STATE OF CALIFORNIA
Department of Financial Protection and Innovation
GOVERNOR **Gavin Newsom** · COMMISSIONER **Clothilde V. Hewlett**

FINAL STATEMENT OF REASONS

FOR THE ADOPTION OF REGULATIONS UNDER THE CALIFORNIA CONSUMER FINANCIAL PROTECTION LAW, CALIFORNIA FINANCING LAW, CALIFORNIA DEFERRED DEPOSIT TRANSACTION LAW, AND CALIFORNIA STUDENT LOAN SERVICING ACT PRO 01-21

UPDATE OF INITIAL STATEMENT OF REASONS (§ 11346.9, subd. (a)(1))[1]

The text of these proposed regulations has changed from the text originally proposed. The Department of Financial Protection and Innovation (Department or DFPI) modified the proposed regulations and made the modified text of the regulations available to the public for comment on three occasions. This update of the information contained in the Initial Statement of Reasons (ISOR) describes all changes to the initial text and the purpose and necessity of each changed provision, as applicable. In proposing these regulations, the Department did not rely on any data or technical, theoretical, or empirical study, report, or similar document that was not previously identified or made available for public review. Unless otherwise indicated, all section references are to title 10 of the California Code of Regulations.

Nonsubstantive or Technical Changes

As identified below, certain subdivisions were renumbered to account for subdivisions that were added or deleted. The purpose of this change is to provide regulations that are coherent and organized. Renumbering is necessary because properly numbered subdivisions are easily read and understood.

As identified more specifically below, nonsubstantive and technical changes were made related to grammar, syntax, capitalization, punctuation, and style, including citation style. The purpose of these changes is to provide regulations that are clear. These changes are necessary because correct and consistent use of language is a prerequisite for easily understandable regulations.

Subchapter 4. California Consumer Financial Protection Law

Article 1. Registration

Section 1000. General Definitions.

Section 1000. The lead-in language of this section was changed from "The following terms used in subchapter 4 of title 10, chapter 3, shall have the following meanings" to "In articles 1, 2, and 3 of this subchapter." The purpose of this provision is to define terms used in the regulations. This change is necessary because these definitions are intended to apply only to articles 1, 2, and

[1] All further statutory references in the headings are to the Government Code.

3 in subchapter 4 and not apply to article 4 or any others that may be added in the future.

Section 1000, subdivision (c). This subdivision was modified with nonsubstantive changes related to citation style and punctuation.

Section 1000, subdivision (e). This subdivision was modified with nonsubstantive changes related to citation style and grammar, including changing "offer" to "offering."

Section 1000, subdivision (f). This subdivision was modified with nonsubstantive changes related to grammar, punctuation, and syntax, including adding "the" and deleting two instances of "or."

Section 1000, subdivision (g). This subdivision was modified with a nonsubstantive change related to citation style—namely, changing the format of a date to use four instead of two digits to refer to the year.

Section 1000, subdivision (k). This subdivision was modified with nonsubstantive changes related to capitalization.

Section 1001. Definitions – Debt Settlement Services.

Section 1001, subdivision (a). This subdivision was modified to delete from the definition of "charges" "amounts contracted for or received by payment processors in connection with a person's provision of debt settlement services." The purpose of this provision is to ensure clarity and consistency among debt-settlement providers when reporting the total charges collected from California residents under section 1042. This change is necessary because it accommodates public comments that debt-settlement providers would not be able to report such information because they have no direct contractual relationship with payment processors, which are selected by consumers, not providers.

Section 1001, subdivision (c). This subdivision was modified to delete the definition of "payment processor." The purpose of this provision is to ensure clarity and consistency among debt-settlement providers when reporting the total charges collected from California residents under section 1042. This change is necessary because it accommodates public comments that debt-settlement providers would not be able to report certain information related to payment processors under subdivision (a) because debt-settlement providers have no direct contractual relationship with payment processors, which are selected by consumers, not providers.

Section 1001, subdivision (d). This subdivision was modified to delete the definition of "payment processing service." The purpose of this provision is to ensure clarity and consistency among debt-settlement providers when reporting the total charges collected from California residents under section 1042. This change is necessary because it accommodates public comments that debt-settlement providers would not be able to report certain information related to payment processors under subdivision (a) because debt-settlement providers have no direct contractual relationship with payment processors, which are selected by consumers, not

providers.

Section 1002. Definitions – Student Debt Relief Services.

Section 1002, subdivision (b). This subdivision was added to provide that "federal student debt" means education financing as defined in section 1003, subdivision (b), that is made or guaranteed pursuant to the federal student aid provisions of the Higher Education Act of 1965 (20 U.S.C. § 1070 et seq.). The purpose of this provision is to clarify a term used in the reporting requirements of section 1043. This provision is necessary because it ensures that registrants understand the information that must be reported and that the information being reported to the Department by all registrants is complete, reliable, and comparable.

Section 1002, subdivision (c). This subdivision was added to provide that "private student debt" means any education financing as defined in section 1003, subdivision (b), that is not federal student debt. The purpose of this provision is to clarify a term used in the reporting requirements of section 1043. This provision is necessary because it ensures that registrants understand the information that must be reported and that the information being reported to the Department by all registrants is complete, reliable, and comparable.

Section 1002, subdivision (d). This subdivision was formerly subdivision (b) and was renumbered and modified with nonsubstantive changes related to citation style and capitalization.

Section 1002, subdivision (e). This subdivision was formerly subdivision (c) and was renumbered and modified with nonsubstantive changes related to citation style.

Section 1003. Definitions – Education Financing.

Section 1003, subdivision (a). This subdivision was modified to add "or any other service rendered" to the definition of "charges." The purpose of this provision is to clarify what constitutes "charges" for purposes of annual reporting. This change is necessary because it clarifies that any fees or costs contracted or received in connection with any service rendered by an education financing provider, not only the enumerated services, is intended to be included in "charges."

Section 1003, subdivision (d). This subdivision was modified to change the term being defined from "income-based repayment" to "income-driven repayment." The definition was also modified by changing "education financing payment obligation" to "periodic payment obligation" and adding language clarifying that "income-driven repayment" does not include arrangements in which a 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 can vary based upon the consumer's income. The purpose of this provision is to clarify what constitutes "income-driven repayment" for purposes of annual reporting. Changing the definition is necessary because it clarifies, in response to public comments, that "income-driven repayment" is not intended to cover arrangements in which the entire payment obligation is deferred. Changing the defined

term from “income-based repayment” to “income-driven repayment” is necessary because it avoids confusion with “income-based advance,” a different subject product.

Former section 1003, subdivision (e). This subdivision, which defined “maximum amount due,” was deleted. The purpose of this provision was to define a term used in the reporting requirements in section 1044. Deleting this provision is necessary because it clarifies, in response to public comments, the difference between the amount advanced and amount owed under education financing contracts. Similar changes were made in both section 1044, subdivision (b)(2), which applies to contracts without income-driven repayment provisions, and subdivision (c)(3), which applies to contracts with income-driven repayment provisions. Because modified subdivision (c)(3) no longer refers to “maximum amount due,” deleting the definition of “maximum amount due” in former section 1003, subdivision (e), is necessary.

Section 1003, subdivision (e). This subdivision was formerly subdivision (f) and was renumbered.

Section 1003, subdivision (f). This subdivision was formerly subdivision (g) and was renumbered.

Section 1004. Definitions – Income-Based Advances.

Section 1004, subdivision (b). This subdivision was modified to clarify that registrants should report only known account transfer fees assessed by the registrant for funds received from income-based advances. The purpose of this provision is to clarify the meaning of an account transfer fee for purposes of annual reporting. This change is necessary because it clarifies, in response to public comments, whether to report an account transfer fee that is charged for a transfer of funds from multiple sources, not only income-based advances.

Section 1004, subdivision (c). This subdivision was modified to add “or otherwise in connection with an income-based advance” to the definition of “charges” and change “in connection with education financing” to “in connection with income-based advances.” The purpose of this provision is to clarify what constitutes “charges” for purposes of annual reporting. Adding “or otherwise in connection with an income-based advance” is necessary because it clarifies, in response to public comments, that any fees or costs contracted or received in connection with an income-based advance, not only those in connection with the enumerated services, is intended to be included in “charges.” Changing “education financing” to “income-based advance” is necessary because it corrects a scrivener’s error and clarifies that this definition applies to income-based advances.

Section 1004, subdivision (e). This subdivision was modified with a nonsubstantive change related to style—namely, changing “is” to “means,” which is the word used in every other subdivision in section 1004.

Section 1004, subdivision (g)(1). This subdivision was modified to change in the definition of “income-based advance” the phrase “based on income that has accrued” to “based on income the provider has reasonably determined to have accrued.” The purpose of this provision is to describe one aspect of the emerging income-based-advance industry. This change is necessary

because public comments demonstrated that the originally proposed provision was subject to several different reasonable interpretations, including one that would have excluded direct-to-consumer advance providers, which is not the regulation's intent. The changed provision more clearly reflects that the provision is intended to cover both employer-integrated and direct-to-consumer forms of income-based advances. The Department rejected recommendations to narrow the definition of "income-based advance" to exclude direct-to-consumer advances because this definition is not intended to define a subset of IBA providers who may enjoy the CCFPL-registrant exemption from the CFL licensure requirements under section 1462. Instead, this definition is intended to capture all forms of income-based advances under the registration and reporting requirements of these regulations.

Section 1004, subdivision (g)(2). This subdivision was modified to change 31 to 34 days. The purpose of this provision is to specify which income-based advances are subject to the registration requirements. Changing the number of days is necessary to accommodate public comments that bank holidays, weekends, and settlement cycles may delay the depositing of wages to more than 31 days.

Section 1004, subdivision (g)(3). The lead-in language of this subdivision was modified with a nonsubstantive change related to grammar—namely, changing "partner(s)" to "partners."

Section 1004, subdivision (g)(3)(A). This subdivision was modified to change "provider and the business partner(s)" to "provider and any business partners" and to change "consumer's failure to repay in the event the amount advanced is not repaid in full" to "consumer's failure to repay in full the amount due." The purpose of this provision is to limit the reporting of income-based advances by CDDTL licensees in their annual reports under section 2030.5 to income-based advances that meet the characteristics in paragraphs (A) and (B). The first change is necessary because it reflects grammatically that the provider may not have business partners, which is indicated in the lead-in language of subdivision (g)(3) ("if applicable, any business partners"). The second change is necessary because it eliminates a superfluous recurrence of the verb "repay" and uses the defined term, "amount due," which is more appropriate than "amount advanced" because the amount due may not be equal to the amount advanced if fees are involved.

Section 1004, subdivision (g)(3)(B). This subdivision was modified to: (1) change "provider and the business partner(s)" to "provider and any business partners"; (2) change "if the advance is not repaid on the scheduled date" to "if the amount due is not repaid on the collection date" and to move that clause to replace the beginning of the sentence, which began, "With respect to the amount advanced to the consumer"; (3) change two other occurrences of "amount advanced" to "amount due"; and (4) add that "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. The purpose of this provision is to limit the reporting of income-based advances by CDDTL licensees in their annual reports under section 2030.5 to income-based advances that meet the characteristics in paragraphs (A) and (B). The first change is necessary because it reflects grammatically that the provider may not have business partners, which is indicated in the lead-in language of subdivision (g)(3) ("if applicable, any business partners"). The second and third changes are necessary because together they express the same meaning more concisely by using two defined terms, "amount due" and "collection date." The fourth

change is necessary because it clarifies, in response to public comments, that an income-based-advance provider's warranty to consumers that it will not engage in any "debt collection activities" does not include when the provider re-presents a consumer's authorized payment method to seek repayment of outstanding proceeds.

Section 1004, subdivision (h)(2). This subdivision was modified to change "person who is not an employer, but who is" to "person other than a consumer's employer who is" and to change "on behalf of" to "for the benefit of." The purpose of this provision is to clarify the meaning of "obligor" for purposes of reporting information under the CCFPL and complying with proposed requirements under the CFL. The first change is necessary because the originally proposed provision inadvertently required that the person not be an employer at all, when the provision was intended to cover a person other than a consumer's employer who is obligated to compensate a consumer for services provided. The second change is necessary because the originally proposed provision inadvertently required that the services provided by the consumer be on behalf of the person rather than in behalf of, or for the benefit of, the person.

Section 1010. Persons Required to Register.

Section 1010, subdivision (a). This subdivision was modified to change "offering or providing" to "offering to provide or providing." The purpose of this provision is to clarify that providers of these services must first register with the Department to offer or provide these products and services. This change is necessary because it addresses concerns raised in public comments of possible overbreadth.

Section 1010, subdivision (b)(1). This subdivision was modified with nonsubstantive changes related to citation style.

Section 1010, subdivision (b)(2). This subdivision was modified to change the exemption from CCFPL registration to include any public postsecondary institution or private nonprofit postsecondary institution and clarify that if the education financing is offered or provided through a partnership with a third party, the third party must be a registrant. The purpose of this provision is to provide an exemption from registration for certain postsecondary institutions that provide education financing. This change is necessary because it addresses public comments that the previous language could be discriminatory. The exemption now provides a level playing field for similarly situated non-California-based postsecondary institutions. In addition, the changes prevent evasion of the registration requirement by specifying that third parties that partner with exempt institutions to offer or provide education financing must be registered under the CCFPL.

Section 1010, subdivision (b)(3). This subdivision was modified with nonsubstantive changes related to citation style.

Section 1010, subdivision (b)(4). This subdivision was modified with nonsubstantive changes related to citation style.

Section 1010, subdivision (b)(5). This subdivision was modified to clarify that this exemption from CCFPL registration applies to a licensee under the Student Loan Servicing Act (SLSA) when offering or providing education financing "to be serviced by the licensee after origination"

and to make nonsubstantive changes related to citation style. The purpose of this provision is to clarify who is exempt from registration. The change is necessary because it clarifies, in response to public comments, that SLSA licensees are exempt only if they service the education financing that they offer or provide. A SLSA licensee must be registered if it offers or provides any education financing that will not be serviced by the licensee after origination.

Section 1010, subdivision (b)(6). This subdivision was added to provide an exemption from CCFPL registration for payroll service providers when verifying available earnings or performing other related facilitation activities on behalf of an obligor or provider in connection with income-based advances, provided that the payroll service provider does not provide the funds for the income-based advances or control the activities of the provider. The purpose of this provision is to clarify who is exempt from registration. This provision is necessary because it addresses public comments that expressed uncertainty about whether payroll service providers would be required to register. These regulations are not intended to regulate payroll service providers who provide limited services and do not themselves offer or provide advances to consumers.

Section 1010, subdivision (b)(7). This subdivision was added to provide an exemption from CCFPL registration for nonprofit organizations that are exempt from federal taxation when providing debt settlement services or student debt relief services to consumers free of charge. The purpose of this provision is to clarify who is exempt from registration. This provision is necessary because it accommodates public comments that registration would be unduly burdensome for bona fide nonprofit organizations that offer debt settlement services or student debt relief services to consumers free of charge.

Section 1010, subdivision (c). This subdivision was modified with nonsubstantive changes related to grammar.

Section 1011. Effect of Registration.

Section 1011, subdivision (b). This subdivision was modified with a nonsubstantive change related to grammar.

Section 1012. Representations Concerning Registration.

Section 1012, subdivision (b). This subdivision was modified to limit its scope from "any advertising or communication to a consumer" to any website that is operated by a registrant and that describes a registrant's subject products. The purpose of this provision is to protect consumers by ensuring that they know that the registrant's state regulator is the Department. This change is necessary because the resulting regulation is less burdensome but equally effective in achieving the regulation's purpose of protecting consumers.

Section 1020. Application for Registration and Related Forms.

Section 1020, subdivision (b)(2). This subdivision was modified with a nonsubstantive change

related to capitalization.

Section 1021. Application for Registration and Related Forms.

Section 1021. This subdivision was modified with a nonsubstantive change related to grammar.

Section 1021, subdivision (a). This subdivision was modified with nonsubstantive changes related to grammar and punctuation.

Section 1021, subdivision (a)(1). This subdivision was modified with a nonsubstantive change related to punctuation.

Section 1021, subdivision (a)(2). This subdivision was modified with a nonsubstantive change related to punctuation.

Section 1021, subdivision (a)(2)(D). This subdivision was modified to change "'Consumer loan lending'" to "the applicable 'Earned Wage Access' business activity." The purpose of this provision is to require applicants to identify their specific business activities on their registration application. This change is necessary because it accounts for new business activities relating to income-based advances that were recently added to the Nationwide Multistate Licensing System & Registry (NMLS), which was noted in public comments.

Section 1021, subdivision (a)(7). This subdivision was modified to clarify that applicants may add additional contact employees in the registration application. The purpose of this provision is to specify the information required from applicants in their registration application. This change is necessary because it provides flexibility to applicants and ensures that the Department will be able to contact the applicant.

Section 1021, subdivision (a)(13)(A). This subdivision was modified to change "person" or "persons" to "individual" or "individuals," respectively, and to make a nonsubstantive change related to grammar—namely, changing "offer" to "offering." The purpose of this provision is to determine who is responsible for the applicant's conduct and activities in California. Changing "person" to "individuals" is necessary because "person" can mean a natural person or entity (Fin. Code, § 90005, subd. (m)) and any confusion is avoided by using "individual," which means a natural person under the proposed regulations (§ 1000, subd. (i)).

Section 1021, subdivision (a)(13)(B). This subdivision was modified to: (1) change "The applicant shall complete each Form MU2" to "For each individual, the applicant shall complete Form MU2"; (2) add the individual's credit-report authorization to the list of information not required to be provided; and (3) to make nonsubstantive changes related to punctuation and grammar. The purpose of this provision is to identify the information in Form MU2 that is not necessary for registration. The first change is necessary because it clarifies that a Form MU2 must be completed for each individual identified in response to subdivision (a)(13)(A). The second change is necessary because it simplifies the application process.

Section 1021, subdivision (a)(14). This subdivision was modified with nonsubstantive changes

related to punctuation.

Section 1021, subdivision (a)(15). This subdivision was modified with a nonsubstantive change related to grammar—namely, changing “offer” to “offering.”

Section 1021, subdivision (d). This subdivision was modified with a nonsubstantive change related to punctuation.

Section 1021, subdivision (e). This subdivision was modified with a nonsubstantive change related to punctuation.

Section 1021, subdivision (f). This subdivision was modified to: (1) provide that an application must be deemed abandoned if the applicant fails to submit a complete application “within 60 days after the third notice of deficiency” rather than “after three (3) notices of deficiency” and (2) more clearly cite the provisions in section 1021 that provide for notices of deficiency. These changes are necessary because they more clearly specify when an application must be deemed abandoned and use the same number of days specified in subdivisions (c)(2), (d)(2), and (e).

Section 1021, subdivision (i). This subdivision was modified with a nonsubstantive change related to citation style.

Section 1022. Supplemental Information – General.

Section 1022. The heading of this section was modified with a nonsubstantive change related to punctuation. The lead-in language of this section was formerly subdivision (a) and was renumbered and modified with nonsubstantive changes related to punctuation, capitalization, citation style, and the Department’s email address.

Section 1022, subdivision (a). This subdivision was formerly subdivision (a)(1) and was renumbered.

Section 1022, subdivision (b). This subdivision was added to provide that applicants are required to provide as part of the application any documentation of the standard enrollment or application process California residents use to request or receive the subject product from the applicant over the phone. The purpose of this provision is to assist the Department in protecting consumers and monitoring markets. This change is necessary because some applicants enroll customers over the phone in addition to or instead of through mobile applications or websites, as noted in a public comment. The change ensures that the registration application captures all forms of enrollment procedures.

Section 1022, subdivision (c). This subdivision was formerly subdivision (a)(2) and was renumbered.

Section 1022, subdivision (d). This subdivision was formerly subdivision (a)(3) and was renumbered.

Section 1022, subdivision (e). This subdivision was formerly subdivision (a)(4) and was renumbered and modified to change “list containing the addresses of all branch locations” to “list

of addresses of all branch locations, if any." The purpose of this provision is to ensure that the Department knows where subject products are being offered or provided to California residents. This change is necessary because it expresses the same meaning more concisely and reflects grammatically that the applicant may not have any branch offices, which was noted in a public comment.

Section 1022, subdivision (f). This subdivision was formerly subdivision (a)(1) and was renumbered and modified to: (1) change "residents of this state" to "California residents" and (2) add that for income-based advances that were provided as part of a bundle of services for which a periodic subscription fee was charged, gross income must include the subscription fees paid to the provider for all periods in which the provider provided an income-based advance to a California resident. The purpose of this provision is to enable the Department to calculate the registrant's initial annual assessment, which is based on the registrant's gross income for the prior calendar year, pursuant to section 1040. The first change is necessary because regulations are clearer when they use the same phrase for the same intended meaning, and every other subdivision in this section uses the phrase "California residents." The second change is necessary because, as noted in a public comment, some providers of income-based advances charge periodic subscription fees for a bundle of financial services that includes advances, and providing this guidance ensures that these providers consistently incorporate subscription fees in calculating their gross income.

Section 1023. Supplemental Information – Debt Settlement Services.

Section 1023. This subdivision was modified with a nonsubstantive change related to the Department's email address.

Section 1024. Supplemental Information – Student Debt Relief Services.

Section 1024. This subdivision was modified with a nonsubstantive change related to the Department's email address.

Section 1025. Supplemental Information – Education Financing.

Section 1025. The lead-in language of this section was formerly subdivision (a) and was renumbered and modified with nonsubstantive changes related to the Department's email address.

Section 1025, subdivision (a). This subdivision was formerly subdivision (a)(1) and was renumbered and modified with a nonsubstantive change related to punctuation.

Section 1025, subdivision (b). This subdivision was formerly subdivision (a)(2) and was renumbered.

Section 1025, subdivision (c). This subdivision was formerly subdivision (a)(3) and was renumbered.

Section 1025, subdivision (d). This subdivision was formerly subdivision (a)(4) and was

renumbered.

Section 1026. Supplemental Information – Income-Based Advances.

Section 1026. This subdivision was modified to delete the requirement to provide "images" when documenting the process by which California residents request and repay income-based advances and to make nonsubstantive changes related to grammar and the Department's email address. The purpose of this provision is to protect consumers and monitor markets. Deleting the requirement to provide "images" is necessary because it allows applicants to choose how to document the request-and-repayment process (e.g., videos, photographs, screenshots, slide presentations).

Section 1030. Confidentiality of Application Materials.

Section 1030. This subdivision was modified with nonsubstantive changes related to citation style.

Section 1031. Designated Email Address.

Section 1031. This subdivision was modified to delete "an applicant" and to make nonsubstantive changes related to grammar and citation style. The purpose of this provision is to assist the Department in communicating with its registrants. Deleting "an applicant" is necessary because "registrant" appears later in the same sentence and throughout the rest of the section, and referring to the same person with two different terms may cause confusion.

Section 1032. Notices to Registrants.

Section 1032. This subdivision and the title of the notes were modified with nonsubstantive changes related to citation style and capitalization.

Section 1034. Notice of Changes.

Section 1034, subdivision (b). This subdivision and the notes were modified to change "previous calendar year" to "prior calendar year" and to make nonsubstantive changes related to grammar, punctuation, and citation style. The purpose of this provision is to simplify the reporting requirements for registrants. Changing "previous calendar year" to "prior calendar year" is necessary because regulations are clearer when they use the same phrase for the same intended meaning, and every other reference in the proposed regulations is "prior calendar year," including later in the subdivision.

Article 2. Annual Assessment and Annual Reporting

Section 1040. Annual Assessment.

Section 1040, subdivision (b). This subdivision was modified with nonsubstantive changes related to grammar and punctuation.

Section 1040, subdivision (d). This subdivision was modified with nonsubstantive changes

related to citation style and grammar.

Section 1041. Annual Reporting – General.

Section 1041. The heading of this section was modified with a nonsubstantive change related to punctuation.

Section 1041, subdivision (a). This subdivision was modified with nonsubstantive changes related to grammar, punctuation, and citation style.

Section 1041, subdivision (b). This subdivision was modified to: (1) change "residents of this state" to "California residents" and (2) add that for income-based advances that were provided as part of a bundle of services for which a periodic subscription fee was charged, gross income must include the subscription fees paid to the provider for all periods in which the provider provided an income-based advance to a California resident. This subdivision was also modified with nonsubstantive changes related to grammar, punctuation, and citation style. The purpose of this provision is to ensure that registrants understand the reporting requirement because a registrant's assessment is based on its gross income. The first change is necessary because regulations are clearer when they use the same phrase for the same intended meaning, and other subdivisions in this section use the phrase "California residents." The second change is necessary because, as noted in a public comment, some providers of income-based advances charge periodic subscription fees for a bundle of financial services that includes advances, and providing this guidance ensures that these providers consistently incorporate subscription fees in calculating their gross income.

Section 1041, subdivision (c). This subdivision was modified with nonsubstantive changes related to citation style and grammar.

Section 1041, subdivision (d). This subdivision was modified with nonsubstantive changes related to citation style.

Section 1042. Annual Reporting – Debt Settlement Services.

Section 1042, subdivision (a). This subdivision was modified to provide that the information required to be reported is the number of California residents who had an existing contract in effect at any time during the prior calendar year, rather than the number of California residents who had an existing contract or who contracted with the registrant in the prior calendar year but whose contract is no longer in effect. The purpose of this provision is to set forth the information that registrants must report in their annual report. This change is necessary because the previous description was confusing and subject to multiple interpretations, as noted in public comments.

Section 1042, subdivision (b). This subdivision was modified to change "average number of debts each resident contracted for" to "total number of debts residents contracted for." The purpose of this provision is to set forth the information that registrants must report in their annual report. This change is necessary because it addresses concerns raised in public comments about compliance burdens, by changing the information required to be reported to a type that is easier

for providers to calculate but is still useful to the Department in fulfilling the CCFPL's purposes.

Section 1042, subdivision (c). This subdivision was modified to: (1) delete the requirement that providers report the average dollar amount of debt per resident, leaving only the requirement to report the total dollar amount of debt of all residents, and (2) more clearly identify which debts must be reported on. The purpose of this provision is to set forth the information that registrants must report in their annual report. The first change is necessary because it addresses concerns raised in public comments about compliance burdens, by changing the information required to be reported to a type that is easier for providers to calculate but is still useful to the Department in fulfilling the CCFPL's purposes. The second change is necessary because it addresses concerns raised in public comments about ambiguity concerning which debts of the residents identified in response to subdivision (a) are required to be included in reporting under this subdivision.

Section 1042, subdivision (d). This subdivision was modified to delete the requirement that providers report the average dollar amount of charges paid over the contract term per resident, leaving only the requirement to report the total dollar amount of charges paid by all residents during their contract terms. Also deleted was the requirement to report charges paid to payment processors. The purpose of this provision is to set forth the information that registrants must report in their annual report. The first change is necessary because it addresses concerns raised in public comments about compliance burdens, by changing the information required to be reported to a type that is easier for providers to calculate but is still useful to the Department in fulfilling the CCFPL's purposes. Deleting the requirement to report charges paid to payment processors is necessary to be consistent with the removal of such amounts from the definition of "charges" in section 1001, subdivision (a).

Section 1042, subdivision (e). This subdivision was modified to delete the requirement that providers report the average number of debts per resident, leaving only the requirement to report the total dollar number of debts for all residents who have settled a debt with a creditor. The subdivision was also modified with a nonsubstantive change related to grammar. The purpose of this provision is to set forth the information that registrants must report in their annual report. Deleting the requirement to report averages is necessary because it addresses concerns raised in public comments about compliance burdens, by changing the information required to be reported to a type that is easier for providers to calculate but is still useful to the Department in fulfilling the CCFPL's purposes.

Section 1042, subdivision (f). This subdivision was modified to specify that the information required to be reported is for settled debts and to make nonsubstantive changes related to grammar. The purpose of this provision is to set forth the information that registrants must report in their annual report. Specifying that the information relates to settled debts is necessary because it addresses concerns raised in public comments about compliance burdens, by changing the information required to be reported to a type that is easier for providers to calculate but is still useful to the Department in fulfilling the CCFPL's purposes. Specifying that the information relates to settled debts is necessary because it addresses concerns raised in public comments about ambiguity concerning which debts of the residents identified in response to subdivision (a) are required to be included in reporting under this subdivision.

Section 1042, subdivision (g). This subdivision was modified with a nonsubstantive change

related to grammar.

Section 1043. Annual Reporting – Student Debt Relief Services.

Section 1043, subdivision (a). This subdivision was modified to provide that the information required to be reported is the number of California residents who had an existing contract in effect at any time during the prior calendar year, rather than the number of California residents who had an existing contract or who contracted with the registrant in the prior calendar year but whose contract is no longer in effect. The purpose of this provision is to set forth the information that registrants must report in their annual report. This change is necessary because the previous description was confusing and subject to multiple interpretations, as noted in public comments.

Section 1043, subdivision (b). This subdivision was modified to: (1) change "average number of debts per resident contracted" to "total number of debts residents contracted" and (2) change "contracted to the registrant for resolution" to "contracted for student debt relief services with the registrant." The purpose of this provision is to set forth the information that registrants must report in their annual report. The first change is necessary because it addresses concerns raised in public comments about compliance burdens, by changing the information required to be reported to a type that is easier for providers to calculate but is still useful to the Department in fulfilling the CCFPL's purposes. The second change is necessary because it makes the language consistent with the analogous annual-reporting provision for debt-settlement providers (§ 1042, subd. (b)) and avoids failing to capture all intended debts if some debts contracted for student-debt-relief services are not contracted for resolution.

Section 1043, subdivision (c). This subdivision was modified to change "contracted to the registrant for resolution" to "contracted for services with the registrant." The purpose of this provision is to set forth the information that registrants must report in their annual report. This change is necessary because it avoids failing to capture all intended debts if some debts contracted for student-debt-relief services are not contracted for resolution.

Section 1043, subdivision (d). This subdivision was modified to: (1) delete the requirement that providers report the average dollar amount of private student debt per resident, leaving only the requirement to report the total dollar amount of private student debt of all residents, (2) more clearly identify which debts must be reported on, and (3) change "contracted to the registrant for resolution" to "contracted for services with the registrant." The purpose of this provision is to set forth the information that registrants must report in their annual report. The first change is necessary because it addresses concerns raised in public comments about compliance burdens, by changing the information required to be reported to a type that is easier for providers to calculate but is still useful to the Department in fulfilling the CCFPL's purposes. The second change is necessary because it addresses concerns raised in public comments about ambiguity concerning which debts of the residents identified in response to subdivision (a) are required to be included in reporting under this subdivision. The third change is necessary because it avoids failing to capture all intended debts if some debts contracted for student-debt-relief services are not contracted for resolution.

Section 1043, subdivision (e). This subdivision was modified to delete the requirement that providers report the average dollar amount of charges paid over the contract term per resident,

leaving only the requirement to report the total dollar amount of charges paid by all residents during their contract terms. Also deleted was the requirement to report charges paid to payment processors. The purpose of this provision is to set forth the information that registrants must report in their annual report. These changes are necessary because they change the information required to be reported to a type that is easier for providers to calculate but is still useful to the Department in fulfilling the CCFPL's purposes.

