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Commissioner of Financial Protection and Innovation
Attn: Sandra Sandoval, Regulations Coordinator
300 South Spring Street, 15th Floor
Los Angeles, CA 90013

By e-mail to regulations@dfpi.ca.gov

Re: Invitation for Comments on Proposed Rulemaking Under the California Consumer Financial Protection Law: Consumer Complaints (Pro 03-21)

Dear Ms. Sandoval,

This letter is submitted on behalf of my clients to in response to the Invitation for Comments on Proposed Rulemaking Under the California Consumer Financial Protection Law: Consumer Complaints (the "Proposal") issued by the Department of Financial Protection and Innovation (the "Department") on May 20, 2022 (the "Proposal"). I am an attorney practicing in the area of consumer and commercial finance in the California market and represent and/or advise nearly 100 financial service providers operating in that space. A number of those entities are financial service providers subject to the California Consumer Financial Protection Law (the "CCFPL"), California Finance Lenders ("CFL's") regulated under the California Financing Law (the "CF Law"), and other direct lenders and loan servicers regulated under the California Debt Collectors Licensing Act (the "DCLA"). I also represent or advise a number of such entities that have recently either left the California market or pivoted their business models away from activities regulated under the CCFLP, the CF Law, or the DCLA. As this letter is submitted in the collective interests of those clients, it will use the first person plural to set forth comments to the Proposal.

Summary

The Proposal is seriously flawed. The proposed regulation should be withdrawn, reconsidered in its entirety, and only reintroduced once the significant flaws have been addressed.

Need for the Proposed Regulation

Initially, we question the need for the Proposal for three reasons. First, there has never been a large volume of complaints as to financial services provided by Covered Persons that could

justify the unduly burdensome structure proposed by the Department. Second, the CFPB complaint process and examination process already in existence adequately addresses consumer complaints made against Covered Persons. The Proposal is a solution in search of a problem (that does not even exist).

Third, the Notice of Proposed Rulemaking to the Proposal (the "Notice") states that the purpose of the Proposal is "establishing reasonable procedures for covered persons to require covered persons to provide a timely response to the Department concerning consumer complaints and inquiries," citing Financial Code §90008(a). That is a laudable aim, but the requirements of the Proposal go far beyond the stated purpose and are unreasonable.

Appropriateness of the Regulation at This Time

Next, issuance of the Proposal at this time puts the cart before the horse. This is based on two major considerations:

First, the Proposal purports to apply, essentially immediately, to all Covered Persons. Yet the Department has not even begun to identify, establish contact with, or even seek to require registration of Covered Persons beyond those it already regulates. The Department estimated to the Legislature in connection with the enactment of the CCFPL that the CCFPL would apply to approximately 9,000 Covered Persons. The Proposal, on its face, would apply to all 9,000 Covered Persons, many or most of whom have no mechanism even to be aware of the existence of the Proposal and thus are unlikely to even know they must comply with it. Then, the Department will have a free path to initiate an enforcement action at any time of the Department's choosing, no matter how arbitrary and capricious that may be. The Department will then have the capacity to use the Proposal as a mechanism to extract fines and settlements from Covered Persons even in the absence of wrongdoing or harm to a California consumer.

Second, it is unclear how the Proposal is intended to apply to "debt collectors," as defined by the DCLA and whether it includes third-party debt collectors, or first-party lenders and loan servicers that the Department has determined are covered by the DCLA. To the extent that there has been coordination with the staff of the Department's DCLA Section in the promulgation of the Proposal it is far from clear which raises the concern of the possibility of another set of proposed regulations governing the DCLA.

In this regard, we also note that there will be numerous business entities that are both Covered Persons under the CCFPL and Debt Collectors under the DCLA. That universe includes any non-exempt direct lender that is collecting or servicing loans or other extensions of credit that it has originated or purchased. Thus, unless identical regulations are adopted under the DCLA, those entities will be facing compliance with two sets of complaint-related regulations: another unreasonable burden upon California business entities.

Third, as is discussed below, the Proposal seems duplicative of other complaint or error resolution procedures currently embodied in Federal and California law. The Proposal contains

no guidance as to how it is intended to interface with the dispute provisions of Regulation Z, the error resolution rules of Regulation E, the adverse action response rules of Regulation B the credit reporting dispute rules of the Fair Credit Reporting Act, the complaint rules of the California Consumer Privacy Act (the "CCPA"). Thus, it appears that the Proposal will add another layer to these already existing requirements.

