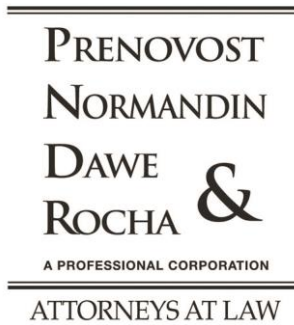


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OUR FILE NO. 8443.0085

E-MAIL ADDRESS:
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July 29, 2022

VIA EMAIL AND U.S. MAIL

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

Re: Department of Financial Protection and Innovation - Proposed Rulemaking Under California Consumer Financial Protection Law (PRO 02-21)

To Whom It May Concern:

Our firm represents NextGear Capital, Inc. (NextGear), California Finance Lenders (CFL) License Number 603G505, and AFC CAL, LLC (AFC), CFL License Number 6053762, and XL Funding, LLC (XL Funding), CFL License Number 60DBO-78245.

NextGear, AFC, and XL Funding are leading providers of used vehicle inventory financing, or “floorplan” financing, to independent and franchise auto and other vehicle dealers in California. These entities engage in commercial lending, not consumer lending. We write on their behalf to express concern regarding the Department of Financial Protection and Innovation’s (DFPI) proposed California Consumer Financial Protection Law (CFPL) regulations relating to small businesses, nonprofits and family farms (PRO 02-21).

The CFPL (Assembly Bill 1864, California Financial Code §§ 90000-90019¹) contains the following provision at § 90009(e), under which PRO 02-21 is being promulgated by the DFPI:

The department, by regulation, may define unfair, deceptive, and abusive acts and practices in connection with the offering or provision of commercial financing, as

¹ All further statutory references are to the California Financial Code.

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defined in subdivision (d) of Section 22800, or other offering or provision of financial products and services to small business recipients, nonprofits, and family farms. The rulemaking may also include data collection and reporting on the provision of commercial financing or other financial products and services.

The CFPL expressly exempts licensed finance lenders, among others, from its provisions. § 90002(b)(2). Since PRO 02-21 is promulgated under the CFPL, we believe PRO 02-21 should be revised to more clearly reflect the legislature's intent to exempt licensed finance lenders.

Additionally, § 90009(e) of the CFPL, quoted above, makes reference to § 22800. To the extent that PRO 02-21 is being promulgated pursuant to § 22800, that code section is part of the Commercial Financing Disclosure Law (CFDL, SB 1235, §§ 22800-22805). The CFDL expressly exempts from its provisions any "commercial financing transaction in which the recipient is a dealer... pursuant to a specific commercial financing offer or commercial open-end credit plan of at least fifty thousand dollars (\$50,000), including any commercial loan made pursuant to such a commercial financing transaction." § 22801(d). NextGear, AFC, and XL Funding, besides being licensed finance lenders exempted from the CFPL, engage exclusively in transactions that fall under § 22801(d), and are thus exempted from the CFDL.

It is a fundamental principal of law that "[w]here a statute empowers an administrative agency to adopt regulations, such regulations 'must be consistent, not in conflict with the statute, and reasonably necessary to effectuate its purpose.'" *Ont. Cmty. Found. v. State Bd. of Equalization* (1984) 35 Cal.3d 811, 816.

We submit that where, as here, the authority-granting statutes in question clearly exempt a class of providers or category of financial transactions, such exemptions must accordingly be reflected in the ensuing regulations. PRO 02-21, as currently drafted, does not reflect the exemptions in the enacting statutes. For example, the definition of "covered provider" means "any person engaged in the business of offering or providing an accounts receivable purchase transaction, including factoring, asset-based lending transaction, commercial loan, commercial open-end credit plan, or lease financing transaction intended by the recipient for use primarily for other than personal, family, or household purposes or another financial product or service to a small business, nonprofit, or family farm whose activities are principally directed or managed from California." Without reference to the statutory exemptions cited above, this definition could be read to capture licensed finance lenders or floorplan finance companies that offer commercial financing to motor vehicle dealers. Similarly, while §1062 includes two exemptions based on covered provider activity, neither exemption incorporates the exemptions listed in the enacting statutes.

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For those reasons, on behalf of NextGear, AFC, and XL Funding, and similarly situated providers, we strongly urge that PRO 02-21 must be revised to comport with the legislature's intent by specifically excluding licensed finance lenders and commercial financing transactions in which the recipient is a dealer as set forth in § 22801(d).

Accordingly, we propose the following addition to Title 10, Chapter 3, Subchapter 4, California Code of Regulations:

This subchapter shall not apply to any person licensed as a finance lender under Division 9 (commencing with Section 22000) of the Financial Code;

Alternatively, we propose the following addition to the same:

This subchapter shall not apply to any commercial financing transaction in which the recipient is a dealer, as defined by Section 285 of the Vehicle Code, or an affiliate of such a dealer, or a vehicle rental company, or an affiliate of such a company, pursuant to a specific commercial financing offer or commercial open-end credit plan of at least fifty thousand dollars (\$50,000), including any commercial loan made pursuant to such a commercial financing transaction.

We thank the DFPI for taking the time to receive and review these comments, and look forward to working with the DFPI on this proposed rulemaking. Please let us know whether it would be possible to arrange a conference call to discuss these issues in more detail.

Sincerely,

PRENOVOST, NORMANDIN, DAWE & ROCHA
A Professional Corporation



TOM R. NORMANDIN

CC: samuel.park@dfpi.ca.gov