Section 1043, subdivision (f). This subdivision was modified to: (1) change "contracted with the registrant for resolution" to "contracted for services with the registrant" and (2) refer to the obtaining of relief rather than the reaching of resolutions. The purpose of this provision is to set forth the information that registrants must report in their annual report. The first change is necessary because it avoids failing to capture all intended debts if some debts contracted for student debt relief services are not contracted for resolution. The second change is necessary because it more accurately reflects the nature of the service offered by student-debt-relief providers.

Section 1043, subdivision (g). This subdivision was modified to: (1) change "contracted with the registrant for resolution" to "contracted for services with the registrant" and (2) refer to the obtaining of relief rather than the reaching of resolutions. The purpose of this provision is to set forth the information that registrants must report in their annual report. The first change is necessary because it avoids failing to capture all intended debts if some debts contracted for student debt relief services are not contracted for resolution. The second change is necessary because it more accurately reflects the nature of the service offered by student-debt-relief providers.

Section 1043, subdivision (h). This subdivision was modified to: (1) change "contracted with the registrant for resolution" to "contracted for services with the registrant" and (2) refer to the obtaining of relief rather than the reaching of resolutions. The purpose of this provision is to set forth the information that registrants must report in their annual report. The first change is necessary because it avoids failing to capture all intended debts if some debts contracted for student debt relief services are not contracted for resolution. The second change is necessary because it more accurately reflects the nature of the service offered by student-debt-relief providers.

Section 1043, subdivision (i). This subdivision was modified to: (1) change "contracted with the registrant for resolution" to "contracted for services with the registrant" and (2) refer to the obtaining of relief rather than the reaching of resolutions. The purpose of this provision is to set forth the information that registrants must report in their annual report. The first change is necessary because it avoids failing to capture all intended debts if some debts contracted for student debt relief services are not contracted for resolution. The second change is necessary because it more accurately reflects the nature of the service offered by student-debt-relief providers.

Section 1043, subdivision (j). This subdivision was added to require registrants to report the number of California residents who received student-debt-relief services from the registrant without a written contract and compensated the registrant for providing the services. The purpose of this provision is to set forth the information that registrants must report in their annual report.

This provision is necessary because some providers operate without written contracts, as noted in a public comment, and some providers could evade reporting requirements by construing "existing contract" in subdivision (a) to mean "existing written contract." This reporting requirement ensures that services provided without written contracts are captured in the annual report.

Section 1044. Annual Reporting – Education Financing.

Section 1044, subdivision (a). This subdivision was modified to reflect the change of the defined term "income-based repayment" to "income-driven repayment" in section 1003, subdivision (d).

Section 1044, subdivision (b). This subdivision was modified to reflect the change of the defined term "income-based repayment" to "income-driven repayment" in section 1003, subdivision (d).

Section 1044, subdivision (b)(2). This subdivision was modified to change "total dollar amount owed under those contracts" to "total dollar amount that would be required to pay off those contracts." The purpose of this provision is to set forth the information that registrants must report in their annual report. The change is necessary because the previous language could be interpreted to have more than one meaning, as noted in public comments.

Section 1044, subdivision (c). This subdivision was modified to reflect the change of the defined term "income-based repayment" to "income-driven repayment" in section 1003, subdivision (d).

Section 1044, subdivision (c)(1). This subdivision was modified with a nonsubstantive change related to punctuation.

Section 1044, subdivision (c)(3). This subdivision was modified to change "total maximum dollar amount due under the contracts" to "total dollar amount that would be required to pay off the contracts at origination." The purpose of this provision is to set forth the information that registrants must report in their annual report. The change is necessary because the previous language could be interpreted to have more than one meaning, as noted in public comments.

Section 1044, subdivision (c)(5). This subdivision was modified with a nonsubstantive change related to punctuation.

Section 1044, subdivision (c)(7). This subdivision was modified with a nonsubstantive change related to punctuation.

Section 1045. Annual Reporting – Income-Based Advances.

Section 1045, subdivision (c)(4). This subdivision was modified to change occurrences of "provider" to "registrant" and to make nonsubstantive changes related to punctuation and grammar. The purpose of this provision is to set forth the information that registrants must report in their annual report. This change is necessary because the lead-in language of this section uses

"registrant," and referring to the same person with two different terms may cause confusion.

Section 1045, subdivision (c)(5). This subdivision was modified to: (1) change "amount collected" to "dollar amount collected," (2) change "provider" to "registrant," (3) add requirements to report the number of times the registrant attempted to collect on and after the collection date, and (4) make nonsubstantive changes related to punctuation and grammar. The purpose of this provision is to set forth the information that registrants must report in their annual report. The first change is necessary because regulations are clearer when they use the same phrase for the same intended meaning, and every other similar occurrence uses the phrase "dollar amount collected" or "dollar amount due." The second change is necessary because the lead-in language of this section uses "registrant," and referring to the same person with two different terms may cause confusion. The third change is necessary because, as noted in a public comment, some providers of obligor-based advances attempt to collect from consumers' bank accounts if they do not successfully collect by payroll deduction. The change imposes equal reporting requirements on non-obligor-based-advance providers and obligor-based-advance providers.

Section 1045, subdivision (c)(6). This subdivision was added to provide that for reporting bank account collections under subdivision (c)(4) and (c)(5), registrants may report Automated Clearing House (ACH) transactions and debit-card transactions separately. The purpose of this provision is to set forth the information that registrants must report in their annual report. This change is necessary because, as noted in public comments, ACH transactions and debit-card transactions have different authorization processes, which may have an effect on the occurrence of bank-account overdrafts or nonsufficient-fund fees. Collecting data on the proportion of registrants' collection attempts that is by ACH or debit card will be useful for market monitoring.

Section 1045, subdivision (d)(1). This subdivision was modified with a nonsubstantive change related to grammar and punctuation.

Article 3. Revocation and Surrender

Section 1048. Rescission of Summary Revocation Order.

Section 1048, subdivision (a). This subdivision was modified to change "after revocation" to "after the date of revocation" and make nonsubstantive changes related to citation style, the Department's email address, and punctuation. The purpose of this provision is to allow former registrants to reinstate their registration. This change is necessary because regulations are clearer when they use the same phrase for the same intended meaning, and other occurrences in this section use the phrase "after the date of revocation."

Section 1048, subdivision (a)(5). This subdivision was modified to change "after revocation" to "after the date of revocation" and make nonsubstantive changes related to punctuation. The purpose of this provision is to allow former registrants to reinstate their registration. This change is necessary because regulations are clearer when they use the same phrase for the same intended meaning, and other occurrences in this section use the phrase "after the date of revocation."

Section 1048, subdivision (b). This subdivision was modified with a nonsubstantive change

related to citation style.

Section 1048, subdivision (c). This subdivision was modified with a nonsubstantive change related to grammar and citation style.

Section 1050. Effectiveness of Registration.

Section 1050. This section was modified with nonsubstantive changes related to citation style.

Section 1051. Surrender of Registration.

Section 1051, subdivision (c). This subdivision was modified with nonsubstantive changes related to grammar.

Section 1051, subdivision (d). This subdivision was modified to: (1) change "the obligation to pay any fee, fine, or other amount" to "any obligation to pay a fee, fine, or other amount"; (2) change "file any report required to be submitted to the Commissioner" to "file any required report"; and (3) make nonsubstantive changes related to grammar. The purpose of this provision is to provide clarity to registrants as to the effects of surrender. The first change is necessary because it reflects grammatically that the registrant may not have any such obligations to pay. The second change is necessary because it expresses the same meaning more concisely.

Section 1052. Revocation of Registration.

Section 1052. This section and the notes were modified with nonsubstantive changes related to citation style and punctuation.

Section 1053. Severability.

Section 1053. This section was added to provide that the provisions of this subchapter are severable and that if any provision or its application is held invalid, illegal, or unenforceable, then that invalidity, illegality, or unenforceability shall not affect other provisions or applications that can be given effect without the invalid, illegal, or unenforceable provision or application. The purpose of this provision is to maintain the overall effectiveness, intent, and goals of these regulations even if any provision or its application is invalidated. A severability provision is necessary because it clarifies that Financial Code section 90019, subdivision (b), which provides that "[t]he provisions of this act are severable," applies in equal force to these and any other regulations promulgated under the CCFPL. Section 1053 clarifies that "provisions of this act" means, as provided in Financial Code section 90019, subdivision (b), "any provision of this division, or amendments to it, or regulations promulgated under it," and that any regulation held to be invalid "shall not affect other . . . regulations that can be given effect without the invalid . . . regulation."

Subchapter 6. California Financing Law

Article 3. Books, Records and Examinations

§ 1430.1. California Consumer Financial Protection Law Registration Exemption:

Reporting.

Section 1430.1, subdivision (a). This subdivision was modified to change "offers and provides" to "offers or provides" and to make nonsubstantive changes related to citation style, grammar, and syntax. The purpose of this provision is to clarify the exemption from the registration requirement as set forth in Financial Code section 90009, subdivision (a)(2)(A), for a CFL licensee when offering or providing income-based advances or education financing within the scope of its license, by defining "within the scope of its license." Changing "and" to "or" is necessary because section 90009, subdivision (a)(2)(A), uses "or," not the more restrictive "and."

Section 1430.1, subdivision (a)(1). This subdivision was modified to change "[o]ffered and provided" to "[o]ffered or provided." The purpose of this provision is to clarify the exemption from the registration requirement as set forth in Financial Code section 90009, subdivision (a)(2)(A), for a CFL licensee when offering or providing income-based advances or education financing within the scope of its license, by defining "within the scope of its license." Changing "and" to "or" is necessary because section 90009, subdivision (a)(2)(A), uses "or," not the more restrictive "and."

Section 1430.1, subdivision (a)(2). This subdivision was modified to change "[o]ffered and provided" to "[o]ffered or provided." The purpose of this provision is to clarify the exemption from the registration requirement as set forth in Financial Code section 90009, subdivision (a)(2)(A), for a CFL licensee when offering or providing income-based advances or education financing within the scope of its license, by defining "within the scope of its license." Changing "and" to "or" is necessary because section 90009, subdivision (a)(2)(A), uses "or," not the more restrictive "and."

Section 1430.1, subdivision (a)(3). This subdivision was modified with nonsubstantive changes related to syntax.

Section 1430.1, subdivision (b). This subdivision was modified with nonsubstantive changes related to citation style.

Section 1430.1, subdivision (c). This subdivision was modified with nonsubstantive changes related to citation style.

Article 4. Loans.

§ 1461. Advances Under the California Financing Law.

Section 1461. The notes were modified to add Financial Code sections 326 and 334 and the CFL's enacting legislation as authority and Financial Code sections 22100 and 90009.5 as reference. These statutes are discussed in more detail below.

Section 1461, subdivision (a). This subdivision was modified with nonsubstantive changes related to punctuation, citation style, grammar, and syntax.

Section 1461, subdivision (d). This subdivision was added to provide that this section shall not be read to interpret what is considered a wage assignment under the Labor Code, consumer credit

or debt under federal law, including the 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. The purpose of this provision is to further clarify what is considered a "consumer loan" or "loan" under Financial Code sections 22203 and 22335, respectively. This provision is necessary because it identifies several laws that section 1461 is not intended to interpret, to address concerns in several public comments that section 1461 would lead to considerable uncertainty regarding the treatment of income-based advances under other consumer financial laws, notwithstanding the disclaimer in Financial Code section 22335 that "[t]his section shall not be construed as modifying or affecting existing statutes governing wage assignments in the state, or as authorizing those assignments."

Section 1461, subdivision (e)(1) and (e)(2). These provisions were formerly section 1462, subdivisions (a)(1), (a)(2), (a)(3), and (b), and were renumbered and modified to: (1) provide that a provider of an advance of funds as described in section 1461, subdivision (a), is not required to obtain a license under the CFL, rather than that such a provider is not "in the business of" a finance lender or broker for purposes of licensure under the CFL; (2) delete as a requirement for qualifying for this exemption that the charges collected by the provider in connection with each income-based advance not exceed charges that would be permitted under the CFL if the provider were licensed under the CFL; and (3) provide that the exemption survives the expiration of the CCFPL registration requirements.

The purpose of this provision is to clarify whether a provider of an advance deemed to be a loan under subdivision (a) must obtain a CFL license. This modified approach to exempting providers of income-based advances within the meaning of the CCFPL is necessary because it enables the Department to gather more comprehensive data on such providers through CCFPL registration without foreclosing possible full application of the CFL to these providers in the future. Additionally, the first change in particular is necessary because it is less technical and easier to understand. The second change in particular is necessary because it addresses concerns raised in several public comments about the Department's economic-impact determinations. While the Department did not have convincing evidence to suggest that application of CFL rate caps would prevent IBA providers from offering their services in California, it determined that removing the rate caps at this time was necessary to address procedural objections raised in other comments. The third change in particular is similarly necessary because it clarifies what happens to the exemption when the CCFPL registration period expires and addresses those procedural objections raised by other commenters relating to the Department's economic-impact assessment.

This approach falls within the scope of the Department's rulemaking authority. Section 7 of the 1994 legislation that enacted the CFL provides: "The regulations adopted by the Commissioner of Corporations[2] may contain those classifications, differentiations, and other provisions, and may provide for those adjustments and exceptions for any class of transactions that in the

[2] Until their merger in 2013, the Department of Corporations and Department of Financial Institutions were each headed by a commissioner. In 2013, the two departments became the Division of Corporations and Division of Financial Institutions within the Department of Business Oversight, the former name of the Department of Financial Protection and Innovation. References to the Commissioner of Corporations or the Department of Corporations mean the Commissioner of Financial Protection and Innovation or the Department of Financial Protection and Innovation, respectively. (Fin. Code, § 321, subd. (b).)

judgment of the commissioner are necessary or proper to effectuate the provisions of this act."[3] (Stats. 1994, ch. 1115, § 7.) Financial Code section 334 provides that the Commissioner "may promulgate or waive such rules and regulations as may be reasonable or necessary to carry out his or her duties and responsibilities."[4] Financial Code section 326, subdivision (a), provides that the Commissioner "may issue rules and regulations consistent with law as the commissioner may deem necessary or advisable in executing the powers, duties, and responsibilities of the department." And, more broadly, the Commissioner "has and may exercise all the powers necessary or convenient for the administration and enforcement of" the laws under her jurisdiction, including the CFL. (*Ibid.*)

Subdivision (e) provides a limited exception for a class of transactions that in the judgment of the Commissioner is necessary and proper to promote the CFL's purposes, including to protect borrowers against unfair practices by some lenders, clarifying and modernizing the law governing finance lenders, fostering competition among finance lenders, and encouraging the development of fair and economically sound lending practices. (Stats. 1994, ch. 1115, § 7; Fin. Code, § 22001, subd. (a).) Providing this exemption is not a determination that income-based advances are not loans or that the CFL's rate caps or other requirements are not appropriate for income-based advances. Rather, the Department needs the additional time and data that a registration period will afford to study associated economic impacts.

Section 1461, subdivision (f). This subdivision was added to provide that income-based advances under section 1004, subdivision (g), are loans subject to the CFL under subdivision (a) of this section. The purpose of this provision is to further clarify what is considered a "consumer loan" or "loan" under Financial Code sections 22203 and 22335, respectively. This provision is necessary because it makes explicit what is implied in subdivision (e)'s exemption—that an advance that meets the definition of "income-based advance" under the CCFPL also meets the definition of a loan secured by an assignment of wages under the CFL. Interested persons may simply rely on this provision rather than compare the two definitions.

Section 1462. Licensure of Advance Providers – Income-Based Advances.

Section 1462. This section, which comprised subdivisions (a)(1), (a)(2), (a)(3), and (b), was moved to section 1461 as subdivision (e)(1) and (e)(2) and modified as described above.

Section 1462.5. Licensure of Advance Providers – Education Financing.

Section 1462.5. The notes were modified to mirror those of section 1461—namely, to add Financial Code sections 326 and 334 and the CFL's enacting legislation as authority and Financial Code section 90009.5 as reference. These statutes are discussed in more detail above

[3] An uncodified section of enacted legislation has the force of law. (*Bernard v. City of Oakland* (2012) 202 Cal.App.4th 1553, 1563, fn. 7 ["an uncodified section of the enacted legislation . . . has the same force and effect as its codified sections"]; *Grinzi v. San Diego Hospice Corp.* (2004) 120 Cal.App.4th 72, 86 [uncodified section of act "is fully part of the law" and "must be read together with provisions of codes"].)

[4] Sections 334 and 326, along with certain other sections in division 1 of the Financial Code (which is part of the Financial Institutions Law), apply "to the administration of laws by the Division of Corporations." (§ 301.) The Division of Corporations was formerly the Department of Corporations, whose head was the Commissioner of Corporations. (See § 321, subd. (b).)

for section 1461.

Section 1462.5, subdivision (a). This subdivision was modified with nonsubstantive changes related to grammar and citation style.

Section 1462.5, subdivision (a)(1). This subdivision was modified to reflect the change of the defined term “income-based repayment” to “income-driven repayment” in section 1003, subdivision (d), and to make nonsubstantive changes related to citation style.

Section 1462.5, subdivision (a)(2). This subdivision was modified with nonsubstantive changes related to citation style.

Section 1462.5, subdivision (a)(3). This subdivision was modified to add “and the financing were provided under the authority of that law.” The purpose of this provision is to specify how a provider of education financing with income-driven repayment provisions may be exempted from CFL licensure under section 1462.5. This change is necessary because it further clarifies that the education financing with income-driven repayment provisions must comply with the CFL’s rate caps, even though it is technically not being provided by a CFL licensee under the authority of the CFL.

Section 1462.5, subdivision (b). This subdivision was modified with nonsubstantive changes related to citation style.

Section 1463. Loans to Be Collected in a Single Periodic Payment.

Section 1463. This section was deleted. The purpose of this provision was to foster competition among finance lenders, to ensure an adequate supply of credit to borrowers in this state, and to simplify, clarify, and modernize the law governing loans made by finance lenders. Deleting this provision is necessary because the need for it was made less compelling when the CFL-licensure exemption for income-based-advance providers was expanded so that it no longer expires when the registration period expires. Because income-based-advance providers will not need to be licensed under the CFL, they also do not need clarification regarding the application of a substantive requirement of the CFL.

Section 1464. Subscription Fees.

Section 1464. This section was deleted. The purpose of this provision was to foster competition among finance lenders, clarify and modernize the law governing loans made by finance lenders, protect borrowers, prevent evasions of the CFL, and ensure that providers of income-based advances have regulatory certainty to collect subscription fees if they choose to do so. Deleting this provision is necessary because the need for it was made less compelling when the CFL-licensure exemption for income-based-advance providers was expanded so that it no longer expires when the registration period expires. Because income-based-advance providers will not need to be licensed under the CFL, they also do not need clarification regarding the application

of a substantive requirement of the CFL.

Section 1465. Voluntary or Optional Payments.

Section 1465. The heading of this section was modified to change “Charges” to “Payments.” This section was modified to add “or otherwise in connection with a loan.” The reference note was modified to delete Financial Code section 22335. The purpose of this provision is to clarify the types of consumer payments that constitute charges within the meaning of Financial Code section 22200. The change in the heading is necessary because it more accurately reflects the text of the provision. Adding “or otherwise in connection with a loan” is necessary because it clarifies, in response to public comments, that any voluntary or optional payment by a borrower in connection with a loan, not only those in connection with the enumerated services, is intended to be included in “charges.” Deleting section 22335 from the reference note is necessary because it corrects a scrivener’s error.

Section 1466. Loans with Income-Driven Repayment Options; Education Financing.

Section 1466. The heading of this section was modified to reflect the change of the defined term “income-based repayment” to “income-driven repayment” in section 1003, subdivision (d). The reference note was modified to delete Financial Code section 22335. Deleting section 22335 from the reference note is necessary because it corrects a scrivener’s error.

Section 1466, subdivision (a). This subdivision was modified to: (1) change “loan contract that provides the borrower with the option of making payments based upon a fixed percentage of the borrower’s income” to “loan contract with income-driven repayment provisions,” (2) change “payments” to “installments,” (3) change “if the contract also provides the borrower with the option of making substantially equal periodical payments” to “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 calculation of each payment,” (4) change “based upon a fixed percentage of a borrower’s income” to “calculated under income-driven repayment,” and (5) make nonsubstantive changes related to citation style.

The purpose of this provision is to clarify how a provider of education financing with income-based repayment provisions can comply with Financial Code section 22307, subdivision (b), which requires that a loan must be paid in substantially equal periodic installments. The first and fourth changes are necessary because they use a defined term to avoid any confusion that may result when a provision appears to be conveying the same meaning as a defined term but uses slightly different language instead. The second change is necessary because it corrects a scrivener’s error. The third change is necessary because the previous language was ambiguous, as noted in a public comment. The “option of making substantially equal periodical payments” could apply to an option that is provided only once or perpetually. The changed language more clearly describes how a loan contract can comply with Financial Code section 22307, subdivision (b).

Section 1466, subdivision (b). This subdivision was modified to: (1) change “for a period of six months after completion” to “for a predefined fixed grace period after completion,” (2) make

nonsubstantive changes related to citation style, and (3) add that in this subdivision, accrued charges are additional amounts that a borrower is required to repay because of the passage or occurrence of the period described in this subdivision.

The purpose of this provision is to allow education financing providers to offer standard consumer-friendly education forbearances provided that those forbearances do not result in costs accruing to a consumer. The first change is necessary because, as noted in a public comment, some programs are less than six months long, and the original language would have required grace periods that are longer than the programs themselves and risked increasing the cost of borrowing without any additional regulatory benefit. The third change is necessary because it clarifies, in response to a public comment, what accrued charges are for the purpose of this subdivision.

Section 1467. Severability.

Section 1467. This section was added to provide that the provisions of this subchapter are severable and that if any provision or its application is held invalid, illegal, or unenforceable, then that invalidity, illegality, or unenforceability shall not affect other provisions or applications that can be given effect without the invalid, illegal, or unenforceable provision or application. The purpose of this provision is to maintain the overall effectiveness, intent, and goals of these regulations even if any provision or its application is invalidated. A severability provision is necessary because the CFL is silent on the issue, and severability ensures that these and other regulations in this subchapter continue to further the purposes of the CFL to the maximum extent possible even if a provision is held invalid.

Subchapter 13. Deferred Deposit Transaction Law

Article 3. Reports to the Commissioner

§ 2030.5. California Consumer Financial Protection Law Registration Exemption: Reporting.

Section 2030.5, subdivision (a). This subdivision was modified with nonsubstantive changes related to citation style.

Section 2030.5, subdivision (b). This subdivision was modified with nonsubstantive changes related to citation style.

Subchapter 15. Student Loan Servicing Act

Article 6. Examination, Books and Records

§ 2044.1. California Consumer Financial Protection Law Registration Exemption: Notice; Reporting.

Section 2044.1, subdivision (a). This subdivision was modified with nonsubstantive changes

related to citation style, the Department's email address, and renumbering of paragraphs.

Section 2044.1, subdivision (a)(1). This subdivision was formerly subdivision (a)(1)(A) and was renumbered.

Section 2044.1, subdivision (a)(2). This subdivision was formerly subdivision (a)(1)(B) and was renumbered.

Section 2044.1, subdivision (b). This subdivision was modified to add "a licensee who is exempt from registration pursuant to subdivision (a) of this section." The purpose of this provision is to ensure that the Department has a complete picture of the markets for education financing products. This change is necessary because it clarifies that the reporting requirement described in this subdivision applies to SLSA licensees who are exempt from registration and not to every SLSA licensee. The same language also occurs in section 2030.5, subdivision (b).

Section 2044.1, subdivision (b)(1). This subdivision was modified with a nonsubstantive change related to punctuation.

Section 2044.1, subdivision (b)(2). This subdivision was modified to change "contracts" to "agreements." The purpose of this provision is to ensure that the Department has a complete picture of the markets for education financing products. This change is necessary because regulations are clearer when they use the same term for the same intended meaning, and subdivision (b)(3) uses "agreements."

Section 2044.1, subdivision (b)(4). This subdivision was modified to move "any interest in" to earlier in the sentence and change "and" to "or." The purpose of this provision is to ensure that the Department has a complete picture of the markets for education financing products. This change is necessary because the syntax of the previous language did not reflect what information was intended to be captured in this reporting requirement.

Section 2044.1, subdivision (b)(5). This subdivision was modified with nonsubstantive changes related to citation style.

Section 2044.1, subdivision (c). This subdivision was modified with nonsubstantive changes related to citation style.

SUMMARY OF AND RESPONSE TO COMMENTS SUBMITTED DURING INITIAL 45-DAY COMMENT PERIOD (MARCH 17 TO MAY 17, 2023)

The initial proposed regulations were made available for public review and comment from March 17 to May 17, 2023. The following persons submitted comments to the Department for this period:

1. Andrew Kushner, Policy Counsel, Center for Responsible Lending, dated March 31, 2023.
2. Denise Dunckel, Chief Executive Officer, American Fair Credit Council, dated May 2, 2023.
3. Frank Dombroski, Chief Executive Officer and Founder, FlexWage Solutions LLC, dated May 3, 2023.

4. Edward Van Wesep, Professor, Leeds School of Business, University of Colorado Boulder, dated May 3, 2023.
5. Eileen Newhall, Owner, Eileen Newhall Consulting LLC, dated May 5, 2023.
6. Amanda Dingler, dated May 8, 2023.
7. Isaac Herrera, dated May 8, 2023.
8. John Parry, dated May 8, 2023.
9. Shanavia Green, dated May 8, 2023.
10. Brian Tate, President and Chief Executive Officer, Innovative Payments Association, dated May 11, 2023.
11. Tal Clark, Chief Executive Officer, Instant Financial USA Inc., dated May 12, 2023.
12. Diwen Lu, dated May 12, 2023.
13. Jennifer Decker, Executive Assistant to General Counsel and Chief Compliance Officer, EarnIn, dated May 12, 2023.
14. Madeline Pepple, dated May 12, 2023.
15. Mona Ahmadi, dated May 12, 2023.
16. Muhammad Ammad Raja, dated May 12, 2023.
17. Ray Sin, dated May 12, 2023.
18. Isaac Tysanner, Data Scientist, EarnIn, dated May 15, 2023.
19. Jackie Zupsic, Executive Vice President, Tusk Strategies LLC, dated May 15, 2023.
20. Alice P. Jacobsohn, Director, Government Relations, PayrollOrg, dated May 15, 2023.
21. Kevin Lefton, Head of Legal & Regulatory, Wagestream, Inc., dated May 15, 2023.
22. Jay King, President and Chief Executive Officer, California Black Chamber of Commerce, dated May 16, 2023.
23. Matthew A. Tompkins, Future Majority, received May 16, 2023.
24. Nestor Valencia, dated May 16, 2023.
25. David E. Durant, General Counsel, Activehours, Inc., doing business as EarnIn, dated May 17, 2023.
26. Ann Christenson, Chief Human Resources Officer; Conrad Riddle, Vice President, HR Shared Services, Aimbridge Hospitality, LLC, dated May 17, 2023.
27. American Fintech Council, dated May 17, 2023.
28. Better Future Forward, Inc.; Jobs for the Future; Stride Funding Inc.; and Social Finance, Inc., dated May 17, 2023.
29. Hamel Kothari, Chief Technology Officer, Bridge IT, Inc. doing business as Brigit, dated May 17, 2023.
30. California Low-Income Consumer Coalition, dated May 17, 2023.
31. California Low-Income Consumer Coalition and National Consumer Law Center, dated May 17, 2023.
32. Andrew Kushner, Policy Counsel, Center for Responsible Lending; Robert Herrell, Executive Director, Consumer Federation of California; and Lauren Saunders, Associate Director, National Consumer Law Center, dated May 17, 2023.
33. Janay Eyo, Director, Financial Policy, Chamber of Progress, dated May 17, 2023.
34. Cliff Andrews, Chief Executive Officer, Consumer Debt Relief Initiative, Inc., dated May 17, 2023.
35. Jared DeMatteis, Chief Legal & Strategy Officer, DailyPay, Inc., dated May 17, 2023.
36. Joe Reinstein, Executive Director, Digital Restaurant Association, dated May 17, 2023.

37. Angelena Bradfield, Head of Policy and Government Relations, Financial Technology Association, dated May 17, 2023.
38. Student Borrower Protection Center, California Low-Income Consumer Coalition, Center for Responsible Lending, Consumer Federation of California, Consumer Reports, Legal Aid Foundation of Los Angeles, National Consumer Law Center, NextGen California, Public Counsel, Student Debt Crisis, Center, The Institute for College Access and Success, and Young Invincibles, dated May 17, 2023.
39. Darrell Feil, Owner, Abate-A-Weed; Timothy Sher, President, Asian Food Trade Association; Marc Ang, Founder & President, Asian Industry B2B; Pat Fong Kushida, President and Chief Executive Officer, CalAsian Chamber of Commerce; Julian Canete, President and Chief Executive Officer, California Hispanic Chamber of Commerce; Aaron Hichman, Co-Founder, California Retail Hardware Association; Joanne Frisco, Owner, Frisco's Carhops; Linda Colley, Owner, IQM; Maryann Marino, Owner, Maloney Meat Company; Bruce Bloom, Owner, North Hollywood Hardware Store; Ruben Franco, President and Chief Executive Officer, Orange County Hispanic Chamber of Commerce; Kyle Knight, Executive Director, Retailers and Store Owners United to Rebuild our Communities' Economies; and Sunder Ramani, Co-Owner, Westwind Media, dated May 17, 2023.
40. California Employment Lawyers Association et al., dated May 17, 2023.
41. Adam VanWagner, Chief Legal Officer, MoneyLion Technologies Inc., dated May 17, 2023.
42. Herman Donner, Associate Professor, KTH Royal Institute of Technology, dated May 11, 2023.
43. Pete Isberg, President, National Payroll Reporting Consortium, Inc., dated May 17, 2023.
44. 6,271 customers of Payactiv, Inc., DailyPay, Inc., and Activehours, Inc., doing business as EarnIn, dated May 17, 2023.
45. Aaron Marienthal, General Counsel, Payactiv, Inc., dated May 17, 2023.
46. Garth McAdam, General Counsel, ZayZoon, dated May 17, 2023.
47. Allison Mather, dated May 8, 2023.
48. Isaac Galindo, dated May 8, 2023.
49. Stephanie Gelman, dated May 8, 2023.
50. EDreana Black, dated May 8, 2023.
51. Sanjiv Ranjan Das, Professor, Santa Clara University, dated May 9, 2023.
52. Jenn Woodcock, dated May 9, 2023.
53. Lauren Libas, dated May 9, 2023.
54. Maryann Boller, Payroll Professional, dated May 9, 2023.
55. Marc Ang, President and Founder, Asian Industry B2B, dated May 23, 2023, and received after the close of the comment period.
56. Darrell Feil, Owner, Abate-A-Weed, dated May 23, 2023, and received after the close of the comment period.
57. Peter Abrego, dated May 25, 2023, and received on May 25, 2023, after the close of the comment period.
58. Maryann Marino, Vice President, Maloney Meat Company, dated May 31, 2023, and received on May 31, 2023, after the close of the comment period.
59. Sunder Ramani, President and Partner at Westwind Properties, LLC and Co-owner of Westwind Media, dated May 31, 2023, and received after the close of the comment period.

