miss out on favorable products and incumbents that serve the California market have fewer reasons (i.e., competition) to improve their offerings.

Because we believe it is not the DFPI's or Legislature's goal to further chill responsible innovation and competition in the state, we recommend creating a size-based threshold under which small businesses are exempt from the specifics of the regulation.

One model the DFPI could follow is the California Consumer Privacy Act (as amended), and set a minimum threshold such that consumer financial services companies are subject to the Proposed Regulation if they:

- Have at least \$25,000,000 of annual gross revenue, or
- Offer consumer financial services to more than 50,000 CA consumer residents per year.⁴

We note that if the DFPI entertains any such exemptions, California consumers are not without redress vis-a-vis exempted companies. This is because these consumers can still lodge

³ By strict, we mean statutorily strict in a manner that cannot be waived or exempted by the DFPI or a similar regulator. Having worked in the lending space on several occasions over the past decade, I am aware and personally appreciative of the DBO and now DFPI's proactive manner in working with companies and licensees.

⁴ We acknowledge that the CCPA also requires compliance if companies receive half their revenue from selling California consumer data. We do not think a similar 50% revenue test is appropriate for an exemption from the Proposal as smaller companies are likely to foot fault over such a threshold before they find product-market fit. This would impose costs on the startup that are disproportionate to the potential consumer benefit, and in some cases could tip startup burn rates to a place where the company fails.

complaints with the DFPI directly. Additionally, these consumers can avail themselves of complaint functions offered by the California Attorney General's office, the CFPB and private groups such as the Better Business Bureau.

We also note that such an exemption may not be necessary if the Department replaces its rigid and prescriptive rule with a more principles based one. Allowing companies the option to choose which complaint intake channels they use, and also relaxing prescriptive requirements to a principles-based approach could allow smaller companies with the flexibility needed to comply with the rule without excessive compliance costs. In these instances, the Department might consider suspending the reporting requirements for smaller companies, but otherwise require compliance with a principles-based rule.

The Proposal should be revised to consider effective alternatives

As noted above, our experience serving customers shows that fewer and fewer are favoring phone and mail for support and complaint matters. However, the Proposal dictates rigid and costly phone and mail support in various areas. Unfortunately, this indicates the Proposal does not effectively consider effective alternatives to meet the DFPI's statutory and policy goals.

For example, proposed rule sections 1072(a)(5) and 1073(a) require live telephone intake channels when email, chat and other modern complaint intake methods are more cost-effective alternatives that are, at least in our experience, preferred by consumers.

The Proposal also includes excessive complaint intake timelines (any complaint from any issue occurring within the past four years) and recordkeeping requirements (five years). The Proposal includes these requirements without discussion of why the DFPI is requiring timelines that are different from those found in federal law or industry rule. For example, it's inconsistent to have companies take complaints about debit card disputes that are four years old when federal law requires those disputes to be raised within months and industry rules generally only allow 180 days for such a dispute complaint. Similarly, Regulation E requires a two-year record retention period whereas the Proposal would require companies to keep records for five years. As a result, the Proposal does not properly consider whether existing federal intake and recordkeeping requirements for consumer payment card products are reasonable alternatives.

As another example of the DFPI failing to consider reasonable and more efficient alternatives, proposed rule section 1072(b)(3) requires companies to provide a unique tracking number when modern support practices allow companies to review prior correspondence and complaints without these types of numbers. It also requires companies to mix media types and provide physical mail to the customer that complains via telephone. This requirement ignores digital intake and response methods and would also seem to conflict with the federal E-SIGN Act standards, which allow customers and companies to agree to correspond on matters—including complaints—via digital and written means.

As the DFPI considers its path forward, we urge the Department to more fully consider alternative means of meeting its consumer protection goals. These include revising the rulemaking to be principles-based, and allowing flexibility for companies to offer their own preferred forms of intake to managing complaints. We also urge the DFPI to revise the intake timeline from four years to something in-line with federal intake timelines for financial services, and to revise the final rule's recordkeeping requirements to similarly match federal recordkeeping requirements for product type.

The Proposal's concept of complaint needs tailoring to eliminate noise for Companies and the Department

There's a concept in financial services compliance circles that you need to balance the signal-to-noise ratio of your controls like transaction monitoring. The same principle would be helpfully applied to the Departments' definition of "Complaint."

As currently constructed, the Proposal's definition and related references appear overly broad and will lead to noise in covered person and DFPI complaint monitoring. Specifically, the Proposal notes that any dissatisfaction with a product or service must be handled as a complaint under the rule. However, this requirement hands a cudgel to fraudsters and others who seek to willfully drain company resources and who otherwise don't care about muddying the Department's data.

