Via Email and U.S. Mail (regulations@dfpi.ca.gov)

May 17, 2023

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

Re: PRO 01-21 - Proposed Rulemaking Under the California Consumer Financial Protection Law, California Financing Law, California Deferred Deposit Transaction Law, and California Student Loan Servicing Act

Dear Ms. Dyson:

The Consumer Debt Relief Initiative, Inc. ("CDRI"), a leading national debt resolution industry association, is pleased to provide these comments on the Department of Financial Protection and Innovation's ("DFPI" or the "Department") Proposed Rulemaking Under the California Consumer Financial Protection Law, California Financing Law, California Deferred Deposit Transaction Law, and California Student Loan Servicing Act (PRO 01-21) ("Proposed Rules").

CDRI is dedicated to the protection and promotion of the debt resolution industry. Our membership consists of diverse stakeholders that comprise our ecosystem including debt resolution companies, dedicated account providers, marketing companies, attorneys, law firms and various industry partners. CDRI is committed to advancing the highest consumer protection standards to ensure that debt-distressed consumers have access to safe and transparent solutions to achieve financial stability.

CDRI commends the DFPI for proposing an efficient process for debt resolution companies operating in California to register with and keep the Department apprised of the benefits they deliver to California consumers. CDRI has supported the steps taken to promote the operation of the industry within the State, and has sought to coordinate with the Department in its efforts to implement a meaningful regulatory framework.

Specific Issues for Consideration by the Department

To that end, the CDRI supports most of the rules that are being proposed by the DFPI. The following comments are offered in an effort to develop rules that will:

1. assist the Department's effective oversight of the industry while removing uncertainty in the reporting process; and

2. avoid requirements that would impose costly additional reporting obligations beyond those that are currently provided in other U.S. jurisdictions.[1]

[1] CDRI has gathered information in support of these comments through informal surveys of various members as well as during an online presentation and discussion with member representatives about the issues presented by the Proposed Rules.

I. Uncertainty Regarding Changes to the Definition of "Debt Settlement Services"

The term "Debt settlement services" is defined by law in Civil Code 1788.301(b) as follows:

> "Debt settlement services" means any of the following:
>
> (1) Providing advice, or offering to act or acting as an intermediary, including, but not limited to, offering debt negotiation, debt reduction, or debt relief services between a consumer and one or more of the consumer's creditors, if the primary purpose of that advice or action is to obtain a settlement for less than the full amount of the debt.
>
> (2) Advising, encouraging, or counseling a consumer to accumulate funds in an account for future payment of a reduced amount of debt to one or more of the consumer's creditors.

However, without any discussion or explanation, the Proposed Rules use a different definition of "Debt settlement services" in Section 1001(b), as follows:

> "Debt settlement services" means any of the following:
>
> (1) Providing advice, or offering to act or acting as an intermediary, including, but not limited to, offering debt negotiation, debt reduction, or debt relief services between a consumer and one or more of the consumer's creditors ***in connection with a consumer's non-mortgage debt***, if the primary purpose of that advice or action is to obtain a settlement for less than the full amount of the debt***, or a reduction in the interest rate or payment amount associated with a consumer's debts***; or
>
> (2) Advising, encouraging, ***assisting,*** or counseling a consumer to accumulate funds in an account for future payment of a reduced amount of debt to one or more of the consumer's creditors.

(Emphasis added.)

The proposed expanded definition used in the Proposed Rules is inconsistent with the definition in the statute and appears to exceed the authority granted to the Department by the Legislature. Alternatively, if the DFPI proposes to expand or otherwise alter the definition provided by the Legislature, it should at least explain why and upon what authority it is making such changes.

II. The Term "Gross Income" Should Be Defined.

Although the Proposed Rules require debt settlement services providers to report their "gross income" generated from California residents in Sections 1022(a)(5) and 1041(b), and provide that the annual assessment referenced in Section 1040(a) shall be based on the provider's "gross income," the Proposed Rules do not define the meaning of the term "gross income."

Nearly all of the companies that responded to CDRI's request for input included among their remarks and questions about the Proposed Rules their concerns and uncertainty about how the term "gross income" would be defined.

For these reasons, CDRI requests that Section 1001(a) be changed to read as follows: "'Gross Income' means the total amount of revenues received."

III. Debt Settlement Services Providers Cannot and Should Not Be Required to Report As "Charges" Fees Received by Unaffiliated Payment Processors.

In Section 1001(a), the Proposed Rules include in the definition of "charges" that must be reported by debt settlement services providers "amounts contracted for or received by payment processors in connection with a person's provision of debt settlement services." However, this requirement appears to assume a relationship between debt settlement services providers and independent dedicated account providers that does not exist. In many instances, debt settlement services providers have no direct contractual relationship with payment processors, which, as required by Civil Code § 1788.302(b)(2)(H), are selected by consumers, not debt settlement services providers.

In addition, even if such information could be obtained from payment processors and reported by debt settlement services providers, it is uncertain what value the information would provide to the Department since the costs of payment processing services (including fees for insufficient funds and issuing funds to creditors by wire or other forms of payment selected by the consumer or creditor) are controlled by the consumers and creditors, not by debt settlement services providers.