Inaccuracies in the Notice of Proposed Rulemaking

Next, as noted above, the CCFPL requires the Department to establish a rule for *reasonable* complaint monitoring procedures (Financial Code § 90008(a)). The procedures set forth in the Proposal are unreasonable both because they appear to be based upon the Department's conjecture and because they are operationally unnecessarily burdensome. Specifically:

(1) The Proposal states that there are no other specific requirements for Covered Persons to respond to complaints and inquiries. The unfortunate inference of the Proposal is that all 9,000 Covered Persons are bad actors. The reality is that most Covered Persons want to successfully engage in business and that goal generally requires good customer service. The Proposal intends to regulate the entire universe of Covered Persons to the outliers. The procedures and requirements set forth in the Proposal are reminiscent of the level of work that one would expect to see in a settlement agreement with a bad actor after the Department had concluded (based upon evidence and ordinarily an exchange of information) that such bad actor had been routinely ignoring or failing to address its complaints. There is absolutely no evidence cited for this proposition in the Proposal nor is there any justification for the imposition of the proposed (overly complicated) mechanism for complaint resolution.

Moreover, the statement ignores the CFPB's complaint procedures and the CFPB's Examination Procedures applicable to consumer complaints. The Department must be familiar with how a CFPB examination works, and must be aware that the very first CFPB examination of a Covered Person includes a full examination of the Covered Person's customer complaint procedures. In fact, the Notice actually states that "there are no significant differences between these [enumerated] federal laws, which apply to covered persons under Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, and the proposed action, which applies to covered persons under the CCFPL."

(2) The Notice contains a statement that there will be no adverse impact on businesses but tellingly cites no evidence for this proposition. It is unreasonable to assert that a requirement to establish a uniform complaint management process (with multiple touchpoints with the consumer) as well as a complex reporting system to be administered by a corporate officer, reviewed monthly and reported to the Department quarterly, will have no adverse impact on the businesses to which it applies;

(3) The Notice contains a statement that the initial costs of compliance to a representative business will be $2,500 and annual costs $4,000. Again, there is no evidence cited

for these figures in the Proposal and frankly, it is unrealistic that the requirements set forth in the Proposal can be implemented for these nominal amounts (particularly given the Proposal's requirements (with multiple touchpoints with the consumer) as well as a complex reporting system to be administered by a corporate officer, reviewed monthly and reported to the Department quarterly);

(4) The notice contains a statement that there was consideration of alternatives. It describes no such alternatives, and this statement cannot be given credence. Several alternatives immediately occur to those of us familiar with the CFPB's system and the retail credit ecosystem: an example is set forth below.

(5) In "The Results of the Economic Impact Analysis" The Department states that it has determined:

- The proposed action may create jobs but will not eliminate jobs within California;
- The proposed action will not create new businesses or eliminate existing businesses within California;
- The proposed action will not affect the expansion of businesses currently doing business within California; and
- The proposed action will benefit the health and welfare of California residents, worker safety, and the state's environment.

Then, in its "Business Reporting Requirement," the Department states:

> "The Department has determined it is necessary for the health, safety, or welfare of the people of this state that the reports required in this regulatory action apply to businesses."

No supporting information is provided for any of these statements or conclusions; and we do not believe any of them to be accurate.

Therefore, we believe that much of the Proposal rests on faulty premises. Accordingly, we believe that the Department should withdraw and rework the Proposal with the input of the financial services industry to establish a complaint resolution mechanism that both effects the Department's goals and does not impose burdens on Covered Persons that are unnecessary to achieve those goals and are unreasonable in their impact on Covered Persons.

Practical Issues with the Proposal

Practicability: We question the Department's capacity to administer the results of the Proposal. As alluded to above, the Department estimated to the Legislature in connection with the enactment of the CCFPL that the CCFPL would apply to approximately 9,000 Covered Persons. The Proposal calls for quarterly reports on complaints and inquiries from all Covered Persons: so, approximately 36,000 reports for the Department to monitor, process and review annually. We respectfully submit that the Department lacks the capacity to do this in any sort of uniform, meaningful or reasonably timely manner.