As an example, Privacy.com recently conducted a KYC rescreen for AML purposes. Some customers were incredibly irate at being asked for their social security number and used rude language in customer support emails before closing or deactivating their accounts. Under the Proposal, companies such as Privacy.com would seem to be obligated to contact those persons to acknowledge their complaints, and then take the time to respond to them. If they contacted Privacy.com via phone, the Proposal would obligate the covered person to have a customer support associate call them back to attempt to collect the DFPI's required complaint fields and submit a mailed acknowledgement. And covered persons would be required to report this frivolous and noisy complaint data to the DFPI, even though the "dissatisfaction with the financial product or service" was triggered by Privacy.com complying with federal AML laws and those customers ultimately chose to discontinue their accounts.

Similarly, fraudsters are highly effective in finding the highest pain point for customer service teams and then using that pain point for financial gain. If they find that activating the Proposal's mandated customer service complaint channels gets them a faster response and access to someone they can try to fool or con, they will share this information online and attempt to overwhelm the company's channels.

Under these real-world scenarios, the Proposal's effect is to add undue expense to covered persons and also create noisy data records for the DFPI that are not capable of signaling actual consumer harm. Given the Gann Limit and general principles of economics,

neither covered persons nor the Department have funds to waste on process or reporting for frivolous complaints.

As a result, we recommend the DFPI revise the proposal to allow covered persons to side track frivolous complaints so that they do not need to be actioned or reported as part of the final rule's requirements. The industry already has some precedent for this, as FinTech banking partners often focus on "material" or "executive" complaints that signal the potential for actual consumer harm.

If the Department took this approach, it could look to tailor the Proposal's complaint definition to limit it to complaints that relate to or could potentially relate to consumer economic harm, such as improperly held funds, improper fees or denied refunds. The Department could pair this revision with language excluding frivolous complaints, defined to include complaints from persons the company has a good faith or reasonable belief might be engaged in fraud and those that do not specify any potential consumer harm.

The Proposal's cost estimates are not reflective of actual operational costs and expenses

We also highlight that the DFPI's cost estimates for the rulemaking are inaccurate, and share the following to support our request that the Department should revise the Proposal to be principles-based and allow covered persons more flexibility.

In the Notice of Proposed Rulemaking, PRO 03-21, Department staff assert that complaints should only cost \$2,500 for initial compliance, and \$4,000 thereafter. However, these cost estimates fail to consider the full amount of work and staffing required to comply with the rule.

Assume a covered person has a fully committed customer support team. This team would need to hire a new employee to staff the Proposal's various intake channels, especially the phone requirements found in Sections 1072 and 1073. If this person is hired in California, they will at least need to be paid the state's minimum wage of \$15 and hour. At a full-year's salary, this person is going to cost a company \$31,200 in wages alone. The company will also need to pay its share of social security tax, as well as California disability and other taxes. And the company will likely need to offer this hire benefits that extend into the thousands of dollars each year.

The proposal's reporting requirements also assume that companies can easily tabulate, track and report granular complaint data and actions taken in response to these complaints. However, most companies using a CRM or ticket management solution like Zendesk will need to undertake time-intensive technical projects to create tagging and reporting that matches the DFPI's proposed reporting framework. These solutions will need to be created by someone with the skills of a computer systems analyst, which has a median salary of \$99,000 and benefits that cost into the tens of thousands.⁵ Such a project is likely to take the computer systems

⁵ See BLS wage data accessible at <https://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm>.

analyst at least a quarter's worth of compliance work, meaning the rule will trigger \$24,750 in wage costs and thousands extra in taxes and benefits for covered persons. This is on top of the additional staffing required to intake and respond to customer complaints across the duplicative and unnecessary multiple intake channels in the Proposal.

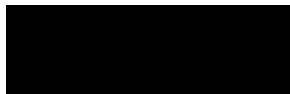
Because response and reporting requirements are ongoing, the Proposal will also carry excessive costs for covered persons going forward. We estimate that at least one additional full time employee will be necessary to manage the Proposal's mandated customer intake channels. And that some ongoing portion of computer system analyst time, at least 10-percent, will need to be committed to ensure accurate and proper reporting. That equates to more than \$40,000 in new wage expenses alone, or more than 10 times the cost estimates in the rule. And as companies scale, these costs will scale proportionally.

To address the actual impact of the rule's costs, we recommend the DFPI revise the Proposal to be principles based and allow covered persons to pick which complaint intake methods they will use for compliance purposes. The DFPI should also simplify its reporting obligations, which are currently constructed in too complex a manner and will drive outsized technical costs and burdens for covered persons without providing clear or actionable data for the department.

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We thank you for the opportunity to comment on the Proposal. Should you have any questions or wish to discuss further, please contact Reggie Young or myself.

Sincerely,



Matthew W. Jániga
Compliance Officer and General Counsel⁶
Lithic, Inc.

⁶ Currently licensed to practice law in New York State. State law work overseen and directed by licensed California attorneys.