

**EILEEN NEWHALL CONSULTING LLC**

5720 River Oak Way, Carmichael, CA 95608  
[enewhall@newhallconsulting.com](mailto:enewhall@newhallconsulting.com), (916) 666-0314

November 27, 2023

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

Subject: Comments on First Modified Text of PRO 01-21, Released November 6, 2023

To Whom It May Concern:

Thank you for the opportunity to comment on the proposed regulations. In general, the most recent proposal is a significant improvement relative to prior versions of PRO 01-21. However, I remain concerned about certain aspects of the most recent proposal, as summarized below. In the comments below, I describe my concerns first, then propose a suggested approach to resolve those concerns.

**CONTINUED CONFUSION REGARDING THE APPLICATION OF THE CFL TO INCOME-BASED ADVANCES AND THE PROVIDERS OF THOSE ADVANCES**

As currently drafted, Section 1461 of Article 4 of Subchapter 6 (California Financing Law; CFL) states that any advance of funds to be repaid in whole or in part by the receipt of a consumer's wages, salary, commissions, or other compensation for services is a sale or assignment of wages and a loan subject to the CFL; a consumer who receives such an advance is a borrower for purposes of the CFL; and a provider who makes such an advance is a finance lender for purposes of the CFL. Because an income-based advance is an advance of funds to be repaid in whole or in part by the receipt of a consumer's wages, salary, commissions, or other compensation for services, the language of Section 1461 equates income-based advances with loans under the CFL and equates providers of income-based advances with lenders under the CFL.

As current drafted, Section 1462 of Article 4 of Subchapter 6 states that a provider of an advance of funds described in Section 1461 is not "in the business" of a finance lender or broker for purposes of licensure under the CFL, if two conditions are met: 1) the advance of funds is an income-based advance, as defined in California Consumer Financial Protection Law (CCFPL) regulations *and* 2) the provider is registered with the Department to offer income-based advances under the CCFPL. Section 1462 goes on to say that the second condition expires when registration requirements for income-based advance providers expire.

The current drafting of both sections is problematic. To begin, Sections 1461 and 1462 are in conflict with one another. Section 1461 states that the provider of an advance of funds is a lender for purposes of the CFL, while Section 1462 says that the very same provider is not required to be licensed under the CFL, if two conditions are met. It is both confusing and misleading to state that the same entity is simultaneously subject to a law and not required to be licensed under that law. Section 1461 makes no reference to Section 1462, and thus provides no indication that its provisions fail to apply in the circumstances described in Section 1462.

Section 1462 also suffers from the flaw that it requires two conditions to be met (an “and” sits between paragraphs (1) and (2)) in order for a provider of an advance of funds to escape the requirement to be licensed under the CFL. However, as Section 1462 is drafted, one of the two required conditions will be unattainable if registration requirements for income-based advance providers sunset. Thus, the same issues the Department was cautioned about in connection with its March 2023 version of PRO 01-21 remain in this current version: income-based advance providers that do not hold CFL licenses as of the date the registration requirements sunset will be considered unlicensed lenders in violation of the CFL as of that date.

A regulatory “gotcha” like this is troublesome for multiple reasons: 1) it imposes significant uncertainty on a still-nascent industry; 2) it imposes significant costs on that same industry, because most, if not all, providers will feel obliged to apply for CFL licenses to ensure that they will not be violating California law once the registration requirement sunsets; 3) it forces an industry whose products bear virtually no relation to California’s installment loan law under the requirements of that law; 4) it hampers, rather than fosters innovation, with no resulting consumer benefit.

### **MISSED OPPORTUNITY TO EMBED CONSUMER PROTECTIONS INTO THE PROPOSED REGULATION**

When it enacted AB 1864 (Chapter 157, Statutes of 2000), the Legislature granted DFPI extensive authority to prescribe required and prohibited acts applicable to persons subject to the CCFPL<sup>1</sup>. Despite this extensive authority, the Department has chosen to apply very few rules to income-based advance companies via PRO 01-21 and is missing an opportunity to embed more extensive consumer protections in its regulation.