Note: In multiple contexts, these regulations refer to products which some providers called earned wage access or earned wage advance products. In this FSOR, the Department refers to these products as "income-based advances" (IBA) as this term better reflects the legal status of the products as loans under the regulations. Referring to these products as "earned wage access" or "earned wage advances" could erroneously suggest that such products should be treated legally as the early payment of consumer wages.

Comment letter 1.1 – Andrew Kushner, Policy Counsel, Center for Responsible Lending (CRL) (dated March 31, 2023)

Comment 1.1: CRL requested an extension of the time to submit comment letters by 15 days, from May 2 to May 17, 2023, because the issues involved are complex and the comment period falls during a busy time on the state legislative calendar.

Response to comment 1.1: The Department accommodated the request by extending the public comment period to Wednesday, May 17, 2023.

Comment letter 1.2 – Denise Dunckel, Chief Executive Officer, American Fair Credit Council (AFCC) (dated May 2, 2023)

Comment 1.2.1: AFCC is a trade association representing the debt resolution industry. It recommended amending section 1010 of the proposed regulations to remove the words "offering or" from subdivision (a) to align the proposed debt resolution registration requirements with the statutory definition of "debt settlement services" as previously enacted by the California Legislature under the Fair Debt Settlement Practices Act. The statutory definition of "debt settlement services" applies to persons who actually offer to act as debt resolution providers while the proposed regulations would require registration of a broad set of market participants, including marketing firms notwithstanding that those firms do not actually offer to act, or actually act, as debt resolution services providers. This would create consumer confusion and result in substantial duplication of reporting since the proposed regulations already require registrants to disclose third-party brokers or lead generators that the registrants use to acquire potential consumers.

Response to comment 1.2.1: The Department accommodated the comment by adding "to provide" to section 1010, subdivision (a). Section 1010, subdivision (a), as amended reads, "No person shall engage in the business of offering to provide or providing subject products to California residents without first registering with the Commissioner pursuant to this subchapter." Whether a person is in the business of offering or providing debt-settlement services is fact-specific. Section 1010, subdivision (a), is intended to ensure that all companies that hold themselves out as offering or providing subject products are subject to regulation. The regulation is not intended to require marketing firms, newspapers, and other advertisers that advertise debt-settlement services on behalf of a debt-settlement business and who do not own or control the activities of the debt-settlement business to register under the CCFPL.

Comment 1.2.2: AFCC expressed its continued support for providing data to the Department on its members' services and suggested that the Department collect similar data from providers of other products and services that may be available to Californians in financial hardship to address

their unmanageable debt burdens, such as credit counseling, bankruptcy, creditor loan modifications, and short-term consumer loans. This information will provide essential context to understand the risks, benefits, costs, and burdens of all products and options to consumers from providers of other products and services, and not just from debt-resolution firms, that may be available to Californians in financial hardship to address their unmanageable debt burdens. AFCC previously suggested this in response to the Department's pre-rulemaking invitation for comments in 2021.

Response to comment 1.2.2: The Department declined to make the suggested change because there are numerous alternatives to debt settlement and each has unique features that would require distinct reporting requirements and further analysis. The Department, however, reiterates its intention to continue to monitor these markets and may propose additional regulations in the future and appreciates AFCC's support for the proposed data-reporting requirements for debt-settlement registrants.

Comment letter 1.3 – Frank Dombroski, Chief Executive Officer and Founder, FlexWage Solutions, LLC (FlexWage) (dated May 3, 2023)

Comment 1.3: FlexWage commented that the provider's method of operation is the essential element to consider for EWA licensing (i.e., accuracy of the data and wage calculation, transparent and capped fees, and funding source) and not simply whether the provider is a direct-to-consumer model or employer-based model. FlexWage recommended adding the following to the employer funding requirement: "Whether an employer uses their funds or funds are provided by a licensed financial institution, if the employer remains an intermediary to the EWA provider and their employees, the same exemption should apply as outlined in the Opinion issued to FlexWage." FlexWage's understanding of the proposed regulations is that FlexWage's program and any licensed provider of funds to an employer-funded EWA program would be exempt from EWA licensing as they exist under the proposed regulations and requested that the Department clarify this in the proposed regulations.

Response to comment 1.3: The Department declined to make the recommended change because it is unnecessary. Section 1461, subdivision (a), generally provides that obligors who use their own funds to make advances of income accrued but not yet paid to the consumer are not making loans subject to the CFL. Section 1461, subdivision (a), however, does not exclude or exempt all obligors from the CFL when making employer-funded advances to consumers. Whether an obligor is required to obtain a license under the CFL will depend on the specific facts.

Comment letter 1.4 – Edward Van Wesep, Professor, Leeds School of Business, University of Colorado Boulder (dated May 3, 2023)

Comment 1.4.3: Van Wesep co-authored and published in 2013, The Timing of Pay, a theoretical exploration of optimal pay frequency and the effect of earned wage access on consumer welfare. Van Wesep provided an analysis of the costs and benefits of earned wage access on consumers and how regulation is not one-size fits all. Specifically, Van Wesep observed that unlike payday loans and other types of loans, earned wage access benefits workers by smoothing access to their pay and allowing them to smooth consumption which reduces the likelihood of financial problems, malnourishment, or property crimes. Van Wesep did not comment on any specific

proposed definition or regulation.

Response to comment 1.4.3: The Department declined to consider the comments because they were not directed at a specific regulation.

Comment 1.4.4: Van Wesep commented that the proposed regulations incorrectly use annual percentage rate (APR) to measure the costs of earned wage access products. APR is the correct measure of cost for a long-term loan or renewing payday loans but not for earned wage access because earned wage access is not about getting money now in exchange for repayment later. Four methods would more correctly measure the cost of earned wage access products: (1) observe actual usage of earned wage access, (2) observe measures of financial distress, (3) compare the total per-period dollar expense of earned wage access to the worker's wage, and (4) allow workers to opt in to use earned wage access.

Response to comment 1.4.4: The Department disagrees that effective APRs are not valuable in assessing income-based-advance products, because: (1) the California Legislature has embraced APR disclosures for short-term financing products, (2) like payday loans, income-based advances involve receiving money now in exchange for repayment later, and (3) like payday loans, income-based advances often involve repeat borrowing.

With respect to the first point, the Legislature's actions demonstrate that APR is a relevant cost metric, even for short-term borrowing. For example, under the CDDTL, the Legislature embraced APR as both a relevant metric for consumer disclosures and for policy analysis. For example, the Legislature requires that payday lenders disclose APRs to consumers in a notice that they post at their place of business and in each consumer's agreement. (Fin. Code, § 23035, subds. (d)(2), (e)(1).) The CDDTL also requires payday lenders to report the average APR for their deferred deposits in their annual reports which are available to the public, suggesting that the Legislature has embraced APR for policy-analysis purposes. (§ 23026.) The Legislature incorporated APR into the regulatory framework for payday loans even though payday loans are definitionally short-term financing products (§ 23035, subd. (a)) and it is illegal to rollover a payday loan (§ 23036, subd. (c)) or charge fees to extend the repayment period for a payday loan (§ 23035, subd. (b)). The Legislature's approval of APR for short-term credit finds further support in its recent passage of Senate Bill 33. (Stats. 2023, ch. 376, § 1 [effective Jan. 1, 2024].) In that bill, the Legislature effectively extended the Department's regulations mandating APR disclosures for short-term commercial financing products like merchant cash advances by extending the mandate that providers of such financing provide the disclosure of an annualized rate. (*Ibid.*; Cal. Code Regs., tit. 10, § 914, subd. (a)(3).)

With respect to the second point, income-based advances ("earned wage advances") are definitionally an arrangement, like a payday loan, where a consumer receives money in exchange for repayment later. That is, in nearly all cases, consumers receive money in advance of their payday from a third-party provider and then repay that amount, plus any applicable charges, to that third party when they have the funds available to do so. This arrangement mirrors the arrangement for traditional payday loans.

Finally, Van Wesep suggests that calculating the effective APR for a financing product is only appropriate for short-term products if those products are renewable. Van Wesep references

payday loans as an example, but payday loans in California are not renewable and yet APR disclosures are still required for both consumers and in annual reports submitted by payday lenders, as discussed above. In any case, without conceding that reviewing an APR is irrelevant for products that cannot be renewed or that are not susceptible to repeat borrowing, the Department notes that its 2021 Earned Wage Access Data Findings showed high incidences of repeat use, with consumers using income-based advances 9 times per quarter on average.[5] Given that consumers can incur fees for every advance they receive, the high frequency of use suggests that analyzing income-based advances in terms of an APR is even more appropriate. While the Department cannot make a perfect apples-to-apples comparison, this data suggests a higher use frequency than payday loans in California, where lenders reported an annual use frequency of 5.4 loans in 2020 and 5.7 loans in 2021, lower than the quarterly use frequency for income-based advances. (See the Department's Annual Reports of Payday Lending Activity Under the CDDTL (2020 and 2021).)[6]

Comment letter 1.5 – Eileen Newhall, Owner, Eileen Newhall Consulting LLC (dated May 5, 2023)

Comment 1.5.1: Newhall urged the Department to withdraw proposed sections 1461, 1462, 1463, 1464, and 1465 in article 4 of subchapter 6 of the CFL regulations and to instead adopt an extensive number of purported income-based advance industry "best practices" to article 1 of subchapter 4 of the proposed CCFPL regulations. The Department has not previously proposed treating income-based advances as loans and providers as lenders subject to the CFL.

Response to comment 1.5.1: The Department disagrees with the comments. The Department has regulatory authority to administer the CCFPL in a manner that is consistent with the statutory objective of the law. (Fin. Code, § 90006, subd. (a).) The CCFPL does not prescribe how the Department must regulate providers and leaves the manner of regulation to the Department's discretion. The regulations regulate all providers of income-based advances in the same manner to avoid inadvertently benefiting one type of business model over another and to promote competition among providers by ensuring that they must all comply with the same rules and requirements in offering or providing their products and services to consumers.

Furthermore, Newhall did not explain how simply requiring providers to follow their own practices would provide better protection to consumers. Rather, a review of the "best practices" identified by Newhall suggests that many of the practices are unlikely to provide meaningful new benefits to consumers. Therefore, codifying these activities as "best practices" in the Department's regulations is not warranted. The Department considers each of these practices in turn:

1. Newhall states that "all industry providers" provide "the consumer with a written document that clearly, conspicuously, and in language intended to inform the consumer of his or her rights under the agreement and disclose all fees associated" with provider's services. It is a

[5] Available at https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/03/2021-Earned-Wage-Access-Data-Findings-Cited-in-ISOR.pdf.

[6] Available at https://dfpi.ca.gov/wp-content/uploads/sites/337/2021/07/DFPI_AnnualReport_CDDTL-2020.pdf and https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/07/DFPI_AnnualReport_CDDTL-2021.pdf.

fundamental principle of consumer contract law that the contract must inform the consumer of his or her rights under the contract and disclose applicable fees. That industry providers do this is not a "best practice." Rather, this represents the bare minimum of consumer protection that the Department would expect all providers of consumer financial products and services to meet. In many cases, failure to do this would constitute an unlawful, unfair, deceptive, or abusive act or practice in violation of the CCFPL, FTC Act, or other laws.

2. Newhall states that another best practice is informing consumers in advance of any material changes to the consumer's agreement. Again, it is a fundamental principle of contract law that you cannot change the terms of a contract without parties' consent. Therefore, it is already impermissible for a business to change terms in a consumer contract without providing a consumer advance notice. (See, e.g., *Douglas v. U.S. Dist. Ct. for Cent. Dist. of California*, 495 F.3d 1062, 1066 (9th Cir. 2007) ("Indeed, a party can't unilaterally change the terms of a contract; it must obtain the other party's consent before doing so. This is because a revised contract is merely an offer and does not bind parties until it is accepted. And generally 'an offeree cannot actually assent to an offer unless he knows of its existence.'").)

3. Newhall claims that "each provider offers each consumer at least one opportunity per pay period to receive an advance of funds at no cost to that consumer." The Department supports finding ways to support consumers obtaining fee-free advances. However, neither Newhall nor other commenters who propose the "free advance option" as a best practice have proposed a rule that would ensure that meaningful free option would be available. For example, simply codifying that an advance provider is not a lender if they offer one free option would allow a lender to offer a free option where payment is delayed until days after the consumer needs funds. Conceivably, the free option could even involve advance payment just a day or two before payday. Given that advocates for the income-based industry have emphasized how time-sensitive[7] their consumers' needs for cash advances are, it is not a meaningful best practice to limit free options to those where cash advances are delayed. Another example of a free option that would be permissible under Newhall's proposal would be limiting free advances to small amounts that are not helpful for cash-strapped consumers. In any case, creating a framework where fee-based loans are exempt from regulation merely because a provider also offers a less appealing fee free option creates incentives for providers to only offer a free option that is useful for a limited subset of consumers, while other consumers must pay for a fee-based option in order to meet their needs.

4. Newhall argues that another best practice should be that "before advancing proceeds to a consumer, each provider verifies that the consumer has already earned at least as much money during that pay period." What Newhall is describing is a form of underwriting, a practice required under the California Financing Law. (See Fin. Code, § 22714, subd. (a)(5); Cal. Code Regs., tit. 10, § 1452.) The form of underwriting Newhall describes may be an

[7] See, e.g., comments 1.10 (stating that EWA is "critical when financial stress occurs" and that over 100 million Americans would "experience financial hardship if they received an unexpected bill for medical expenses or a car repair"), 1.17 ("Like millions of Californians who live paycheck to paycheck, my EWA app allows me to manage my finances and helps me avoid having to choose which bills to pay, just because my paycheck hasn't landed in my account yet"), 1.22 ("Short term cashflow disruptions are the norm for too many today. Without EWA, employees are left with debt as their only option."), 1.6. 1.49, 1.50.

effective form of underwriting as it virtually eliminates any risk of nonpayment for the lender. However, given IBA providers' strong financial incentive to follow an approach that virtually guarantees repayment, the Department sees little need to codify the approach as a best practice.

5. Newhall argues that another best practice should be that providers "do not unilaterally decide how a consumer will receive advances." Instead, the process for receiving an advance will be "mutually agreed." Newhall provides insufficient information to evaluate this best practice, but Newhall fails to articulate how this approach exceeds the basic requirements of contract law, which request mutual assent to any contract terms.

6. Newhall argues that another best practice of IBA providers is that advances are provided on "a non-recourse basis . . . that providers do not seek to compel repayment of advances or of fees through repeated attempts to debit a consumer's depository institution account in violation of applicable payment system rules, use of outbounds telephone calls to attempt collection from the consumer, use of or threatened use of a civil suit against the consumer, use of a third party to pursue collection from the consumer on the providers behalf, or sale of outstanding advances to a third-party collector." As noted in the ISOR, nonpayment of income-based advances is already exceedingly rare. (See Financial Health Network "Earned Wage Access and Direct-to-Consumer Advance Usage Trends," at p. 2 (April 2021) (finding that advances "were recouped successfully at least 97% of the time).) This is likely due to the effective underwriting practices of many IBA providers (see paragraph 4 above). Given this, it seems like IBA providers have already concluded that the practices outlined above are unnecessary for their success, so there is little reason to codify that their self-imposed limitations on activities as best practices.

7. The next best practice Newhall identifies is the ability of consumers "to opt out of their participation in income-based advances at any time and without financial penalty for doing so." As with some of the other practices above, it is unclear how this practice improves upon existing protections for California borrowers. Neither the CFL nor the CDDTL authorize lenders to impose fees or penalties on borrowers who decline to request additional loans. (See Fin. Code, §§ 22000 et seq., 23000 et seq.)

8. Newhall suggests codifying as a best practice that providers do not base the size or frequency of advance eligibility on the charges (fees or gratuities) that a consumer pays, or how this practice deviates from the practice of the Department's existing payday lenders. Newhall fails to explain why this approach is an effective way to protect consumers from the high costs often associated with income-based advances. This is particularly true given that the restriction proposed would not prevent providers from conditioning the timing of advance payments on payment of an additional fee, or using frequent notifications, guilt-based strategies, and social conditioning associated with gratuities to make borrowers feel a compelling obligation to pay gratuities.

9. Newhall suggests codifying as a best practice that providers do not charge deferral fees or charges for failure to pay outstanding advances. This suggestion would limit providers from engaging in practices that are permitted under both the CFL and the CDDTL. However, it is unclear that this restriction provides a sufficient consumer benefit to justify a determination

that income-based advances are not loans, particularly given how IBA providers are able to use data to effectively underwrite their products. As with limitations collection practices discussed in paragraph (6) above, it appears that IBA providers have already made the decision that it is in their financial interest to offer a product where revenue is generated from other charges. The promise of no deferral fees or aggressive debt collection likely enhances the marketability of their loans, and providers can likely absorb some losses from uncollected loans due to their underwriting practices and ability to collect directly from employers. In any case, whether the absence of a deferral fees is sufficient to justify excluding IBAs from the definition of "loan" is a policy determination best left to the legislature.

10. Newhall suggests that not accepting payments by credit card should be a best practice. However, the Department has no evidence that lenders typically accept loan payments by credit card, so it is unclear how this requirement would meaningfully improve consumers' experience. Since accepting payment by credit card would likely result in the lender paying interchange fees, lenders are already likely to have financial disincentive to accept payment by credit card.

11. Newhall suggests that not collecting a credit report or credit score should be a best practice. Lenders often review credit reports or credit scores for underwriting purposes. As noted above, IBA providers already have a form of income-based underwriting that allows them to establish reasonable confidence that they will repaid on payday. That is, they know that the amount loaned has been earned and will be repaid on payday from the consumer's employer or bank account. In this context, IBA providers would have no reason to incur the costs to review a consumer's credit history. It is unclear why limiting the use of credit histories would provide consumer benefits when IBA providers already have underwriting systems that render credit reviews unnecessary. Furthermore, not collecting credit reports or credit scores does not distinguish IBA providers from most payday lenders. In the Department's experience, licensed payday lenders also do not collect traditional credit reports or use credit scores from a credit reporting agency for underwriting purposes.

12. Newhall suggests that not reporting unpaid advances to a consumer credit reporting agency should be considered a best practice. As with late fees, this suggestion would limit providers from engaging in practices that are permitted under existing law. However, it is unclear that this restriction provides a sufficient consumer benefit to justify a determination that income-based advances are not loans given that IBA providers' underwriting makes repayment reasonably certain. In any case, this is a policy determination best a left to the Legislature.

Finally, the Department notes that it did engage interested parties in public discussions on the proposed regulations before initiating formal rulemaking, and while these discussions did not include treating IBAs as loans and providers as lenders subject to the CFL, the Department did not believe it was required to do so under Government Code section 11346.45 because these provisions were neither complex nor involved a large number of proposals and the CFL is not a new or unfamiliar lending law.

Comment 1.5.2: Newhall commented that the proposed approach to regulating income-based advances as loans subject to the CFL fails to foster responsible innovation, which is one of the purposes of the CCFPL, because it forces income-based advances into a decades-old installment

loan law rather than the Department using its authority under the CCFPL to craft rules specific to these innovative products. The Department could do a much better job of promoting consumer protection and fostering innovation by codifying existing best practices and trying to force income-based advances into a decades-old installment loan law will do more harm than good. The Department had repeatedly argued to the Legislature in connection with the enactment of the CCFPL in 2020 that the Department needed authority to regulate providers of consumer financial products and services in a more flexible way than California's existing financial services laws allowed and the Legislature's understanding was that the Department would propose registration requirements for these industries in a manner that promoted consumer protection and reflecting the unique and innovative nature of the industries.

Response to comment 1.5.2: The Department disagrees with the comments. The Department has regulatory authority to administer the CCFPL in a manner that is consistent with the statutory objective of the law. (Fin. Code, § 90006, subd. (a).) The CCFPL does not prescribe how the Department must regulate providers and leaves the manner of regulation to the Department's discretion. The regulations regulate all providers of income-based advances in the same manner to avoid inadvertently benefiting one type of business model over another and to promote competition among providers by ensuring that they must all comply with the same rules and requirements in offering or providing their products and services to consumers. The Department was unable to fully respond to the comments because they did not explain how requiring providers to follow their own practices would be an innovative approach to regulating providers or provide better consumer protection than the regulations. See also response to comment 1.5.1.

Comment 1.5.3: Newhall commented that the proposed provisions that treat income-based advances as installment loans regulated under the CFL are unclear and confusing in the extreme and create a myriad of practical problems. While the core element of the Department's proposal requires that the charges collected by the provider in connection with each income-based advance do not exceed charges that would be permitted under the CFL if the provider were licensed under that law, the proposed regulations are entirely unclear as to which sections of the CFL apply to providers of income-based advances and how it expects them to comply with the sections, and which sections would be inapplicable. Newhall listed various code sections of the CFL, including administrative fees, delinquency fees, and APR disclosure requirements, to demonstrate the lack of clarity created by the proposed approach.

Response to comment 1.5.3: The Department disagrees with the comment. The CFL regulates a wide range of business models engaged in lending and there does not appear to be anything specific or unique about IBA models that would make it in any way more difficult for them comply with the CFL. The comments did not provide sufficient information to enable the Department to understand why and how Newhall believes that the sections are unclear or create confusion.

Comment 1.5.4: Newhall commented that the overly confusing "rate cap only" structure is ill-conceived and insufficient and suggested that consumers would be far better protected if the Department proposed a regulation that is tailored to the industry by codifying industry best practices. While there is a wide range of business models, all industry providers currently adhere to the same business practices, including providing proceeds to consumers on a nonrecourse basis, verifying that the consumer has already earned at least as much money during the pay

period as they are requesting, and not charging late fees or charges for failure to pay outstanding proceeds, and codifying these practices in lieu of the proposed CFL-focused approach will ensure that they will continue to be used by existing providers.

Response to comment 1.5.4: The Department notes that this comment is resolved because the requirement that IBA providers comply with CFL rate caps was removed to address procedural concerns related to economic impact made by other commenters. However, the Department disagrees with the comment. The Department has regulatory authority to administer the CCFPL in a manner that is consistent with the statutory objective of the law. (Fin. Code, § 90006, subd. (a).) The CCFPL does not prescribe how the Department must regulate providers and leaves the manner of regulation to the Department's discretion. The Department was unable to fully respond to the comments because they did not explain how requiring providers to follow their own practices would provide better consumer protection than the regulations. See also response to comment 1.5.1.

Comment 1.5.5: Newhall commented that the proposed approach lacks flexibility with respect to subscription fees because it only contemplates a monthly subscription fee and questioned whether subscription fees that are imposed on a different frequency allowed, why subscription fees are treated differently than all other types of fees that providers may charge, what is the basis for the $12 monthly cap when no other allowable charge are subject to specific caps, and what percentage of a subscription fee should be included as a "loan charge" associated with the advance when disclosing an APR.

Response to comment 1.5.5: The Department declined to consider the comments because the subscription fee requirements in section 1464 were deleted from the final regulations and the comment is resolved because the requirement that IBA providers comply with CFL rate caps was removed to address procedures arguments relating to economic impact made by other commenters.

Comment 1.5.6: Newhall disagreed with the proposed approach to characterize income-based advances as loan because all providers offer their customers at least one method to obtain advances free of charge and on a nonrecourse basis because they are unlike any other "loans" regulated by the Department and calling them loans and regulating them like installment loans under the CFL fails to acknowledge their unique and consumer-friendly characteristics.

Response to comment 1.5.6: The Department disagrees with the comment. As noted in the Department's response to comment 1.5.1, the Department is not convinced that "best practices" offer consumer benefits consumers that would justify a policy-based determination that the products are not loans. In any case, Newhall did not address any of the legal reasoning from the ISOR addressing why IBAs are properly classified as loans. Additionally, under the revised regulatory framework, IBA providers will not be required to offer their loans in a manner consistent with the CFL.

Comment 1.5.7: Newhall commented that requiring disclosure to consumers of the actual cost of advances would be more helpful than requiring disclosure of APRs because an APR is useful only as a tool to compare different financing options and consumers who seek out advances are not seeking to compare these advances to longer-term loans. Consumers are seeking to obtain a

portion of their paycheck a few days earlier than payday and simply want to understand how much the advance will cost in money.

Response to comment 1.5.7: The Department declined to consider the comment because the regulation never required APR disclosures. Whether an IBA is credit under the federal Truth in Lending Act is not something the regulations were intended to address.

Comment 1.5.8: Newhall suggested making the following change to paragraph 4 of section 1022 ("Supplemental Information - General") because many of the entities that will be applying for registration operated entirely online: "A list containing the addresses of all branch locations, if any, from which the applicant will offer or provide subject products to California residents."

Response to comment 1.5.8: The Department accommodated this comment by making the suggested change to section 1022, subdivision (e), which was formerly section 1022, subdivision (a)(4), and was renumbered in the final regulations.

Comment 1.5.9: Newhall suggested revising paragraph 5 of section 1022 and section 1041, subdivision (b), to clarify how providers must calculate the pro rata share of gross income attributable to income-based advances, when those advances are provided as part of a bundle of services for which a periodic subscription fee is charged because providers are likely to calculate their pro rata shares differently, which will render the information collected by the Department pursuant to this paragraph 5 useless for comparison purposes.

Response to comment 1.5.9: The Department accommodated this comment by revising both sections to include language clarifying that for IBAs that were provided as part of a bundle of services for which a periodic subscription fee was charged, gross income must include the subscription fees paid to the provider for all periods in which the provider provided an IBA to a California resident. Section 1022, subdivision (a)(5), was renumbered to section 1022, subdivision (f).

Comment 1.5.10: Newhall suggested revising paragraph (2) of subdivision (c) of proposed section 1045 to clarify the terms "was made" and "collection date" by specifying providers to calculate the average length of time, in days, between when the provider initiates the transfer of an income-based advance to a consumer and the originally scheduled collection date associated with that advance. Clarification is needed because the terms are subject to multiple interpretations. Paragraph (2) of subdivision (c) of proposed section 1045 requires providers to calculate the average length of time between when each income-based advance was made and each advance's collection date.

Response to comment 1.5.10: The Department declined to make the suggested changes because they are unnecessary. "Collection date" is a defined term under the regulations. Defining when an advance "was made" is unnecessary because the plain language of the regulation is sufficient to indicate that an advance is made when the provider initiates a transfer and the funds are no longer available to the provider.

Comment 1.5.11: Newhall recommended that paragraph (5) of subdivision (c) of proposed section 1045 be revised to request similar information as the Department is requesting in

paragraph (4), specifically, “the number of times, if any, in which the provider attempted to collect from the resident’s bank account and the total amount collected from the resident’s bank account” because paragraph (5) fails to reflect the fact that some providers of obligor-based advances seek access to their customers’ bank accounts, in the event the provider has trouble collecting its advances via payroll deduction. The revision is needed to ensure that the Department collects information regarding attempts if any, by providers of obligor-based advances to debit their customers’ depository institution accounts.

Response to comment 1.5.11: The Department accommodated this comment by revising section 1045, subdivision (c)(5), as recommended.

Comment letter 1.6 – Amanda Dingler (dated May 8, 2023)

Comment 1.6: Dingler asked the Department to not take away a worker’s option to access their earned wages, as some livelihoods may depend on it. Easy access to earned wages helps in times of need and in today’s high inflation enabled Dingler to save Dingler’s pet’s life in a medical emergency, replace parts on Dingler’s car to go to work, and survive as a single person living alone in this economy. Earned wages are wages that the workers have earned and not “free money” and apps like “Earnin” have made access easy for workers and ensure re-payment when due and have done nothing but helped in times of need. Dingler recommended that the Department focus on regulating other activities and not on earned wage access.

Response to comment 1.6: The Department declined to make revisions because the comment was not directed at a specific regulation. The Department notes that its regulations do not prohibit IBA providers from continuing to offer their services.

Comment letter 1.7 – Isaac Herrera (dated May 8, 2023)

Comment 1.7: Herrera strongly encouraged the Department to consider a different approach because this is an important workers’ rights issue, and the proposed regulations will do more harm than good. The Department has essentially ruled by its proposed regulations that it is better equipped than consumers to make important financial decisions that affect their families. Herrera uses EarnIn to access wages when needed and is worried that the Department isn’t fully considering why hundreds of thousands of Californians use earned wage access products. EWA services are not loans but are an innovation that allows workers to access wages they’ve already earned at their discretion.

Response to comment 1.7: No changes were made in response to this comment for the reasons described in the Department’s response to comment 1.22.1. The Department has not received credible evidence from any commenter that these regulations (as initially proposed or as revised) would result in IBA providers’ inability to offer IBA products. These regulations do not prohibit IBA providers from continuing to offer their services and are not intended to limit consumer access to these services.

Comment letter 1.8 – John Parry (dated May 8, 2023)

Comment 1.8: Parry objected to the proposed regulation of charges for earned wage access and

believes the regulations will take away individuals' right to access their funds how they want and force them to take a higher interest rate loan and pay interest on the loans as in the old way with payday loans. Earned wage access is money the worker has earned and if the worker can find someone to lend money cheaper, the worker should have the right to do so.

Response to comment 1.8: No changes were made in response to this comment for the reasons described in the Department's response to comment 1.22.1. The Department has not received credible evidence from any commenter that these regulations (as initially proposed or as revised) would result in IBA providers' inability to offer IBA products. These regulations do not prohibit IBA providers from continuing to offer their services and are not intended to limit consumer access to these services.

Comment letter 1.9 – Shanavia Green (dated May 8, 2023)

Comment 1.9: Green objected to the proposed regulation of earned wage access and asked the Department to instead allow consumers to make their own financial decisions without the input of legislators. Green expressed how important EarnIn is to the many people that use it, including when Green needed to pay a bill and didn't have government assistance or any other available option. EarnIn provides the money when needed, allows users to borrow until the next pay day, and doesn't charge outrageous fees when it is time to pay back the loan.

Response to comment 1.9: No changes were made in response to this comment for the reasons described in the Department's response to comment 1.22.1. The Department has not received credible evidence from any commenter that these regulations (as initially proposed or as revised) would result in IBA providers' inability to offer IBA products. These regulations do not prohibit IBA providers from continuing to offer their services and are not intended to limit consumer access to these services.

Comment letter 1.10 – Brian Tate, President and Chief Executive Officer, Innovative Payments Association (IPA) (dated May 11, 2023)

Comment 1.10.1: IPA is a trade organization that represents the electronic payments sector, including prepaid products, mobile wallets, and person-to-person technology for consumers, businesses, and governments at all levels. While its members are generally not opposed to the proposed registration requirement, they are concerned that although the proposed rule includes some acknowledgment of the different models and structures EWA services take in the marketplace, it fails to differentiate between these models in concluding that all EWA disbursements are per se "loans" for purposes of the CFL and they do not believe it is appropriate to paint all EWA services with such a broad brush. Some EWA models do not contain any features or functionality that resemble "credit" or the establishment of a lending relationship between the employee and the EWA provider. The Department should reexamine this aspect of its proposed regulations and to clarify that based on the features and functionality of some EWA models, not all EWA models are per se covered by the CFL and to adopt a separate registration requirement for those EWA models that do not resemble credit and to expressly recognize that

disbursements under such models are not “loans” and should not be subject to CFL.

