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PROTECTION CENTER

January 20, 2023

Ms. Clothilde V. Hewlett

Commissioner, Department of Financial Protection and Innovation

2101 Arena Blvd.

Sacramento, CA 95834

Submitted electronically to [regulations@dfpi.ca.gov](mailto:regulations@dfpi.ca.gov)

Re: PRO-03-21

Dear Commissioner Hewlett,

The undersigned consumer, small business, and economic justice organizations are dismayed that, seven months after the complaint regulations were first proposed, the Department has, over the holidays, released a set of proposed modifications to the above-referenced regulations that uniformly favor industry by substantially diluting common-sense and easy to comply with requirements for how covered persons should themselves best address consumer complaints about their products and services. As California confronts a substantial budget deficit, that the Department of Financial Protection and Innovation (“Department”) would so uniformly and belatedly dilute regulations that would, if effective, reduce the number and severity of complaints that would be received by the Department, thus saving the Department money, is dismaying as well as confusing. We already know that many consumers harmed by companies do not currently file complaints for a myriad of reasons, including the complexity of complaint filing, fear or shame surrounding the filing of a complaint, and lack of sufficient time to devote

to filing a complaint. Given this reality, the Department should be making it easier for consumers to interact and resolve issues with companies, not harder.

The inevitable impact of nearly all the changes proposed will be to permit covered entities to forgo effectively addressing and resolving consumer complaints. The changes substantially undermine the regulations' ability to guarantee substantive review of consumers' complaints and to ensure covered persons' accountability for problems in the consumer experience. This will needlessly harm consumers who experience more unresolved complaints and drive them to have to complain to the Department, needlessly increasing the Department's workload during a budget-challenged time. For these reasons, our coalition must respectfully object to nearly all of the changes in the Department's most recent proposed modifications. In this letter we will highlight our objections to the most harmful and unjustified ones:

- the changes to the definition of "officer" in section 1071(g);
- the extension of complaint processing timelines in section 1072(g);
- the elimination of customer service hours for accepting oral complaints in section 1072(c)(3);
- the reduction in language access requirements in section 1072(c)(4);
- new restrictions on who qualifies as a "complainant" in section 1071(b); and
- the scope of the litigation-related exemption to a "complaint" in section 1071(a)(1)(G).

That this letter does not address other recent modifications, such as reduced review and reporting about complaints and reduced document retention periods, does not imply our agreement to those changes. To the contrary, we oppose nearly all of the Department's last-minute changes. We particularly urge the Department, at a minimum, to fix the following most obvious deficiencies in its recent modifications to the proposed text.

**1. We Object To The Department's Change To The Definition Of "Officer" In Section 1071(G).**

The proposed regulations' current definition of "officer" incorporated the already familiar and longstanding definition of that term in Financial Code section 190. That choice was wise – even obvious – because it is a definition covered persons have long operated under and because the definition properly mandated that the officer overseeing a covered person's complaint procedures have actual authority to ensure that the complaint process operates effectively. Now, however, the proposed regulations permit the "officer" to be simply any "individual designated by the covered person with primary authority to monitor the complaint process and resolve complaints." Respectfully, this change simply makes no sense, for two reasons:

First, prior to this latest round of proposed changes, “Officers” were persons who “have the authority to act on behalf of the corporation, including contract authority.”<sup>1</sup> It is obviously the case that if the “officer” does not have sufficient authority within the covered person to direct changes to a result or policy in response to a complaint or to trends in complaints, then the review required in section 1072(f) is entirely meaningless. It would fail to build in the necessary internal accountability for effective use of complaints to address problems for consumers and reduce the eventual workload for the Department. Nothing in the newly proposed definition, however, prevents a covered person from assigning complaint oversight to literally any class of employee – including a receptionist, janitor, or salesperson.

Second, in lieu of assuring the power of the covered entity employee’s “officer” through the employee being required to have a certain status (the prior Financial Code definition), the regulation proposes instead to require the complaint employee “officer” have certain duties regarding complaints, even if they are (for example) to be exercised by a covered person’s summer intern, which would be permitted under the new text that the Department is proposing. We would note that under the Department’s current proposal even the selected officer may themselves, under the new changes, devolve their authority to someone else in their discretion by selecting some sort of “designee,” perhaps someone with less stature within the covered person than themselves. *See* proposed changes to section 1072(f)(1).