As drafted, the regulation proposes to require income-based advance companies to register; submit specified supplemental information as part of their registration applications; and file annual reports; and prohibits registrants from representing that registration represents approval by the Commissioner of DFPI. These requirements are bureaucratic, but hardly protective of consumers.

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<sup>1</sup> See Financial Code Sections 90009 and 90012, in particular.

The only elements of the proposed regulation that appear to focus on consumer protection are embedded in the definition of the term income-based advance. Paragraph (3) of subdivision (g) of proposed Section 1004 (Article 1, Subchapter 4) defines an income-based advance as one in which the provider of that advance warrants to the consumer that it has no legal or contractual claim or remedy against the consumer based on the consumer's failure to pay the full amount due, the provider will not undertake debt collection activities to collect unpaid amounts due, and the provider will not report the consumer's failure to repay amounts due to a consumer reporting agency. Although these represent important consumer protections, they fall far short of describing the best practices currently in place among participants in the income-based advance industry and far short of codifying a comprehensive set of rules focused on consumer protection.

## **PROPOSED SOLUTION**

My proposed solution to the concerns noted above does four, related things:

- 1) Defines the term "provider" in the context of income-based advances as an entity that adheres to a comprehensive set of specified consumer protections.
- 2) Separates the definition of an "income-based advance" from the definition of "provider" to clarify that some income-based advances may be made by providers, and other income-based advances may be made by persons who fail to meet the provider definition.
- 3) Exempts income-based advances made by providers from the CFL, and exempt providers that extend those income-based advances from licensure under the CFL.
- 4) Applies the CFL to income-based advances made by persons who fail to meet the provider definition and requires those persons to be licensed under the CFL. Although I continue to believe that the CFL is an inappropriate law for use by DFPI to regulate income-based advances, it is my hope that when given a choice between being subject to an ill-fitting, antiquated installment loan law and complying with the "provider" definition, all entities making income-based advances in California will choose the latter alternative.

This proposed solution achieves three outcomes not currently achieved by the proposed regulations:

- 1) Embeds extensive consumer protections into the registration scheme. Codifying these best practices will ensure that they continue to be used by existing industry participants and that they represent the minimum standard of practice among new industry participants.
- 2) Clearly describes who and what is and is not subject to the CFL.
- 3) Requires entities that make income-based advances, but do not adhere to specified consumer protections, to become licensed under the CFL.

Specific language reflecting the proposed solution is attached as Appendix A. As much as possible, the language in Appendix A uses the Department’s proposed definitions, organization, and sentence structure, in order to minimize suggested changes.

I am not proposing the attached solution on behalf of any specific industry participants. However, after speaking with several of the companies that would be impacted by PRO 01-21, it is my understanding that a majority of the income-based advance industry is comfortable with the language in Appendix A, and that the language accurately reflects best practices currently in use within the industry. Stated another way, the language in Appendix A has been extensively vetted, in an attempt to reduce any impediments to the Department’s finalization of the regulation as proposed in Appendix A.

The following table represents a brief comparison and contrast of the two proposals.

	<b>DFPI’s Proposed Regulation</b>	<b>Suggested Solution</b>
Are Consumer Protections Built in to the Definition of Income-Based Advance Provider?	No (Section 1004(j))	Yes; a person is not considered a provider unless that person complies with industry best practices (Section 1004(j)).
Are Income-Based Advances Subject to the CFL?	Yes (Section 1461)	No (Section 1461)
Are Income-Based Advance Providers Required to be Licensed Under the CFL?	No, though the extent to which this is true following the sunset of registration requirements is unclear (Section 1462).	No (Section 1462)
Are Income-Based Advance Providers Required to Register?	Yes (Section 1010)	Yes (Section 1010)
What Happens to Registered Providers When Registration Requirement Sunset?	Unclear. Income-based advance providers will continue to fall under DFPI jurisdiction pursuant to the CCFPL. Providers of income-based advances may also be considered unlicensed lenders, in violation of the CFL (Section 1462).	Income-based advance providers will continue to fall under DFPI jurisdiction pursuant to the CCFPL.

