Submitted by Electronic mail to: regulations@dfpi.ca.gov, with a copy to: Samuel.Park@dfpi.ca.gov

August 8, 2022

Department of Financial Protection and Innovation
Attn: Sandra Sandoval, Legal Division
2101 Arena Boulevard
Sacramento, California 95834

Re: File No.: PRO 02-21 –Comments on Proposed Regulations for California Consumer Protection Law ("Invitation")

To Whom It May Concern,

Small Business Financial Solutions, LLC dba RapidAdvance ("RapidAdvance") would like to thank the California Department of Financial Protection and Innovation ("DFPI") for reaching out for input on the above proposed regulations ("Regulations"). While the proposed Regulations attempt to regulate unfair, deceptive, and abusive acts and practices ("UDAAP"), the Regulations are unclear, not well defined, vague, and cause numerous substantive problems. Below are our comments.

I. OUR COMPANY

RapidAdvance provides working capital to small businesses throughout the United States and operates as a licensed Finance Lender and Broker in California ("CFL License"). RapidAdvance and its affiliates have been providing funding to small businesses for more than a decade and the majority of our customers have grown to become thriving businesses. Our financing products include merchant cash advances ("MCAs"), lines of credit and business loans. MCAs allow small retail businesses to sell their future card sales in exchange for immediate working capital (the transaction is a purchase and sale rather than a loan). The receivables we purchase are delivered to us whenever the merchant batches out its credit card terminal and forwards to us the percentage of funds that we purchased. We do not offer an MCA product in California that includes

a true-up mechanism or a fixed payment amount (each payment truly varies based on the split rate). Our small business loan is similar to a traditional commercial loan with two primary differences. First, the borrower makes daily or weekly payments rather than monthly payments. Second, our loans charge a fixed fee rather than an interest rate. A fixed fee allows our customers to easily determine the actual dollar amount the loan will cost and the more frequent payment schedule ensures the business is not overwhelmed by large monthly payments for years. Our underwriting model allows us to fund businesses that traditional lenders turn away and permits us to offer financing solutions to businesses whose growth is constrained by their ability to access capital. Our customers that qualify for both the loan product and the MCA can choose the product that best fits their needs.

The customers that use our financing products include almost every type of small and medium sized business in California. A customer's annual revenue generally ranges from $250,000 to $4,000,000 and the average funding we provide is about $50,000. Approximately 90% of our customers are limited liability companies or corporations. The online small business finance industry now originates more than $15 billion annually and the overwhelming majority of small businesses that have obtained financing from industry participants prefer our products and process over traditional financing sources. The industry has proven to be a great option for small businesses during COVID. Given our products don't have an accruing rate and many businesses have been shut down or negatively impacted since March of 2020, many of our customers are not in default despite not making payments (MCAs don't require a payment if there is no revenue being generated due to COVID) or have extended their terms under our loan program for free as we do not charge an accruing rate. The current environment is a great example of why our products work better than traditional loan products and why our customers love us.

II. OVERARCHING COMMENTS

The proposed Regulations alter the definitions of what is a "covered consumer," and "financial product or service," to include commercial financing and providers of commercial financing. The Regulations inappropriately expand the scope and authority to include commercial financing products and providers of those products, even though they were not included in Assembly Bill No. 1864 (the "Bill"). The DFPI has expanded the authority and scope of the Bill.

As the Regulations are inconsistent with the Bill, it violates the APA Consistency standard.[1] The regulation also violates the APA Necessity standard[2] and is not within the scope of authority granted by the statute, in violation of section 11342.1 of the APA. The Regulations alters or amends the governing statute and enlarges or impairs its scope and should be removed. *See Samantha C. v. State Department of Development Services* (2010) 185 Cal.App. 4th 1462.

III. DEFINITIONS

a. **Section 1060(c)(1) –** The definition of "covered consumer" extends coverage to small businesses, which are not consumers. This will not only cause confusion but blurs the line between consumer and commercial financing. California has specifically differentiated between consumer and commercial financing in its Financial Code and by now calling commercial entities "consumers," is not only an unjustified deviation from established California regulations, but is confusing to small businesses and providers of commercial financing. Small businesses and consumers are different. The average small business is more sophisticated than the average consumer. They generally have a better understanding of commercial financing products compared to knowledge consumers have about consumer financial products. It is imperative that there remain the distinction between consumer and commercial financing so that "consumer" specific requirements are not imposed on commercial financing which is more sophisticated. Moreover, it can cause confusion for commercial providers because they are required to interpret and implement California rules and regulations, and if the rules they are required to adhere to have different definitions as to what is consumer and commercial, it will cause confusion and the potential for misinterpretation of laws. We would suggest the DFPI amend this definition to more accurately reflect the statutory language of the Bill.

b. **Section 1060(d) –** This Section defines a "covered provider" as "any person engaged in the business of offering or providing commercial financing…." While it is clear that if a person provides commercial financing they are a covered provider, it is not clear if this would include a person who just brokers commercial