This modification makes a near 180-degree retreat of the proposed regulation, retreating from requiring the stature of an “officer” by tying the term to the definition in the Financial Code to the proposed modification now permitting literally anyone connected with the covered person to be the complaints “officer.” Given this major change, one would expect the regulation to require that the new, stature-free “officer” have specific mandated authority, in order to prevent the whole complaint process from becoming a useless exercise where complaints are funneled to those with wholly insufficient power or influence to do anything about them.

This is not the case. Nothing in this definition whatsoever prevents a covered person from assigning complaint oversight to a lower-level employee without sufficient authority or access to decisionmakers within the covered person to address complaints or the trends that they illustrate. If the “officer” does not have sufficient authority within the covered person to make changes to resolve issues raised by consumer complaints, then the review required in section 1072(f) fails to build in the necessary internal accountability for effective use of complaints to reduce problems for consumers.<sup>2</sup>

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<sup>1</sup> <https://www.upcounsel.com/corporate-officer-definition#:~:text=Corporate%20officers%20are%20high%2Dlevel,%2C%20vice%20president%2C%20and%20secretary.>

<sup>2</sup> In a related context, in fact, we know from firsthand experience that debt collection companies will often put a paralegal or other low-level staffer in charge of legal filings related to compliance with legal obligations, even though that person does not have requisite authority to bind the company to its responses or statements.

Thus, we urge the Department to revert to a definition of “officer” that incorporates Financial Code section 190. If the Department will not make that change, it must at least amend section 1072(f) to ensure that the “officer” has sufficient authority to effectively oversee the complaint resolution process, as follows (new language bolded):

(f) The covered person shall designate an officer to monitor the complaint process. **The person designated and any designee of that person shall be a full-time employee with unilateral and definitive authority within the covered person to change, amend, or rescind acts, omissions, decisions, conditions, or policies of a covered person or service provider related to the financial product or service that is the subject of a complaint, and to forgive or extinguish a debt, charge, or obligation of a consumer.**

The remainder of 1072(f) would remain in place.

Without these changes, the Department’s regulations are not protecting consumers by requiring meaningful internal complaint processes. They will, in fact, be doing the opposite. The recent modifications create a significant loophole that could permit complaint processes that are all form and no substance, leaving unresolved problems for consumers, more complaints for the Department to address, and an unlevel playing field for those covered persons who provide real and meaningful complaint processes while their competitors do not.

## **2. We Object To Yet Another Dilution Of The Timetables For Covered Persons To Respond To Complaints.**

The Department has yet again watered down the requirements setting minimum timelines for complaints to be definitively addressed. The prior, modified version of the proposed rules provided that a “covered person shall respond in writing with a final decision on all issues within fifteen (15) calendar days [half a month] of receiving the complaint” but if “the covered person needs additional time to respond” that period can be extended an additional 45 calendar days.”

In our July 2022 letter, members of this coalition objected to that initial weakening of the timelines, which functionally gave covered persons unilateral *carte blanche* to take 60 days to address any complaint. Yet the Department has decided to weaken those rules *even more*, this time by changing the initial response period to fifteen *business* days (usually equivalent to 21 calendar days). (Section 1072(g).) While we appreciate that the duration of the extension period was approximately preserved when changed from 45 calendar days to 30 business days, this same conversion was not made for the initial time period. Thus, covered persons now have free rein to take three full weeks for the initial – just the initial – response to every single complaint, combined with what appears to be overly broad discretion to determine that it

needs the additional time. We believe that this fails to meet the statutory standard that mandates covered persons “to provide a *timely* response to consumers, in writing where appropriate, to complaints against, or inquiries concerning, a covered person.” Fin. Code section 90008(a) (emphasis added).

The proposed rules govern complaints ranging from inability to access deposited funds, missing funds, or error in an electronic fund transaction, offset, levy or garnishment. A whopping 63% of all Americans live paycheck to paycheck.<sup>3</sup> Homes could be lost, jobs not offered, money needed to pay utilities or health care bills diverted, lives irrevocably broken, all within these newly proposed Department-blessed timeframes. Indeed, because 63% of Americans live on the financial edge every pay period, these time frames give Department-blessed leverage to the worst wrongdoers to settle meritorious complaints for pennies-on-the-dollar.