	<b>DFPI's Proposed Regulation</b>	<b>Suggested Solution</b>
What Is Subject to the CFL?	All advances of funds to be repaid in whole or in part by the receipt of a consumer's wages, salary, commissions, or other compensation for services, <i>including</i> income-based advances, but excluding obligor-provided advances (Section 1461).	All advances of funds to be repaid in whole or in part by the receipt of a consumer's wages, salary, commissions, or other compensation for services, <i>unless</i> those advances are made by providers or are obligor-provided advances (Section 1461).
What if a Provider Does not Adhere to Specified Consumer Protections?	N/A; the consumer protections are not part of the proposed regulation.	That provider is subject to the CFL (Sections 1461 and 1462).

#### **EFFECT OF A SUNSET ON ARTICLE 1 OF SUBCHAPTER 4**

Beyond the specific suggestions above, I also hope to flag a more general topic for the Department's consideration. Subdivision (b) of Financial Code Section 90009.5 states that "the regulation requiring a covered person to register with the department shall become inoperative on January 1 of the calendar year that is four years following the initial year of required registration," unless the Legislature takes specified actions. This language begs the question, "how much of what the Department is proposing in PRO 01-21 will cease to be operative on the January 1 that is four years following adoption of the proposal?"

I believe a strong case can be made that the entirety of Subchapter 4 (California Consumer Financial Protection Law) will survive the sunset of a *specific* registration requirement, and that the only effect of a sunset would be to render Section 1010 inapplicable to specific groups of persons whose registration requirements are no longer in force. However, it may be valuable for the Department to include in its regulation some statement to that effect. Doing so should help ensure that cross references, both within regulations implementing the CCFPL and regulations implementing other laws administered by DFPI, are not rendered meaningless following a possible sunset. One possible way of addressing this issue would be the addition of a new Section 1054 to Article 3 of Subchapter 4.

#### **1054. Effect of a Sunset**

Unless the language of this subchapter expressly provides otherwise, its provisions shall survive the sunset of a registration requirement pursuant to subdivision (b) of Financial Code Section 90009.5.

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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.

Sincerely,

Eileen Newhall, Owner  
Eileen Newhall Consulting LLC  
Attachment: Appendix A

**EILEEN NEWHALL CONSULTING LLC**  
**COMMENTS ON FIRST MODIFIED TEXT OF PRO 01-21**  
**RELEASED NOVEMBER 6, 2023**  
**APPENDIX A**

**PROPOSED CHANGES TO**  
**FIRST MODIFIED TEXT OF PROPOSED REGULATIONS**  
**DEPARTMENT OF FINANCIAL PROTECTION AND INNOVATION**  
**TITLE 10. INVESTMENT**  
**CHAPTER 3. COMMISSIONER OF FINANCIAL PROTECTION AND INNOVATION**  
**PRO 01-21**

(The original proposed text is shown without underline.<sup>1</sup> The first modifications to the text are shown with underline for additions and strikethrough for deletions.) **Proposed changes to the first modified text of proposed regulations are shown in bold type. Deletions are shown as strikethroughs, and additions are shown as underlined italics).**

**Subchapter 4. California Consumer Financial Protection Law**

**§ 1004. Definitions – Income-Based Advances.**

With respect to income-based advances, these terms shall have the following meanings:

- (a) “Amount due” means the amount to be paid by the consumer of an income-based advance on the collection date.
- (b) “Account transfer fee” means a fee imposed to move an income-based advance from an account designated or required by the provider to other accounts owned or controlled by the consumer. **For purposes of annual reporting account transfer fees pursuant to section 1045, a registrant should only report known account transfer fees assessed by the registrant for funds received from income-based advances.**
- (c) “Charges” mean any interest, fees, bonuses, commissions, brokerage, discounts, expenses, and other forms of costs charged, contracted for, or received by a person in connection with **~~the investigating, arranging, negotiating, procuring, guaranteeing, making, servicing, collecting, and enforcing of~~ an income-based advance, ~~or any other service rendered.~~** Charges include, without limitation, subscription fees, expedited funds fees, account transfer fees, and gratuities. For purposes of this definition, “charges” include amounts received by a person from a consumer for payment of optional or discretionary services elected by the consumer in connection with **income-based advances.** ~~education financing.~~

(d) “Collection date” means the date a provider plans to collect all previous unpaid income-based advances made during a particular period. This date may be a consumer’s payday or the date when the provider anticipates that amounts that have accrued to the benefit of the consumer will be paid to the consumer.

