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Department of Financial Protection and Innovation  
Attn: Araceli Dyson  
2101 Arena Boulevard  
Sacramento, California 95834

Subject: Comments on PRO 03-21

To Whom It May Concern:

This letter is submitted in response to the Notice of Third Modification to Proposed Regulations under the California Consumer Financial Protection Law (CCFPL): Consumer Complaints and Inquiries (PRO 03-21), issued on April 14, 2023. This letter also serves as a follow-up to the comment letters I submitted regarding PRO 03-21 on September 17, 2021, June 21, 2022, and January 3, 2023.

I appreciate the changes the Department has made to the version of PRO 03-21 it issued in December, 2022. However, I believe that the Department's most recent proposal continues to contain provisions that are ambiguous as currently drafted, unreasonably burdensome on covered persons, and, in some cases, unlikely to lead to the collection of valuable information. Because the Department appears disinclined to make further changes to PRO 03-21 to address concerns I have previously expressed, I have included additional justification for the requested changes below.

**COMMENTS AND RECOMMENDATIONS SPECIFIC TO THE PROPOSED LANGUAGE**

**Proposed Section 1071: Definitions**

Definition of complaint (1071(a)(1)(H)): The proposed regulation states that a complaint does not include any matter at issue in litigation filed by the complainant against the covered person, including documents filed with a court and discovery requests. This is a helpful clarification, but the regulation fails to clarify at what point a matter at issue in litigation ceases to be considered a complaint for purposes of the regulation. Most matters under litigation will begin as consumer complaints. Does a consumer complaint cease to be a complaint as of the date on which it becomes the subject of litigation? If so, may a covered person dispense with all of the requirements of the proposed regulations in connection with a specific complaint, as of the date a customer or former customer files suit against the covered person? Should a complaint that becomes the subject of litigation be included in a covered person's annual complaint report? The Department's refusal to clarify at what point a matter at issue in litigation ceases to represent a

complaint for purposes of the regulation places an unreasonable burden on covered persons by opening them up to discipline for failure to comply with an ambiguous requirement.

### **Proposed Section 1072: Complaint Processes and Procedures**

- 1) Paragraph (2) of subdivision (c) contains two prohibitions: subparagraph (A) prohibits a covered person from requesting personal identifying information beyond what is reasonably necessary to identify the complainant and to send correspondence, and subparagraph (B) prohibits a covered person from requesting financial information unrelated to the specific complaint of the consumer. It is entirely possible that a covered person could reasonably need general financial information from a consumer without that information being specifically related to an individual complaint (e.g., a bank account number into which to deposit a refund). Thus, as drafted, the regulation is unnecessarily limiting and could impede a covered person's ability to collect needed information. For that reason, I recommend applying the same criteria to both prohibitions and prohibiting a covered person from requesting personal identifying information or financial information, beyond what is reasonably necessary to investigate and resolve the complaint.

Suggested language: "(B) Request financial information ~~unrelated to the specific complaint of the consumer~~ beyond what is reasonably necessary to investigate and resolve the complaint.

- 2) Paragraph (5) of subdivision (c) prohibits a covered person from imposing a time limit for filing a complaint that is shorter than one year from the time the complainant discovers the act, omission, decision, condition, or policy that is the subject of the complaint. The current, proposed language imposes an unreasonable burden on covered persons, because it has the practical effect of requiring covered persons to retain customer documents forever. It is impossible for any covered person to know when a consumer may discover something about which he or she wishes to complain (it could be a year from the date of the act, five years, or longer; the covered person has no way of knowing and thus no way of knowing for how long it must retain documents related to a given customer or former customer). Rather than basing the time limit on the date of a complainant's discovery (a date known only to one of the two parties involved), I recommend that you base it on when the product or service that is the subject of the complaint was provided (a date known to both parties). Language reflecting that recommendation is provided below.

Suggested language: (5) The covered person shall not impose a time limit for filing a complaint shorter than one (1) year from the ~~time the complainant discovers~~ date on which the act, omission, or decision occurred or on which the condition or policy that is the subject of the complaint was adopted by the covered person.

If the Department rejects the recommended language above, it should at least place an

upper bound on the length of time a customer has in which to file a complaint, so that covered persons will not be required to retain customer data forever.

- 3) Subdivision (e) requires covered persons to review, evaluate, investigate, and resolve complaints. It is unreasonable for the Department to require each covered person to resolve every complaint (for example, what happens if a complainant becomes unreachable during the complaint process? What happens if a complainant fails to provide all of the information necessary for a covered person to investigate a complaint?)

To better reflect the intent of the regulations and remove the unreasonable burden on covered persons, I recommend the following revision and clarification:

Suggested language: (e) The covered person shall review, evaluate, investigate, and **take reasonable steps to** resolve complaints.