[1] CA Government Code § 11349(d)
[2] CA Government Code § 11349(a)

financing. It is our suggestion that this definition be amended to explicitly include brokers as it is important that brokers are not providing any misleading information about commercial financing products or partaking in any deceptive practices. As brokers are an integral part of the commercial finance industry, it is important that they are required to refrain from any false or deceptive practices to ensure that small businesses are not provided with misleading or incorrect information about any commercial financing product that they are applying for

IV. UNFAIR, DECEPTIVE, AND ABUSIVE ACTS AND PRACTICES

a. Section 1061(b) states that "an act or practice is unfair" causes some type of "injury," but does not elaborate what would constitute an "injury." There is no definition, examples, or guidance as to what would be an "injury." We would suggest having additional guidance and clarity as to what would constitute an "injury."

b. Section 1061(d) states that a covered provider cannot interfere with a business's ability to understand a term of conditions of a financial product or service. First of all, what constitutes interference? Is a small business's own ignorance of a term or condition considered interference? While numerous terms and conditions are obviously necessary in financing contracts, if a covered provider does not simplify the language sufficiently but does the best they can, does that constitute interference on behalf of the covered provider? Studies has shown most people (consumers and small business owners) do not understand APR. So if a covered provider provides an APR and the business does not understand the concept of APR, is there liability? Secondly, what does it mean for a "covered person to protect its interests in selecting or using commercial financing…?" How can a covered provider make sure that it is not committing abusive practices if it cannot understand what it must refrain from doing? Additional clarity is requested.

c. Section 1061(d)(2) discusses how a covered provider is not allowed to take unreasonable advantage of a small business. This prohibition is broad and vague and does not provide any guidance as to what constitutes an unreasonable advantage as there are no definitions, examples or specifics. If a covered provider asks a small business if it understands the costs and conditions of the financing and

the small business answers in the affirmative, although in actuality it did not understand, is the covered provider still liable? Where is the line drawn from what the covered provider is told by the small business and how it relies on any statements by the small business? Furthermore, a covered provider should not be in violation of the Regulations if there is no indication that the small business does not understand the terms. Also, what if another party, for example a broker of a commercial financing product, was the one engaging in the deceptive practices and acts and made a small business unreasonably relay on terms and costs that were not the actual terms and costs of the financing product. Is the covered provider liable for the actions of a third party if it had no knowledge? It is imperative that additional guidance and clarity is provided.

V. ANNUAL REPORT

As we have a CFL license, we are currently required to provide annual reporting on our loan and line of credit products and any commissions received as a broker. As we are already reporting for those products, we would suggest that an additional section in the CFL Annual Report be added to include other products that are not currently covered. That way CFL licensees are only required to submit one report. However, if it is the intention of the DFPI to have two separate filings to keep items separate, then we would suggest the Annual Report be similar to what is currently being used for the CFL Annual Report. While we appreciate the DFPI providing guidance that a CFL Licensee does not need to provide duplicative information, we would like clarified so that we do not provide more information than is requested to the DFPI.

Firstly, on our CFL Annual Report, we currently report a total dollar amount of any financing that we provide that is not covered by our CFL License. Since we are already reporting the total dollar amount of MCAs that we are providing in California, does that mean that we would not have to provide them pursuant to the Regulations? Additional clarity is appreciated to make sure that we understand whether or not it is the intention of the DFPI to have CFL Licensees still report pursuant to the Regulations if that number is already being provided.

Secondly, the Regulations require that the commercial financing be broken out into dollar amount categories. In the 2021 CFL Annual Report, there was no requirement for commercial financing to be broken out into specific financing buckets (it was only required for consumer

loans). If the 2022 CFL Annual Report does not include those buckets, does the covered provider then need to complete the Annual Report pursuant to these Regulations? If the DFPI's intent is not to have covered providers provide duplicative information, then it would make sense for CFL Licensees to not have to file an Annual Report for the Regulations just for these financing buckets. Another suggestion would be the add these financing buckets for the CFL Annual Report for commercial products, so that CFL Licensees are reporting the data along with the rest of the information reported in their annual filings.

Lastly, the Regulations require the disclosure of annualized percentage rate. There are two issues we would request clarity surrounding this requirement. First, while the CFL Annual Report requires the disclosure of an annualized rate, it only gives buckets based on the annualized rate and not the dollar amount as required in the Regulations. Because the method for disclosure is different in the Regulations compared to the CFL Annual Report, how do you want CFL licensees to proceed? We would suggest once again updating the CFL Annual Report to reflect the requested annualized percentage rate buckets based on financing amount so that the data reported in the CFL Annual Report matches the requirements in the Regulations. If this is not addressed, then it appears that a CFL Licensee is once again going to have to double report because the annual reports will be slightly different.

VI. CONCLUSIONS

Thank you for considering our comments. We remain committed to working with you to implement regulations that provide value and are clear and easy to understand and implement. We hope you appreciate our comments. We would be happy to discuss these matters with you. You may reach me at [redacted].

Very truly yours,

[redacted]

Joseph D. Looney
General Counsel