(e) “Expedited funds fee” means is any amount paid by a consumer to accelerate the receipt of an income-based advance.

(f) “Gratuity” means an optional payment made by a consumer in connection with the provider’s provision of an income-based advance to the consumer that does not affect the service rendered by the provider to the consumer.

(g) “Income-based advance” means an advance made to a consumer by a **provider person** and that has all of the following characteristics:

- (1) The advance is based on income the provider person has reasonably determined to have ~~that has~~ accrued to the benefit of the consumer but has not, at the time of the advance, been paid to the consumer;
- (2) When the advance is made, the advance is scheduled or anticipated for collection in a single payment on a date within ~~thirty-one (31)~~ thirty-four (34) days, and that date corresponds to the date that the **provider person** anticipates the income described in paragraph (1) of this subdivision will be paid to the consumer; and
- (3) The **provider person** warrants to the consumer as part of the contract between the parties on behalf of the **provider person** and, if applicable, any business partners partner(s) that:
  - (A) The **provider person** and any the business partners partner(s) have no legal or contractual claim or remedy against the consumer based on the consumer’s failure to repay in full the event the amount of the advance, provided that this provision shall not prohibit a person from suspending income-based advance services to a consumer as a result of the consumer’s failure to repay an income-based advance advanced is not repaid in full; and
  - (B) If With respect to the amount due is not repaid on the collection date, advanced to the consumer, the provider person and any the business partners partner(s) will not engage in any debt collection activities, if the advance is not repaid on the scheduled date, or place the amount due advanced as a debt with or sell it to a third party, or report to a consumer reporting agency concerning the amount due advanced. In this paragraph, “debt collection activities” do not include initiating with the consumer’s authorization an electronic fund transfer or payroll deduction to collect any outstanding amount due.

(h) “Obligor” means:

- (1) A consumer’s employer, or



(2) A person other than a consumer's employer who is not an employer, but who is contractually obligated to pay a consumer a sum of money on an hourly, project-based, piecework, or other basis for labor or services provided by the consumer to or for the benefit on behalf of the person.

(i) "Obligor-based advance" means any income-based advance where the provider intends to collect the amounts that have accrued to the benefit of the consumer directly from the consumer's obligor on the collection date.

(j) "Provider" means a person other than an obligor that engages in the business of providing income-based advances, adheres to the requirements in paragraph (1) of this subdivision, and refrains from engaging in the prohibited acts in paragraph (2) of this subdivision.

(1) To meet the definition of a provider, a person that provides income-based advances to a consumer must do all of the following:

(A) Develop and implement policies and procedures to respond to inquiries raised by consumers and address complaints from consumers in an expedient manner.

(B) Whenever it offers a consumer the option to receive proceeds for a charge, the provider must also provide the consumer at least one reasonable option to obtain the same amount of proceeds at no cost and clearly explain how the consumer may select the no-cost option.

(C) Before entering into an agreement with a consumer for the provision of income-based advances, the provider must do all of the following:

(i) Inform the consumer of the consumer's rights under the agreement;

(ii) Inform the consumer that the agreement is not intended to create a legal obligation for the consumer to repay advances;

(iii) Fully and clearly disclose to the consumer all charges associated with the provision of income-based advances.

(D) Inform the consumer of the fact of any material changes to the terms of conditions of the income-based advance agreement before implementing those changes for that consumer.

(E) Allow the consumer to cancel use of the provider's income-based advance services at any time, without incurring a charge for that cancellation.

(F) Comply with all applicable local, state, and federal privacy and information security laws.

(G) Provide income-based advances to a consumer via any means mutually agreed upon by the consumer and the provider.