Response to comment 1.10.1: For the reasons stated in the ISOR, the Department did not make any changes in response to this comment, which was construed as a recommendation to withdraw the IBA-related regulations proposed under the CFL. Additionally, the Department has regulatory authority to administer the CCFPL in a manner that is consistent with the statutory objective of the law. (Fin. Code, § 90006, subd. (a).) The CCFPL does not prescribe how the Department must regulate providers and leaves the manner of regulation to the Department’s discretion. The regulations regulate all providers of income-based advances in the same manner to avoid inadvertently benefiting one type of business model over another and to promote competition among providers by ensuring that they must all comply with the same rules and requirements in offering or providing their products and services to consumers.

Furthermore, IBAs are loans regardless of whether they are provided directly to consumers without employer involvement (direct-to-consumer IBAs) or made by third parties with the cooperation of a consumer’s employer (employer-integrated IBAs). IPA has not presented a compelling argument why employer-integrated IBAs should receive different legal treatment when they contain the key feature of other loan products: A cash advance provided by a third party to be repaid at a later date, often with an additional charge. That is the core feature of lending. Employer-integrated IBAs do not constitute the payment of wages because the third party funding the IBA does not owe the consumer earned but unpaid wages.

Arguments that employer-integrated or direct-to-consumer IBA providers are not lenders because they simply give workers early access to earned wages—paying wages due those workers—are similarly unpersuasive for two at least two reasons: (1) IBA providers are third parties who owe no obligation to pay wages to the consumers for labor performed, and (2) the Department has yet to see any evidence that IBA providers facilitate wage payments in compliance with the California Labor Code. On the former point, it is unclear how IBA providers can pay consumer’s wages early since they are not the consumer’s employer who owes wages to be paid. Rather, like other lenders, they are advancing funds to consumers that they expect the consumers to repay at a later date. On the latter point, although numerous IBA providers have submitted comments on this rulemaking, none have claimed that they are legally paying wages in compliance with the Labor Code. The Department suspects this is because IBA providers cannot make this claim. For example, it is unclear how an IBA provider would comply with California’s minimum-wage laws when charging expedited-funds fees or any other charge to a minimum-wage employee, since these charges would result in wage payments that are less than the required minimum wage. (See Lab. Code, § 1197.) Similarly, it is unclear how some IBA providers could comply with Labor Code section 212, subdivision (a)(1), which requires non-cash payments of wages to be made “without discount,” when they charge fees in connection with the advances made. On its website, prominent employer-integrated IBA provider Payactiv dismisses concerns about labor law compliance by stating conclusorily that its “payroll deductions do not implicate federal or state minimum wage laws” and that it “does not disburse wages.” (Payactiv, Trust Center <www.payactiv.com/trust-center> [Legal FAQs].)

Last, in 2019, IBA providers sought but failed to secure a California law that would have classified IBA products as distinct from loans. (See Sen. Bill No. 472 (2019-2020 Reg. Sess.) § 51.) Had the bill passed, it also would have granted significant consumer protections, including

limitations on charges, for recipients of IBAs. This suggests that the Legislature contemplated exempting EWA providers from existing legal requirements for loans only if the IBA industry would agree to a concrete consumer protection framework that included rate protections. The Legislature's consideration and ultimate rejection of these provisions is not conclusive evidence that IBAs are loans.[8] However, it does suggest to the Department that the Legislature is the proper forum for advancing arguments that lending laws should not apply to IBA products. In that context, the people's representatives can hear IBA providers' policy-based arguments and assess what protections should be afforded to IBA users in exchange for any perpetual, statute-based exemption from the vigorous consumer protections offered by California's lending laws.

Comment 1.10.2: IPA observed that the proposed regulations would be inconsistent with federal guidance because the CFPB has recognized that disbursements under employer-based models should not be viewed as "credit" under either the Truth in Lending Act or Regulation Z. Important precedence for differentiating between employer-based and direct-to-consumer EWA models can be found in the treatment of EWA services by the CFPB, particularly in the CFPB's 2020 advisory opinion, which details certain features that EWA services may adopt to avoid their products being deemed to offer "credit" under the Truth in Lending Act and Regulation Z, and many of the features highlighted in the advisory opinion to establish that a EWA disbursement does not constitute "credit" are commonly found in employer-based EWA models. The Department should revise its proposed regulations to similarly recognize that employer-based EWA models do not qualify as per se loans under the CFL.

Response to comment 1.10.2: For the reasons stated in the ISOR, the Department did not make any changes in response to this comment, which was construed as a recommendation to withdraw the IBA-related regulations proposed under the CFL. Additionally, the Department has regulatory authority to administer the CCFPL in a manner that is consistent with the statutory objective of the law. (Fin. Code, § 90006, subd. (a).) The CCFPL does not prescribe how the Department must regulate providers and leaves the manner of regulation to the Department's discretion. These regulations would not be inconsistent with the CFPB's guidance. As explained in response to comment 1.45.13, the 2020 CFPB advisory opinion interpreted whether EWA was "credit" under the federal Truth in Lending Act, not whether it was a "loan" under state law. And whether a transaction is a loan under the CFL generally does not involve determining whether "credit" or "debt" exists. The CFPB itself, in its November 27, 2023 comment letter in this rulemaking, observed that it is critically important that IBA providers be subject to state oversight and that treating these products as loans under the CFL is a similar regulatory approach to that of TILA and Regulation Z. (See comments 2.14.2, 2.14.3, 2.14.4 [cautioning against misrepresenting "very narrow scope" of advisory opinion].)

Comment 1.10.3: IPA urged the Department to be mindful of the benefits of EWA services as it moves forward in its rulemaking process and avoid taking any action that may ultimately harm California consumers by impeding access to EWA services. Changes to the regulatory framework under which these services operate have the potential to negatively impact consumers and should only be undertaken after a full accounting of feedback from industry stakeholders (including meeting with them in-person) and pursuant to a clear, well-defined process for making such

[8] On this point, the Department relies on its own analysis and expertise after carefully studying industry data, contained in the ISOR and this FSOR.

changes. EWA products offer substantial benefits to consumers, including allowing them to handle financial stressors without the need to resort to costly alternatives such as payday loans and overdraft fees and smoothing income volatility, which can lead to poverty for families, and financial literacy resources that many providers integrate in EWA services. EWA products seek to address the timing mismatch between workers' hours on the job and receipt of their paychecks by facilitating on-demand access to an employee's earned but unpaid wages. While some consumers groups contend that EWA could make financial management more difficult for consumers, this contention is simply out of touch with the reality experienced by many workers through gaining greater control over their own finances.

Response to comment 1.10.3: For the reasons stated in the ISOR, the Department did not make any changes in response to this comment, which was construed as a recommendation to withdraw the IBA-related regulations proposed under the CFL. Additionally, the Department incorporates by reference its responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

IPA did not provide evidence that imposing reasonable rate caps on IBAs would harm consumers, given that this requirement's primary effect would have been to limit charges IBA providers can extract from their consumer base. Thus, the Department disagrees that the regulations identified would have negatively impacted consumers. That said, the final regulations require only that IBA providers register and annually report information on their business activities to the Department and do not require that they comply with the CFL, as explained in the purpose-and-necessity statement for section 1461, subdivision (e), in this FSOR.

Comment 1.10.4: IPA disagreed with the Department's assertion that an authorization to debit a worker's bank account to facilitate an advance would be a wage assignment. The Department's statement that "by timing debits from a consumer's bank account to coincide with when a consumer's wages are deposited into their account" a provider would be utilizing a wage assignment is legally incorrect because a wage assignment can only take place when the assignee has the right to receive wages directly from the employer. When wages are electronically transferred into the worker's bank account, the funds are received by the employee, held in the employee's bank account, and cease to be a payment of wages and an authorization to debit that account is an authorization to collect from bank deposits, not from a payment of wages. This conclusion is supported by the legal authority cited by the Department, which states that the provisions related to wage assignments in the Labor Code are designed "to reach every form of instrument which could result in the impounding of a wage earner's wages before he received them" (*Lande v. Jurisich* (1943) 59 Cal.App.2d 613, 619), and in the situation where an employee has been paid by direct deposit, the worker has received their wages in their bank account, and thus no mechanism which debits that account can be deemed a wage assignment under California law.

Response to comment 1.10.4: For the reasons stated in the ISOR, the Department did not make any changes in response to this comment, which was construed as a recommendation to withdraw the IBA-related regulations proposed under the CFL. Additionally, when an IBA provider structures its product so that a consumer's account is debited as soon as the consumer's wages reaches the account and before the consumer can put those wages to use, the IBA provider is, for all practical purposes, receiving the consumer's wages before the consumer receives them.

This is the correct interpretation based upon a substance-over-form analysis of IBA products and the CFL's mandate that its provisions be "liberally construed" to protect borrowers. (Fin. Code, § 22001, subd. (a)(4).)

In any event, in response to other comments, the Department added section 1461, subdivision (d), which clarifies that section 1461 should not be construed to interpret what is considered a wage assignment under the Labor Code, among other things.

Comment 1.10.5: IPA noted a drafting error in the definition of "charges" in section 1004, subdivision (c), which "contains a reference to 'education financing' that should be 'income-based loans.'"

Response to comment 1.10.5: The Department amended section 1004, subdivision (c), to change "education financing" to "income-based advance."

Comment letter 1.11 – Tal Clark, Chief Executive Officer, Instant Financial USA Inc. (Instant Financial) (dated May 12, 2023)

Comment 1.11.1: Instant Financial is a financial services company based in Atlanta that provides EWA and other disbursement services to a number of employers and their workers and makes this service available without a fee to employees and does not believe its EWA services constitute an extension of credit. The Department should not automatically categorize employer-based models and direct-to-consumer models as one product for regulatory purposes because they differ significantly.

Response to comment 1.11.1: This comment is substantially similar to comment 1.10.1. See response to that comment.

Comment 1.11.2: Instant Financial urged the Department to modify the provisions in section 1461 regarding wage assignments to make clear that it will not grant registration under the CCFPL or CFL to entities that use wage assignments in an unfair, deceptive, or abusive manner or in ways that otherwise violate state law and to use its full legal authority to put a stop to these illegal practices. Section 1461 restates California law that an advance of funds repaid by receipt of a consumer's wages is a wage assignment the provision of which is subject to the CFL and providers who utilize wage assignments in their business model would be required to obtain a license under the CFL. Instant Financial supports this requirement but does not feel it goes far enough to protect California consumers from certain unscrupulous actors.

Response to comment 1.11.2: The Department appreciates the comment of support and declined to make the recommended changes because they are unnecessary. The Department already has authority to pursue providers who engage in unfair, deceptive, or abusive acts or practices. Section 1461's primary purpose is to clarify that advances repaid through collection of a consumer's earned income is a loan. This is the case whether the repayment is received from the consumer's employer, through a debit from a consumer's bank account after a direct deposit, or through any other means where the sources of funds is the consumer's earned income.

Comment letter 1.12 – Diwen Lu (dated May 12, 2023)

Comment 1.12: Lu disagreed with the proposed regulations seeking to regulate EWA as short-term loans and recommended that the Department support non-predatory EWA providers instead of putting them into the same bucket as payday loans. Lu, a long-time customer of EWA provider EarnIn, described the benefits of EWA, including peace of mind, no mandatory fees or interest, and being less financially stressed compared to using payday loans. Lu supports and values EarnIn's mission.

Response to comment 1.12: The Department recognizes this comment as an example of a consumer who has found value in an IBA product. However, no changes were made in response to this comment for the reasons described in the Department's response to comment 1.22.1. The Department has not received credible evidence from any commenter that these regulations (as initially proposed or as revised) would result in IBA providers' inability to offer IBA products. These regulations do not prohibit IBA providers from continuing to offer their services and are not intended to limit consumer access to these services.

Comment letter 1.13 – Jennifer Decker, Executive Assistant to General Counsel and Chief Compliance Officer, EarnIn (dated May 12, 2023)

Comment 1.13: Decker strongly opposed the proposed regulation of Earned Wage Access products and strongly encouraged the Department to do everything in its power to stop this proposed rule. The Department is supposed to protect consumers and this rulemaking will have the opposite effect because if consumers need to access their money to meet financial obligations, they should be able to do so. Like countless other Californians, Decker struggles every month to keep up with the mountain of bills and manage a balanced budget and EarnIn has been such a relief because Decker no longer worries about stretching Decker's finances to reach payday. Without EarnIn, Decker would have to turn to payday loans or another credit card to bridge the paycheck gap.

Response to comment 1.13: The Department recognizes this comment as an example of a consumer who has found value in an IBA product. However, no changes were made in response to this comment for the reasons described in the Department's response to comment 1.22.1. The Department has not received credible evidence from any commenter that these regulations (as initially proposed or as revised) would result in IBA providers' inability to offer IBA products. These regulations do not prohibit IBA providers from continuing to offer their services and are not intended to limit consumer access to these services.

Comment letter 1.14 – Madeline Pepple (dated May 12, 2023)

Comment 1.14: Seeking to regulate earned wage access as short-term loans is misguided, anti-innovation, short-sighted, and anti-choice, and Pepple strongly opposes removing consumer choice. EWA is fundamentally different from loans and much better and more ethical for consumers because it seeks to help people get better access to already earned wages. The proposed regulations will take away the ability of Californians to choose what to pay for EWA and push them back to a fixed-fee model, which is not a consumer-choice model. EWA, specifically through EarnIn, has saved California community members an estimated $117 million

in overdraft fees in the last year. EWA offers something in financial services that has never been done before: no interest, no mandatory fees, no reporting to credit reporting agencies or collections.

Response to comment 1.14: No changes were made in response to this comment for the reasons described in the Department's response to comment 1.22.1. The Department has not received credible evidence from any commenter that these regulations (as initially proposed or as revised) would result in IBA providers' inability to offer IBA products. These regulations do not prohibit IBA providers from continuing to offer their services and are not intended to limit consumer access to these services.

Comment letter 1.15 – Mona Ahmadi (dated May 12, 2023)

Comment 1.15: Ahmadi strongly encouraged the Department to consider a different approach for this important workers' rights issue because this does more harm than good. The Department is essentially ruling by regulation that it is better equipped than workers to make important financial decisions affecting their families and is not fully considering why hundreds of thousands of Californians use earned wage access products. These services are not loans but are an innovation that allows workers to access wages they've already earned at their discretion. The services are extremely important, including providing critical economic benefits and a low-cost alternative to predatory lending and removing barriers to financial services.

Response to comment 1.15: No changes were made in response to this comment for the reasons described in the Department's response to comment 1.22.1. The Department has not received credible evidence from any commenter that these regulations (as initially proposed or as revised) would result in IBA providers' inability to offer IBA products. These regulations do not prohibit IBA providers from continuing to offer their services and are not intended to limit consumer access to these services.

Comment letter 1.16 – Muhammad Ammad Raja, Product Manager, EarnIn (dated May 12, 2023)

Comment 1.16: Raja disagreed with categorizing EWA services as loans under the CFL because the categorization does not accurately represent the unique services that companies like EarnIn offer. Unlike traditional lenders, EWA providers advance funds based on wages that customers have already earned and not on future income. EWA providers do not impose finance charges, interest, or legal recourse, which are key features of credit products that often disadvantage consumers. The Department should reconsider this decision because EarnIn and other EWA providers do not sell data, charge interest, or engage in collections like traditional lenders, and EarnIn's current business model, centered around voluntary tips, may not be sustainable if forced into the lending framework. The Department should consider the significant value these services offer and the potential negative consequences that could ensue from their misclassification. The Department should support responsible innovation instead of forcing new ideas into outdated categories. Regulating EWAs as short-term loans would not only limit these companies' ability to serve their customers effectively but also undermine consumer choice. The proposed regulations would consider tips to be fees and cap them at 5%, pushing these providers towards a fixed-fee model, which would be a departure from the consumer-choice model that has worked well for

many users. EWA providers have made a positive impact over the past decade, providing access to over $15 billion in earned wages nationwide and helping over 276,000 customers in California navigate financial challenges between paydays. EWA providers have saved California community members an estimated $117 million in overdraft fees in just the last year.

Response to comment 1.16: No changes were made in response to this comment for the reasons described in the Department's response to comment 1.22.1. The Department has not received credible evidence from any commenter that these regulations (as initially proposed or as revised) would result in IBA providers' inability to offer IBA products. These regulations do not prohibit IBA providers from continuing to offer their services and are not intended to limit consumer access to these services.

Comment letter 1.17 – Ray Sin (dated May 12, 2023)

Comment 1.17: Ray Sin strongly opposes the proposed rulemaking on Earned Wage Access services for the following reasons: Like millions of Californians who live paycheck to paycheck, EWA allows Sin to manage finances and helps avoid having to choose which bills to pay, eliminates stress over choosing between a car payment or groceries, or between rent or monthly prescriptions, having access to money in real-time prevents account overdrafts. EWA allows Sin to proactively put away some money for a rainy day. The peace of mind from knowing there is a safety net to help make it through the month is irreplaceable. It is unacceptable to propose such sweeping changes without any regard for the impact it will have on thousands of Californians in a similar financial situation, and the Department should rethink its decision before it is too late.

Response to comment 1.17: No changes were made in response to this comment for the reasons described in the Department's response to comment 1.22.1. The Department has not received credible evidence from any commenter that these regulations (as initially proposed or as revised) would result in IBA providers' inability to offer IBA products. These regulations do not prohibit IBA providers from continuing to offer their services and are not intended to limit consumer access to these services.

Comment letter 1.18 – Isaac Tysanner, Data Scientist, EarnIn (dated May 15, 2023)

Comment 1.18.1: Tysanner is a data scientist at EarnIn who strongly believes in EarnIn's mission and has no personal (financial) stake in the outcome. Although regulation is a net positive for society and ought to exist in the Earned Wage Access (EWA) space, the Department is shoving a square box onto a circle hole with this regulation. The proposed regulations do not make sense and are not in the best interest of the people who use EarnIn's app. EWA products do not operate in a way that resembles an installment loan. Not everyone who uses EarnIn does so on an ongoing basis as opposed to a periodic basis, and the amount of their paycheck that they need advanced to them varies over time. Requiring providers to advance paychecks in an installment loan format will result in some people actually paying significantly more than they are paying today. While some people would pay less, that is because they are voluntarily tipping, not because they are required to, as they would be under the proposed regulations.

Response to comment 1.18.1: The Department declined to consider the comments because they were not directed at a specific regulation. The Department disagrees that IBAs are not loans for

the reasons stated in the ISOR and as discussed in the Department's responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Comment 1.18.2: Tysanner questioned the validity of the Department's calculation method and analysis that suggests that the APRs of EarnIn's advances are too high. This is a valid opinion, but the Department's exact calculation method is highly questionable. When evaluating APRs, the Department should be comparing the APR to the alternative costs consumers pay, such as overdraft fees and late payment penalties on bills that can easily range between $10 and $15, which are both more expensive than what the vast majority of EarnIn's customers pay. While EWA products are obviously vastly cheaper than overdraft fees, there exist no regulations to prevent exorbitant overdraft APRs. It is necessary to consider other alternatives to these options, including not being able to buy gas to go to work and getting written up or pay docked as a result, which are by far worse options compared to the cost EarnIn's customers pay for an advance. The Department should consider a different approach to regulating the industry because the proposed regulations will do far more harm than good for consumers. The Department should also consider that regular EarnIn users generally do not have a reliable network from which they can borrow at no cost, including those who are estranged from family or are destitute.

Response to comment 1.18.2: The Department declined to make the recommended change because it has regulatory authority to administer the CCFPL in a manner that is consistent with the statutory objective of the law. (Fin. Code, § 90006, subd. (a).) The CCFPL does not prescribe how the Department must regulate providers and leaves the manner of regulation to the Department's discretion. The Department notes that its data analysis (cited in the ISOR) reflected that income-based advances are on average as expensive on an annualized basis as payday loans offered by CDDTL-licensed payday lenders. Considering effective APR is appropriate when assessing income-based-advance products because: (1) the California Legislature has embraced APR disclosures for short-term financing products, (2) like payday loans, income-based advances involve receiving money now in exchange for repayment later, and (3) like payday loans, income-based advances often involve repeat borrowing. (See response to comment 1.4.2.) With respect to consumer harm, the Department notes that its regulations do not prohibit IBA providers from offering their services and are not intended to restrict consumer access to these services, and Tysanner did not provide evidence of harm from the regulations.

Comment letter 1.19 – Jackie Zupsic, Executive Vice President, Tusk Strategies LLC (dated May 15, 2023)

Comment 1.19: Zupsic is an AAPI business owner who operates Los Angeles-based Tusk Strategies. Zupsic stated that she is concerned about the impact that the proposed regulations would have on the business. The Department should reject the proposed EWA provisions because they will greatly harm AAPI businesses and the greater California AAPI community. AAPI business owners already face significant challenges as minority-owned businesses doing their best in the current climate. Finding, motivating, and keeping good workers is not easy, and this draft rule, if adopted, would only make it harder. Many AAPI-owned businesses like Tusk Strategies give wage advances informally, and EWA providers make this process much easier.

Regulating EWA as credit doesn't seem fair, given that EWA programs are entirely voluntary.

The proposed rulemaking would remove the employer's option to offer their employees EWA services because the services would be treated as a credit product. While the services are similar to a loan in the aspect of money advancement to consumers, the basis of that money is based on wages earned, not future income; there are also no finance charges, interest, or legal recourse—all key elements of credit products that work against the consumer. If regulated as credit, EWA providers would not be able to offer the same terms that benefit businesses. Employees would have to accept worse terms and may not be able to find replacement services.

Response to comment 1.19: See the Department's response to comments 1.10.3 and 1.22.1. In addition, Zupsic has not offered an argument for why imposition of CFL requirements on IBAs would result in IBA providers offering IBAs to consumers on less advantageous terms.

Comment letter 1.20 – Alice P. Jacobsohn, Director, Government Relations, PayrollOrg, (dated May 15, 2023)

Comment 1.20.1: PayrollOrg disagreed with the approach to sandwich earned-wage-access (EWA) services into the definition of credit products, advancements, or loans. EWA products are not credit because employees are receiving money they have earned and have a legal right to. EWA is merely a new administrative feature enabling employees to access part of their own earnings before the next scheduled payday.

Response to comment 1.20.1: The Department did not make any changes in response to this comment because it was an observation rather than a recommendation to change the regulation. The Department disagrees that IBAs are not loans for the reasons stated in the ISOR and as discussed in the Department's responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Comment 1.20.2: PayrollOrg stated that the Department should consider consumers' alternatives to EWA. EWA allows customers to avoid $35 bank returned-item fees by spending $1.99 and payday loans that could cost $40 to $60.

Response to comment 1.20.2: The Department did not make any changes in response to this comment. The comment is inaccurate with respect to California consumers in that it would be illegal to charge more than $45 for a payday loan. To the extent the comment argues that existing state and federal laws allow other forms of credit that cost more than IBAs and that IBAs should therefore be exempt from credit regulation, the Department notes that its data analysis (cited in the ISOR) reflected that IBAs are on average as expensive on an annualized basis as payday loans offered by CDDTL-licensed payday lenders. Even to the extent that IBAs are less expensive than some other credit alternatives, this argument alone does not support the conclusion that IBAs are not loans, as the CFL covers many low APR loans, including buy-now, pay-later loans that often have 0% APRs.

Comment 1.20.3: PayrollOrg observed that placing regulatory restrictions on employees' use of EWA does not protect them. The best way to prevent predatory practices is to require reporting and disclosures. PayrollOrg supports the reporting requirements to the extent that they protect

against predatory practices.

Response to comment 1.20.3: The Department appreciates the comment of support. To the extent the comment recommended that the Department adopt a reporting-based regime for IBAs without treating them as loans, the Department declines to do so for the reasons discussed in its response to comment 1.37.4. The reasons discussed there, which were made with respect to a recommendation to adopt a disclosure-based regime, also apply here.

Comment 1.20.4: PayrollOrg recommended that the Department not deem all forms of EWA to be lending. The Department should distinguish between employer-integrated and direct-to-consumer EWA models and clarify that employer-integrated offerings are not a form of lending.

Response to comment 1.20.4: The Department did not make any changes in response to this comment for the reasons described in the ISOR. In section 1461, the Department interprets Financial Code section 22335 (which deems to be a consumer loan any advance for a "sale or assignment of . . . wages, . . . whether earned or to be earned") as covering any advance to be repaid by the receipt of a consumer's wages. This interpretation is grounded in the CFL's legislative history, the Legislature's mandate to liberally construe the CFL to further its purposes, courts' interpretation of analogous laws, and the presence of certain indicia of lending such as low risk of capital loss. As explained in the ISOR, this interpretation applies to both employer-integrated ("making direct arrangements with employers to collect a consumer's wages") and direct-to-consumer EWA models ("timing debits from a consumer's bank account to coincide with when a consumer's wages are deposited into their account"). For these reasons, the Department declined to make any distinction in section 1461 between various forms of EWA or other IBA products. See also the Department's responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Comment letter 1.21 – Kevin Lefton, Head of Legal & Regulatory, Wagestream, Inc. (dated May 15, 2023)

Comment 1.21.1: Wagestream is a global provider of employer-integrated earned wage access services. It is critical that the Department take into consideration and understand that within the EWA industry there are different models of EWA. The most common models are the direct-to-consumer model and the employer-integrated model. It is not appropriate, or in the best interest of California consumers, to regulate these models in the same manner because they have different features, functionality, pricing, and risk to consumers. The Department should adopt separate registration requirements for direct-to-consumer models and employer-integrated models, which do not resemble credit.

Response to comment 1.21.1: See the Department's response to comment 1.10.1.

Comment 1.21.2: Wagestream is a member of the Innovative Payments Association (IPA) and fully supported and agreed with IPA's comments to the proposed rulemaking.

Response to comment 1.21.2: The Department notes Wagestream's support of IPA's comments (see comment letter 1.10) and provides responses to those comments in this FSOR.

Comment letter 1.22 – Jay King, President and Chief Executive Officer, California Black Chamber of Commerce (dated May 16, 2023)

Comment 1.22.1: The California Black Chamber of Commerce (CBCC) is the largest African American non-profit business organization representing hundreds of small and emerging businesses, affiliates, and chambers of commerce throughout the state. CBCC expressed considerable concern about the proposed regulations, which would categorize earned wage access as a loan and regulate this important service as such. The Department should rescind these regulations and open a true stakeholder dialogue aimed at nurturing opportunities and choices for our Black communities. CBCC objected on three grounds. The proposed rule is unnecessary because EWA is a widely used service chosen by many employees with a short-term financial need, and employees and employers, like many of our members, appreciate and prefer the service.

Response to comment 1.22.1: For the reasons stated in the ISOR, the Department did not make any changes in response to this comment, which was construed as a recommendation to withdraw the IBA-related regulations proposed under the CFL. Additionally, the Department incorporates by reference its responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Furthermore, with respect to CBCC's first argument, the Department rejects the premise that consumer use of a product, particularly a consumer credit product that does not comply with CFL's regulatory requirements, justifies extending a regulatory exemption to IBAs. In adopting the CFL, the Legislature created a regulatory regime that necessarily limits consumers' ability to contract for lending products that exceed certain rate limits or violate the CFL's other disclosure and consumer protection requirements. As noted in the Department's response to comment 2.22.4, giving undue weight to consumer use of IBA products would encourage lenders to ignore regulation to gain market share, further undermining the CFL's credit cost protections.

Comment 1.22.2: Characterizing an EWA advance as a loan is incorrect and unwise. EWA providers do not run credit reports and their services aren't conditioned or priced based on an employee's credit rating. They do not charge interest to the employee or employer. Many employers appreciate the streamlined compliance offered by EWA providers versus an otherwise cumbersome request for a paycheck advance from an often stressed or embarrassed employee.

Response to comment 1.22.2: For the reasons stated in the ISOR, the Department did not make any changes in response to this comment, which was construed as a recommendation to withdraw all IBA-related regulations proposed under both the CCFPL and CFL. Additionally, the Department incorporates by reference its responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

The Department supports employer efforts to offer early payment of wages but notes that by mandating through Labor Code section 212 that "payment of wages due" shall be made "without discount," California appears to have embraced a policy wherein wage earners should not be required to pay fees for wage payments made by employers. While the Department recognizes that IBA providers do not run credit reports, do not price advances based upon an employee's

credit ratings, and do not charge periodic interest, CBCC has offered no legal argument for why these facts preclude the Department's finding that IBAs are loans. It would be odd for the Department to conclude that these factors suggest that a product is not a loan when the Department regulates payday lenders offering loans with all of these characteristics.

Comment 1.22.3: The Department should consider the timing of its action and the potential impact on hard-working Californians, particularly disadvantaged communities. Consumers and businesses alike are facing inflationary costs not seen in a generation, and everything from food to rent to gas is subject to wide and unpredictable price swings. Short-term cash-flow disruptions are the norm for too many today. Without EWA, employees are left with debt as their only option. Nearly a third of Black households are late on their debt payments. 42% of Black families are using credit cards for basic living expenses, and half use high-interest credit cards to send their kids to college. Further debt is not an answer to our Black families and the next generation of Black business owners. An ill-timed regulation even with the best of intentions, which removes options from Black employees and employers during these tough times, is a disaster to creating opportunities for our communities.

Response to comment 1.22.3: See the Department's response to comment 1.22.1. Credit laws like the CFL necessarily limit consumers' ability to contract for credit products. That said, the Department believes this comment is rendered moot by changes to the final regulation that do not require IBA providers to comply with CFL rate caps.

For the reasons stated in the ISOR, the Department did not make any changes in response to this comment, which was construed as a recommendation to withdraw the IBA-related regulations proposed under the CFL. Additionally, the Department incorporates by reference its responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10. The Department also incorporates by reference its responses to other comments that argued that these regulations would reduce the availability of IBAs, including but not limited to comment 2.22.4.

Comment letter 1.23 – Matthew A. Tompkins, Future Majority (received May 16, 2023)

Comment 1.23: Future Majority recommended reconsidering the regulations and protecting earned wage access. The proposed regulations would make it harder for Californians to get by. Earned wage access is a worker's right and workers deserve to access wages they've rightfully earned without the burden of mandatory fees. Workers have surrendered too many freedoms already, and enforcing these mandatory fees will do more harm than good. According to Future Majority's public opinion research, wide majorities of voters feel like they are falling behind the cost of living and support innovative solutions. California should make it easier for workers to access what they have earned and give them freedom to build a better financial future for themselves and their families. California wants to be a national leader in protecting freedom and should do so in its efforts to protect and expand economic freedom, as it is working to do for personal freedom.

Response to comment 1.23: For the reasons stated in the ISOR, the Department did not make any changes in response to this comment, which was construed as a recommendation to withdraw the IBA-related regulations proposed under the CFL. Additionally, the Department

incorporates by reference its responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10. To the extent that the comment recommended not imposing mandatory fees on IBAs, nothing in these final regulations (or in the previously proposed regulations) requires IBA providers to impose mandatory fees. See also the Department's response to comment 1.10.3.

Comment letter 1.24 – Nestor Valencia (dated May 16, 2023)

Comment 1.24: Valencia recommended that the Department reconsider regulating earned wage access (EWA) as a loan. Many Californians rely on EWA, and EWA is not a loan, doesn't create further debt, and enables saving more effectively. Regulating EWA providers as lenders will mean that they will no longer be able to offer the same consumer-first terms. Consumers will lose flexibility and freedom to "choose your price" and will face more debt, stress, and anxiety.