By way of illustration, we refer to the implementation of the DCLA and the CFL conversion to the NMLS system. The Department has simply been unable to implement its statutory and regulatory requirements with regard to those tasks: the tasks are too big and the staffs are too small. The underlying statutory and regulatory decisions were overly optimistic, and have forced the Department's staff into difficult circumstances and caused significant and unnecessary disruption to Covered Persons forced to comply with unrealistic timeframes. The Department should at a minimum learn from those experiences and not repeat them with the implementation of a(nother) unrealistic Proposal.

"Officer" Privacy: The Proposal requires a corporate "officer" to be designated to manage complaints and to report to the Department, and apparently requires that "officer" to be identified by name. There is no consideration of privacy protection for the person designated as that "officer." If the Department's policy as set forth in the Proposal is that the identity of every such "officer" becomes public record, that seems to be a major privacy-related policy decision that needs to be made by the Legislature or the California Privacy Protection Agency.

Categories of Complaints: The Proposal contains too many specific categories of complaints, and the lines between categories are unclear. This could cause Covered Persons to list several categories for one complaint to avoid allegations of noncompliance. That, in turn, will surely lead to the Department characterizing each category as a separate complaint and will result in what likely be an over count and inflate the number of complaints the Department will report to the Legislature. We assume this is not the Department's intention. The Department should address and resolve this issue by communicating with industry participants with experience with complaint management systems and jointly develop an intelligent and workable system that addresses, initially, how a "complaint" should be defined.

Conflation of Inquiries & Complaints: The Proposal effectively treats inquiries and complaints in a unitary manner. Even a request for service can be characterized as a "complaint." For example, under the Proposal as currently written, if a customer contacts a Covered Person and advises the Covered Person that the customer has lost their job and needs an accommodation or forbearance, such a request would be considered as a complaint even if the Covered Person immediately took the requested action. That situation should not have to be characterized as a complaint. Similarly, based upon the language as written, Covered Persons who are also furnishers under the Fair Credit Reporting Act would arguably have to report any credit reporting dispute as a complaint and therefore duplicate their communication efforts. Credit reporting disputes should be expressly excluded from reporting as the Fair Credit Reporting Act already provides a mechanism for the resolution of credit reporting disputes.

To put this another way, Covered Persons address, on a daily basis, numerous communications from and with their customers that are really customer service issues that are solved by the Covered Persons in the normal course of business and do not need escalation. Those communications are generally not "complaints" in the normal sense of that work. Thus, a major problem with the Proposal is that its definition of "complaint" is much too broad. We understand

that there have been times and places in the consumer finance space where there have been systemic failures to provide adequate levels of engagement with consumers: student loan servicing and mortgage loan servicing during the mortgage crisis come to mind. However, we believe that such is generally not the case in the universe of relations between Covered Persons and their customers and, for that reason, the Proposal is unnecessarily overreaching.

Duplicativeness of Other Complaint Rules: As noted above, the Proposal contains no exclusions for customer communications that are already subject to other statutory or regulatory requirements. We would be happy to work with the Department to enumerate those requirements and discuss whether or why such communications should reasonably be excluded from the coverage of the Proposal. As noted above, those requirements include, but are not limited to: Regulation Z, Regulation E, Regulation B, the Fair Credit Reporting Act, and the privacy inquiry rules of Regulation P and the CCPA.

Specific Questions and Comments: We have received a number of specific comments from Covered Persons:

- In addition to having a complaint form on the Covered Person's website prominently displayed at or near the top of the page, does the Department anticipate the Covered Person will be required to keep complaint forms upon request at any physical location "accessible to its consumers"? For example, for an automobile dealership that engages in purchase financing, would that mean the dealer would have to have these forms available at each location in California, and train staff on handling the physical complaint forms?
- The online form and physical paper form requires that the Covered Person describe the complaint process. However, the rules don't specify whether the Covered Person must then treat these physical complaint submissions as being received electronically, via mail, or via telephone.
- Where complaints are received orally, is the Covered Person expected to transcribe these?
- Why doesn't the Department create a complaint form complaint on the Department's website, with the content and format desired, rather than require each Covered Person to produce its own form, which in turn must meet the Department's exacting standards? Each Covered Person could be required to have a link to the Department's complaint portal on its website. This, which is similar to the CFPB's approach, will maximize the consistency of the compliance of the universe of Covered Persons with the Department's final regulation.
- Depending on how the complaint is received, the Covered Person needs to send the customer confirmation of receipt of the complaint as well as a written acknowledgement of the complaint. Would that just be satisfied by the response itself? Why must there be a multiplicity of communications?
- Rather than having one process, the process is broken down by how the complaint is received (electronically, via phone, or via mail). Again, this leads to great, and expensive, operational complexity.
- Additionally, if a complaint is received via phone, the Covered Person must provide a customer with a tracking number at the time the complaint is received. This would

