May 17, 2023

Commissioner Clothilde V. Hewlett
Department of Financial Protection and Innovation
2101 Arena Boulevard
Sacramento, California 95834
regulations@dfpi.ca.gov

RE: PRO 01-21, Proposed Rulemaking under the California Consumer Financial Protection Law

Dear Commissioner Hewlett:

Bridge IT, Inc. d/b/a Brigit ("Brigit") appreciates the opportunity to submit comments to the Department of Financial Protection and Innovation ("DFPI") regarding its proposed rule governing the registration and regulation of income-based advance ("IBA") providers under the California Financing Law ("CFL") and the California Consumer Financial Protection Law ("CCFPL"). Brigit has appreciated DFPI's willingness to engage in dialogue with Brigit regarding IBA issues and the opportunity to regularly provide reports on its business under a memorandum of understanding that Brigit and DFPI entered into in January 2021.

Brigit is part of a new industry of financial technology companies dedicated to providing consumers with additional ways to improve their financial health. Brigit provides its suite of services to millions of members across the US, with hundreds of thousands of members in California. These financial products are designed to improve a consumer's financial well-being and include access to (1) non-recourse, instant cash advances ("Advances"), (2) personalized budgeting tools and financial literacy resources, (3) credit builder loans from a bank partner; and (4) credit building tools including access to credit reports, credit monitoring and identity theft protection. These services enable consumers to access liquidity, save, budget and build credit. While Advances are a part of Brigit's offering, they are merely one component of a broader service intended to improve a user's financial state. Based on the results of a research study conducted with FTI Consulting, 82% of consumers consider IBAs as being important to helping them reach their financial goals[1], and twice as many consumers felt in complete control of their finances after using an IBA relative to prior to using the product.[2]

Brigit offers Advances to consumers who demonstrate an ability to pay, and consumers typically use these Advances to avoid overdraft fees charged by their bank as well as late payment fees from their billers. That being said, a consumer may affirmatively request an Advance for any other reason. Brigit also enables consumers to opt into an Advance-related feature that will

[1] FTI Consulting Research, *Brigit Customer Research*, Question 18 (May 2021) (on file with author)[the "FTI Consulting Report"].
[2] FTI Consulting Report, Questions 14 and 15.

automatically send the consumer an Advance to prevent an overdraft. Brigit subscribers have saved over $500 million in overdraft fees, or an average of $344 in overdraft fees annually.[3]

In these comments, we discuss Brigit's concerns about DFPI's approach to subscription fees, advertising, and several other provisions of the proposed rule. In short, Brigit is concerned that DFPI's approach provides the wrong incentives and places unnecessary burdens on industry participants. These concerns, Brigit fears, will ultimately make CCFPL registration unworkable and result in IBA providers seeking licensure under alternate authorities, resulting in worse products and outcomes for consumers.

I. Subscription Fees – §§ 1022, subd. (a)(5); 1464

Brigit takes a comprehensive approach to its mission to promote sustainable financial health for Californians. We do so by providing a whole range of financial wellness services to consumers for a monthly subscription fee. Regrettably, the current rulemaking proposal would directly and adversely affect Brigit's ability to operate under its subscription-based business model. As explained further below, DFPI's treatment of subscription fees provides strong disincentives to Brigit and other companies from offering subscription-based financial wellness packages alongside IBA products. Instead, the rule encourages providers to drop their IBA offerings or structure advances as payday loans under alternate licensing authority.

Brigit is grateful that the DFPI is interested in modernizing the CFL's treatment of subscription fees. However, Brigit is concerned that the proposal strikes the wrong balance and wrongly discounts non-IBA offerings offered as part of a subscription. In effect, the proposal will ensure that subscription fees are only charged for IBAs, and not part of a meaningful overall package. IBA providers that do have compelling subscriptions to offer will be forced to exclude IBAs from their overall packages. This hurts consumers by giving them access to fewer value-add products and damages the businesses that are trying to provide affordable alternatives to consumers who have been hurt by overdrafts and payday loans.

In particular, by limiting the subscription fee to $12 a month, the proposal naturally sets a limit for what other products can be provided to a consumer by an IBA provider. Other products, particularly those with higher costs for providers, cannot be paired with IBAs since the limit for the bundle is $12, regardless of the substantial additional value to the consumer they may provide.

This dynamic is accentuated by the requirement that the subscription fees be credited to any charges directly assessed in connection with an IBA. This disincentivizes Brigit and companies like it from offering IBAs to more consumers because doing so adds more in costs to Brigit and cuts into subscription revenue. The DFPI reasons that this is necessary to prevent "evasion," because it "may be difficult to assess whether consumers pay subscription fees solely or primarily to receive income-based advances or whether they value the other products or services that are part of the subscription service."[4] However, DFPI's solution–to treat the entirety of the

[3] This figure is based on an analysis conducted by Brigit from its inception until June 2021, and assumes an overdraft fee of $34.