Response to comment 1.24: For the reasons stated in the ISOR, the Department did not make any changes in response to this comment, which was construed as a recommendation to withdraw the IBA-related regulations proposed under the CFL. Additionally, the Department incorporates by reference its responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Comment letter 1.25 – David E. Durant, General Counsel, Activehours, Inc., doing business as EarnIn (dated May 17, 2023)

Comment 1.25.1: EarnIn described the benefits of its direct-to-consumer income-based-advance (IBA) product, Cash Out, including no mandatory fees, interest, or late fees and no impact on credit score. Since launching its app in 2014, EarnIn has provided 276,000 California consumers (including 122,000 in the last year alone) with access to $1.67 billion in earned wages and saved them an estimated $117 million in potential overdraft fees in the last year. Nationwide, 1.3 million consumers have used Cash Out to access $5 billion in earned wages in 2022. Because consumers have found immense value in EarnIn's service, EarnIn sought a rule that set appropriate limitations and did not unduly inhibit the provision of its service.

Response to comment 1.25.1: The Department did not make any changes in response to this comment because it was an observation rather than a recommendation to change the regulation.

Comment 1.25.2: EarnIn stated that the proposed regulations threaten the IBA industry's ability to offer IBAs to California residents on consumer-friendly terms. The proposed regulations would force providers to eliminate no-fee, nonrecourse offerings or stop offering IBAs altogether, leaving consumers with only high-cost, predatory alternatives. Forcing IBAs into the CFL licensure regime "incentivizes IBA providers to operate like traditional lenders in an antiquated system, a system based on 'creditworthiness' checks, punitive fees and actions, and restricting access to liquidity based on a consumer's credit history." Forcing IBAs into a CFL framework "limits consumer choice and access."

For these reasons, EarnIn recommended revising the proposal "to create reasonable regulations and guidance in the context of CCFPL registration."

Response to comment 1.25.2: The Department construed this comment as a recommendation that IBA providers be subject only to registration requirements under the CCFPL and not also to licensure and other substantive requirements under the CFL. The Department disagreed with EarnIn's reasoning, but the comment was nonetheless resolved because the Department removed the requirement that IBA providers comply with the CFL's rate caps to be exempt from licensure and provided that when the CCFPL registration requirements expire, IBA providers will continue to be exempt from licensure. The Department also deleted sections 1463 (guidance regarding prohibition on requiring the first payment in less than 15 days for single-payment loans) and 1464 (guidance regarding "charges" for subscription-fee-based IBA models. These changes were made not because the Department agreed with EarnIn's reasoning but to address arguments made by other commenters.

Comment 1.25.3: The CFL's product and pricing limitations (e.g., rate caps, 5% cap on voluntary payments and non-interest charges, prohibition on requiring first payment in less than 15 days) were not a "natural fit with innovative, short-term, non-interest-bearing, nonrecourse IBA products that offer consumers the choice of whether or not to pay for the service." EarnIn recommended regulating IBA providers under the CCFPL without invoking the CFL, rather than changing the CFL to accommodate IBAs.

Response to comment 1.25.3: The Department incorporates by reference its response to comment 1.25.2.

Comment 1.25.4: EarnIn stated that imposing CFL rate and fee caps on IBAs conflicts with legislative efforts to expand access to "responsible short-term liquidity," such as CFL-exempt zero-interest, 7%-fee loans from nonprofits (Fin. Code, § 22066) and the Pilot Program for Increased Access to Responsible Small Dollar Loans (§ 22365 et seq.). The Department "offers no justification for the discrepancy between the treatment of state-proffered alternatives and the caps on for-profit alternatives in the current proposal."

Response to comment 1.25.4: The Department construed this comment as a recommendation that IBA providers be subject only to registration requirements under the CCFPL and not also to licensure and other substantive requirements under the CFL, in particular its rate and fee caps. The Department incorporates by reference its response to comment 1.25.2. Additionally, the Department notes that the CFL's product and price limitations are less onerous than those imposed on nonprofit loans and Pilot Program loans, which must have terms of at least 90 days and principal amounts of at least $250 and $300, respectively. (Fin. Code, §§ 22066, subd. (c)(6)(G), 22370, subd. (a)(5).)

Comment 1.25.5: EarnIn stated that this rulemaking "reflects an expansive and inappropriate exercise of authority" that "stretches into the legislative realm." The proposal also represents "a significant departure from how the Department previously thought about IBAs, with no justification for the departure." The Department has not explained why it now believes, contrary to initial proposals, that it has authority to regulate IBAs under the CFL.

The CCFPL does not contemplate application of the CFL to IBA providers because the CCFPL was designed to fill the oversight gaps left by outdated statutes that failed to cover new business models and practices. By declaring all IBA providers subject to the CFL unless registered under

the CCFPL, the Department has created a perpetual registration requirement that circumvents the CCFPL and will outlast the CCFPL's four-year registration period. The Department would, in effect, create a pilot program like the zero-interest or responsible small-dollar loan programs established by the Legislature but without explicit legislative authority or direction. For example, the proposed regulations would give "a unique permission for CCFPL registrants that is not available to other CFL licensees: the ability to charge a $12 subscription fee."

"Structuring the IBA registration regime as a carve-out from the CFL is highly unusual and unnecessary." When the registration regime expires, IBA providers would be required to obtain CFL licenses and become subject to requirements for which compliance is impossible. For example, CFL concepts like "maturity" and the "time" for which a loan is made are rendered "undefined" because IBAs are offered with no contractual or legal obligation to repay. The foregoing "reinforces the wisdom in DFPI's initial proposal to conduct an IBA rulemaking focused solely on requiring registration of IBA providers without invoking the CFL."

Response to comment 1.25.5: The Department construed this comment as a recommendation that IBA providers be subject only to registration requirements under the CCFPL and not also to licensure and other substantive requirements under the CFL. The Department incorporates by reference its response to comment 1.25.2. Additionally, as a preliminary matter, the Department has authority to regulate IBAs under the CFL under Financial Code section 22150, as described in the ISOR. EarnIn's assertion that this rulemaking is a "significant departure" from the Department's previous thinking is specious. The Department has never issued guidance indicating that the Department intended to take a different approach from the one proposed in this rulemaking. In addition, the Department disagrees that certain CFL requirements are impossible to comply with or otherwise incompatible with IBA business models. Finally, section 1464 did not represent "unique permission" to charge a certain fee but rather guidance that provided regulatory certainty to IBA providers and would have prevented evasions of the CFL's rate and fee caps.

Comment 1.25.6: EarnIn recommended establishing a comprehensive CCFPL registration requirement for IBA providers but without otherwise subjecting providers to CFL licensure.

Response to comment 1.25.6: The Department incorporates by reference its response to comment 1.25.2.

Comment 1.25.7: EarnIn recommended permitting IBA registrants to "receive an average of up to 7% of the 'principal' of all IBA transactions in a month." With their short time frames, IBA products are much more like the zero-interest, nonprofit loans under Financial Code section 22066 than the mostly-interest loan products permitted to be offered by CFL licensees. Accordingly, and especially given that California legislators have determined that 7% is "low-cost," IBA registrants should be allowed to collect charges that would not exceed the charges that would be permitted for a section 22066 loan. This structure more reasonably reflects the structure of IBAs and has the benefit of incentivizing IBA providers to offer IBAs as CCFPL registrants rather than as CFL licensees.

Response to comment 1.25.7: The Department did not make any changes in response to this comment. The nonprofit loans under Financial Code section 22066 are not a helpful analog to

for-profit IBAs. In section 22066, the Legislature considered a 7% fee to be low-cost for loans with terms of at least 90 days. The same 7% fee for a loan with a much shorter term—such as a 10-day IBA—would represent a much higher annualized cost. The Department also incorporates by reference its response to comment 1.25.2.

Comment 1.25.8: EarnIn recommended excluding from the definition of "charges" "bona fide tips," or voluntary payments that are reasonable and made after disclosures. Just as section 1464 excludes subscription fees from "charges" under Financial Code sections 22202, subdivision (f), and 22154, the proposed regulations should exclude bona fide tips. Section 22202, subdivision (f), excludes from the definition of "charges" payments for services where such amounts are paid pursuant to "a separately signed authorization" that acknowledges that such amounts are "optional," as long as the payments are authorized under section 22154. This provision recognizes the principle that "charges" do not properly include amounts that consumers understand are clearly optional and that are not paid as consideration for the loan.

This recommendation also aligns with the California common law doctrine known as the "interest contingency rule," which states that "a debtor by voluntary act cannot render an otherwise valid transaction usurious." (*Southwest Concrete Products v. Gosh Construction Corp.* (1990) 51 Cal.3d 701, 706 [holding that late payment fees were not usurious].) For an agreement to be usurious, it "must in its inception require a payment of usury" and "subsequent events do not render a legal contract usurious." (*WRI Opportunity Loans II, LLC v. Cooper* (2007) 154 Cal.App.4th 525, 533.) Interest will only be usurious "when it is 'absolutely repayable by the borrower.'" (*Id.* at p. 534.) Typically, this rule has come up in cases where either in addition to, or in lieu of, charging interest, a lender seeks a share of profits for a related transaction. (*Id.* at pp. 534-535.) Courts have generally rejected borrower attempts to characterize profits that banks generate on such transactions as usurious. (*Ibid.*; see *Adar Bays, LLC v. GeneSYS ID, Inc.* (S.D.N.Y. 2018) 341 F.Supp.3d 339, 354-56 [holding that discount on converted stock was too uncertain at time of contracting to be included as "interest" for determining whether a loan was usurious].)

In the same way that voluntary payments are not considered part of a usury calculation under California common law, properly disclosed voluntary payments should not be considered part of capped "charges" under the CFL. The Department should adopt this narrower definition of "charges" and exclude reasonable and disclosed voluntary payments.

Response to comment 1.25.8: The Department did not make any changes in response to this comment. Section 22154 concerns any "other business" engaged in by a CFL licensee. The section 22202, subdivision (f) exclusion applies only to payments for the sale of services considered to be a CFL licensee's "other business." Tips, gratuities, and other voluntary payments are not "other business" but rather part of the business of providing IBAs.

As for the interest contingency rule, EarnIn does not identify any case law discussing the rule's application to the CFL, and the Department stands by its interpretation of the CFL's plain-language definition of "charge," which permits treating voluntary payments such as gratuities as charges because they are payments "received by" the financer. (Fin. Code § 22200.)

In any event, not all voluntary or contingent payments to a lender support application of the rule. A court will not apply the interest contingency rule unless the contingent nature of the payment puts the lender's profit at risk and there is no intent to evade the usury law. (*WRI Opportunity Loans II, LLC v. Cooper* (2007) 154 Cal.App.4th 525, 534.) To determine whether the lender's profits are exposed to the requisite risk, courts look to the substance rather than the form of transactions. (*Id.* at p. 535.) If the lender's risk is not great enough, or if its profit is guaranteed, the rule will not apply and the payments in question will be included in the usury calculation. (*Ibid.*) As discussed in the ISOR, the voluntary nature of tips, gratuities, and expedited-funds fees has not been found to jeopardize IBA providers' profits.

Southwest Concrete Products v. Gosh Construction Corp. (1990) 51 Cal.3d 701 is of questionable value. There, the transaction at issue was a bona fide credit sale of a commercial good, a sewer pipe, not a loan or forbearance of money. (*Id.* at p. 708.) Thus, the late charge resulting from the buyer's failure to pay for the sewer pipe did not constitute payment for the loan or forbearance of any money within the meaning of the usury law. (*Id.* at p. 709.) Additionally, the principle that a debtor's voluntary act cannot render an otherwise valid contract usurious appears to be a distinct rule separate from the interest contingency rule. (*Id.* at pp. 713-716 & fns. 4-5 (conc. opn. of Mosk, J.) [referring to principle as "debtor's act rule" and noting no need to invoke it].)

Adar Bays, LLC v. GeneSYS ID, Inc. (S.D.N.Y. 2018) 341 F.Supp.3d 339 was not a California case and has no authoritative value because it was vacated by the Second Circuit Court of Appeals. (*Adar Bays, LLC v. GeneSYS ID, Inc.* (2d Cir. 2022) 28 F.4th 379, 382.) The federal district court's interpretation of New York law, on which EarnIn relies, was directly contradicted by the New York Court of Appeals in its answer to the question certified to it by the Second Circuit. (*Id.* at p. 381.) Interpreting New York's criminal usury law, the state high court held that the contingent payment at issue should be included in interest in determining whether the loan was usurious. (*Id.* at pp. 381-382; *Adar Bays, LLC v. GeneSYS ID, Inc.* (2021) 37 N.Y.3d 320, 334.)

Comment 1.25.9: EarnIn recommended that the proposed regulations' vetting of indirect owners align with the CFL's, which excludes indirect owners with only economic interests or who do not manage lending activities.

Response to comment 1.25.9: The Department did not make any changes to this comment, which was construed as a recommendation to modify section 1021, subdivision (a)(13), which requires registration applicants to disclose their direct and indirect officers and owners. The proposed regulations already provided what EarnIn sought: The term "control" in section 1021, subdivision (a)(13), is defined in section 1000, subdivision (e), and has the effect of excluding indirect owners with only economic interests or who do not have the power to manage the applicant's offering or provision of subject products.

Comment 1.25.10: EarnIn recommended clarifying that debits to deposit accounts into which consumers receive wages or other income do not constitute wage assignment. EarnIn acknowledged that the Department does not enforce California labor law and that Financial Code section 22335 provides that the CFL's treatment of wage assignments does not affect their

treatment under other statutes.

Response to comment 1.25.10: The Department disagrees that debits to deposit accounts into which consumers receive wages or other earned income do not constitute wage assignments under section 1461 and Financial Code section 22335, for the reasons stated in the ISOR. However, to accommodate EarnIn's observation about the Labor Code, the Department added subdivision (d) to section 1461, which provides that section 1461 shall not be read to interpret what is considered a wage assignment under the Labor Code, consumer credit or debt under federal law, including the Truth in Lending Act, or a loan or forbearance of money under article XV of the California Constitution.

Comment 1.25.11: EarnIn recommended incorporating a reasonableness standard in the definition of "income-based advance" in section 1004, subdivision (g)—for example, "based on income reasonably determined to have accrued to the benefit of the consumer." Without reasonableness, the definition could be read to exclude direct-to-consumer IBA providers, by requiring absolute certainty that income has actually accrued to a consumer's benefit.

Response to comment 1.25.11: To accommodate this recommendation, the Department amended section 1004, subdivision (g)(1), by changing "based on income that has accrued to the benefit of the consumer" to "based on income the provider has reasonably determined to have accrued to the benefit of the consumer."

Comment letter 1.26 – Ann Christenson, Chief Human Resources Officer; Conrad Riddle, Vice President, HR Shared Services, Aimbridge Hospitality, LLC (dated May 17, 2023)

Comment 1.26.1: Aimbridge stated that over 500,000 Californians have used an EWA product, and hundreds of employers like Aimbridge offer EWA to their employees. Without this critical service, Aimbridge's employees would have to turn to traditional, high-cost products, such as payday loans, credit cards, and bank-account overdrafts, to pay unexpected bills between paychecks, potentially trapping them in cycles of debt.

Employer-integrated EWA models have several meaningful consumer protections. EWA providers verify wages by integrating into Aimbridge's time-and-attendance payroll system and recommend capping the accessible amount of wages at a percentage of net income. There are multiple free options and no credit check or risk of overdraft or use of tipping in this model.

Response to comment 1.26.1: The Department did not make any changes in response to this comment because it was an observation rather than a recommendation to change the regulation.

Comment 1.26.2: Aimbridge recommended issuing a revised proposal "that adequately considers the needs of consumers and California employers" because regulating EWA as a loan would have several negative consequences: (1) Providers would switch to complicated fee structures, increase fees, and likely eliminate free EWA options; (2) the nonrecourse aspects of EWA would become obsolete; (3) Aimbridge's employees would be forced into predatory lending products, cycles of debt, and decreased wealth; and (4) withdrawing EWA as an

employee benefit would significantly harm Aimbridge's ability to recruit and retain employees.

Response to comment 1.26.2: The Department incorporates by reference its response to comment 1.25.2. The Department disagrees that IBAs are not loans for the reasons stated in the ISOR and as discussed in the Department's responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Comment letter 1.27 – American Fintech Council (AFC) (dated May 17, 2023)

Comment 1.27.1: AFC requested clarity on the credit-license exemption because EWA is a "non-credit product."

Response to comment 1.27.1: The Department did not make any changes in response to this comment because AFC presented no argument for why what it calls "earned wage access" is not a credit product and it did not describe any recommended changes with sufficient specificity.

Comment 1.27.2: AFC observed that "responsible earned wage access companies and products meet the 3 As": Availability (of financial products and services), accessibility (for a diversity of consumers), and affordability.

Response to comment 1.27.2: The Department did not make any changes in response to this comment because it was an observation rather than a recommendation to change the regulation.

Comment 1.27.3: AFC recommended that the proposed regulations clarify that EWA is not a loan or credit product. Unlike a loan or credit product, EWA requires no credit checks, does not incur late fees or penalties, is nonrecourse, and does not impact a user's credit score. Regulations clarifying that EWA is not a loan would ensure that these protections continue and the product is as affordable as possible.

Response to comment 1.27.3: For the reasons stated in the ISOR, the Department did not make any changes in response to this comment, which was construed as a recommendation to withdraw the IBA-related regulations proposed under the CFL. Additionally, the Department incorporates by reference its responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10. Regulating IBAs under the CFL does not necessarily prohibit the "protections" described in this comment.

Comment 1.27.4: AFC observed that "smart regulation should be data-driven and based on comprehensive, transparent data analysis." Annual percentages rates (APR) do not accurately represent the actual cost and potential savings of EWA compared to other, more costly products. Any data analysis should consider savings from using EWA compared to payday loan fees, late fees, and bank overdraft fees.

Response to comment 1.27.4: The Department did not make any changes in response to this comment because it was an observation rather than a recommendation to change the regulation. With respect to the ISOR's consideration of IBA products' high, payday-loan-like APRs, the Department incorporates by reference its responses to comments 1.4.2 and 1.42.

Comment 1.27.5: AFC thanked the Department for its "hard work on behalf of California consumers" and is "grateful for the time and effort . . . [the] thoughtfully revised proposed regulations required."

Response to comment 1.27.5: The Department appreciates the comment of support. No change was made in response to this comment because it was an observation rather than a recommendation and it concurred with the proposed regulations.

Comment letter 1.28 – Better Future Forward, Inc.; Jobs for the Future; Stride Funding Inc.; and Social Finance, Inc. (collectively, Better Future Forward) (dated May 17, 2023)

Comment 1.28.1: Better Future Forward commented that income-contingent, income-indexed tools such as income share agreements (ISA) are critical tools for expanding students' access to postsecondary education in a way that is affordable and designed around students' outcome and while these tools can have these important benefits, they can be used in beneficial or problematic ways. Because of how these tools differ from conventional loans, it is critical to craft regulations that address their unique features. The definition of "income-based repayment" under section 1003, subdivision (d), is over-inclusive and inadvertently risks including loans that offer deferral or forbearance provisions but that do not offer all the elements necessary to fully protect students in an income-based repayment structure. Better Future Forward recommended amending the definition so that "income-based repayment" is "any arrangement, inclusive of Income Share Agreements, in which the consumer's primary education financing payment obligation (excluding deferral and forbearance payment opportunities) is based upon the consumer's income or employment status. For the avoidance of doubt, no Income-Based Repayment arrangement will be considered an 'Income-Based Advance' under this subdivision unless such arrangement specifically meets the definition of 'Income-Based Advance' as defined herein."

Response to comment 1.28.1: The Department accommodated the comment by clarifying that "income-driven repayment" in section 1003, subdivision (d) does not include certain loan deferral arrangements when the consumer is unemployed or pursuing education unless it is provided for in the agreement. The Department also changed the term "income-based repayment" to "income-driven repayment" as discussed in response to comment 1.28.3 below.

Comment 1.28.2: Better Future Forward recommended defining "Income Share Agreement" to incorporate both contingent payments and a maximum duration, as follows: "any arrangement in which the consumer's education financing payment obligation is (1) calculated, based upon, or determined by the consumer's income, (2) the consumer only incurs an obligation in each payment period if the individual's income in that period is above an income threshold specified in the agreement, (3) there is a contract duration after which the obligation is complete regardless of how much has been paid, as long as the consumer has paid any prior amounts due, and (4) each of these elements is available at the time of contracting."

Response to comment 1.28.2: The Department did not make any changes in response to this comment because it may reduce consumer protection and frustrate the intent of the CCFPL by limiting the types of arrangements that would be subject to registration. For example, if the Department based its registration requirements upon the definition above, then a provider could avoid oversight simply by removing from their contract one of the four elements listed above.

Comment 1.28.3: Better Future Forward recommended clarifying the distinction between "income-based advance" and "income-based repayment" by adding the following to the definition of "income-based repayment": "For the avoidance of doubt, no Income-Based Repayment arrangement will be considered an 'Income-Based Advance' under this subdivision unless such arrangement specifically meets the definition of 'Income-Based Advance' as defined herein." The similar phrasing may lead to consumer and market confusion. Specifying that the two are separate and distinct would improve clarity.

Response to comment 1.28.3: The Department accommodated the comment by changing the term "income-based repayment" to "income-driven repayment" in section 1003, subdivision (d), to avoid confusion regarding the different products.

Comment 1.28.4: Better Future Forward commented that ISAs fall outside the definition of an advance in section 1461 because the definition requires that, amongst other requirements, such an advance be "based on income that has accrued to the benefit of the consumer but has not, at the time of the advance, been paid to the consumer" and "collection in a single payment on a date within thirty-one (31) days," neither of which at all describe an ISA or income-based repayment arrangement. Any interpretation of a 1461 advance that included ISAs within that definition would simultaneously capture traditional private installment student loans under Regulation Z in such a definition, which Better Future Forward believes is outside of the Department's intent.

Response to comment 1.28.4: The Department did not make any changes in response to this comment, which was construed as a recommendation to withdraw the provisions that treat education financing (including ISAs) as loans under the CFL. In arguing that ISAs fall outside the definition of an advance in section 1461, subdivision (a), Better Future Forward quotes language from the definition of "income-based advance" in section 1004, subdivision (g). As stated in the ISOR, when a consumer engages in transactions that resemble factoring with respect to their wages, those transactions fall within the scope of the CFL. Section 1461, subdivision (a), reflects that courts liberally interpret statutory consumer protections related to the sale or assignment of wages.

In response to other comments, the Department amended section 1461, subdivision (d), to clarify that section 1461 does not interpret what is considered consumer credit or debt under federal law, including the Truth in Lending Act, which had the effect of addressing a secondary concern in this comment. The Department agrees that section 1461 also captures traditional private installment student loans, but Better Future Forward has not explained why this is a problem.

Comment 1.28.5: Better Future Forward recommended removing language from the regulations and ISOR stating that ISAs are inherently an "assignment of wages." Asserting that ISAs are assignments of wages conflates two distinct types of contractual arrangements, is at odds with the plain text of existing statutes and regulations, and would potentially be harmful to consumers. "Assignment of wages" is terminology that has specific legal meaning and generally refers to borrowers assigning and creditors legally obtaining the right to garnish or seek wages directly from an individual's employer as a means of preempting payment of wages to the individual from their employer. This is not inherent to or a common feature of an ISA and, to Better Future Forward's knowledge, no ISA provider in the United States includes such language in their

borrower agreements. With an ISA, in contrast, a borrower's monthly payment amounts are indexed to, or calculated as a function of, the borrower's current income level at the time a given payment becomes due and nothing about the process of indexing payments to income requires that a borrower assign their wages.

Response to comment 1.28.5: The Department disagrees with this comment. See response to comment 1.28.4 above.

Comment 1.28.6: Better Future Forward recommended revising section 1466, subdivision (a), to clarify whether the existing option to make substantially equal periodic payments is a one-time or perpetual choice: "An Income-Based Repayment loan contract 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 payments,' if, as of the effective date of each contract, 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 calculation of each payment. For a contract described in this subdivision, a payment based upon an Income-Based Repayment loan contract shall not be considered a balloon payment under Section 1453 of these rules." The suggested language would give consumers the predictability of substantially equal periodic payments with clearer implementation.

Response to comment 1.28.6: The Department accommodated the comment by clarifying "substantially equal periodic installments" for education financing loan contracts in section 1466, subdivision (a).

Comment 1.28.7: Better Future Forward recommended revising section 1466, subdivision (b), as follows: "A loan contract that does not require a borrower to make payments while the borrower is obtaining a postsecondary education or for a predefined fixed grace period after completion or termination of a postsecondary education, as that term is defined in subdivision (f) of Section 1003 of subchapter 4 of these rules, complies with the requirement in Financial Code section 22307, subdivision (b), that the first payment be made not 'more than one month and 15 days from the date the loan is made,' if the loan contract is an Income-Based Repayment education loan."

Many programs fund programs that are six months or less, and mandating six-month grace periods for programs that are shorter than six months is antithetical to the consumer purpose behind such programs and will likely increase borrowing costs. The change in the final clause is recommended because of gaps in the defined terminology used by federal regulators and the Department. Financial Code section 22307, subdivision (b), already excludes "student loan[s] made by an eligible lender under the Higher Education Act of 1965." While Better Future Forward believes that the CFPB and U.S. Department of Education have clearly defined ISAs as a type of "private education loan" under the Higher Education Act of 1965, there are still questions as to the breadth of applicability of such non-rulemaking actions. This could result in that exclusion not being also equally and appropriately applied to income-based repayment arrangements under these new regulations.

Alternatively, if the Department opts to use the language as currently drafted, Better Future Forward recommended clarifying the definition of "accruing charges." For example, ISAs generally do not accrue an obligation until the individual earns above the income threshold in a given payment period and only in such payment periods.

Response to comment 1.28.7: The Department accommodated the comment by making changes to section 1466, subdivision (b).

Comment letter 1.29 – Hamel Kothari, Chief Technology Officer, Bridge IT, Inc. (Brigit) (dated May 17, 2023)

Comment 1.29.1: Brigit is part of a new industry of financial technology companies dedicated to providing consumers with additional ways to improve their financial health and provides its suite of services to millions of members across the US, with hundreds of thousands of members in California. The regulations would directly and adversely affect Brigit's ability to operate under its subscription-based business model because the Department'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. Heavy-handed constraints placed on subscription fees only encourage more IBA providers to adopt needlessly complicated fee structures and encourage CCFPL registrants to charge administrative fees and interest on top of the subscription fee, which will make the cost of an IBA harder for consumers to assess. Brigit recommended revising the proposal to clarify that subscription fees need not be credited against charges, which will allow the Department to limit subscription fees that can be charged by CCFPL registrants without a complex crediting operation.

Response to comment 1.29.1: Without accepting the merits of Brigit's above arguments, the Department notes that this comment was rendered moot by changes to the regulations that eliminated the requirement that IBA providers comply with CFL rate caps. In connection with that change, section 1464 was removed because section 1464 was drafted to provide clarity when the regulations applied CFL rate caps to subscription-based IBAs.

Comment 1.29.2: Brigit recommended that the Department explicitly clarify that the rule in no way limits subscription fees that may be charged for a bundle of services that do 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 and by allowing providers to separate IBA products from other subscriptions, the Department 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.

Response to comment 1.29.2: See response to comment 1.29.1.

Comment 1.29.3: Brigit recommended that the Department clarify certain inconsistencies in the proposed rule because the definition of "subscription fee" appears to conflict with the substantive regulation on subscription fees, and the Department 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, but the proposed regulation indicates that "subscription fees" would be paid for something other than the right to receive an income-based advance. 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.

Response to comment 1.29.3: See response to comment 1.29.1.

Comment 1.29.4: Brigit recommended that the definition of subscription fee be modified to include any periodic fee, even if assessed on a basis other than monthly and does not believe there is a reason why monthly fees should be treated differently than, for example, quarterly or annual fees. 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.

Response to comment 1.29.4: See response to comment 1.29.1.

Comment 1.29.5: Brigit objected to the requirement in section 1012, subdivision (b), that required all CCFPL registrants to disclose their registration status in each and every advertisement and communication to Californians because it is burdensome, unnecessary, and should be modified to require a much simpler disclosure as there are far less burdensome alternatives that would enable distribution of a disclosure. Brigit strongly recommended that the Department adopt similar modification as it has under its other CCFPL rulemaking so that IBA providers only be required to disclose their registration status prior to the consummation of an IBA transaction, and, for IBA providers that offer access to IBAs as part of a subscription, at least once annually as well.

Response to comment 1.29.5: The Department accommodated the comment by amending section 1012, subdivision (b), to require disclosure of the registrant's registration information only on the registrant's website if the registrant operates a website that describes its subject products.

Comment 1.29.6: Brigit commented that the requirement in section 1045, subdivision (c)(4), to report the number of unsuccessful collection attempts from consumers' bank accounts is misguided and recommended that the Department either eliminate or clarify this reporting requirement as it is unlikely to be informative about the level of risk posed by an IBA provider to consumers and the account-holding banks are ultimately responsible for overdraft fees, not the merchants or IBA providers that initiate properly authorized debits. This approach is also inexplicably distinct from the Department's approach to CFL licensees or any other entities that it oversees that may also initiate debits to a consumer's account and no other entity in the consumer liquidity space is required to report this type of activity to the Department, yet each of these entities (e.g., CFL licensees, CDDTL licensees) present the same, if not greater, risk of overdrafts as IBA providers. The Department 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.

Response to comment 1.29.6: The Department disagrees with the comments. Collecting data on unsuccessful collection attempts is necessary to determine whether IBAs would help consumers avoid overdrafts fees and insufficient funds fees. This data will also help better assess whether IBA providers are properly underwriting their loans. The Department agrees that CFL licensees are not required to collect and report such data, but CFL licensees do not argue that they should be exempt from consumer lending regulations because they offer a lower-cost alternative to bank overdraft or insufficient fund fees.

Comment 1.29.7: Brigit commented that the requirement in section 1045, subdivision (b), to report the total dollar amount of subscription fees collected is based on the improper assumption that the subscription fee is entirely attributable to IBAs and that the value of their additional services is $0. Evidence that consumers did not receive an IBA is not evidence that consumers did not receive a benefit, and not only may consumers benefit from other services in the subscription bundle, but they may also benefit from access to IBAs.

Response to comment 1.29.7: The Department declined to make changes to section 1045, subdivision (b), because information on whether registrants are collecting fees without providing income-based advances to consumers is necessary to help the Department understand whether protections for consumers are needed in this area. Collecting this information does not preclude the Department from considering other services offered in connection with its subscription or prevent registrants from sharing information about such services with the Department.

Comment 1.29.8: Brigit recommended that the timeline for revoking a registration for a late annual reporting filing in section 1041, subdivision (c), be extended to 30 days or, alternatively, the deadline for reporting should be postponed from March 15 to March 31, 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 recognized that the Department applies this time frame to other licensees, but disagreed with the Department that making the report due date uniform is necessary to ensure reports cover the same reporting period across licensees and registrants. The reporting period should remain the prior calendar year regardless of the report due date.