In cases of levy or garnishment, moreover, the loss of funds can be the first time that consumers have learned about a judgment. See Comments by Elizabeth Gonzalez, *Debt Collector Advisory Board Zoom Recording*, at 43:54 (July 28, 2021), available at <https://dfpi.ca.gov/debt-collection-advisory-committee/>. There is no reason to permit covered persons to take 45 business days to resolve important errors that could easily push a family down a path of financial ruin, or to make the consumer wait three weeks (15 business days) for the first response.

For these reasons, the proposed rules should be amended to reduce consumer hardship by translating the 15 calendar-day time period into 10 or 11 business days, not 15 business days; and by requiring that there be good cause why the complaint cannot be resolved in the initial review period. In addition, 30 business days is too long of an extended review period, especially if the Department extends the initial review period to 15 business days.

Thus, we recommend the following changes to section 1072(g)(1) and (g)(1)(A) (amended language bolded):

(1) Within **ten (10)** business days after receiving a complaint

(A) If the covered person **has objective, good cause to need** additional time to respond, the covered person shall, within three (3) business days after the initial 10-business day period ends, provide the complainant with a written update regarding the status of the complaint, the reason for the delay, and an estimate of the additional time needed to

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<sup>3</sup> <https://www.cnn.com/2022/10/24/more-americans-live-paycheck-to-paycheck-as-inflation-outpaces-income.html#:~:text=Investing%20Club-.63%25%20of%20Americans%20are%20living%20paycheck%20to%20paycheck%20%E2%80%94%20including%20nearly%20half%20of%20six%2Dfigure%20earners&text=With%20persistent%20inflation%20eroding%20wage,acording%20to%20a%20recent%20report.>

issue a final decision, which shall not be more than **fifteen (15)** business days after the initial 10-business day period ends.

### **3. We Object To The Department's Watering Down Of The Rules Governing Oral Complaints In Section 1072(C)(3) Of The Modified Proposed Rules.**

Under the proposed modifications, the regulations would not require a live operator to be available for any minimum number of hours at all, meaning that covered persons could have a live person available for only two hours a day, or even less, such as one hour a week or for 30 minutes on the second Sunday of every month. When the Department first included a requirement that covered persons offer an oral complaint option, the Department rightly recognized the importance of allowing consumers to make complaints over the phone. This option is especially important for older consumers, who are both more vulnerable consumers and less likely to be comfortable navigating a website to make a complaint. The Department should not undermine that option by omitting any meaningful requirement for covered persons to provide reasonable hours during which they make available staffed oral complaint telephone lines.

Thus, the Department should revert to the requirement that covered persons make a live person available for oral complaints during business hours. If the Department will not revert to that language, we urge it to, at a minimum, require that covered persons make live oral complaint intake options available for a reasonable number of hours per week and to post on the covered person's website the hours when a live person is available along with the phone number for consumer complaints. We therefore suggest the following changes to section 1072(c)(3):

(3) The covered person shall maintain a telephone number, which complainants can use to file complaints orally with a live representative. **Live representatives shall be available for a reasonable number of set hours each week, which shall be posted on the covered person's website along with the phone number for oral complaints.** If a live representative is unavailable to take the call, the covered person shall provide complainants with the option to leave a voicemail message with their telephone number and to authorize a call back from a live representative within two (2) business days of the voicemail message. The live representative shall document the identity of the complainant and the nature and details of each complaint filed orally.

### **4. We Oppose The Department's Changes To The Language Access Provision Of The Proposed Rules (Section 1072(C)(4)).**

While we recognize that the Department may be attempting to reduce potential burden with this change, it goes too far by requiring only that the initial complaint and the covered person's final decision be presented in the language in which the covered person negotiated the contract with the consumer. The Department should instead at least require that all written

communications, including any notification of additional time under section 1072(g)(1)(A), be presented in the language in which the contract was negotiated. Thus, while we strongly prefer the unamended version of section 1072(c)(4), we suggest at least the following change to section 1072(c)(4):

(4) The covered person who negotiates a contract with a consumer primarily in Spanish, Chinese, Tagalog, Vietnamese, or Korean shall accept written complaints submitted in the language in which the contract was negotiated and, for those complaints, issue in that language **all written communications related to the complaint.**

