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COMMENTS ON DRAFT RULEMAKING FOR CONSUMER COMPLAINTS AND INQUIRIES UNDER CALIFORNIA CONSUMER FINANCIAL PROTECTION LAW (CCFPL) – PRO 03-21

I served from 2014-2018 as deputy commissioner and as special advisor to the commissioner at the Department of Business Oversight, now the Department of Financial Protection and Innovation (DFPI). Submitted below are comments regarding the DFPI’s draft rulemaking on consumer complaints and inquiries under the California Consumer Financial Protection Law (CCFPL).

➤ **Section 1070: Exemptions**

The proposed section’s language does not adequately inform the public about the extent to which consumers would not benefit from the complaint and inquiry processes established by the draft rules. It should be broadened to do so.

The CCFPL does not apply to many providers of financial services and products regulated by the DFPI. Those providers would not have to comply with the proposed regulations governing consumer complaints and inquiries, since those rules would be promulgated pursuant to the CCFPL.

Such exempt providers include those licensed by the DFPI as finance lenders, PACE program administrators, mortgage loan originators, residential mortgage lenders and servicers, broker-dealers, investment advisers, check sellers, bill payers, proraters, capital access companies, state-chartered banks and credit unions, money transmitters, escrow agents and more.

Section 1070 should be amended to inform consumers who do business with these exempt entities that they cannot access the complaint and inquiry processes that would be established by the draft rules. This could be accomplished by adding to the section language that tracks subdivisions (b) and (c) of Section 90002 of the Financial Code.

➤ **Section 1072 (e) and Section 1074: DFPI Role in Consumer Complaint and Inquiry Processes**

These two proposed sections appear to envision a role for the DFPI in handling consumer complaints.

Section 1072 (e) would require covered persons, when notifying consumers of final decisions on complaints, to inform consumers they can submit their complaint to the DFPI if they are not satisfied.

Section 1074 would require covered persons to meet certain requirements when responding to DFPI requests regarding a consumer complaint. The draft language implies such requests could be made when the DFPI receives a complaint directly from a consumer and not after the complaint has been processed by the covered person, as envisioned by Section 1072 (e).

Given the DFPI's apparent role under these provisions, the draft rules should be amended to require the DFPI to meet timelines in providing notifications to covered persons and consumers about complaints the DFPI receives.

➤ **Section 1075: Consumer Requests for Nonpublic or Confidential Information**

This proposed section contains language that fails to keep faith with bedrock California policy that establishes the people's right to access information about how their government is doing its job. That policy is enshrined in statute and the state constitution.

The California Public Records Act (CPRA) states, in Government Code Section 6250, that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state."

The California Constitution, in Article 1, Section 3(b), guarantees the public's right to access "information concerning the conduct of the people's business." The provision mandates that "the writings of public officials and agencies shall be open to public scrutiny." And it specifies that statutes which restrict public access must be "narrowly construed."

The DFPI cites Section 90008 of the Financial Code as providing the authority to promulgate the proposed rules governing consumer complaint and inquiry processes. Subdivision (d)(1) of Section 90008 generally requires covered businesses, in handling consumer complaints or inquiries, to comply with consumers' requests for information controlled or possessed by the business concerning the relevant financial service or product. Such information could include DFPI documents, and other DFPI records and information.

Subdivision (d)(2) of Section 90008 provides exceptions to the general disclosure requirement. Among the exceptions, per paragraph (D) of this subdivision: “Nonpublic or confidential information, including confidential supervisory information.” Such information includes DFPI documents, and other DFPI records and information.

The DFPI, under Article 1, Section 3(b) of the state constitution, is required to narrowly construe this statutory limit on public access to government records. The draft rules, however, take the opposite approach. In defining “confidential supervisory information,” subdivision (c) of Section 1075 adopts a breathtakingly broad interpretation of the term. The proposed definition encompasses:

- “Any documents, materials, or records, including reports of examinations, prepared by, on behalf of, or for the use of the Department or any other federal, state or foreign government agency ... and *any information derived from* such documents, materials, or records.” (Emphasis added)
- “Any communications between the Department and a covered person or service provider *related to* the Department’s regulatory oversight of the covered person or service provider.” (Emphasis added)
- “Any information provided to the Department by a covered person or service provider for *purposes of detecting and assessing risks to consumers* and to markets for consumer financial products or services, or to *assess whether an entity should be considered a covered person or is subject to the Department’s regulatory oversight.*” (Emphasis added)

It’s hard to imagine supervisory documents, records or other information, that would not be covered by this cloak of confidentiality.

As a consequence, consumers could well be denied access to information they need to assure adequate, fair resolution of a complaint. To cite just one example, the DFPI routinely finds violations of laws and regulations when it conducts examinations of entities subject to its regulatory jurisdiction. Many times, these cases are resolved privately, with no public enforcement order. Under the draft rule, such information could be kept secret from consumers who file complaints.

If adopted, the draft rule’s ramifications could well extend far beyond consumers who file complaints with entities covered by the proposed rules. The DFPI likely would cite the definition to deny requests for such information made by other members of the public, including reporters, scholars, consumer advocacy groups and regulated entities. Additionally, the DFPI could apply the definition to make access decisions about *all* entities it regulates, not just the ones covered by the CCFPL.

The end result would be less rigorous scrutiny of the DFPI by the public and policymakers.

In the Initial Statement of Reasons that accompanies the proposed rules, the DFPI argues the definition language is “necessary because the Department’s supervision, and therefore the protection of consumers, depends on the full and frank exchange of information with covered persons regarding their operations and compliance with regulatory requirements.”

It adds, “These provisions will provide incentives for covered persons to share with the Department certain types of supervisory information freely and with reasonable assurance that information will not be publicly disclosed.”

The justification does not mention the countervailing public and consumer interests in learning about market misconduct and ensuring the DFPI adequately and properly does its job. The proposed definition of “confidential supervisory information” undermines those interests. Further, history shows government secrecy is more likely to harm consumers than protect them.

The legislation that established the CCFPL does not mention “full and frank” communications between DFPI and regulated entities as an interest protected by the law’s limits on public access to government documents. The 2020 legislation (AB 1864, Chapter 157), cites only one interest: protecting “personal financial information and identify information ... against misuse.”

The draft definition of “confidential supervisory information” should be significantly amended to ensure compliance with the California Constitution.

The language referenced in the first bullet above should be limited to cover only reports of examinations prepared by the DPFI, and documents, materials and records used to compile and produce those reports. The phrase “any information derived from such documents, materials or records” should be deleted.

The language referenced in the second bullet above should be struck in its entirety.

The language referenced in the third bullet above also should be eliminated, or least narrowed. The DFPI already publishes on its website communications of a kind that would be covered by the language. In some of these posted communications, the name of the business entity has been redacted.

Thank you for the opportunity to submit comments on these important consumer protection regulatory issues.