**(H) If a provider solicits, charges, or accepts a gratuity from a consumer, the provider must do all of the following:**

**(i) Clearly and conspicuously disclose to the consumer immediately prior to each transaction that a gratuity amount may be zero, and that the act of paying a gratuity is voluntary;**

**(ii) Clearly and conspicuously disclose in its service agreement with the consumer that gratuities are voluntary and that the offering of income-based advances, including the amount of an income-based advance a consumer is eligible to request and the frequency with which income-based advances are provided to a consumer, is not contingent on whether the consumer pays a gratuity or on the size of the gratuity.**

**(I) If a provider seeks repayment of income-based advances or payment of charges in connection with the provision of income-based advances from a consumer's depository institution account, including via electronic funds transfer, that provider must do all of the following:**

**(i) Comply with applicable provisions of the federal Electronic Fund Transfer Act, 15 USC 1693 et seq., and regulations adopted pursuant to that act; and**

**(ii) Reimburse the consumer for the full amount of any overdraft or non-sufficient funds fees imposed on that consumer by the consumer's depository institution, which are caused by the provider attempting to seek repayment of income-based advances or charges on a date before, or in an incorrect amount from, the date or amount previously disclosed to the consumer.**

**(2) To meet the definition of a provider, a person that provides income-based advances to a consumer may not do any of the following:**

**(A) Compel or attempt to compel repayment of income-based advances or charges through any of the following means:**

**(i) A suit against the consumer in a court of competent jurisdiction;**

**(ii) Use of outbound telephone calls;**

**(iii) Use of a third party debt collector to pursue collection from the consumer on the provider's behalf;**

**(iv) Sale of outstanding amounts to a third-party debt collector or debt buyer for collection from the consumer.**

**(B) Share with an obligor any portion of charges received from a consumer in connection with income-based advances.**

**(C) Require a credit report or credit score issued by a consumer reporting agency to determine a consumer's eligibility for income-based advances.**

**(D) Accept repayment of income-based advances or charges by a consumer via any form of credit, including a credit card.**

**(E) Impose a charge for failure of a consumer to repay income-based advances or charges.**

**(F) Report any information about a consumer's failure to repay income-based advances or charges to a consumer reporting agency or debt collector.**

**(G) If a provider solicits or accepts gratuities from a consumer, that provider may not mislead or deceive consumers about the voluntary nature of those gratuities or make representations that gratuities will benefit any specific individuals.**

**(3) A person shall not be rendered ineligible to be a provider for purposes of this subdivision by compelling or attempting to compel repayment of income-based advances or charges that were incurred by a consumer through fraudulent or other unlawful means or by pursuing an obligor for a breach of its contractual obligations to that person.**

(k) "Subscription fee" means any periodic fee paid by a consumer under an agreement that includes any right, whether absolute or conditioned, to receive an income-based advance.

NOTE: Authority cited: Section 90009, Financial Code. Reference: Sections 90003, 90005, and 90009, Financial Code.

## **§ 1021. Registration Application.**

The procedures set forth in this section are applicable to a person who is required to be registered pursuant to this subchapter. If an applicant is offering or providing more than one subject product, separate registration is required for each subject product. The application for registration shall be filed as follows:

(a) INITIAL APPLICATION: The applicant shall complete and file Form MU1 in accordance with the instructions of NMLS and this subchapter for transmission to the Commissioner. Unless otherwise specified below, an applicant shall complete all sections of the Form MU1.

All exhibits and supporting documents related to the application or amendment required by NMLS or identified in this section shall also be filed with NMLS (unless otherwise specified), in accordance with the instructions of NMLS and this subchapter for transmission to the Commissioner. An applicant shall provide the following information, exhibits, and documentation in the manner provided below.

- (1) **ITEMS NOT REQUIRED:** Applicants are not required to complete Item Number 9 (Approvals and Designations), Item Number 10 (Bank Account Information), or Item Number 17 (Qualifying Individuals) of Form MU1.
- (2) **BUSINESS ACTIVITIES:** On Item Number 1 of Form MU1 (Business Activities), an applicant shall indicate that it will offer or provide a subject product according to the following instructions.
  - (A) For debt settlement services, the applicant shall select “Debt settlement/debt adjuster,” “Debt management/credit counseling,” and/or “Debt Negotiation” as applicable under the Debt section of the form.
  - (B) For student debt relief services, the applicant shall select “Debt settlement/debt adjuster,” “Debt management/credit counseling,” and/or “Debt Negotiation” as applicable under the Debt section of the form.
  - (C) For education financing, the applicant shall select “Private student loan lending” under the Consumer Finance section of the form.
  - (D) For income-based advances, an applicant shall select “Consumer loan lending” under the Consumer Finance section of the form, *until such time as NMLS creates a separate product category for income-based advances which shall instead be selected at such time.*
- (3) **IDENTIFYING INFORMATION:** An applicant shall provide all identifying information on Item Number 2 of Form MU1, i.e., the entity’s name, IRS employee identification number or social security number, legal name amendment, main address (not a P.O. Box), business phone number, toll-free number for consumers, fax line, email address, mailing address, and a statement as to whether the entity conducts business with consumers through branch offices or other business locations.