[4] DFPI, *INITIAL STATEMENT OF REASONS (PRO 01-21)*, page 59.

subscription fee as a charge for IBAs–is unwarranted and improperly assumes that the value of such other services is zero.

Many financial wellness subscriptions include IBAs as a flagship product which attracts consumers, but such IBAs remain only one element of a package that allows consumers to focus on improving their financial health holistically through budgeting, savings, credit building and other means. Similarly, some consumers may be drawn to one IBA provider over another because of the breadth of a given provider's product suite. These non-IBA services have value to consumers and costs to providers, and discounting both the value and costs of these other services overlooks the meaning behind consumer choice and the natural function of the market.. Based on the FTI Consulting research, 76% of consumers using IBA products find these non-IBA additional services helpful in managing their finances, reinforcing the fact that a comprehensive financial wellness subscription can be more valuable to a consumer than the sum of its parts, since it can provide a one-stop-shop for a variety of consumer financial needs.[5]

In this context, concerns about the possibility of CCFPL registration evasion are misguided. IBA providers provide non-recourse advances because they recognize that there is a need for financial products that address consumers' liquidity needs without penalizing them and putting them at risk of a downward spiral of debt. The true concern should lie with the incentives in this rulemaking to offer advances under a California Deferred Deposit Transaction Law ("CDDTL") license. CDDTL licensees are permitted to charge significantly higher fees as well as exercise recourse against customers in the form of debt collection and negative credit reporting.[6]

These incentives make no sense: IBAs are much more consumer-friendly than are loans or deferred deposit transactions. Enabling innovation and competition ensures that liquidity products that do not meet the needs or interests of consumers are "competed away." If DFPI agrees that IBAs are a valuable alternative to these traditional credit products, it should ensure the rule encourages the development of IBAs, instead of incentivizing more expensive loan products, subject to recourse. This cannot possibly be DFPI's intended result.

Even solely within the context of the CCFPL, the heavy-handed constraints placed on subscription fees only encourage more IBA providers to adopt needlessly complicated fee structures. Rather than have a single, monthly subscription fee that consumers can reasonably anticipate, CCFPL registrants will be encouraged to charge administrative fees and interest on top of the subscription fee. This makes the cost of an IBA harder for consumers to assess.

To address the poor incentives created by the rule, Brigit recommends that the proposal be modified in its treatment of subscription fees. First, Brigit recommends that DFPI revise the proposal to clarify that subscription fees need not be credited against charges. DFPI can instead

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[5] FTI Consulting Report, Question 21.

[6] *See* Cal Fin. Code § 23036, subd. (a)(permitting fees of up to 15%). In 2021, DFPI reports an average fee of roughly 15% of the credit extended across all CDDTL loans, with approximately $187.7 million in fees collected on $1.26 billion in loans. *See* DFPI, *Annual Report of Payday Lending Activity Under the California Deferred Deposit Transaction Law*, pages 3 and 28 (July 2022) https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/07/DFPI_AnnualReport_CDDTL-2021.pdf.

limit subscription fees that can be charged by CCFPL registrants without a complex crediting operation.

Second, Brigit recommends that DFPI explicitly clarify that the rule in no way limits subscription fees that may be charged for a bundle of services that does *not* include IBAs, that the rule in no way constrains an IBA provider's ability to offer non-IBA services, and that it does not require reporting of information related to non-IBA services. Otherwise, IBA providers would simply drop IBA products to preserve pricing flexibility associated with other offerings. By allowing providers to separate IBA products from other subscriptions, DFPI can be assured that those paying for non-IBA subscription packages value such services and avoid the need to cap fees for such non-lending services under the CFL and CCFPL.

We note that the rule already seems to provide that non-IBA services are not subject to the subscription fee limitations. Indeed, the pricing restriction for CCFPL registrants is that the "charges collected by the provider *in connection with each income-based advance*" do not exceed the charges that CFL licensees could charge.[7] Because a CCFPL registrant's subscription fee for non-IBA bundles would not be collected "in connection with" IBAs (since the bundle excludes IBAs), any fee for such bundles would arguably be permitted under the proposal. However, to provide greater certainty to industry, we recommend that DFPI adopt language or guidance making this interpretation explicit.