Response to comment 1.29.8: The Department declined to make the requested change because it is unnecessary. The regulations do not provide for revoking a registration in 10 days. They provide that revocation is 10 days after the Commissioner provides notice to the registrant that the report is due and not filed, which will occur after the report's due date.

Comment letter 1.30 – California Low-Income Consumer Coalition (CLICC) (dated May 17, 2023)

Comment 1.30.1: CLICC is a statewide coalition of more than a dozen providers of free legal services and low-income consumer advocacy in Sacramento and welcomes the proposed regulations under the CCFPL to protect low-income and vulnerable students, employees, and consumers from predatory lending, debt settlement, and income-based advance practices. 3.3 million—or one in three—households in California struggle to meet their basic needs and while

income-based advances promise a lifeline, they pull struggling consumers further underwater. The CFL, CCFPL, and CDDTL were enacted to protect consumers from harmful financial products, and they should be used to their full effect to regulate the income-based advance industry. Income-based advances are loans in both form and function, i.e., deferring repayment so that the consumer receives the benefit of the transaction before the cost is due and while income-based advances generally do not charge "interest" as such, the charges, fees, and tips function the same way—compensating lenders for the time value of money—and can be just as harmful to consumers as a high-APR payday loan. CLICC supported the proposed regulations because they represent a step forward in protecting California's low-income consumers and puts California at the forefront of consumer protection efforts. CLICC suggested removing the nondisclosure policy because it limits consumers' ability to make informed decisions about income-based-advance products and limits advocates' ability to identify noncompliant practices and make the Department aware of these issues.

Response to comment 1.30.1: The Department appreciates the comment of support. The Department declined to make the recommended change to remove the provisions in sections 1030 and 1045 that treat applications and information in annual reports as confidential because nothing in the regulations precludes the Department from voluntarily sharing annual report data, or compilations of annual report data, to inform future policy. The recommended change is also unnecessary because the Department's experience has been that consumers do not request information on licensees under the other laws that the Department administers.

Comment 1.30.2: CLICC applauded the Department's clarity in stating that all income-based-advance products (whether employer-integrated or direct-to-consumer) are loans and are subject to rate caps under the CFL and welcomes this wide-angle approach, which (1) prevents providers from circumventing the rules with creative business models, (2) allows consumers to choose among different models knowing they will be afforded the same legal protections, and (3) fosters competition among providers—one of the stated purposes of the CFL—and thereby benefits low-income consumers. The Department correctly interpreted the definition of credit under the CFL to apply to income-based advances and that interpretation is legally sound and consistent with the language and purpose of the statute and understandings of the meaning of credit by California courts and that the state legislature itself has mandated that the Department and courts interpret the CFL "liberally" to protect borrowers. Historically, California courts have embraced consumer protections related to the sale or assignment of wages, and for example, interpreting the Labor Code in *Lande v. Jurisich*, the California Court of Appeal found that "the Legislature obviously sought to reach every form of instrument which would result in the impounding of a wage earner's wages before he received them." CLICC, however, recommended that obligor-funded advances should also be treated as loans under these regulations to the extent that an obligor-funded advance charges fees, interest, or "tips" in excess of the allowed administrative fee.

Response to comment 1.30.2: The Department did not make any changes in response to this comment. As stated in the ISOR, section 1461, subdivision (a), is not intended to imply that if an obligor makes advances to be repaid by receipt of a consumer's wages, all its business activities are categorically excluded from the CFL. In any event, if such employer-funded advances are wage payments and not loans, such advances would still be subject to the requirements of the Labor Code.

Comment 1.30.3: CLICC stated that the proposed regulations establish a well-designed data collection protocol for the income-based advance industry to determine (among other things) what frequency and amounts consumers borrow and the associated charges and will enable the Department to monitor compliance with the CFL rate caps and take enforcement action when needed to protect consumers.

Response to comment 1.30.3: The Department appreciates the comment of support.

Comment 1.30.4: CLICC recommended amending section 1012, subdivision (b), to require registrants to affirmatively state that registration is not an endorsement. Section 1012, subdivision (b), requires providers to "disclose in any advertisement or communication to a consumer that the registrant is registered with" the Department. Subdivision (a) of that section states that it is a deceptive practice "for a registrant to represent, directly or indirectly, that the registrant's acts, practices, or business have been approved" by the Department. A reasonable consumer may interpret the disclosure required by section 1012, subdivision (b), to imply that the business has been approved by the Department. To prevent such an interpretation, section 1012, subdivision (b), should be amended to include the following language: "[Registrant's] registration status does not constitute a determination that [Registrant]'s acts, practices, or business model complies with any law or regulation."

Response to comment 1.30.4: The Department declined to make the recommended change because it is unnecessary. Many of the Department's licensing laws require licensees to disclose their license number and licensing agency in advertisements but none require the additional suggested language and CLICC offered no basis for requiring a different standard for registrants.

Comment 1.30.5: CLICC recommended amending section 1026 to require registrants in an employer-integrated model to provide at the time of registration representative agreements between the provider and the obligor. This is consistent with the requirement for education financing registrants to provide the agreements between the loan servicer and the provider in section 1025 and is necessary to ensure that proper procedures are in place to ensure accuracy of collection from payroll and it may also shed light on how obligors are instructed to handle situations in which a provider seeks to collect from an account on which a garnishment has been served.

Response to comment 1.30.5: The Department declined to make the recommended change because the information is unnecessary at the application stage. The Department can obtain and review this information as needed during examinations of registrants.

Comment 1.30.6: CLICC recommended preventing overdraft fees by requiring income-based advance companies to report in their annual reports on whether their collection models are adjustable based on reported pay date and how frequently consumers are asked about their current pay date, in case of changes. CLICC also recommended imposing a limit on the number of collection attempts companies are allowed to make.

Response to comment 1.30.6: The Department declined to make the recommended change because it is unnecessary. The level of reporting for registrants required under these regulations is consistent with the reporting requirements for licensees under the Department's other laws and

the Department can review these issues during the examinations of registrants. While the Department may consider requiring additional information to be reported in the future, the Department will need to first assess the information already being reported for sufficiency before requiring registrants to report additional information.

Comment 1.30.7: CLICC noted a typographical error in section 1004, subdivision (c), which reads, "'charges' include amounts received by a person from a consumer for payment of optional or discretionary services elected by the consumer in connection with education financing." The provision should end, "in connection with income-based advances."

Response to comment 1.30.7: The Department has corrected the typographical error. See response to comment 1.10.5.

Comment letter 1.31 – California Low-Income Consumer Coalition (CLICC) and National Consumer Law Center (NCLC) (dated May 17, 2023)

Comment 1.31.1: CLICC and NCLC observed that debt-settlement providers' practices can lead to no actual results and leave consumers worse off than if they had filed bankruptcy. CLICC and NCLC supported the proposed regulations' inclusion of debt-settlement services and data-collection protocol for the debt-settlement industry.

Response to comment 1.31.1: The Department appreciates the comment of support. No change was made in response to this comment because it was an observation rather than a recommendation and it concurred with the proposed regulations.

Comment 1.31.2: CLICC and NCLC recommended modifying the definition of "charges" in section 1001, subdivision (a), to add "all" before "amounts contracted for or received by payment processors." The preceding clause, "amounts contracted for or received by a person in connection with . . . debt settlement services" has "all," so this change would make the two clauses consistent.

Response to comment 1.31.2: In response to other comments, the Department deleted the provision discussed in this comment, rendering its recommendation moot.

Comment 1.31.3: CLICC and NCLC recommended modifying the definition of "debt settlement services" in section 1001, subdivision (b)(1), to change "the primary purpose" to "a purpose." Providers who offer various consumer-debt services could argue that they are not subject to registration because the "primary purpose" of their services was for something other than debt settlement.

Response to comment 1.31.3: The Department did not make any changes in response to this comment. The recommended change would result in a definition that is less consistent with the already existing definition adopted by the Legislature in the Fair Debt Settlement Practices Act (Civ. Code, § 1788.301, subd. (b)), and CLICC and NCLC did not provide an example of a company that could use the "primary" language to evade oversight. If the Department learns of examples of providers who provide the services described for some other primary purpose in the

future, the Department may review whether the policy justifications for these proposed regulations would support further revision to the regulations.

Comment 1.31.4: CLICC and NCLC recommended modifying the definition of "payment processing services" in section 1001, subdivision (d), to add "including but not limited to providing loans to consumers." The definition should be expanded to capture interest paid by consumers to lenders who "facilitate" the use of funds by debt-settlement providers.

Response to comment 1.31.4: In response to other comments, the Department deleted the provision discussed in this comment, rendering its recommendation moot.

Comment 1.31.5: CLICC and NCLC recommended deleting section 1010, subdivision (c), which permits registration applicants to operate while their applications are pending. Alternatively, CLICC and NCLC recommended a maximum number of provisional periods during which an applicant may operate. The procedures provided in section 1021, subdivisions (c) to (f), could result in a lengthy application process of up to seven months. The recommended changes would help avoid long periods of activity without oversight.

Response to comment 1.31.5: The Department did not make any changes in response to this comment. As described in the ISOR, the proposed regulations balance the Department's interest in efficient administration of the CCFPL and the interest of both consumers and providers of subject products in the continued availability of products in the marketplace.

Comment 1.31.6: CLICC and NCLC supported the inclusion of section 1011, which clarifies the limits of registration, namely that registration does not preempt the applicability of, or determine compliance with, other laws or regulations.

Response to comment 1.31.6: The Department appreciated the comment of support. No change was made in response to this comment because it concurred with the proposed regulations.

Comment 1.31.7: CLICC and NCLC recommended modifying section 1012, subdivision (b), to require registrants to state that registration is not an endorsement.

Response to comment 1.31.7: The Department did not make any changes in response to this comment. The purpose of section 1012, subdivision (b), is to provide information to consumers about the regulatory agency responsible for overseeing a registrant. In subdivision (a), the Department chose to protect consumers from deceptive representations concerning registration status by prohibiting, rather than mandating, a certain disclosure.

Comment 1.31.8: CLICC and NCLC recommended requiring an additional category of information from registration applicants under section 1021, subdivision (a): "any entity with which it has a business, financial and/or referral relationship related to the subject product or its provision." Debt-settlement providers can have partnerships with nonaffiliates and nonsubsidiaries, such as lenders.

Response to comment 1.31.8: The Department did not make any changes in response to this comment. Information about relationships of ownership or control are required under section 1021, subdivision (a)(10) and (a)(11), and item numbers 12 and 13 of the Form MU1 uniform

application form used by the Nationwide Multistate Licensing System and Registry. Form MU1 does not require information about additional subject-product-related relationships as described in this comment. Such additional information, however, may help the Department monitor markets, foster fair competition, and enforce the CCFPL and could be sought during examinations.

Comment 1.31.9: CLICC and NCLC recommended expanding the scope of information required from registration applicants about their business activities under section 1021, subdivision (a)(15), by adding "all products or services promoted or recommended to California residents, related to subject products, whether or not offered by the registrant." This would help capture products offered by a registrant's partners that consumers feel obligated to engage with to receive services.

Response to comment 1.31.9: The Department did not make any changes in response to this comment. Such additional information, which may help the Department monitor markets, foster fair competition, and enforce the CCFPL, could be sought during examinations.

Comment 1.31.10: CLICC and NCLC recommended expanding the scope of supplemental information required from registration applicants about their business activities under section 1022, by adding: "Any materials used to process the standard enrollment or application for California residents over the phone, including but not limited to any phone scripts and internal procedures or processes documentation." This information is important because the consumers most likely to apply over the phone are also most likely to be especially vulnerable.

Response to comment 1.31.10: The Department amended section 1022 to accommodate this recommendation, by adding: "Any documentation of the standard enrollment or application process California residents use to request or receive the subject product from the applicant over the phone."

Comment 1.31.11: CLICC and NCLC recommended requiring debt-settlement providers to provide mailed periodic statements to consumers and modifying the supplemental information required in section 1023 to change "copies of sample periodic account or activity statements" to "copies of all regular communications sent to consumers, including but not limited to required sample periodic account or activity statements." The current language may incentivize companies to not use periodic statements at all to avoid the requirement to provide them to the Department.

Response to comment 1.31.11: The Department did not make any changes in response to this comment. Requiring mailed periodic statements without also prescribing the content of such periodic statements would likely not be helpful to consumers. And requiring copies of all regular communications sent to consumers as part of the registration application is not necessary as the Department can obtain this information during examinations.

Comment 1.31.12: CLICC and NCLC recommended modifying section 1030 so that instead of treating the entire application as not subject to disclosure under the California Public Records Act (CPRA), "only those sections of the applications containing confidential information" should

be treated as such.

Response to comment 1.31.12: The Department did not make any changes in response to this comment. Without further defining what constitutes "confidential information," the recommended language would elude consistent application.

Comment 1.31.13: CLICC and NCLC supported the inclusion of section 1034 because it provides a mechanism through which the Department can continue monitoring changing materials.

Response to comment 1.31.13: The Department appreciates the comment of support. No change was made in response to this comment because it concurred with the proposed regulations.

Comment 1.31.14: CLICC and NCLC recommended modifying section 1041 so that instead of treating the entire annual report as not subject to disclosure under the CPRA, "only those sections of the reports containing confidential information" should be treated as such.

Response to comment 1.31.14: The Department did not make any changes in response to this comment. Without further defining what constitutes "confidential information," the recommended language would elude consistent application.

Comment 1.31.15: CLICC and NCLC recommended modifying the annual-reporting requirement for debt-settlement providers in section 1042 to include the average total current dollar value of the unsettled enrolled debts still owed by a client as of the reporting date. The proposed regulations emphasize data on settled debts, which does not consider accretion from interest, charges, and fees. This data is inadequate to assess the most important question: whether debt-settlement services cause more harm than good.

Response to comment 1.31.15: The Department did not make any changes in response to this comment. As the comment acknowledges, some debt-settlement providers may not now collect such data on unsettled debts, and further consideration is required before the Department imposes additional requirements for providers to collect new data.

Comment 1.31.16: CLICC and NCLC recommended modifying section 1042, subdivision (a), to more clearly define the "number of California residents" who contracted with debt-settlement providers. CLICC and NCLC identifies several possible categories of debt-settlement customers differentiated by the year that their contracts started and ended and requested that the provision more clearly identify which customers need to be reported.

Response to comment 1.31.16: The Department amended section 1042, subdivision (a), to accommodate this recommendation, by changing "The number of California residents who had an existing contract for debt settlement services in effect or who contracted with the registrant for debt settlement services in the prior calendar year but whose contract is no longer in effect" to "The number of California residents who had an existing contract for debt settlement services in effect at any time during the prior calendar year."

Comment 1.31.17: CLICC and NCLC recommended modifying the opening clauses of section 1042, subdivisions (c) and (e), by adding "and the debts identified in subdivision (b)" after "For

the residents identified in subdivision (a).” The references to “debt” in subdivisions (c) and (e) are ambiguous. It is unclear whether such debts are the same as the debts identified in subdivision (b) (debts for which a resident contracted for debt-settlement services).

Response to comment 1.31.17: In response to other comments, the Department removed from section 1042, subdivisions (c) and (e), the requirement that registrants report the “average dollar amount” and “average number” of debts per resident. These changes had the effect of eliminating the ambiguity discussed in this comment. In any event, the Department amended subdivision (c) to reflect the recommended language.

Comment 1.31.18: CLICC and NCLC recommended modifying the annual-reporting requirement for debt-settlement providers in section 1042 to include the average number and average total amount of debts that were delinquent at the time of enrollment. This data would provide insight into consumers’ financial conditions.

Response to comment 1.31.18: The Department did not make any changes in response to this comment. Some debt-settlement providers may not now collect such data. Therefore, the Department will use at least part of the registration period to assess whether this data is needed and whether it can be collected practicably before further considering whether imposing this requirement is warranted.

Comment 1.31.19: CLICC and NCLC recommended that “complete,” anonymized account-level data from all debt-settlement registrants be made available to independent researchers. This includes the whole distribution of outstanding debt, settlement amounts, and customer characteristics.

Response to comment 1.31.19: The Department did not make any changes in response to this comment to the extent it recommends requiring additional data to be reported by debt-settlement providers because this would require registrants to report and disclose information that is more detailed than anything required of other entities the Department regulates. CLICC and NCLC did not explain what warrants such detailed reporting in this case. Nothing, however, precludes the Department from collecting this data through examinations or sharing data with researchers under information-sharing agreements.

Comment 1.31.20: CLICC and NCLC recommended defining debt-settlement providers’ omission of certain material information in representations to consumers to be an unlawful, unfair, deceptive, or abusive act or practice (UDAAP). Omission of material information by a debt-settlement provider is a false, deceptive, or misleading act or practice in violation of section 1788.302, subdivision (a)(3), of the Fair Debt Settlement Practices Act (FDSPA) (Civ. Code, § 1788.300 et seq.). CLICC and NCLC are concerned that this prohibition will be ignored unless the Department defines what information is material.

Response to comment 1.31.20: The Department did not make any changes in response to this comment. Although the proposed regulations define certain representations concerning registration status to be a deceptive practice (§ 1012, subd. (a)), defining UDAAPs not specifically related to registration is beyond the scope of this rulemaking. The FDSPA’s prohibition against omitting material information is not likely to be ignored, as CLICC and

NCLC asserts, given that the FDSPA defines a substantial number of disclosures of presumably material information that must be provided to consumers. (Civ. Code, § 1788.302, subd. (b).)

Comment 1.31.21: CLICC and NCLC recommended requiring that debt-settlement providers provide disclosures of their performance records with particular creditors and debt sizes.

Response to comment 1.31.21: The Department did not make any changes in response to this comment. Although the proposed regulations mandate certain disclosures concerning registration status (§ 1012, subd. (b)), mandating disclosures not specifically related to registration is beyond the scope of this rulemaking.

Comment 1.31.22: CLICC and NCLC recommended requiring a specific size and placement of the fee disclosure required by Civil Code section 1788.302, subdivision (b)(2)(D)—namely, fees should be disclosed in large font and contrasting type in a space adjacent to the consumer's signature or initials. CLICC members have seen the following from debt-settlement providers: A contract that does not explicitly state the fee at all, a 37-page contract in which the fees are disclosed in 10-point font on page 7, and a 43-page contract in which the fees are disclosed in 10-point font on page 23.

Response to comment 1.31.22: The Department did not make any changes in response to this comment. Although the proposed regulations mandate certain disclosures concerning registration status (§ 1012, subd. (b)), mandating disclosures not specifically related to registration is beyond the scope of this rulemaking.

Comment 1.31.23: CLICC and NCLC recommended prohibiting debt-settlement providers from terminating online access to account information until four years after the last transaction. CLICC members have met with many consumers whose account information was available only online and whose access was terminated after defaulting on the debt-settlement agreement.

Response to comment 1.31.23: The Department did not make any changes in response to this comment. Although the proposed regulations define certain conduct relating to representing registration status to be a UDAAP (§ 1012, subd. (a)), defining UDAAPs not specifically related to registration is beyond the scope of this rulemaking.

Comment letter 1.32 – Andrew Kushner, Policy Counsel, Center for Responsible Lending (CRL); Robert Herrell, Executive Director, Consumer Federation of California (CFC); and Lauren Saunders, Associate Director, National Consumer Law Center (NCLC) (collectively, CRL) (dated May 17, 2023)

Comment 1.32.1: CRL applauded the Department for its conclusion in section 1461, subdivisions (a) and (b), that advances repaid by wages or other compensation for services are loans subject to the California Financing Law (CFL). CRL strongly supported the proposal to require income-based-advance providers who register under the CCFPL to comply with the CFL's charge limitations during the four-year registration period.

The conclusion that income-based advances are loans is plainly correct under the text and purposes of the CFL and related statutes.

The CFL defines a "finance lender" as "any person who is engaged in the business of making consumer loans or making commercial loans." (Fin. Code, § 22009.) Although "loan" is not defined in the CFL, "loan of money" is defined in the Civil Code as "a contract by which one delivers a sum of money to another, and the latter agrees to return at a future time a sum equivalent to that which he borrowed." (Civ. Code, § 1912; see also *Milana v. Credit Discount Co.* (1945) 27 Cal.2d 335, 339 ["A loan . . . is the delivery of a sum of money to another under a contract to return at some future time an equivalent amount with or without an additional sum agreed upon for its use"].) With income-based advances, consumers receive money from an employer or third-party company and agree to return that money at a later date by authorizing a payroll deduction, bank-account debit, or some other mechanism.

The CFL also provides that "payment by any person in money, credit, goods, or things in action as consideration for any sale or assignment of, or order for, the payment of wages, salary, commissions, or other compensation for services, whether earned or to be earned, is, for the purposes of regulation under [the CFL], a loan secured by the assignment." (Fin. Code, § 22335.) Income-based-advance providers obtain an assignment of or order for the payment of wages or other compensation for services when they obtain authorization for a payroll deduction, bank-account debit tied to receipt of compensation, or another method to directly take part of a consumer's compensation on payday. Thus, according to the text of the CFL and related statutes, income-based advances are loans under California law.

The CFL's purposes also confirm that income-based advances are loans. The Legislature mandated that the CFL "be liberally construed and applied to promote its underlying purposes and policies," including to "protect borrowers against unfair practices by some lenders, having due regard for the interests of legitimate and scrupulous lenders." (Fin. Code, § 22001, subd. (a)(4).) If there were any doubt that income-based-advance providers fit the CFL's plain-language definition of "finance lender," this provision would erase that doubt by requiring that the CFL be applied to products that operate like loans in all relevant respects.

Finally, viewing income-based advances as loans is consistent with the longstanding principle that courts and regulators should focus on the substance of a transaction rather than its purported form to prevent evasions of usury and lending laws.

Response to comment 1.32.1: The Department appreciates the comment of support. The Department agrees with this comment but did not make any changes in response to it because it was an observation rather than a recommendation and it concurred with the proposed regulations.

Comment 1.32.2: CRL stated that the Department rightly rejects providers' argument that income-based advances are not loans because they are allegedly nonrecourse.

Financial Code section 22335 plainly says that a wage assignment is a loan, without stating any requirement that it be nonrecourse. California law has long recognized that a transaction wherein an entity obtains a security interest in property is still a loan even if the entity lacks the ability to hold the property owner personally liable. (See, e.g., *Aozora Bank, Ltd. v. 1333 North California Boulevard* (2004) 119 Cal.App.4th 1291, 1295 ["In a nonrecourse loan like the one here, the borrower has no personal liability and the lender's sole recourse is against the security for the obligation."].)

In any case, providers' assertions that their "earned-wage advances" are nonrecourse is "a fiction devised in the hope of avoiding regulation." Payactiv, for example, has the right to attempt two more payroll deductions against the consumer's future, unearned wages. (Payactiv, Compliance Assistance Sandbox Submission to CFPB from Payactiv, Inc. (hereafter Payactiv Sandbox Application) (Dec. 2020) appen. A at p. 3 (Program Terms and Conditions) (hereafter Payactiv Terms) <https://files.consumerfinance.gov/f/documents/cfpb_payactiv_approval-request_2020-12.PDF>.) That is a way of collecting on an obligation.

Payactiv also requires employees to make certain "representations and warranties" and "reserve[s] the right to pursue claims against individuals" who breach those representations and warranties. (Payactiv Sandbox Application at p. 9 & fn. 11; Payactiv Terms at p. 4.) The fine print of the Payactiv agreement states: "You represent and warrant that, to the best of your knowledge, you have earned the net accessible wages to which the FFRWP relates, that those wages are not subject to reduction in whole or in part by reason of a valid lien or garnishment, and that by requesting an FFRWP, you have a reasonable expectation of receiving those net wages in your next scheduled wage payment." (Payactiv Terms at p. 4.)

Thus, if a payroll deduction fails, in addition to the right to attempt twice more to collect the loan from future, unearned, wage payments, Payactiv also has the ability to assert a claim against the consumer for breaching this representation and warranty. Payactiv needs to insert this representation and warranty because it is not paying wages; it is making loans in advance of payday that it expects to be repaid on payday.

Similarly, the EarnIn agreement states: "When you request a Cash Out, Max Boost, or Balance Shield Cash Out, you represent and warrant that the earned wages being cashed out are just and due to you and that you have not received payment for such wages or any part of the wages from anyone else." (EarnIn, Cash Out User Agreement <www.earnin.com/privacyandterms/cash-out/terms-of-service>.)

Thus, nearly all income-based advances are in fact recouped, notwithstanding providers' "disingenuous claims" that the transactions are nonrecourse.

Response to comment 1.32.2: The Department agrees with this comment but did not make any changes in response to it because it was an observation rather than a recommendation and it concurred with the proposed regulations.

Comment 1.32.3: CRL recommended adding a provision parallel to section 1461, subdivision (a), to capture advances to be repaid from other, nonwage income, as follows: "A loan that is by contract to be repaid from an asset the payee owns or from income or a payment that the payee expects to receive is subject to the California Financing Law regardless of the means of collection, whether the provider has legal recourse if the provider is unable to collect the amount advanced, or whether the consumer has the right to cancel collection of the amount advanced."

Response to comment 1.32.3: The Department did not make any changes in response to this comment. Expanding section 1461 to cover advances to be repaid solely from income not earned through labor is beyond the scope of this rulemaking. The Department will continue to consider

whether these or any other consumer financial products or services are subject to the laws under its jurisdiction.

Comment 1.32.4: CRL stated that the Department rightly rejects providers' argument that nonrecourse advances are not loans because they do not carry mandatory finance charges. This argument ignores the techniques used by providers to encourage consumers to pay for the allegedly "free" product. The principal "non-mandatory" fees that income-based-advance providers charge are "expedite fees" for faster delivery of proceeds and "tips," neither of which are truly voluntary.

Although "tips" are purportedly voluntary, providers can use strategies to make it difficult not to tip or to pressure the consumer to tip, including, as the Department described in the ISOR, adding a default tip that must be removed each time, user interfaces that send psychological signals, disingenuous statements about how tips support a "community," and denial or reduction of service if the consumer does not tip enough.

Even absent any special techniques, consumers who are asked to "tip" before they have received an advance are likely to fear that not tipping with reduce their access. And of course, a "tip" committed before service has been rendered, with a binding authorization for the bank account debit, is hardly a tip for good service; it is a payment for that service.

Response to comment 1.32.4: The Department agrees with this comment but did not make any changes in response to it because it was an observation rather than a recommendation and it concurred with the proposed regulations.

Comment 1.32.5: CRL applauded the Department for recognizing the similarities between these new fintech products and traditional payday loans in their associated consumer harms, including fees that add up to high APRs averaging 330%, pushing consumers into a cycle of repeat borrowing, no underwriting for ability to repay, and increased risk of overdraft and nonsufficient-funds fees.

Response to comment 1.32.5: The Department appreciates the comment of support. No change was made in response to this comment because it was an observation rather than a recommendation and it concurred with the proposed regulations.

Comment 1.32.6: CRL observed that nothing in the proposed regulations bans "fintech cash advances." The Department must not be swayed by arguments that providers cannot operate under the proposed rules. Complying with the CFL's rate caps still permits high APRs. The proposed regulations appear to attempt to accommodate the business model of providers, not shut them down.

Response to comment 1.32.6: The Department did not make any changes in response to this comment because it was an observation rather than a recommendation to change the regulation.

Comment 1.32.7: CRL recommended revising the definition of "gratuity" in section 1004, subdivision (f), to change "does not affect the service rendered" to "is not made for purposes of obtaining a different type or level of service." The current language could be read to provide that

an optional payment that does affect the service rendered is not a gratuity. Although such an optional payment would still be a "charge" under the CFL, CRL recommended broadening the definition of "gratuity" for CCFPL annual reporting.

Response to comment 1.32.7: The Department did not make any changes in response to this comment. Including purpose or intent would make the definition too subjective, and it is not clear how much larger the pool of reportable gratuities would be or how much more helpful the information would be with such a definition. Such an optional payment would still be considered a "charge" (§ 1004, subd. (c)), and any charges not reported separately as gratuities would still need to be reported as "all other charges paid" (§ 1045, subd. (c)(1)).

Comment 1.32.8: CRL recommended modifying the definition of "income-based advance" in section 1004, subdivision (g), to change "based on income that has accrued" to "based on income that an obligor has confirmed has accrued." The phrase "based on income that has accrued" is vague and can apply to models that merely estimate earned income. The proposed definition would make clearer that only employer-integrated products are exempt from CFL licensure. To the extent that the proposed regulations provide an exception to the licensure requirements of the CFL, it should be narrowly tailored and should not include providers who purport to advance earned wages but are not integrated into an employer's payroll system or "fintech cash advance" providers who do not even purport to advance earned wages.

Response to comment 1.32.8: The Department did not make any changes in response to this comment. The definition of "income-based advance" in section 1004, subdivision (g), is not intended to define a subset of IBA providers who may enjoy the CCFPL-registrant exemption from the CFL licensure requirements under section 1462. Instead, all IBAs are subject products and all IBA providers are covered persons subject to registration and reporting under the proposed regulations, whether they are direct-to-consumer or employer-integrated and whether they purport to provide access to earned wages or not.

Comment 1.32.9: CRL recommended modifying the annual-reporting requirement for income-based-advance providers in section 1045, subdivision (c), to include: (1) separately reporting income-based advances without charges and advances with charges, (2) ranges and averages of amount, cost, duration, and APR, and (3) additional data related to collection attempts.

Response to comment 1.32.9: The Department did not make any changes in response to this comment, because such additional information, which may help the Department monitor markets, foster fair competition, and enforce the CCFPL, could be sought during examinations.

Comment 1.32.10: CRL recommended modifying the annual-reporting requirement for income-based-advance providers in section 1045 to include annual total usage of IBAs in addition to the existing monthly and quarterly totals in subdivision (d).

Response to comment 1.32.10: The Department did not make any changes in response to this comment. Some income-based-advance providers may not now collect such data, and requiring them to report such data would impose undue additional compliance burden. Such additional information, which may help the Department monitor markets, foster fair competition, and enforce the CCFPL, could be sought during examinations.

Comment 1.32.11: CRL recommended that the proposed regulations require that the Department annually publish a consolidated report that aggregates data from income-based-advance providers' annual reports and is made available to the public.

Response to comment 1.32.11: The Department did not make any changes in response to this comment. The authorizing statutes for the proposed regulations (Fin. Code, §§ 90006, subd. (d), 90009, subds. (a), (b), (f), 90010, subd. (b)), do not mandate that the data or reports received by the Department be aggregated into a composite report that is made available to the public. As a general matter, documents received by the Department are subject to public disclosure unless exempt under specific provisions of the California Public Records Act.

Comment 1.32.12: CRL applauded the Department for "stating categorically that an 'earned wage advance' is a loan" subject to the CFL. CRL objected, however, to section 1461's exclusion of employers who advance their own funds. Nothing in the CFL's definition of "finance lender" categorically excludes obligors. Rather than a "categorical carveout," CRL recommended modifying section 1461 to exclude only employer-funded programs that do not charge any fees or receive any gratuities. Alternatively, CRL recommended excluding obligors but including third-party service providers such as FlexWage as brokers. CRL disagreed, as the Department stated in its 2022 FlexWage interpretive opinion, that employers in employer-funded programs do not appear to be providing money for temporary use.

