November 27, 2023

Via Email to regulations@dfpi.ca.gov
Araceli Dyson, Regulations Coordinator
California Department of Financial Protection and Innovation

RE: Rulemaking under the CCFPL, CFL, CDDTL, and CSLSA (PRO 01-21)

Dear Ms. Dyson:

We appreciate the opportunity to submit additional comments related to *PRO 01-21 - Notice of Proposed Rulemaking Under the California Consumer Financial Protection Law and the California Financing Law, California Deferred Deposit Transaction Law, and California Student Loan Servicing Act*.

We also appreciate the continued efforts by the California Department of Financial Protection and Innovation ("DFPI" or the "Department") to provide additional legal clarity for those groups providing funding to students utilizing income-contingent, income-indexed forms of financing, such as income share agreements ("ISAs").

The following are suggestions related to the revised proposed regulations:

I. Clarify whether certain income-based products are covered under the definition of "income-driven repayment."

The definition of "income-driven repayment" states that it covers "any arrangement in which the consumer's education financing periodic payment obligation is based upon the consumer's income or employment status." There are certain income-based products that require a consumer to make a fixed payment only when earning above an income cutoff. We interpret the proposed rule's language as covering these products–which we believe is the right outcome. The income-threshold products have fixed payment obligations when the consumer is earning above the income cutoff; however, the overall obligation is "based upon the consumer's income" because whether the payment is due depends only on the consumer's income. The concern is that the language, as written, may not include such products as the amount of the payments in these programs are not based upon the consumer's income or employment status. A clarification would provide certainty that an "income-driven repayment" is any arrangement where the payment or the obligation is based upon the consumer's income or employment status. We suggest revising the definition to clarify this case.

We offer the following revision as one suggested way to approach this:

> "Income-driven repayment" means any arrangement in which the consumer's periodic payment obligation is based upon the consumer's income or employment status**, including an arrangement where a consumer's payments fall to $0 if they earn below a specific threshold**. Income-driven repayment does not include arrangements in which the consumer's payment

obligation is deferred during certain periods specified by the education financing agreement, such as when the consumer is unemployed or pursuing education, unless the agreement provides that after the completion of a deferment period the amount of the consumer's periodic payment obligation**, whether $0 or an amount greater than $0,** can vary based upon the consumer's income.

II. Remove assertion that ISAs are an assignment of wages or earnings.

The Initial Statement of Reasons stated that "income share agreements are, for all practical purposes, an assignment of a portion of the consumer's wages or earnings."

In our prior comments, we shared the following:

> "For the avoidance of doubt, we are not disputing the proposed regulatory treatment of advances with Income Based Repayment or Income Share Agreements as "loans" under Section 1461. But we strongly urge the Department to remove language from proposed regulations and the Statement of Reasons stating that ISAs are inherently an "assignment of wages." To conflate the two erodes the fundamental distinction between indexing an individual's payment amount to their income (as with ISAs or federal income-driven repayment plans)–an important tool for ensuring an affordable obligation–and a consumer contractually providing a lender access to the consumer's wages via an employer before the consumer is paid those wages (wage assignment).

The revised proposal includes new language in Section 1461, as shown here:

> This section shall not be read to interpret what is considered a wage assignment under the Labor Code, consumer credit under the federal Truth in Lending Act (15 U.S.C. § 1601 et seq.), or a loan or forbearance of money under the California Constitution, article XV, section 1.

We appreciate this addition to the proposed rule and support this clarification. However, because ISAs do <u>not</u> in any way represent an assignment of wages, the initial Statement of Reasons must be updated to reflect a change in language used by the Department. As noted in our first comment submission, the language in the Statement of Reasons "will create market confusion between two very distinct arrangements – one (ISAs and indexing payment amounts to income, generally) that is designed to be a consumer protection and affordability measure, and another (assignment of wages) that is a measure where consumers yield many of their rights with respect to their earned wages."

For this reason, we strongly urge the Department to issue a final Statement of Reasons and remove language stating that ISAs are inherently an "assignment of wages."