-----No changes are proposed to the remainder of Section 1021

(Remainder of section is excluded in the interest of brevity)-----

## § 1461. Advances Under the California Financing Law.

(a) Any advance of funds to be repaid in whole or in part by the receipt of a consumer's wages, salary, commissions, or other compensation for services, is a sale or assignment of wages and a loan subject to the California Financing Law, **unless either of the following conditions is met:**

**(1) The advance of funds is an income-based advance, as that term is defined by California Code of Regulations, title 10, section 1004, subdivision (g) and the person advancing those funds is a provider, as that term is defined in California Code of Regulations, title 10, section 1004, subdivision (j) regardless of the funding provider's means of collection, whether the provider has legal recourse if the provider is unable to collect the amount it advanced, or whether the consumer has the right to cancel collection of the amount advanced. or**

**(2) The funds are provided by an obligor. This section does not apply to obligors, as that term is defined by California Code of Regulations, title 10, section Section 1004, subdivision (h), of subchapter 4 of these rules who advance advances from their its own funds only income that has accrued to the benefit of a consumer, but that has not, at the time of the advance, been paid to the consumer.**

(b) A consumer who receives an advance **of funds considered a loan** under subdivision (a) of this section is a borrower, and a provider **a person** who makes an **that** advance is a finance lender within the meaning of the California Financing Law.

(c) For the purposes of determining whether an advance of funds to a California consumer is to be repaid in whole or in part by the receipt of wages, salary, commissions, or other compensation for services, the source of funds from which the lender ordinarily collects its advances in similar transactions may be considered.

**(d) 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.**

NOTE: Authority cited: Sections 22150 and 90009, Financial Code. Reference: Sections 22203 and 22335, Financial Code.

#### **§ 1462. Licensure of Advance Providers – Income-Based Advances.**

(a) A provider, **as defined by California Code of Regulations, title 10, Section 1004, subdivision (j)** of an advance of funds **as described** in ~~s~~Section 1461 of these rules is not "in the business" of a finance lender or broker for purposes of licensure under Financial Code section 22100 of the California Financing Law (~~d~~Divisions 9 (commencing with ~~s~~Section 22000) of the Financial Code) if:

(1) The advance of funds is an income-based advance as defined by California Code of Regulations, title 10, section Section 1004, subdivision (g), and of subchapter 4 of these rules; **and**

(2) The provider is registered with the Department to offer income-based advances under California Code of Regulations, title 10, section Section 1010 of subchapter 4; or

**(3) The provider has received written notification from the Commissioner that it is exempt from the California Financing Law.** ~~and~~

- ~~1. The charges collected by the provider in connection with each income-based advance do not exceed charges that would be permitted under the California Financing Law if the provider were licensed under that law.~~

~~This paragraph~~ (b) **Paragraph (2) of subdivision (a)** section shall expire when the registration requirements for income-based advance providers under ~~s~~Section 1010 of subchapter 4 of these rules expire.

NOTE: Authority cited: Sections 22150 and 90009, Financial Code. Reference: Sections 22100 and 22335, Financial Code.

#### **§ 1465. Voluntary or Optional PaymentsCharges.**

A voluntary or optional payment, including, without limitation, a tip or gratuity, paid by a borrower to a licensee or any other person in connection with the investigating, arranging, negotiating, procuring, guaranteeing, making, servicing, collecting, and enforcing of a loan or any other service rendered in connection with a loan, is a charge under Financial Code section 22200.

NOTE: Authority cited: Sections 22150 and 90009, Financial Code. Reference: Sections 22200 ~~and 22335~~, Financial Code.