

Upgrade, Inc.
275 Battery Street, Suite 2300
San Francisco, CA 94111



April 29, 2022

VIA ELECTRONIC MAIL

California Department of Financial Protection and Innovation
Legal Division
Attn: Sandra Navarro, Legal Assistant
2101 Arena Boulevard
Sacramento, CA 95834
regulations@dfpi.ca.gov

Re: California Proposed Rule PRO 05-21 re: Debt Collection Licensing Act

To Whom It May Concern:

We are writing in response to the California Department of Financial Protection and Innovation (“DFPI”)’s Invitation for Comments on the Second Rulemaking of the Debt Collection Licensing Act (PRO 05-21) on July 15, 2022 to seek clarification on the language in Section 1850.1 (d) and the reporting requirements of Section 1850.70.

I. About Upgrade, Inc.

Upgrade, Inc. (“Upgrade”) operates an online lending marketplace (“Platform”) through which consumers may apply for and obtain loans that are originated and funded by a Federal Deposit Insurance Corporation (“FDIC”) insured bank, as permitted by applicable law. The loans available through Upgrade include unsecured consumer installment loans, a personal credit line that provides access to a series of unsecured installment loans, and auto-secured loans. Upgrade acts as a service provider by marketing, processing applications, and servicing these accounts since inception or the time of origination. Performing loans may be sold to subsequent investors but remain serviced by Upgrade since inception. Our goal is to always keep an account performing and post-default servicing is a very small portion of our loan servicing activity.

Upgrade is committed to offering loans with affordable rates that benefit the consumer with APRs between 4.48% and 35.97%. Upgrade also offers free credit monitoring services and offers a rewards checking account, which is opened and maintained by a FDIC-insured bank.

II. Upgrade’s Requests for Clarifications on PRO 05-21

A. Section 1850.1 (d)

Upgrade requests that the DFPI clarify the language in Section 1850.1 (d) to exempt loan servicers who begin servicing loans at inception and do not have significant portions of their servicing portfolio in a

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state of default. The DFPI's draft regulation is inconsistent with modern day loan servicing, where few companies cease conducting servicing activity for consumers who go into a state of default. In fact, for many companies like Upgrade, "default" – unlike "charge off" — is reversible and accounts can pass the default threshold and then be brought current. Upgrade believes that the DFPI's rulemaking creates adverse consequences for consumers as it would actually encourage loan servicers to cease servicing activity for defaulted loans, and hand those California consumers over to debt collectors. In addition, for companies like Upgrade, debt collection is a very minor and ancillary part of the business.

Upgrade's requested clarifications relate to Section 1850.1 (d), which currently reads "*(d) A person solely servicing debts not in default on behalf of an original creditor, as described in subdivision (c), is not engaged in the business of debt collection for purposes of licensure under the Debt Collection Licensing Act. For purposes of this section, "default" means more than 90 days past due, unless the contract governing the transaction or another law provides otherwise.*"

In the case of Upgrade, we are the servicer from the time of origination. We act as a servicer on behalf of the originating banks or subsequent assignees. We do not purchase debtor accounts for collection purposes and we service all accounts prior to any delinquency. As of December 31, 2021, less than 2% of California loans we serviced were 90+ days past due (as defined in Section 1850.1(d)). California consumers' performance is consistent with Upgrade's national servicing portfolio, where, as of December 31, 2021, less than 2% of all loans were 90+ days past due. Upgrade was servicing all of these loans prior to default.

In its current form, Section 1850.1 (d) exempts from licensure only those entities servicing debts up to the point of default, as defined. This approach is unlike many states that do have licensure exemptions for entities that begin to service the debt prior to default. For example, the Colorado Revised Statutes 5-16-103 provides an exemption for collection activities when debt is not in default when acquired. In New Mexico, the definition of a collection agency in the Collection Agency Regulation Act exempts any debt that was not in default at the time it was obtained for collection and therefore any company that services the debt prior to default is exempt from licensing. In North Carolina, the North Carolina General Statute 58-70-15 provides an exemption if servicing the loan begins at inception or prior to default. In Florida, the Florida Consumer Collection Practices Act exempts an entity from licensure if the debt was not in default at the time it was obtained. F.S.A. 559-55(7)(f). The proposed rules would incentivize current loan servicers like Upgrade to cease servicing activity for consumers in a state of default, and transitioning those consumers to debt collectors. This would create a worse outcome for California consumers.

Considering the above, Upgrade suggests changing "*A person solely servicing debts not in default on behalf of an original creditor...*" to "*A person solely servicing debts not in default **when obtained on behalf of the creditor...***". This exemption provides clarification to responsible non-bank platforms and service providers where servicing debts in default is a very small part of the business model.

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B. Section 1850.70

If the DFPI finalizes the Proposed Second Rulemaking with minimal changes and Sections 1850.1 (d) remains unchanged, Upgrade requests clarification on definitions and other technical assessments to streamline the Annual Report process to provide the DFPI with the most accurate data.

Specifically, we request the DFPI to clarify the definition of “California debtor account” under Section 1850.70 and how an entity like Upgrade should report accounts “collected in full”, “collected where ... a balance remains due”, “for which collection was attempted”, as well as the “face value dollar amount of California debtor accounts . . . regardless of when the accounts entered the portfolio”. This clarification is needed in order to provide accurate data for accounts that go into default and are subsequently cured multiple times during the same reporting period. In the case of Upgrade, the few account holders that do go into default may bring their accounts current and cure their default and continue paying their account as a performing account. For example, would an account that goes into default at any time during the life of the loan but then subsequently becomes current and continues to perform be considered a California debtor account for reporting purposes? Similarly, would the entire balance of the account count towards the face value dollar amount or only the amount by which the account was past due? These situations exemplify the differences between true debt collectors and entities like Upgrade that may not be original creditors but service the loan since inception. Accordingly, clarifications to these proposed regulations will be instrumental to providing accurate and consistent data to the DFPI.

III. Conclusion

Upgrade supports the objective of strong consumer protections resulting from the California Debt Collection Licensing Act and welcomes the DFPI’s focus on fostering responsible practice and fair lending in the California consumer financial markets. We encourage the DFPI to provide additional guidance or clarification concerning Section 1850.1 (d) and Section 1850.70.

Thank you for the opportunity to seek clarification on PRO 05-21 Debt Collection Licensing Act. If you have any questions, please do not hesitate to contact Thomas Curran ([REDACTED]) or Danielle Herring ([REDACTED]).

Kind regards,



Thomas Curran
Chief Risk & Compliance Officer