- 4) Subdivision (j) describes the required elements of the annual complaint report. One of these elements more properly belongs elsewhere in the regulation, either as its own subdivision in Section 1072 or in Section 1074. Specifically, paragraph (2) of subdivision (j) requires a covered person to include (in a portion of its annual complaint report that is available to the public) the covered person's designated e-mail address for receiving requests from the Department regarding consumer complaints, requires each covered person to ensure that this e-mail address is accessible by the complaint officer, and requires the covered person to notify the Consumer Financial Protection Division within five business days, if the covered person's designated e-mail address for receiving requests from the Department regarding consumer complaints changes. There is nothing inherently problematic about these requirements, but they have nothing to do with covered persons' annual complaint reports and should not be included in subdivision (j) of Section 1072. Further, by requiring covered persons to include in their public annual complaint reports their designated e-mail address for receiving requests from the Department regarding consumer complaints, the Department is increasing the likelihood that members of the public will also use this e-mail address, which could make it more difficult for covered persons to clearly distinguish e-mails from the Department. It is unclear why the Department is refusing to move these requirements to a more appropriate location.

Suggested language: Delete proposed Section 1072(j)(2) in its entirety and add a new subdivision to Section 1072 or Section 1074, which reads: "A covered person shall provide the Department with a designated e-mail address for receiving requests from the Department regarding consumer complaints. This e-mail address shall be accessible by the complaint officer. In the event of a change to this e-mail address, the covered person shall, within five (5) business days of the change, provide the Consumer Financial

Protection Division with the new e-mail address.”

- 5) Paragraph (8) of subdivision (j) requires each covered person to report to the Department regarding the total number of complaints “denied,” either partially or fully. However, the Department has failed to clarify how it interprets the term “denial.” For example, is every complaint that is not at least partially resolved considered at least partially denied? Is a complaint denied if a customer ceases communicating with the covered person before the covered person has obtained sufficient information from the customer to resolve the complaint? Is a complaint denied if a customer requests something to which they are not entitled? Because the term “denial” remains unclarified in the regulation, the question in paragraph (8) is likely to be interpreted differently by different covered persons, yielding inconsistent responses and meaningless data.

Recommendation: Either clarify the term “denial” or delete paragraph (8) of subdivision (j).

- 6) Question (11) of subdivision (j) should be deleted, because it is unlikely to lead to the collection of any valuable information. Any covered person that takes longer than 15 business days to respond to a complaint will cite as its reason “insufficient time to resolve complaint.” It is unclear what other answers the Department would expect to see in this context.

## **GENERAL COMMENTS AND CONCERNS**

### Reporting Requirements Likely to Lead to Overcounting of Complaints

Without questioning the Department’s desire to fully understand the types and numbers of complaints each covered person receives, I am concerned that the nature of the information requested in paragraphs (13) and (14) is likely to result in the Department overstating the number of consumer complaints against covered persons when it issues annual reports and press releases summarizing covered persons’ submissions.

When it issues a report or a press release regarding the total number of consumer complaints fielded by covered persons under its jurisdiction, the Department should cite a number that equals the sum of covered persons’ responses to the information requested in paragraph (3). The total number of consumer complaints fielded by covered persons under the Department’s jurisdiction should *not* equal the sum of all categories checked in responses to paragraphs (13) and (14). Double- or triple-counting complaints can have the effect of undermining consumer confidence in certain industries and deprives policy makers of valuable information they need to evaluate whether enhanced oversight of covered persons is warranted.

### Importance of Publicizing the Existence of Complaint and Inquiry Regulations

As the proposed regulations are drafted, they apply to *all* covered persons, not just those covered persons who will be required to register with the Department. For that reason, this regulation will apply to all persons subject to the CCFPL (i.e., all persons offering or providing consumer financial products or services in California, and their third-party service providers, unless those financial service providers or their third-party service providers are expressly exempt from the CCFPL). Although many financial service providers are already aware of the CCFPL and of their coverage under it, it is undoubtedly the case that many other financial service providers are unaware of that law, or are aware of the law but unaware that they are subject to it. For that reason, it is highly likely that a significant number of financial product and service providers and their third-party service providers will be unaware of this regulation and their responsibilities under it.

Certainly, all financial product and service providers have a legal responsibility to know the laws to which they are subject. However, many of these providers are small businesses that do not have dedicated regulatory compliance departments, and it is highly likely that a significant number of entities subject to the law are unaware of its existence. Once these regulations become final, I highly encourage the Department to do extensive outreach across a broad swath of consumer financial product and service providers operating in California, with the goal of ensuring that all entities subject to the regulations are aware of them and of their responsibilities under them. I also encourage the Department to be lenient when it encounters small businesses that have failed to comply with these regulations due to ignorance about their existence. The Department's approach toward small business' compliance with this regulation should be educational, not punitive.

If these regulations are to achieve their goal of ensuring that all financial product and service providers in California have robust consumer complaint policies and procedures in place, extensive and continuing outreach by the Department to all consumer financial product and service providers operating in California will be critical.

Thank you for the opportunity to comment on the proposal. Please don't hesitate to reach out to me at [enewhall@newhallconsulting.com](mailto:enewhall@newhallconsulting.com) or (916) 666-0314 if you have any questions regarding this letter.



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