Finally, various member companies advise that ***no other U.S. jurisdictions include payment processor fees among those that must be reported*** by debt settlement services providers.

Requiring debt settlement services providers to obtain and report on "amounts contracted for or received by payment processors," which are third parties with which the provider may have no contractual relationship, would put them in an impossible position with no ability to comply with the Proposed Rule and/or would impose on them additional costs to attempt to gather such information, which is not required elsewhere.

For these reasons, CDRI requests that Section 1001(a) be amended to read as follows: "'Charges' mean all amounts contracted for or received by a person in connection with the person's provision of debt settlement services to a consumer."

Similarly, CDRI requests that Section 1042(d) be amended to read as follows: "For the residents identified in subdivision (a) of this section, the average dollar amount of charges paid over the contract term per resident and the total dollar amount of charges paid by all residents."

IV. The Proposed Rules Created Uncertainties by Imposing Different Consumer Debt Amounts Reporting Requirements in Different Subsections.

Two of the reports required for the proposed annual reporting rule in Section 1042 seek information about the amount of debt enrolled by residents with debt settlement services providers, yet the different subsections use different language in describing the calculations required. It is unclear whether these differences are intentional, and if so, what significance should be attributed to the differences.

Section 1042(c) requests "For the residents identified in subdivision (a) of this section, ***the average dollar amount of debt per resident*** and the total dollar amount of debt of all residents

who contracted for services with the registrant based on the total debt balances upon execution of the contracts with the registrant." (Emphasis added.)

Section 1042(f) requests "For the debts for which a resident identified in subdivision (a) of this section has accepted a settlement at any time with their creditor and made at least one payment pursuant to that settlement, ***the average amount owed upon execution of the contract with the registrant***, and the average settlement amount based upon the total of all payments due under each settlement." (Emphasis added.)

If both of these subsections seek the average amount of debt reported by consumers owed at the time they enter into the contract with the debt settlement services provider, the same terminology should be used in both subsections to avoid confusion. Otherwise, it would be helpful if the Proposed Rules would provide a more robust description of the intended differences between the respective requests. For example, if Section 1042(f) seeks "the average dollar amount of debt per resident" as of a point in time other than when the contract is executed, the subsection should state when that time should be.

V. Calculations Required by Some of the Proposed Rules Would be Costly and/or Impossible for Companies to Provide.

While some larger members advise they would likely have the capability to create the new reports that would be needed to comply with several of the proposed reporting requirements, they raised concerns about the costs of preparing such reports. Based on the feedback it has received, CDRI is concerned that smaller (with 2 to 30 employees) and mid-sized companies (with fewer than 100 employees), which do not have comparable information technology and reporting capabilities, would not be able to complete the relatively complex calculations required for several of the proposed annual reports. These proposed reports include:

A. Section 1042(e), which seeks, "the average number of debts per resident and the total number of debts for all residents who contracted for services with the registrant in which the resident, over the contract term, has accepted a settlement with their creditor and made at least one payment pursuant to that settlement."

B. Section 1042(g), seeking, "For the debts for which a resident identified in subdivision (a) of this section has accepted a settlement with their creditor and made at least one payment pursuant to that settlement over the contract term, the average amount of time between execution of the contract and the first payment under each settlement."

Where member companies report that ***no other states require the reporting of the above information,*** such calculations will require even the largest members to develop specialized reports. However, smaller and mid-sized debt settlement services providers would likely have to engage in costly painstaking reviews of client contracts and statements as well as hand-calculations in order to produce the information requested. CDRI questions whether the Department has performed the analyses required by §§ 11346.2(b)(2)A) and 11346.3(b) in including these requirements.

VI. Adequacy of the Department's Economic Impact Statement Analysis

As discussed above, CDRI has concerns that the additional costs and time impacts that would be imposed by some of the Proposed Rules have not been considered or addressed in the economic impact statement required by §§ 11346.2(b)(2)A) and 11346.3(b).

The California Supreme Court provided guidance on these issues in *Western States Petroleum Assn. v. Board of Equalization*, 57 Cal. 4th 401 (Cal. 2013). The Court acknowledged that although "a regulation will not be invalidated simply because of disagreement over the strict accuracy of cost estimates on which the agency relied to support its initial determination," *id.* at 429, the requirements of an initial economic impact assessment "plainly call for an evaluation based on facts." *Id.* at 428 (citations omitted).

Where the DFPI's "Initial Statement of Reasons" contains no mention of any attempt to quantify the potential negative financial impacts the above-referenced reporting requirements would have on California businesses, including the potential elimination of jobs and elimination of existing businesses, the bald declarations of the Commissioner's determination that the Proposed Rules "likely will not have a significant impact" on the elimination of jobs or existing businesses in the State of California is insufficient to comply with these provisions.

For the above reasons, CDRI requests that the Department add the requested definition and reevaluate the inclusion and wording of the various provisions addressed herein, as needed to address these concerns.

Thank you for this opportunity.

Respectfully,

Cliff Andrews
CEO, CDRI

cc: Peggy Fairman (via Email to Peggy.Fairman@dfpi.ca.gov)