require each Covered Person to build out some sort of internal complaint tool just for CCFPL complaints so that a tracking number can be provided on demand and the reps would have to document all the required complaint information. Note, however, this would not apply if the representative believes the communication is an inquiry and the Covered Person later determines it was in fact a complaint

- By contrast, if all complaints were filed through the Department's portal, there could be a consistency of complaint registration and tracking. Otherwise, there will certainly be created some complex tracking issues, and require separate processes based on how the Covered Person receives the complaint could also become convoluted. There is also a potential for conflict with how complaints and inquiries are handled by other state agencies and by the CFPB.
- Under the Proposal, each Covered Person would need to ensure that anyone taking calls knows how to differentiate between an inquiry and a complaint, and someone else would then have to review each inquiry to make sure it is not in fact a complaint.
- The requirement to communicate directly with the complainant regarding the status of a complaint can lead to complications, or may violate other provisions of law. It is not unusual for a Covered Person to be unable to contact a customer, or for the customer to refuse to talk to the Covered Person. What if the customer has filed for bankruptcy, or has given the covered person a do-not-contact directive, or is represented by counsel?

Alternative Reasonable Proposals to Effect Section 90008(a)

As demonstrated above, the Proposal does not conform to Section 90008(a) because it is not reasonable. We suggest the following:

(1) The aim should be a reasonable, accessible complaint process consistent with the Covered Person's size, complexity, and capabilities;

(2) Some reporting of complaints is a good idea. In fact, the Department has long been remiss in this area. Indeed, clients of mine have on several occasions asked the Department for data on industry-wide customer complaints, only to be informed that no such data exists (which as addressed above, calls into question the entire basis upon which the Proposal is predicated). However, a mandatory monthly review of complaints and quarterly reporting is excessive for most Covered Persons. An annual report should suffice;

(3) The CCFPL complaint regulation should be coordinated with and be consistent with regulations that the Department issues under the DCLA so there is a singular structure;

(4) The CCFPL complaint regulation should be only applicable to Covered Persons that are licensed by or required to register with the Department, unless the Department takes serious and vigorous steps to insure that all Covered Persons are identified and notified of the proposed regulation;

(5) The complaints required to be tracked and reported should fall into reasonable and manageable complaint categories, and one customer contact should not result in required reporting of multiple complaints. The level of detail should be consistent with the standards already provided by the CFPB, and as the CFPB may revise its requirements from time to time;

(6) Requirements for complaint management should also be consistent with those of the CFPB, and as the CFPB may revise its requirements from time to time;

(7) Another much less burdensome, and equally effective procedure would be to require a certification requirement from each Covered Person, indicating that the Covered Person has reviewed its quarterly complaints received, identified system vs. human error opportunities, and engaged in remedial training, as necessary. This would have the additional advantage of being generally consistent with the CFPB's complaint system; and

(8) An appropriate effective date should be provided. The Department should consider its recent experiences with both DCLA and CFL/NMLS as to how long implementation of something this complicated may require (particularly when the Proposal is overly complicated, apparently by design). This is particularly important in the current work force environment resulting from the COVID-19 pandemic.

Request for Abeyance and Further Review

We believe the factual bases cited in for Proposal are fatally flawed, as discussed above. Accordingly, we have filed a Public Records Act ("PRA") request with the Department to obtain the data/information upon which those statements purport to be based. We accordingly request that the Department hold action on the Proposal in abeyance until 45 days after the PRA request has been addressed. In that regard, we note that while the PRA requires information requested to be provided within 10 days of a request, it has historically taken the Department longer to satisfy its obligations.

Thank you very much for the consideration of these comments.

Sincerely,

/s/ *R. P. Soter, Jr.*

R. Paul Soter, Jr.