#### **5. We Oppose Depriving Persons Who Have Moved to California With A Current Ongoing Problem From Having Their Complaints Covered Under This Regulation**

Our coalition does not understand the need for the Department's change to the definition of "Complainant" to add the requirement that the complainant "must have been a resident of California at the time of the act, omission, decision, condition, or policy giving rise to the complaint." (Section 1071(b)). This change will almost certainly generate added confusion and additional burden for covered persons, as they will have to verify not only that the complainant is a California resident but also that the individual was a California resident at the time of the incident that led to the complaint. Worse, the change may also leave new California residents without coverage under these regulations for current, ongoing problems that first arose before they moved to California but have continued or remained unresolved after moving here. A California licensee should not be allowed to violate California law on an ongoing basis to the detriment of California residents and, to the extent the proposed regulation implies otherwise (and it does), it is at best confusing and at worst a consumer-harmful and statutorily unauthorized constriction of current law. If the concern is some potential for complaints from consumers from other states who did not reside in California at either the time the problem arose or at the time of the complaint was filed, that could be addressed more narrowly by replacing the new residency text in section 1071(b) with:

**[At and in place of "For this Article"] "Complainant" does not include an individual consumer, whether submitting the complaint to the covered person directly or through an agent, trustee, representative, estate, trust, or joint trust, who is not a resident of California at **the time the complaint was submitted or** the time of the act, omission, decision, condition, or **application of the policy** giving rise to the complaint. **Nothing herein shall be interpreted as permitting a covered person to violate these regulations or any other law or regulation enforced by the Department if the act, omission, decision, condition, or application of the policy that gave rise to the complaint is affecting the individual consumer after they become a resident of California.****

The offered changes address an additional problem in the modification by clarifying that the relevant time for a policy is when it was *applied* to the individual. As written, the modified language in section 1071(b) could exclude someone who is affected by a policy that was adopted by the covered person while the complainant lived outside California but that was applied to the complainant only after they'd moved into the state. That makes no sense. The addition of "application of" before "policy," offered above, avoids that problem.

#### **6. Section 1071's Definitional Exemption For Litigation Is Overbroad.**

Section 1071(a)(1)(G) exempts from the definition of a "complaint," "Any matter under litigation, including documents filed with a court and discovery requests..." "

If the Department were to file an enforcement action based on complaints, then a complaint would be a "matter under litigation" and thus this language could exempt complaints of individuals who have not sued but are affected by the same issue. This problem should be fixed by deleting the current wording and replacing it with language clarifying that "complaints" do not include those implicating matters at issue in litigation filed by *the complainant* against the covered person, as follows:

**Any matter at issue in litigation filed by the complainant against the covered person.**

#### **Conclusion**

The undersigned members of our coalition strongly urge the Department to fix these issues with its latest modifications to the rules governing complaint processing. Unfortunately, the Department has chosen to water down nearly every aspect of these rules in each iteration, which undermines its own ability to enforce its regulations and reduces the incentives and requirements impelling covered persons privately, without Department involvement, to fix errors and mistakes that affect California consumers. Despite the fact that errors and mistakes covered by the CCFPL can quite literally lead to financial ruin for our working families, the Department has chosen (among other things) to permit literally anyone to be in charge of addressing complaints no matter how low they are on the company organizational chart, ensconce in law that the internal complaint oversight can be assigned by the covered person to a person without the authority to actually fix issues raised by the complaints, loosen the timelines on which complaints are processed, reduce language access, remove any meaningful requirement for the infrastructure to give consumers a real option to file oral complaints, and reduce consumer access to a regulated complaint process if someone else, including the Department, has filed suit over the same issue. In other words, the Department is harming consumers with this latest version of the rules governing complaint processes.

If these most glaring problems with the proposed revisions are not fixed, the proposed rules will simply fail to protect consumers and their families, to their irrevocable detriment, lead to



more complaints needing to be resolved by the Department for no sound policy reason, and frustrate rather than implement, the plain letter and legislative intent of the CCFPL

If any further information would be useful, please contact or Andrew Kushner at [REDACTED], Gail Hillebrand at [REDACTED], or Ed Howard at [REDACTED].

Very truly yours,

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