Response to comment 1.32.12: The Department did not make any changes in response to this comment. As stated in the ISOR, section 1461, subdivision (a), is not intended to imply that if an obligor makes advances to be repaid by receipt of a consumer's wages, all its business activities are categorically excluded from the CFL. In any event, if such employer-funded advances are wage payments and not loans, such advances would still be subject to the requirements of the Labor Code.

Comment 1.32.13: CRL did not object to the temporary transition path in section 1462, subdivision (a), although it believed that the CFL should apply with full force to income-based-advance providers. Nonetheless, CRL understood that the Department may need additional time to study the IBA market. As discussed earlier, CRL recommended limiting the exemption from CFL licensure to employer-integrated products only.

Response to comment 1.32.13: The Department construed this comment as being substantially similar to comment 1.32.8. See response to that comment.

Comment 1.32.14: CRL applauded the expiration of the exemption in section 1462 as provided in subdivision (b).

Response to comment 1.32.14: The Department appreciates the comment of support. No change was made in response to this comment because it concurred with the proposed regulations.

Comment 1.32.15: CRL objected to section 1463, which waives for loans to be collected in a single periodic payment the CFL's requirement in Financial Code section 22307, subdivision (a), that the first payment not be due for at least 15 days. Sections 22305 and 22307 work together as part of an articulated statutory scheme. Section 22305 permits the charging of a 5%

administrative fee while section 22307 limits the impact of that fee on the overall APR of the loan by prohibiting terms of less than 15 days. Allowing this fee on loans of less than 15 days results in very-high-cost loans that are undoubtedly not what the Legislature intended. A 15-day loan with a 5% administrative fee would have an APR of 121.7%, or 122.7% if allowable interest is included.

Thus, CRL recommended altering the application of section 22305 by any of the following: (1) requiring a prorated administrative fee for loans of less than 15 days, (2) allowing only one administrative fee per 15-day period, or (3) prohibiting additional administrative fees to the same consumer on amounts repaid and reborrowed within a 15-day period.

Response to comment 1.32.15: In response to other comments, the Department deleted the provision discussed in this comment, rendering its recommendation moot.

Comment 1.32.16: At a minimum, CRL recommended modifying section 1463 so that it applies only to "income-based advances," not all "loans."

Response to comment 1.32.16: In response to other comments, the Department deleted the provision discussed in this comment, rendering its recommendation moot.

Comment 1.32.17: CRL recommended modifying section 1464 to require providers to inform consumers that a subscription fee is not a prerequisite to receiving income-based advances.

Response to comment 1.32.17: In response to other comments, the Department deleted the provision discussed in this comment, rendering its recommendation moot.

Comment 1.32.18: CRL recommended modifying section 1464, subdivision (a)(5), to change "licensee" to "provider," to make clear that this provision applies to providers that register under these rules as well as those that obtain a CFL license.

Response to comment 1.32.18: In response to other comments, the Department deleted the provision discussed in this comment, rendering its recommendation moot.

Comment 1.32.19: CRL supported section 1465, which provides that all voluntary payments, including any tips and gratuities, received by an "earned wage advance provider" are "charges" under the CFL. The Department should not "be forced to play whack-a-mole." Subjecting all "so-called 'voluntary'" fees to the CFL's cost limits is a "far more efficient use of the Department's scarce resources" than attempting to police the myriad practices used to induce those fees.

Response to comment 1.32.19: The Department appreciates the comment of support. No change was made in response to this comment because it concurred with the proposed regulations.

Comment 1.32.20: CRL applauded the Department for clearly stating in section 1012, subdivision (a), that it is a deceptive practice for a registrant to represent that its acts, practices, or business have been approved by the Department. CRL has seen EWA providers (most notably Payactiv) misrepresent government regulatory materials as "approval" of their products. The Department was right to prevent providers from misrepresenting CCFPL registration to influence

legislators and regulators in other jurisdictions.

Response to comment 1.32.20: The Department appreciates the comment of support. No change was made in response to this comment because it concurred with the proposed regulations.

Comment 1.32.21: CRL supported section 1430.1, subdivision (a), which exempts CFL-licensed income-based-advance providers from CCFPL registration only if they make income-based advances within the scope of their CFL license and in compliance with the CFL's requirements. CRL also supported subdivision (b), which requires such CFL licensees to nonetheless file an annual report with the information required from CCFPL registrants.

Response to comment 1.32.21: The Department appreciates the comment of support. No change was made in response to this comment because it concurred with the proposed regulations.

Comment 1.32.22: CRL supported section 2030.5, subdivision (a), which exempts CDDTL-licensed income-based-advance providers from CCFPL registration only if they make income-based advances within the scope of their CDDTL license and in compliance with the CDDTL's requirements. CRL also supported subdivision (b), which requires such CDDTL licensees to nonetheless file an annual report with the information required from CCFPL registrants.

Response to comment 1.32.22: The Department appreciates the comment of support. No change was made in response to this comment because it concurred with the proposed regulations.

Comment letter 1.33 – Janay Eyo, Director, Financial Policy, Chamber of Progress (dated May 17, 2023)

Comment 1.33.1: Chamber of Progress is a tech industry association that works to ensure that all Americans benefit from technological leaps. The proposed rulemaking threatens consumers that currently use IBA products by implying that all IBAs would be considered loans subject to the CFL. The intention of the CCFPL is to foster innovation in a safe way for consumers, but requiring IBA services to comply with both CCFPL and CFL regulations is counterintuitive to establishing a competitive marketplace for emerging fintech companies in California. Loans are associated with add-on costs like origination fees, interest charges, late payment fees, and prepayment penalties. These add-on costs could exponentially increase the amount repaid by a consumer, which makes loans a costlier option compared to IBA services that often do not require a fee for participation. This could impact Californians who are currently benefiting from IBA services that are not required to follow the same guidelines as traditional lenders to obtain financing, such as credit history, collateral, or even loan purposes. Costs like voluntary gratuities are not directly related costs of an IBA because they are discretionary payments from customers as gratitude or appreciation for services provided. Most if not all IBA services do not require their customers to provide a voluntary gratuity in order to use their service at any time.

The Department has said for years through Memorandums of Understanding (MOU) with IBA companies that various costs like voluntary gratuities, subscription fees, and expedited transaction fees are not considered finance charges and wouldn't be included in an APR calculation. However, the Department's Earned Wage Access Data Findings from service

providers compared these costs to APRs from traditional lending, leading to claims that APRs calculated for IBAs were similar to the average payday lender APR in California.

Response to comment 1.33.1: For the reasons stated in the ISOR, the Department did not make any changes in response to this comment, which was construed as a recommendation to withdraw the IBA-related regulations proposed under the CFL. Additionally, the Department incorporates by reference its responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

With respect to the argument concerning past MOUs, the Department cannot make law by way of voluntary MOUs, and the Department is not the primary authority on the interpretation of the Truth in Lending Act. The Department therefore gives no credit to a statement of law negotiated by enforcement counsel in an MOU concerning the treatment of tips and other charges under federal law, particularly when such statements were unaccompanied by legal reasoning or citation to controlling authority and served solely to outline a methodology for MOU reporting. (See *De La Torre v. CashCall, Inc.* (2018) 5 Cal.5th 966, 987 [declining to credit statement of law of Department's predecessor agency when statement of law appeared in enforcement action without analysis or reasoning].) In any case, the Department's decision to include gratuities in its APR calculation was warranted because it helped accurately account for the costs actually incurred by consumers to receive IBAs and because under the CFL, gratuities would be treated as charges.

Comment 1.33.2: Chamber of Progress stated that the Department's proposed rulemaking on IBAs may hinder other innovative financial services that use similar business models from operating fully in California. This restrictive stance contradicts the Department's mission of promoting innovation in California and providing an equitable marketplace for consumers to make optimal decisions for building a more financially secure future. Fintech companies provide financial services to non-traditional workers, including content creators, freelancers, and entrepreneurs. By imposing stringent requirements and limitations on emerging financial products, the Department risks limiting consumer access to beneficial services for millions of Californians. The introduction of IBA services provides a solution attuned to consumers' needs and preferences by allowing consumers to access a portion of their earned wages before their scheduled payday. IBA services increase competition by spurring traditional banks to offer their customers early access to their direct deposits. This increased access to financial services empowers and benefits consumers to meet their immediate financial needs, build financial stability, and widen their financial options in a way that was constrained by traditional credit-based systems, particularly for consumers with limited credit history by not relying on credit history as a determining factor.

Response to comment 1.33.2: See response to comment 1.33.1.

Comment letter 1.34 – Cliff Andrews, Chief Executive Officer, Consumer Debt Relief Initiative (CDRI) (dated May 17, 2023)

Comment 1.34.1: CDRI is a leading national debt resolution industry association dedicated to the protection and promotion of the debt resolution industry. The proposed rules use a definition of "debt settlement services" in section 1001, subdivision (b), that is different from the definition

in the Civil Code section 1788.301, subdivision (b), and this expanded definition is inconsistent with the definition in the statute and appears to exceed the authority granted to the Department by the Legislature and alternatively, if the Department 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.

Response to comment 1.34.1: The Department disagrees with the comment. The Department has regulatory authority to administer the CCFPL in a manner that is consistent with the statutory objective of the law, which includes protecting consumers from unfair, deceptive, and abusive acts and practices. (Fin. Code, § 90006, subd. (a).) The CCFPL does not prescribe how the Department must regulate providers and leaves the manner of regulation to the Department's discretion. While the definition in section 1001, subdivision (b), is similar to the definition in the Fair Debt Settlement Practices Act, it is not the same because the definition in the regulation is necessary to ensure that all companies that hold themselves out to consumers as providing services to eliminate the consumer's debts or make the consumer's debts more manageable are subject to regulations.

Comment 1.34.2: CDRI commented that while the proposed rules require debt settlement services providers to report their "gross income" generated from California residents in sections 1022, subdivision (a)(5) and 1041, subdivision (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." CDRI requested that section 1001, subdivision (a) be changed to read as follows: "'Gross Income' means the total amount of revenues received."

Response to comment 1.34.2: The Department declined to make the requested change because the comment did not explain why the term "gross income" is ambiguous in light of its common use, by, for example, explaining why definitions of "gross income" from different sources are contradictory or inconsistent.

Comment 1.34.3: CDRI requested section 1001, subdivision (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" and section 1042, subdivision (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." Debt-settlement providers cannot and should not be required to report as "charges" fees received by unaffiliated payment processors because providers may not have any contractual relationship with the payment processor and the proposed rule would put providers in an impossible position with no ability to comply with the rule or impose additional costs on them to comply and even if the information could be obtained and reported, the value of the information to the Department is uncertain because the cost of payment processing services are controlled by the consumers and creditors, not by providers, and no other jurisdiction requires the reporting of payment processor fees.

Response to comment 1.34.3: The Department accommodated the comment by making the requested changes to sections 1001, subdivision (a), and 1042, subdivision (e).

Comment 1.34.4: CDRI observed that two of the reporting requirements 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 (i.e., section 1042, subdivision (c) requires reporting on the average dollar amount of debt per resident and 1042, subdivision (f) requires reporting on the average amount owed upon execution of the contract with the registrant.) It is unclear whether these differences are intentional, and if so, what significance should be attributed to the differences and recommended that 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 or provide a more robust description of the intended differences between the respective requests; for example, if section 1042, subdivision (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.

Response to comment 1.34.4: The Department accommodated the comment by deleting "average dollar amount of debt per resident" in section 1042, subdivision (c). The Department declined to make the recommended changes to section 1042, subdivision (f), because it is unnecessary since the Department deleted the requirement to report the average dollar amount owed from section 1042, subdivision (c).

Comment 1.34.5: CDRI commented that the calculations required by some of the proposed rules would be costly and/or impossible for companies to provide and questioned whether the Department has performed the analyses required by Government Code sections 11346.2, subdivision (b)(2)(A), and 11346.3, subdivision (b), in including these requirements in the rulemaking. Some larger members advise that while 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 and smaller and mid-sized companies would not be able to complete the complex calculations required for several of the proposed reporting requirements, particularly sections 1042, subdivision (e), and 1042, subdivision (g).

Response to comment 1.34.5: The Department accommodated the comment in part by deleting the requirement for registrants to calculate the average number of debts per resident in section 1042, subdivision (e). The Department declined to make a change to section 1042, subdivision (g), because the comment did not articulate why the information required would be difficult or impossible to provide. Section 1042, subdivision (g), requires registrants to report on the average amount of time between the contract being executed and the first payment under each settlement and this information should be readily available to registrants in their records. The Department responds to the concern about the adequacy of the economic-impact analysis in its response to comment 1.34.6 below.

Comment 1.34.6: CDRI expressed 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 Government Code sections 11346.2, subdivision (b)(2)(A), and 11346.3, subdivision (b), and requested 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. The Department's ISOR contained 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 and 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. CDRI directed the Department to the California Supreme Court's guidance on these issues in *Western States Petroleum Assn. v. Board of Equalization* (2013) 57 Cal.4th 401, where 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, the requirements of an initial economic impact assessment "plainly call for an evaluation based on facts."

Response to comment 1.34.6: The Department disagrees with the comments. The final regulations removed the provisions that would have subjected IBA providers to the rate cap provisions of the CFL. With respect to reporting requirements for debt-settlement companies and other providers, the economic-impact statement correctly reflects the Department's analysis of the cost impact from the registration and reporting requirements in the final regulations.

Comment letter 1.35 – Jared DeMatteis, Chief Legal & Strategy Officer, DailyPay, Inc. (dated May 17, 2023)

Comment 1.35.1: DailyPay is the nation's leading on-demand pay provider that offers a suite of software and services to enhance workers' financial well-being. DailyPay objected to broadly classifying income-based advances as loans and to framing CCFPL registration as merely a temporary exemption from the CFL because it is ultra vires under the CCFPL by bypassing the state legislature, unnecessary to accomplish the CCFPL's registration purposes, disadvantages some providers according to their business model, is bad for consumers because it disincentivizes providers from offering optional fee arrangements to workers and from becoming registrants in favor of becoming CFL licensees, and is not supported by law or fact and relies on limited, incomplete, and stale data. These products are not loans legally as they lack any hallmark of a loan, including no application or credit pulls, no risk-based pricing, no interest, and no installment payments. The proposed rule confusingly suggests that many direct-to-consumer providers' services may not be income-based advances because providers who "reasonably determine" income that has accrued to the benefit of a consumer cannot satisfy the "has accrued" requirement in section 1004, subdivision (g)(1). DailyPay urged the Department to delete section 1461 from the regulations.

Response to comment 1.35.1: The Department accommodated the comment by amending the definition of "income-based advance" in section 1004, subdivision (g)(1), to provide that the provider has reasonably determined the income to have accrued to the benefit of the consumer. However, the Department disagrees with the other comments. The Department has regulatory authority to administer the CCFPL in a manner that is consistent with the statutory objective of the law. (Fin. Code, § 90006, subd. (a).) The CCFPL does not prescribe how the Department must regulate providers and leaves the manner of regulation to the Department's discretion. When a consumer engages in transactions that resemble factoring with respect to their wages, those transactions fall within the scope of the CFL. Section 1461, subdivision (a), reflects that courts liberally interpret statutory consumer protections related to the sale or assignment of

wages. The Department further disagrees with the comment that the regulations are ultra vires because the CCFPL authorizes the Department to regulate income-based advances.

The Department disagrees that IBAs are not loans for the reasons stated in the ISOR and as discussed in the Department's responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

As noted in those responses, DailyPay ignores that IBAs have the hallmark of a payday loan: A third-party cash advance before payday in exchange for repayment on the consumer's payday. DailyPay further outlines that IBAs involve no application or credit pulls, no risk-based pricing, no interest, and no installment payments, as evidence that IBAs are not loans. However, in the Department's experience, the elements listed by DailyPay are all hallmarks of a product that is commonly accepted to be a credit product—the payday loan. While in California such transactions are legally referred to as "deferred deposit transactions," in enacting the CDDTL, the Legislature recognized that such products were loans and therefore included specific provisions exempting such products from California's generally applicable loan laws. (See Fin. Code, §§ 22050, subd. (b), 23106.) In 2019, the IBA industry proposed a similar statutory carve-out for IBAs but did not secure it. (See Sen. Bill No. 472 (2019-2020 Reg. Sess.) § 51.) Given this, and because DailyPay has offered no controlling authority to suggest that the elements listed above are necessary elements to finding that the product is a loan, the Department sees no reason to conclude that IBAs are not loans.

Comment 1.35.2: DailyPay objected to broadly characterize optional fees as "charges" because it is a significant departure from precedent and practice, legally and factually incorrect to include within the scope of "charges" for an advance any optional costs that a consumer might choose to incur separate and apart from the charges actually associated with the advance, contrary to statutory and judicial precedent causing inconsistencies with TILA, and to the way income-based-advance products work in practice, creates regulatory uncertainty for providers to know where to draw the line between optional services and charges and impairs their ability to offer optional expedited delivery conveniences, and harms consumers who currently enjoy flexibility and access to optional expedited delivery conveniences offered by providers of income-based advances. Optional fees for optional conveniences or add-on services provided to a borrower are not "charges" as a matter of law according to the federal court's reasoning in *Veale v. Citibank FSB* that if the borrower can choose to avoid the Federal Express fee by having the documents sent via regular mail, then the fee is not imposed as an incident to the loan and, therefore, is not a finance charge. The Ninth Circuit also determined in an unreported case that charges that were not required were not "finance charges." If the Department's goal here is to forge greater consumer protections with respect to transparency and disclosure of optional fees or gratuities, UDAAP or other enforcement actions targeting specific provider misconduct or appropriate disclosure expectations (e.g., clear and conspicuous disclosure to a consumer at the time an optional fee or gratuity is solicited that such fee or gratuity is truly optional) are the right ways to achieve these objectives.

Response to comment 1.35.2: The Department disagrees with the comments. Treating optional payments as charges under the CFL is consistent with the law's underlying purposes and with the language of the statute, which defines "charges" to include other forms of costs received by a licensee in connection with a loan or credit. The Legislature mandated that the CFL be "liberally

construed and applied to promote its underlying purposes and policies," which includes, among other things, protecting "borrowers against unfair practices by some lenders." This policy favors a broad interpretation of the CFL's definition of charges to include optional payments.

Comment 1.35.3: DailyPay stated that the proposed rule will have an adverse impact on business and the Department's assertion that the proposed rule will have "no adverse impact" on business lacks support because it relies on comment letters from interested parties submitted during preliminary rulemaking activities (presumably the March 2021 pre-rulemaking proposal), which involved activities that were remarkably different from the proposed rule, such as preliminary activities that did not propose to treat income-based advances as "loans" or optional fees as "charges," so there is no identifiable existing record upon which the Department may conclude the proposed rule will have "no adverse impact." The proposed rule includes some particularly burdensome administrative requirements, and the Department's estimate of only $544 per year to prepare and submit an extensive annual report significantly underestimates the costs and burdens the proposed rule imposes on providers. Since the Department did not publish a record supporting this estimate, DailyPay is unable to comment on the Department's specific assumptions underlying the estimate. DailyPay challenged this estimate based on its own experiences to-date providing periodic reports to the Department under a Memorandum of Understanding, which required DailyPay to dedicate personnel from its finance and data science teams to prepare the data for such a report and then have the report reviewed by them and by DailyPay's compliance teams and counsel, which is hardly a $544 endeavor. DailyPay roughly estimated that while an initial report will be more costly to prepare, ongoing annual reporting costs are likely to be at least approximately $10,000 to $25,000 because the proposed rule's reporting obligations are significantly broader and more burdensome than those of the Memorandum of Understanding. Providers facing these costs and other compliance costs under the proposed rule can be expected to raise prices for their services, such as optional transaction-based services and the administrative burdens and costs imposed by the proposed rule could also deter or discourage additional startups or other competitors from entering the California market, thereby having an anticompetitive impact. If the administrative burdens and costs for CCFPL registration are equivalent to those of CFL licensing, existing providers might reasonably choose to either exit California or operate as CFL licensees, which for income-based advance services will be harmful to consumers.

Response to comment 1.35.3: The Department resolved concerns relating to economic impact by removing the provisions that would have subjected providers to the rate cap provisions of the CFL. With respect to annual-reporting costs, the Department reviewed the cost claims that DailyPay provided. However, DailyPay did not quantify how it reached such high estimates of annual report costs related to information that the Department would expect DailyPay to have within its systems, nor did DailyPay explain whether costs would vary year-to-year after initial set-up costs. The Department notes that commenters may have an incentive to over-estimate reporting costs in order to discourage the Department from adopting robust reporting requirements. Despite this, no other commenter provided similar estimates of reporting costs. For these reasons, the Department stands by its initial estimate of the cost impact from the registration and reporting requirements in the final regulations.

Comment 1.35.4: DailyPay offered its support of the clarification in section 1463 that no section of the CFL explicitly prohibits "loans" being repaid in a single payment and that Financial Code

section 22307, subdivision (b) (requiring an initial loan payment to be due not less than 15 days after the date the loan is made), refers to contracts with "periodical installments," which the Department interprets to apply only to transactions with multiple periodic payments and not to transactions collected in a single payment. DailyPay also supported the express assurances that a registrant's application and reporting information will be confidential. Such information will include trade secrets and commercially and personally sensitive information from registrants, and maintaining the information's confidentiality is imperative.

Response to comment 1.35.4: The Department appreciates the comment of support and notes that section 1463 was removed from the regulations.

Comment letter 1.36 – Joe Reinstein, Executive Director, Digital Restaurant Association (dated May 17, 2023)

Comment 1.36: Digital Restaurant Association is a trade association that helps restaurants operate more effectively in an increasingly digital world. It expressed concern regarding the impact that the proposed rule will have on members as it relates to earned wage access (EWA) because the restaurant industry has already endured a great deal of hardship since the pandemic and the proposed regulations will only add to this hardship. Digitization is necessary for restaurants to survive as technology advances. Pandemic impacts are still prominent. Members have particularly struggled with finding and retaining reliable employees. EWA is a digital financial tool that has enabled members and their employees to stay afloat during the past few years. Because EWA services provided to members' workers would be treated as a credit product under the proposed rulemaking, EWA providers would no longer be able to offer the same terms that benefit members and their employees, if at all. Members are deeply concerned that the proposed rule will make it harder to keep their employees motivated and at work and urged the Department to revisit the proposed regulations written for the sake of restaurant owners and employees across California.

Response to comment 1.36: The Department declined to make changes because Digital Restaurant Association did not explain why the proposed regulations would prevent IBA providers from continuing to offer IBA products.

Comment letter 1.37 – Penny Lee, Chief Executive Officer, Financial Technology Association (FTA) (dated May 17, 2023)

Comment 1.37.1: FTA is a non-profit trade association representing industry leaders shaping the future of finance and works to champion the power of technology-centered financial services and advocate for the modernization of financial regulation to support inclusion and responsible innovation, including EWA products that are helping thousands of consumers avoid traditional high-cost and predatory alternatives while awaiting a paycheck. It is committed to EWA standards and requirements that promote consumer protection and transparency, including potential state registration, and that all EWA services, regardless of the business model adopted by the provider, should be treated similarly in order to avoid anti-competitive market developments and allow for consumer-centric product innovation because this equal and fair treatment is vital to ensure that the broadest set of Californians have access to safe EWA products, including under the common circumstance that an employer does not offer such a

service to its employees. It is concerned that the proposed regulations miss an opportunity to pursue these objectives and instead may inadvertently harm an area of innovation that is clearly benefiting California consumers. The high repayment rate and a recent study of EWA customers show that consumers had a greater sense of financial control after using EWA and that they understand how the service works. When an innovative product is working well for consumers and is not subject to widespread complaints, it is proper for a regulator to proceed cautiously before taking measures that may inadvertently impede or alter the well-functioning market.

Response to comment 1.37.1: The Department declined to make changes in response to this comment because the comment did not provide any concrete recommendation for the Department to assess. The Department notes that it did proceed with caution in this context, relying on careful analysis of IBA industry data and detailed reasoning set forth in its ISOR. The Department incorporates by reference its responses to comments 1.22.1 and 2.22.4.

Comment 1.37.2: FTA urged the Department to reconsider the proposed regulation's unnecessary and unwarranted designation of EWA products as loans because they are not loans and it is improper and unnecessary to reach such a conclusion that will undermine innovation, competition, and regulatory clarity in contravention of the Department's mandate to promote responsible innovation and clarify regulatory hurdles and is unnecessary for establishing a registry, and it creates harmful precedent and further confusion across state and federal regulation. EWA products are not loans for the following reasons: they simply give employees access to their already earned wages, they are nonrecourse and never charge interest, customers can cancel their engagement with an EWA provider at any time, there is never a credit pull or credit reporting associated with this service, and other state and federal government entities have confirmed the non-credit status of EWA products, including the CFPB creating specific exclusions and conditional exemptions for certain EWA products that do not require any fees or finance charges and the provider has no legal or contractual claim or remedy against the consumer for failure to repay and recently passed state laws specifically exempting them from lending laws. The Department should either confirm that EWA products are not credit or a loan or defer such policy determinations to the Legislature and FTA recommended that the Department proceed with finalizing an EWA registry framework similar to the rule proposed in November 2021, which FTA believes will result in the collection of more information from registrants and will enable the Department to better understand the EWA space, product characteristics, and customer outcomes and satisfaction, which can then be used to inform future policy or regulation.

Response to comment 1.37.2: For the reasons stated in the ISOR, the Department did not make any changes in response to this comment, which was construed as a recommendation to withdraw the IBA-related regulations proposed under the CFL. Additionally, the Department incorporates by reference its responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Comment 1.37.3: FTA disagreed that including optional and voluntary payments as a charge is consistent with the statutory language that includes payments "received" by a provider because there is a profound distinction between a mandatory, contracted "cost" or charge and a voluntary tip, gratuity or donation as the latter does not form a legal, contractual obligation (unless specifically agreed by the parties) and in no other contexts or scenarios are such voluntary

payments deemed to be “charges” resulting in upending settled legal norms and commercial expectations. FTA also identified policy reasons to refrain from finding such payments to be charges because it would restrict innovation, tip the scale in favor of lenders, and limit ongoing competition.

Response to comment 1.37.3: The Department disagrees with the comments. Treating optional payments as charges under the CFL is consistent with the law’s underlying purposes and with the language of the statute, which defines “charges” to include other forms of costs received by a licensee in connection with a loan or credit. The Legislature mandated that the CFL be “liberally construed and applied to promote its underlying purposes and policies,” which includes, among other things, protecting “borrowers against unfair practices by some lenders.” This policy favors a broad interpretation of the CFL’s definition of charges to include optional payments.

Comment 1.37.4: FTA recommended focusing on requiring clear disclosure and consumer safeguard requirements tailored to EWA products. Defining EWA products as credit is unnecessary for implementing a registration framework and FTA recommended that the Department instead develop a registration framework requiring clear disclosures to empower consumers, including clearly informing consumers of their rights, and commonsense protections such as expressly prohibiting providers from charging late fees for failing to repay advances.

Response to comment 1.37.4: See the Department’s response to comment 2.22.3. The Department declines to adopt a disclosure-based regime for IBAs that clarifies that “earned-wage advances” and similar products are not loans. When the California Legislature considered creating an IBA carve-out from consumer credit laws, that carve-out included robust cost limitations and consumer disclosures. (See Sen. Bill No. 472 (2019-2020 Reg. Sess.) § 51.) It would be inappropriate for the Department to now create a carve-out based solely upon disclosure without meaningful substantive protections.

Comment 1.37.5: FTA recommended updating provisions and definitions for income-based advances to make the requirements less prescriptive and avoid altering the competitive landscape. FTA recommended replacing all references of “income-based advances” to “earned wage access services” because it is more consistent with ongoing federal and state consideration of these products, more accurately reflects their characteristics, and are not advances on income, a term which introduces greater ambiguity regarding the intended coverage of products. FTA agreed with the spirit of section 1004, subdivision (g)(2), but recommended amending it to avoid setting a specific date to collect the advance in favor of a more flexible approach that considers a period of time from when the individual is paid because it is less prescriptive and will prove more feasible in implementation, especially given the various ways employees are paid wages in the U.S. FTA agreed with the general spirit and intent of the requirement in section 1004, subdivision (g)(3)(A), requiring that the provider has no legal or contractual claim or remedy in the event of nonpayment but noted that it may be inadvertently overbroad in certain, limited situations, such as in cases of fraud, abuse, or mistake. The Department should update this provision to track the language in the ISOR, which specifically notes that an EWA product should be defined as having “limited remedies against the consumer” in order to allow certain protective actions in these exceptional situations. FTA recommended clarifying in the definition of “income-based advance” in section 1004, subdivision (g)(3)(B), that “debt collection activities” do not include when a provider seeks repayments of outstanding proceeds from a

consumer's deposit account, including via an electronic transfer. FTA strongly opposed section 1461, subdivision (a), which states that all EWA payments will be considered a loan because they are highly distinguishable from loans and proposed that regulations be tailored to their different risks. Finally, FTA urged the Department to reconsider the use of an overly prescriptive and arbitrary fee cap in connection with a monthly subscription fee in section 1461, subdivision (a)(1), that may serve to impede ongoing and robust market competition that is already leading to better, more responsible, and lower cost products for consumers and believed that the proposed registry will further inform the Department on the nature of the current EWA market, which can then allow thoughtful consideration of future pricing parameters, should they be necessary.

Response to comment 1.37.5: The Department declined to make the recommended change to replace all references of "income-based advances" to "earned wage access services" because the term "income-based advance" is necessary to ensure that other products that are essentially the same or serve the same purpose as EWA products are captured in the registration requirement. The phrase "earned wage access" perpetuates the misconception that IBA providers are simply offering an advance payment of a consumer's wages and is therefore inconsistent with the Department's conclusion that IBAs, including those offered by the "earned wage access" industry, are loans. See additional discussion in the Department's response to comment 1.10.1.

The Department declined to delete the 31-day requirement in the definition of "income-based advance "in section 1004, subdivision (g)(2), because it may inadvertently expand registration to products beyond those intended under the regulations. The Department declined to make the recommended change to section 1004, subdivision (g)(3)(A), to the prohibition against legal or contractual claims because the change would reduce consumer protection by allowing providers to use loopholes to collect payments from consumers. With respect to the recommendation to clarify "debt collection activities" in section 1004, subdivision (g)(3)(B), the Department accommodated the comment by adding language clarifying that "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.

The Department disagrees that IBAs are not loans for the reasons stated in the ISOR and as discussed in the Department's responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

The Department declined to make the changes recommended concerning subscription fees because section 1464 was removed and these regulations do not apply CFL rate caps to IBA providers.

Comment letter 1.38 – Student Borrower Protection Center (SBPC), California Low-Income Consumer Coalition (CLICC), Center for Responsible Lending (CRL), Consumer Federation of California (CFC), Consumer Reports, Legal Aid Foundation of Los Angeles (LAFLA), National Consumer Law Center (NCLC), NextGen California, Public Counsel, Student Debt Crisis Center, The Institute for College Access and Success, and Young Invincibles (collectively, SBPC) (dated May 17, 2023)

Comment 1.38.1: SBPC represents California consumers, borrowers, and students. SBPC applauded the proposed regulations, which they noted reflect the Department's commitment to

consumer protection and to ensuring a safe and well-monitored marketplace for consumer financial products and services and commended the Department for including education financing in its registry regulations because it will provide the most data on its student debt market of any jurisdiction in the United States, including what actors are operating in California, what products they offer, how they offer them, their terms, and how many California residents use these products. SBPC urged the Department to use this opportunity to gather all the data that it will need to effectively monitor the education financing market and ensure consumer protection compliance from market participants.