III. Clarify Sec. 1466(a) to make the language in this subsection consistent

The revised subsection 1466(a) reads as follows:

> (a) A loan contract that provides the borrower with the option of making payments based upon a fixed percentage of the borrower's income complies with the requirement in Financial Code section 22307, subdivision (b), that a loan contract "provide for payment of the aggregate amount contracted to be paid in substantially equal periodical installments," if the contract provides the borrower with a predefined formula for calculating each payment during the term of the contract where the only unknown variable as of the effective date of each such contract is the income of the borrower at the point of calculating of each payment. For a contract described in this subdivision, a payment based upon a fixed percentage of a borrower's income shall not be considered a balloon payment under section 1453 of this subchapter.

First, we appreciate and support the clarifications the Department provided in this subsection related to ways a product can comply with the substantially equal periodical installment requirement.

Second, we worry that some of the language in the subsection is now slightly inconsistent and requires a minor technical amendment. Specifically, at two points, the subsection refers to a loan contract that provides for payments based on "a fixed percentage of a borrower's income." However, the language added in the most recent revisions–"if the contract provides the borrower with a predefined formula for calculating each payment…"–is more general and would cover products where the payment amount is contingent but not based on a percentage of income. We worry that this inconsistency could create uncertainty for these types of products as to if and how the "percentage of income" clauses apply.

For this reason, we suggest that the paragraph be reworded as follows:

> (a) A loan contract **with income-driven repayment** ~~that provides the borrower with the option of making payments based upon a fixed percentage of the borrower's income~~ complies with the requirement in Financial Code section 22307, subdivision (b), that a loan contract "provide for payment of the aggregate amount contracted to be paid in substantially equal periodical installments," if the contract provides the borrower with a predefined formula for calculating each payment during the term of the contract where the only unknown variable as of the effective date of each such contract is the income of the borrower at the point of calculating of each payment. For a contract described in this subdivision, a payment **calculated under income-driven repayment** ~~based upon a fixed percentage of a borrower's income~~ shall not be considered a balloon payment under section 1453 of this subchapter.

This revision has the added benefit of relying on a term ("income-driven repayment") that has already been explicitly defined in the rule rather than creating a new concept ("loan contract that provides the borrower with the option of making payments based upon a fixed percentage of the borrower's income"). However, if the original language is used, it should be consistently used in the first and last sentence of the above clause.

IV. Clarify reporting language under Section 1044(c)(3).

The revised version of Section 1044(c)(3) requires annual reporting by registrants that includes:

(3) The total dollar amount that would be required to pay off the contracts at origination.

We are aligned with and supportive of the policy goal to have registrants report on their education financing offerings to California consistent with this Section 1044. We nonetheless seek your clarification with regard to the correct way for registrants to report the data requested under this proposed Section 1044(c)(3). In our own review, we came up with at least three (3) different potential interpretations for how a registrant might report "the total dollar amount that would be required to pay off the contracts at origination." They are as follows:

1. **Total Loan Amount** if this is intended to be the amount a borrower would need to pay to pay off the contract on the day the contract was originated. Based on the time-based APR cap that most income-driven repayment products utilize, we would expect this to be equal to the total loan amount given the APR cap would accrue for 0 days, so borrowers would just need to pay back what they were advanced.

2. **Zero** if this is intended to be the amount definitively owed by the borrower over the life of the education financing contract as measured at the point of origination. Because income-driven repayment products that are structured as ISAs generally do not require borrowers to make payments unless they owe more than the minimum income threshold or income cutoff, at the point of origination (assuming the students are not employed), they "would be required to pay" $0.

3. **Payment Cap** if this is intended to be the maximum amount the borrower might be required to pay to fully satisfy the contract at the highest point. This is less textual, but nonetheless something we thought the Department may be seeking here based on our initial reading and our general understanding of the regulatory intent.

We do not have strong feelings about which of these interpretations is right, or even optimal to serve the Department's regulatory intent. Nonetheless, given the ambiguity that we were unable to resolve during our own reviews and discussion of the proposed language, we would request that the Department clarify this language to make its intent clearer.

Thank you again for this opportunity to comment. We welcome any questions you may have regarding this submission.

Sincerely,

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