Additionally, in recognition of this rulemaking as an important opportunity for DFPI to bring clarity to the provision of IBAs in California, Brigit recommends that DFPI clarify certain inconsistencies in the proposed rule. Specifically, the definition of "subscription fee" appears to conflict with the substantive regulation on subscription fees, and DFPI should clarify its intention accordingly. The definition of "subscription fee" requires the fee to be paid under an agreement that includes a right to receive an income-based advance.[8] However, the proposed regulation indicates that "subscription fees" would be paid for something *other* than the right to receive an income-based advance. The proposal states that, to be permitted, the subscription fee must not be "a prerequisite to receiving income-based advances from the licensee."[9] It is inconsistent for a subscription fee to be paid in exchange for the right to receive an IBA, as implied in the definition of the term, but also for the right to receive an IBA to be granted independent of the payment of the subscription fee, as the substantive provision suggests. DFPI should clarify.

Lastly, Brigit recommends that the definition of subscription fee be modified to include any periodic fee, even if assessed on a basis other than monthly. Although Brigit currently charges a monthly subscription fee, Brigit does not believe there is a reason why monthly fees should be treated differently than, for example, quarterly or annual fees. Indeed, annual fees are common for credit cards, and Regulation Z, which implements the federal Truth-in-Lending Act, does not differentiate between periodic fees based on how frequently the fees are assessed.[10]

II. **Advertising Disclosures** – § 1012, subd. (b)

[7] PRO 01-21 § 1462, subd. (a)(3)(emphasis added).
[8] PRO 01-21 § 1009, subd. (k).
[9] PRO 01-21 § 1464, subd. (a)(5).
[10] *See* 12 CFR § 1026.4(c)(f).

DFPI proposes that all CCFPL registrants disclose their registration status in each and every advertisement and communication to Californians. Brigit believes this requirement is burdensome, unnecessary, and should be modified to require a much simpler disclosure. Specifically, IBA providers should only be required to disclose their registration status prior to the consummation of an IBA transactions, and, for IBA providers that offer access to IBAs as part of a subscription, at least once annually as well.

Brigit utilizes very short videos to advertise on social media on a nationwide basis. Requiring disclosure of Brigit's status as a CCFPL registrant that it is regulated by DFPI in this type of advertising is unduly burdensome. Advertising is one of Brigit's largest expenses. Every second or area of space is a valuable commodity which makes this disclosure requirement prohibitively expensive. Further, if other states follow DFPI's lead, the result would be an extremely long disclosure that offers little to no corresponding consumer benefit.

Similarly, many IBA providers may provide Californians with alerts or notifications via SMS or text messages as well as via "push notifications" to a person's mobile telephone. These formats require messages to be extremely concise, and the imposition of a requirement to include a CCFPL registrant's status in each such communication is infeasible.

The DFPI states that the purpose of this provision "is to protect consumers by ensuring that they know that the registrant's state regulator is the DFPI" and are able to reach out to DFPI to express concerns or make a complaint. DFPI fails to explain, however, why this requirement is necessary for CCFPL registrants but not for other persons licensed by DFPI, such as CFL licensees, which have no requirement to disclose their license number and regulator in every one of their communications.[11] Further, CFL licensees are exempt from making mandated disclosures in short advertisements.[12] At the very least, the advertising requirements for CCFPL registrants should be no more burdensome than the requirements for CFL licensees.

There are also far less burdensome alternatives that would enable distribution of a disclosure—such as one identifying registrant's registration status—to consumers. These types of alternatives have long been recognized as legitimate by federal regulators. For example, Regulation Z, which implements the cornerstone federal consumer credit disclosure law, the Truth-in-Lending Act, allows less burdensome disclosures for certain advertisements, such as disclosure of a toll-free number where required disclosures may be heard.[13]

Moreover, the DFPI has adopted reasonable alternatives in the context of extremely similar disclosures in other rulemaking proposals promulgated under the CCFPL. For example, in its "complaints and inquiries" rulemaking, the DFPI first proposed that that certain CCFPL covered persons would be required to disclose specific language identifying DFPI as the covered person's regulator.[14] This initial proposal applied broadly, but in a narrower subset of communications than what is proposed here, as it excluded court documents and electronic text messages, including iMessage, SMS, and MMS, which are not exempted from this proposed rule. Still, DFPI revised

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[11] *Cf.* Cal. Fin. Code § 22162(requiring disclosure by a licensee of its license, but not in all communications, and not in any advertisement that is not primarily disseminated in California).
[12] *See* Cal. Code Regs. tit. 10, § 1550, subd(c).
[13] *See* 12 CFR §§1026.16(e); 1026.24(g)(2).
[14] *See* PRO 03-21.

its proposal to only require this disclosure in an annual notice and on the home page or main contact page for covered persons.

Such alternatives reasonably accomplish DFPI's consumer protection goals without overly and unnecessarily burdening CCFPL registrants. Brigit strongly recommends that DFPI adopt similar modifications to this rule, much as it has under its other CCFPL rulemaking.

III. Reporting Overdraft & Collections Attempts – § 1045, subd. (c)(4)

DFPI seeks to require annual reporting regarding the number of unsuccessful collection attempts from consumers' bank accounts. It believes that a high number of collections attempts may warrant further review because such models may result in other third-party charges such as overdraft fees.[15]

Brigit believes that this concern is misguided and recommends that DFPI either eliminate or clarify this reporting requirement as it is unlikely to be informative about the level risk of posed by an IBA provider to consumers.

Brigit is sympathetic to concerns about overdraft; indeed a key benefit of Advances is that they enable consumers to avoid overdraft fees. However, ultimate responsibility for overdraft fees lies with the account-holding bank, not the merchants or IBA providers that initiate properly authorized debits. Banks have the discretion to set and assess overdraft fees to the extent that a consumer has not exercised their opt-out rights under federal law.[16]

Subjecting IBA providers to scrutiny for triggering a bank-assessed overdraft is treating a symptom, not the cause of overdraft. This approach is also inexplicably distinct from DFPI's approach to CFL licensees or any other entities that it oversees that may also initiate debits to a consumers account. No other entity in the consumer liquidity space are required to report this type of activity to DFPI, yet each of these entities (e.g., CFL licensees, CDDTL licensees) present the same, if not greater, risk of overdrafts as IBA providers.

Further, Brigit does not believe this reporting requirement will provide useful information to DFPI due to the differing nature of ACH and card network collection attempts. Unlike ACH transactions, debit card transactions are typically preceded by an authorization that can be declined for an insufficient balance. This authorization process generally means that consumers are unlikely to incur an overdraft (or NSF fee) for a debit card transaction. Thus, the number of debit transactions attempted will not be probative of the occurrence of overdraft fees.

Further, in instances where a bank charges a consumer an overdraft fee in connection with a debit card transaction, such as when the authorization is positive, but the consumer has insufficient funds at the time the transaction settles, the bank is likely to be in violation of federal law and banking guidance.[17] Accordingly, scrutiny of IBA providers in such cases is inappropriate,

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[15] *See* DFPI, *INITIAL STATEMENT OF REASONS (PRO 01-21)*, page 49.
[16] *See* 12 CFR § 1005.17.
[17] *See* Office of the Comptroller of the Currency, *OCC Bulletin 2023-12* (Apr. 26, 2023) (addressing "authorize positive, settle negative" debit card transactions as a risk of violating federal prohibitions on unfair, deceptive or abusive acts or practices).

and DFPI should clarify that only collection attempts via the ACH network, to the exclusion of attempts via debit card payment networks, need be reported under this provision.

IV. Reporting Fees Without Advances – §§ 1045, subd. (b)

The rule requires IBA providers to report the total dollar amount of subscription fees collected. However, this requirement is based on the improper assumption that the subscription fee is entirely attributable to IBAs and that the value of our additional services as $0.[18]

Consumers can and do subscribe for benefits other than IBA, and evidence that consumers did not receive an IBA is not evidence that consumers did not receive a benefit. Not only may consumers benefit from other services in the subscription bundle, but they may also benefit from *access* to IBAs. Even if a consumer never draws on the liquidity provided by IBAs, having a "back-up" option in case of emergency can bring significant peace of mind and be a smart financial decision.

V. Revoking Registration – § 1041, subd. (c)

Brigit recommends that the timeline for revoking a registration for a late annual reporting filing be extended to thirty days. Alternatively, the deadline for reporting should be postponed from March 15th to March 31st, the end of the calendar quarter.

Ten days is a short amount of time and companies may have many reporting obligations at the start of the calendar year. Brigit recognizes that DFPI applies this time frame to other licensees, but disagrees with DFPI that making the report due date uniform is necessary to ensure reports cover the same reporting period across licensees and registrants[19]--the reporting period should remain the prior calendar year regardless of the report due date.

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Brigit appreciates the opportunity to provide comments on DFPI's proposal and invites DFPI to contact Brigit with any questions or requests for additional information.

Sincerely,

Hamel Kothari
Chief Technology Officer
Bridge IT, Inc. d/b/a Brigit

cc: Peggy Fairman (Peggy.Fairman@dfpi.ca.gov)

[18] *See* DFPI, *INITIAL STATEMENT OF REASONS (PRO 01-21)*, page 48 (stating this information is necessary to "identify programs where registrants collect subscription fees from substantial numbers of California residents without providing any income-based advances").
[19] DFPI, *INITIAL STATEMENT OF REASONS (PRO 01-21)*, page 42.