Response to comment 1.38.1: The Department appreciates the comment of support. While the annual report requires registrants to report comprehensive information on their education financing practices, the Department will continue to monitor the market and may require additional reporting as necessary.

Comment 1.38.2: SBPC supported the definition of education financing in section 1003 because the student debt marketplace is diverse and includes an array of products and services that may not fit neatly into the traditional understanding of what constitutes a "private student loan" or similar product and that by defining the term to mean extensions of "credit" used for postsecondary education, the proposed registry will cover the landscape of financial products that result in student debt and preempt education financing providers' potential claims that their products are somehow not covered because the amount of repayment is not certain.

Response to comment 1.38.2: The Department appreciates the comment of support.

Comment 1.38.3: SBPC supported section 1003, subdivision (f), which departs from the definition of "postsecondary education" found in the Education Code. The definition appropriately covers all types of postsecondary education, whether the institutions are public, private nonprofit, or for-profit; whether they are accredited or unaccredited; whether or not they are eligible to receive federal financial aid; and whether or not they are required to be licensed to offer postsecondary education in California.

Response to comment 1.38.3: The Department appreciates the comment of support.

Comment 1.38.4: SBPC recommended expanding the definition of "education financing" to include refinancing loans because they are arguably not covered by the registry's regulations as refinance loans are not "extended for the purpose of funding postsecondary education" and not including them would result in an entire sector remaining effectively off the agency's radar. SBPC similarly recommended that reporting requirements for education financing providers, both those that register and those that are exempt from registration due to existing licensure, be revised to distinguish between information related to refinance loans and other education financing because it is consistent with Regulation Z's official interpretation of "private education loan," which includes loans extended to consolidate pre-existing private education loans.

Response to comment 1.38.4: The Department declined to make the recommended changes at this time because further study is needed to determine the feasibility of implementing such requirements.

Comment 1.38.5: SBPC supported the definition of "education financing" that includes funding for the "cost of attendance, including, but not limited to, tuition, fees, books and supplies, room and board, transportation, and miscellaneous personal expenses and recommended adding childcare to the list because it is unclear whether childcare would be considered a "miscellaneous personal expense." This will remove this ambiguity and ensure that education financing includes credit extended for the purpose of funding childcare.

Response to comment 1.38.5: The Department appreciates the comment of support and declined to make the recommended change because it is unnecessary. The definition of "education financing" includes miscellaneous personal expenses related to the student's education financing.

Comment 1.38.6: SBPC supported the requirement that education financing providers register and affirmed the Department's explanation in its ISOR for covering this sector. However, they disagreed with the exemption for California's public colleges and universities and schools that are accredited by the Western Association of Schools and Colleges (WASC) from the obligation to register with the Department for their provision of education financing for the purpose of obtaining a postsecondary education at those institutions and urged the Department to include all school-based education financing providers in the registry. SBPC vigorously disagreed with the Department's proffered justification for this exemption that these institutions have not been identified as "sources of concern" and that therefore "requiring registration would not further consumer protection and may have unintended adverse consequences for these institutions." Whether or not the Department has received complaints about lending from these schools is not dispositive as to whether such lending requires consumer protection, oversight by education regulators is not a sufficient substitute for consumer protection oversight, and WASC is an accreditation agency and does not in any way examine its institutions' education finance products or practices and public schools are not overseen by any agency or accreditor that would examine their education finance products or practices. SBPC pointed to at least one recent instance of a WASC-accredited California school engaging in predatory lending to Californians involving a third-party for-profit, non-degree granting bootcamp. The exemption for in-state schools also raises serious dormant commerce clause concerns, as the registration requirement could be viewed as discrimination against out-of-state schools that engage in education financing for Californians and this potential vulnerability can be avoided by requiring registration by all schools that offer education financing. The cost and administrative burden of registering is far outweighed by the transparency and accountability that such compliance will provide and public institutions could be exempted to the extent that the financing comes from the state itself.

Response to comment 1.38.6: The Department did not adopt SBPC's recommendation because further study is needed to fully understand the impact on these institutions before requiring them to register. The Department has addressed SBPC's dormant commerce clause concerns by exempting in section 1010, subdivision (b)(2), any public postsecondary institution or private nonprofit postsecondary institution for financing offered or provided for education at that institution, which will increase competition and provide a level playing field for institutions, and the concern regarding third-parties by clarifying that registration is required for the third party if the education financing is offered or provided through a partnership with the third party.

Comment 1.38.7: SBPC commented that the exemption from registration for CFL licensees for their education financing activities and supplemental reporting requirement is appropriate to

accomplish the registry's purpose without requiring duplicative actions by an existing licensee. However, if CFL licensees are to be exempt, the supplemental reporting must capture all of the data points that registrants are required to submit.

Response to comment 1.38.7: The Department appreciates the comment of support and notes that section 1430.1, subdivision (b), requires licensees to submit a special report each year containing the same information registrants are required to report.

Comment 1.38.8: SBPC recommended clarifying in section 1010, subdivision (b)(5), the instances in which a licensed student loan servicer is exempt from registration, i.e., the exemption only applies "to the extent the licensee offers or provides education financing . . . to California residents to be serviced by the licensee after origination and require registration except in those specified instances. The SLSA does not provide an alternative basis of authority related to these education financing products if those products are not, in fact, serviced by servicers licensed under the SLSA and therefore the Department should clarify in section 1010, subdivision (b)(5), that SLSA licensees are only exempt to the extent they continue to service the education financing that they offer or provide, mirroring proposed section 2044.1, and that any education financing products that will not be serviced by the licensee require registration.

Response to comment 1.38.8: The Department amended section 1010, subdivision (b)(5), as recommended.

Comment 1.38.9: SBPC stated that the Department should close a loophole in section 1010, subdivision (a), by requiring persons engaged in the business of "arranging" subject products, in addition to "offering or providing" subject products, to register and doing so is within the intended scope of the CCFPL and the Department's authority and legislative mandate. This market exists such as certain ISA companies partner with schools to help them create ISA programs wherein the school is the lender and the ISA company, which is certainly in the business of education financing, is arguably neither offering nor providing the financing.

Response to comment 1.38.9: The Department declined to make the recommended change. The reporting requirements are designed for persons engaged in the business of originating education financing products and not for those who connect consumers with originators. The reporting requirements would be different and further study is required before expanding reporting to this group.

Comment 1.38.10: SBPC commented that the proposed regulations for the registration application process appropriately require registrants to submit a variety of information about their corporate governance structure and business models. However, the Description of Business requirement in section 1021, subdivision (a)(15)(C), should be amended to include the submission of any targeted advertising and search terms, and similar metrics that suggest registrants are marketing to specific protected classes because this information would facilitate the Department's examinations for fair lending protection and maximize the registration application's utility.

Response to comment 1.38.10: The Department declined to make the recommended change because the regulations already require robust reporting on marketing information. As with any

registration or licensure regime, the Department limits what it collects through annual reports. The Department can collect information like what SBPC described in periodic exams.

Comment 1.38.11: SBPC urged the Department to require registrants to annually update their application materials, in particular those related to Description of Business either as an annual requirement to update application materials, which should include more detailed information, or as an additional requirement in the annual report. The regulations require registrants to submit application materials one time and only provide an update to the Department if there are changes to the submitted materials, and the annual reports do not necessarily capture all the information required with the application. This would practically allow registrants to adjust their practices within a broadly described practice without having to report a change. This is particularly true for the Description of Business in proposed section 1021, subdivision (a)(15), where the discrete marketing tactics that registrants use may vary year to year, and those variations could have profound effects on how Californians are targeted for financial products and services, but would not appear in the annual reports.

Response to comment 1.38.11: The Department declined to make the recommended changes because they are unnecessary. Section 1034 requires registrants to report any changes to their application information to the Department either within 30 days of the change or annually depending on the type of change. Requiring registrants to submit updated applications annually would be costly and difficult for registrants to comply with and would require additional resources to enable the Department to review the annual applications and follow up on the information with registrants. Licensees under the Department's other laws are not required to file updated applications annually and there is no compelling reason for requiring registrants to do so either.

Comment 1.38.12: SBPC applauded the Department's inclusion of active contracts and a description of funding source in the supplemental information required for education financing registrants in section 1025 and urged the Department to require registrants to provide contracts providing for the sale of education financing from any postsecondary school that offers or provides education financing to third parties because while section 1025, subdivision (a)(2), addresses education financing to be provided by a third party for a school, it does not capture business arrangements in which third parties agree to purchase schools' education financing. The ability to offload these debts is a critical part of any education financing providers' business model, and so should be covered by the registry. In the past, large postsecondary institutions, including ITT Technical Institute and Corinthian Colleges, Inc., entered into agreements with private third-party lenders under which the institutions made the loans and immediately sold them to the private third-party lenders or arranged the loans for third-party lenders and these types of arrangements encouraged illegal and unfair debt collection practices that were the subject of CFPB actions and also involved predatory lending to a majority of students that the institutions knew were unlikely to be able to repay the loans.

Response to comment 1.38.12: The Department appreciates the comment of support and declined to make the recommended changes. As with any registration or licensure regime, the Department limits what it collects through applications, and the Department's current proposed requirements are already detailed. Information similar to that described in the comment can be obtained from registrants outside of annual reporting, such as during a registrant's examination.

Comment 1.38.13: SBPC recommended amending section 1025, subdivision (a)(3), to cover third-party service providers engaged in any of the activities identified in proposed section 1021, subdivision (a)(15), and require submission of any active agreements or contracts related to the Description of Business activities in the main application. SBPC further recommended that the supplemental materials include agreements in effect between registrants and third-party servicers of the education financing and registrants to submit active agreements for any third-party service provider, not just servicers, involved in the origination, marketing, or administration of registrants' education financing, including lead generators and third-party brokers who may be paid in a way that encourages illegal or deceptive practices, such as through revenue sharing, commissions based on student numbers, or kickbacks and that the information should be updated annually. The information would help the Department to obtain a better understanding of the various stakeholders in the education financing market and their respective roles.

Response to comment 1.38.13: The Department did not make any changes in response to this comment for the reasons described in its response to comment 1.38.12.

Comment 1.38.14: SBPC urged the Department to require registrants to submit images reflecting their marketing materials or materials used by third-party servicers with whom the registrant has contracted for marketing services and to update the information annually to ensure meaningful oversight of these marketing practices. Financing companies regularly target certain demographic groups, which is prohibited by state and federal law, and the current application materials do not include information that would help regulators readily identify these unlawful practices and merely requires a "description" of these materials and applicants could revise their marketing materials to be substantially different from a consumer perspective but still meet a vague description that had been previously filed, and evade meaningful scrutiny.

Response to comment 1.38.14: The Department did not make any changes in response to this comment for the reasons described in its response to comment 1.38.12.

Comment 1.38.15: SBPC recommended revising sections 1030, 1041, subdivision (d), 1430.1, subdivision (c), and 2044.1, subdivision (a), to remove the provisions making registrants' application materials not subject to disclosure pursuant to requests made under the California Public Records Act under Government Code section 7929.000. The Department should not itself legislate an exemption beyond what has been provided in that section by the legislature and the provisions could inadvertently exempt records from public disclosure that are not exempt under section 7929.000. The provisions are unnecessary because as a state government agency, the Department is already required to comply with Government Code section 7929.000 and must assert this exemption in response to Public Records Act requests whenever appropriate, regardless of whether or not provided for by regulation. SBPC recommended that at a minimum the proposed regulation should be revised as follows: The Commissioner shall treat applications submitted pursuant to Section 1021 as confidential to the extent they are exempt from disclosure under Government Code section 7929.000, subdivisions (a) and (d), and to the extent that the Department chooses not to disclose application or report information, it should require the submission of information relevant to the education financing market and for which public review is important through some other mechanism, i.e., not application or annual report, and

publish that information.

Response to comment 1.38.15: The Department did not make any changes in response to this comment. The Department disagrees with the comments that the provisions are in conflict with the Government Code. The provisions are consistent with and not beyond the provisions of Government Code section 7929.000, which authorizes the Department to withhold from public inspection applications filed with the Department and information received in confidence by the Department. Sections 1030, 1041, subdivision (d), 1430.1, subdivision (c), and 2044.1, subdivision (a), are necessary to ensure the protection of confidential information.

Comment 1.38.16: SBPC urged the Department to revise section 1034 to require annual resubmission of certain application materials because it would ensure the agency has up-to-date and relevant information related to important registrant interactions with California consumers.

Response to comment 1.38.16: The Department did not make any changes in response to this comment for the reasons described in its response to comment 1.38.11.

Comment 1.38.17: SBPC applauded the Department's proposed annual reporting in Section 1041, which captures the legislative intent behind the CCFPL and its registration authorities and which will result in meaningful data and analysis of the market for consumer financial products and services in California and urged the Department to make these reports available to the public, both in response to requests pursuant to the California Public Records Act and by affirmatively posting the reports on the Department's website, as discussed in greater detail above in comment 1.38.15.

Response to comment 1.38.17: See the Department's response to comment 1.38.15.

Comment 1.38.18: SBPC applauded the Department's proposal to require reporting specific to education financing, and to further require separate reporting for contracts with income-based repayment provisions and those without income-based payment provisions and urged the Department to revise the annual report to cover more than just contracts entered into during the prior calendar year, i.e., both their activity during the prior calendar year, as currently provided, and their overall portfolios of outstanding education financing contracts, because the proposed annual report for education financing registrants would only require them to report on contracts "entered into" during the prior calendar year, which will result in underreporting on education financing activities and a limited set of data on outstanding education finance contracts owed by California residents.

Response to comment 1.38.18: The Department declined to make the recommended changes. Requiring registrants to report this information in their annual reports is unnecessary because the Department can obtain this information from the annual reports or examinations of SLSA licensees.

Comment 1.38.19: SBPC commented that the annual report should include more granular data about registrants' outstanding education financing contracts at the loan level and the Californians who owe them such as their terms, whether they include a cosigner, what school the contracts were taken out to attend, and their status or outcomes. This also includes more information about

the Californians who take out these contracts, such as their gender, race, zip code, and age because these data points are critical to empowering the Department to screen for predatory practices, including violations of fair lending laws and while the Department could access much of this information through its Student Loan Servicing Act licensure, these data would have to be sorted by lender and paired with registrants, which is unnecessarily cumbersome and may lead to an imperfect snapshot of registrants' activities.

Response to comment 1.38.19: The Department did not make any changes in response to this comment for the reasons described in its response to comment 1.38.12. Also, in this case, further study would be required to determine whether registrants may lawfully collect some of the data requested in the comment.

Comment 1.38.20: SBPC stated that the Department should clarify the distinction between amount advanced and amount owed because with respect to education finance contracts without income-based repayment provisions, the proposed regulation requires registrants to submit the total amount advanced and the total amount owed under those contracts and it is not clear whether "total amount owed" is meant to capture outstanding principal at the time of reporting or the amount that the registrant expects to collect over the course of the contract term. This is especially confusing as drafted given that the current proposal only requires reporting on contracts entered into during the prior year, which presumably have not yet accrued significant interest in addition to the principal amount and therefore additional clarity about the Department's intent with this reporting item would be useful.

Response to comment 1.38.20: The Department accommodated the comment by clarifying in sections 1044, subdivisions (b)(2) and (c)(3), that the "total amount owed" is the dollar amount that would be required to pay off the contract at origination.

Comment 1.38.21: SBPC stated that the method for calculating the cash price for school-based education financing with income-based repayment provisions should be revised to require registrants to also report the actual cash price offered to Californians instead of the amount owed using the lowest available cash price for the remote program by the registrant in any United States jurisdiction, regardless of the cash price available in California because the information would be extremely valuable in understanding how registrants operate in the California market versus in the rest of the country. SBPC also pointed out a stray comma on the fourth line of proposed section 1044, subdivision (c)(1).

Response to comment 1.38.21: The Department declined to make the recommended changes to the method for calculating the cash price because it would provide inaccurate information. The purpose for requiring the lowest available cash price for the remote program provided by the registrant in any United States jurisdiction is to collect the best representation of the true cost of the education program being provided to California students. In the Department's experience, education financing providers who appear to be seeking to obscure the cost of credit for their California contracts can offer an artificially high cash price for their education programs in California while offering cheaper cash prices in other jurisdictions. In such cases, the suggested change would result in the reporting of a marked-up cost for California and not the true cost of the program.

Comment 1.38.22: SBPC agreed with the proposed regulations exempting from registration an existing CFL licensee that is engaged in the offering or providing of education financing within the scope of its CFL license as requiring licensees to register for activities that are already covered by their licensure results in unnecessary additional work and supported the requirement for such exempt licensees to annually submit a special report that includes the same information that registered education financing providers submit pursuant to proposed sections 1041 and 1044.58 because it will help the Department create a full picture of education financing activity in the state across both registered and licensed entities. SBPC urged the Department to make these special reports available to the public.

Response to comment 1.38.22: See comment 1.38.15 and the Department's response to it.

Comment 1.38.23: SBPC supported section 1461 of the proposed regulation that advances of funds to be repaid in whole or in part by receipt of a consumer's wages is a sale or assignment of wages and a loan subject to the CFL and that a consumer who receives such an advance of funds is a borrower, and a provider of such funds is a lender, as those terms are used in the CFL. SBPC, however, urged the Department to include in proposed section 1461 itself that ISAs are considered advances covered by the CFL because while the subsequent proposed sections make clear that education financing contracts with income-based repayment provisions, i.e., ISAs, are "advances" under proposed section 1461, the text of section 1461 does not provide an equivalent level of clarity and this uncertainty is in part due to the fact that one of the other subject products covered by the register is "income-based advances" and the use of the term "advance" in this section could be misinterpreted to apply to only those subject products.

Response to comment 1.38.23: The Department appreciates the comment of support and declined to make the recommended change because there is no ambiguity or confusion with section 1461. Section 1461 applies to any arrangement where a provider offers funds in exchange for an agreement by a consumer agreeing to repay the amount advanced from funds that can be reasonably traced to the consumer's earned income. Section 1461, subdivision (c), makes clear that that a lender's ordinary behavior in collecting on similar advances may be considered when determining whether an advance meets section 1461, subdivision (a). The Department crafted subdivisions (a) and (c) in an intentionally broad manner to cover a wide range of conduct, including <u>both</u> circumstances in which a provider collects directly from a consumer's employer and in which the provider collects from a consumer's bank account where "wages, salary, commissions, or other compensation" are deposited. Had the Department intended to cover only the former types of transactions, the Department would have specifically identified employer-based collections as a requirement under section 1461. This is further evidenced by the Department's intentional use of "in whole or in part" in subdivision (a), which recognizes that bank accounts may include other sources of funds beyond "wages, salary, commissions, or other compensation for services." When an employer deposits wages, salary, commissions, or other compensation for services into an account, and those funds are used, even with other types of funds, to repay amounts advanced, section 1461 applies. This language is sufficiently broad to ensure that transactions commonly called income-share agreements are loans under section 1461. In a typical income-share agreement, consumers agree to repay an amount advanced based on a percentage of their earned income, and those funds are typically deducted from their bank account where wages are deposited.

Comment 1.38.24: SBPC supported the provisions in section 1462.5 that providers of education financing with income-based repayment provisions, as those terms are defined in proposed subparagraphs 1003, subdivision (b), and 1003, subdivision (d), do not need to obtain a license under the CFL for that education financing activity if the provider is either registered under the CCFPL or covered by the registry's SLSA licensee exemption, and the provider does not collect charges in excess of what would be permitted under the CFL and that this provision expires when the registry sunsets after four years and when the registry and this licensing exemption expire, the Department and the legislature can decide if it is necessary to enact additional legislation to cover ISA activity or if existing CFL licensure is sufficient. This proposal is a prudent way for the agency to gather more information about the ISA industry without having to engage with individual unlicensed ISA providers and make fact-specific determinations, as the registry unequivocally covers ISAs and the information that the Department receives will further inform their analysis of the applicability of the CFL and other California laws to the ISA industry.

Response to comment 1.38.24: The Department appreciates the comment of support.

Comment 1.38.25: SBPC applauded the application of the consumer protections to education financing contracts with income-based repayment provisions in section 1466 that provide that such contracts can comply with the equal installments provision if, in addition to their income-based repayment options, they provide an option of making equal installment payments. Second, it provides that when these contracts have grace periods before borrowers have to commence payments, those grace periods can comply with the "month and fifteen days" requirement if they do not accrue charges during the grace period. The proposed regulations make clear that education financing contracts, including ISAs, are covered by the CFL and applying CFL protections to ISA through these regulations provides clarity to both providers and consumers, including the availability of a standard installment repayment option for ISA borrowers, which will provide California ISA borrowers the transparency and options that the Legislature intended when enacting Financial Code section 22307.

Response to comment 1.38.25: The Department appreciates the comment of support.

Comment 1.38.26: SBPC recommended clarifying that the provision in Financial Code section 22307, subdivision (a), i.e., "loans made under this division," applies to all education financing providers with income-based repayment provisions that are exempt from CFL licensure pursuant to proposed section 1462.5 regardless of whether the provider is a CFL licensee or a CCFPL registrant. The Department's application of the CFL in proposed section 1466 applies to the same financial contracts for which the providers are exempt from CFL licensure if they register with the Department and comply with the Department's registration regulations but it is not clear, whether loans made by registrants that are not licensed under the CFL are considered to have been made under that division of the CFL, such that the analysis in section 22307, subdivision (b), applies to them.

Response to comment 1.38.26: The Department accommodated the comment by clarifying in section 1462.5, subdivision (a)(3), that the education financing with income-driven repayment provisions must comply with the CFL's rate caps, even though it is technically not being provided by a CFL licensee under the authority of the CFL.

Comment 1.38.27: SBPC commented that the proposed regulations make clear that California law requires ISA providers to provide a total amount due and substantially equal periodic payments under their financing contracts because at various times, ISA providers have claimed that their contracts do not have a principal amount due and that the value of the contract is dependent on the borrower's future income, and that for this reason they cannot compute an interest rate or APR or that future payments may fluctuate and be difficult to pre-determine and to the extent that there are ISAs outstanding in California that do not provide such a plan and that are identified through the registration process, the Department should use its enforcement authority to rescind or reform these contracts.

Response to comment 1.38.27: The Department appreciates the comment of support.

Comment 1.38.28: SBPC supported the provisions in section 2044.1 exempting from registration any education financing providers that are also SLSA licensees and that service the education financing contracts that they provide. The Department proposes having registry-exempt SLSA licensees submit special annual reports about its education financing activities and while these reports essentially mirror what registrants must file with the Department, one area that SLSA licensees would not currently be required to report on are the marketing activities for registrants covered by proposed section 1021, subdivision (a)(15), and SBPC urged the Department to include this information in the SLSA licensees' special report.

Response to comment 1.38.28: The Department declined to make the recommended change because additional reporting requirements for SLSA licensees are more appropriate for an SLSA-focused rulemaking package.

Comment 1.38.29: SBPC stated that the Department must ensure the SLSA licensees' special reports are available to the public and should strive to publish as much data as possible and should not unnecessarily or preemptively determine that certain material is protected from disclosure.

Response to comment 1.38.29: See comment 1.38.15 and the Department's response to it.

Comment 1.38.30: SBPC objected to the Department's rejection of SBPC's recommendation to collect contract performance metrics from registrants because the Department believed it could gather those metrics from its SLSA licensees and urged the Department to request registrants provide their own portfolio metrics. While it is true that the Department can request these metrics from its licensed student loan servicers, the data would not be disaggregated by originator and would need to be disaggregated and then matched with the corresponding registrant, involving unnecessary steps and burdens for the Department, given that the registrants themselves have access to their portfolio metrics and could easily include it in their annual reports, alongside the other relevant data that is already required.

Response to comment 1.38.30: The Department declined to make the recommended change because it is unnecessary. The Department can collect this data when examining SLSA licensees.

Comment 1.38.31: SBPC objected to the Department's rejection of SBPC's recommendation to include the reporting of marketing strategies to assess whether protected classes of borrowers are

being targeted by education financing providers. Contrary to the Department's rationale that it can review for fair lending violations during its examination process, it is not clear from the proposed regulations that registrants will be examined by the Department on any routine basis and even if registrants are routinely examined, one of the Department's stated purposes for the registry is to gather information that can inform its examination priorities and to ensure the most effective and efficient fair lending reviews during exams, so the Department should collect fair lending-related information from its registrants. When violations of any kind are found during exams, it can be difficult to make consumers whole and by requiring reporting of fair lending-related data during the registration and annually, the Department would be able to more readily identify ongoing harms and address them in real time.

Response to comment 1.38.31: The Department declined to make the recommended change because the regulations already require robust reporting on marketing information. As with any registration or licensure regime, the Department limits what it collects through applications, and the Department's current proposed requirements are already detailed. Information similar to that described in the comment can be obtained from registrants outside of annual reporting, such as during a registrant's examination.

Comment 1.38.32: SBPC objected to the Department's rejection of SBPC's recommendation to deem void and enforceable contracts entered into when an education financing provider was out of compliance. While the Department's justification was that it has extensive enforcement powers to make consumers whole, including through rescission, the Department will not know of every violation nor have the resources to address every violation in a state the size of California and should therefore aspire to make any borrower relief as self-executing as possible by incorporating into its regulations that noncompliant actors or contracts result in those contracts being void and reduce the number of steps that an individual California consumer or the Department would need to take to deliver that relief.

Response to comment 1.38.32: The Department declined to make the recommended change because SBPC did not provide a legal basis for establishing this provision by regulation and the focus of this rulemaking is on registration and reporting, not prohibitions on other unfair, unlawful, deceptive, or abusive practices.

Comment 1.38.33: SBPC objected to the Department's rejection of SBPC's recommendation to make public the applications and annual reports that the agency receives from registrants and registry-exempt licensees. The Department cited its analysis of a provision of the Government Code related to operating or condition reports as justification for keeping this information confidential, noting that the legislature could choose to make future reports public if it extends the registry after it sunsets. SBPC urged the Department to reconsider because it is critical that the public benefit from the information about the education financing market in California that the Department will obtain through the registry, and this information will inform policy analysis and consumer choice, as well as likely identify outlier bad actors, and to the extent that the Department does not feel that it is authorized to disclose the reported information, it should compile annual summaries and make those publicly available.

Response to comment 1.38.33: See the Department's response to comment 1.38.15.

Comment 1.38.34: SBPC applauded the Department's inclusion of student debt relief service providers in its registry, especially in light of its recent enforcement actions against predatory student debt relief companies and given the likelihood that these scams will increase in the coming years as student loan borrowers resume repayment on their federal student loans. SBPC also affirmed the Department's proposal of a broad definition of "student loan," which incorporates the registry's definition of "education financing" and would include both federal and private student loans.

SBPC urged the Department to create a broad exemption for nonprofits engaged in student debt relief services to ensure that bona fide nonprofit service providers are not inadvertently required to register because the proposed registration regulations do not include any nonprofit exemption for student debt relief services providers and all nonprofit organizations that assist borrowers with student debt for free and who already struggle to fund student loan assistance will be required to register, and many, if not most, would have to register for debt settlement work and compliance could be unduly burdensome for these organizations and diminish options for free assistance, which generally provide services to the same low-income communities on which scammers prey. Specifically, the Department must revise regulations to ensure that appropriate nonprofit organizations are exempt from both the debt-settlement services and student debt relief services registration requirements including nonprofit organizations that provide student loan services free of charge; nonprofit legal aid organizations that represent and assist low-income student loan borrowers; nonprofit legal aid organizations providing advice and act as intermediaries for the purpose of negotiating student loan payments, negotiating settlements, and addressing other legal issues with loan servicers and private education financing; and legal aid organizations, as well as other nonprofit organizations that offer student loan counseling and have limited resources to provide desperately needed student loan assistance. These organizations should not have the additional burdens of having to register as debt settlement or relief services providers and provide annual reports. It is for-profit debt relief companies that deceive borrowers into making payments for debt forgiveness and then either do nothing or simply consolidate their student loans. If required to register and report, many nonprofit organizations that provide student loan services, including legal aid organizations, are likely to pull out of providing such assistance altogether, which would be counterproductive to borrowers who desperately need them.

Response to comment 1.38.34: The Department appreciates the comment of support and accommodated the comments by amending section 1010, subdivision (b)(7), to exempt nonprofit organizations from registration under the CCFPL.

Comment 1.38.35: SBPC recommended expanding the existing exemption for debt-settlement services to include those entities that it anticipates are eligible to participate in its Student Loan Empowerment Project. The Department received over $7 million in funds to administer a grant program for community-based nonprofit organizations to offer student loan counseling and the program, the Student Loan Empowerment Project, contemplates services that fall under the proposed definition of student debt relief services. Unless the Department ensures that the nonprofit organizations that are eligible to participate in the Student Loan Empowerment Project are exempt from registration as student debt relief service providers, the Department is likely to unduly burden these entities that are already resource-strapped, which may deter participation in the program, and the program and its eligibility requirements should serve as a model for the

types of nonprofits that do not require registration.

Response to comment 1.38.35: The Department accommodated the comments by amending section 1010, subdivision (b)(7), to exempt nonprofit organizations from registration under the CCFPL.

Comment 1.38.36: SBPC affirmed the Department's decision to require supplemental annual reporting by subject product and recommended expanding the reporting requirements to include all student debt relief services, regardless of whether those services are subject to a written contract because the most predatory student debt relief companies are likely to operate without a written contract and may evade reporting on their activities.

Response to comment 1.38.36: The Department declined to make the recommended change because it is unnecessary. Section 1043 does not limit reporting to written contracts.

Comment 1.38.37: SBPC stated that the terms "federal" and "private" student debt should be defined because the reporting requirement includes references to "federal student debt" and "private student debt" throughout the proposed provisions but does not define either term. SBPC recommended defining "federal student debt" as "education financing" that is made or guaranteed pursuant to the federal student aid provisions of the Higher Education Act and defining "private student debt" as any "education financing" that is not "federal student debt," including debts that may be owed to the State. As with education financing, any outstanding contracts with California residents by debt settlement or student debt relief service providers that are not registered and are not exempt from registration should be deemed void and unenforceable as a self-enforcing mechanism, as the California market is too vast and there are too many actors for the Department to be able to monitor, police, and deliver relief in every instance of unauthorized conduct.

Response to comment 1.38.37: The Department accommodated the comments by amending section 1002, subdivisions (b) and (c), as recommended.

Comment letter 1.39 – Darrell Feil, Owner, Abate-A-Weed; Timothy Sher, President, Asian Food Trade Association; Marc Ang, Founder & President, Asian Industry B2B; Pat Fong Kushida, President and Chief Executive Officer, CalAsian Chamber of Commerce; Julian Canete, President and Chief Executive Officer, California Hispanic Chamber of Commerce; Aaron Hichman, Co-Founder, California Retail Hardware Association; Joanne Frisco, Owner, Frisco's Carhops; Linda Colley, Owner, IQM; Maryann Marino, Owner, Maloney Meat Company; Bruce Bloom, Owner, North Hollywood Hardware Store; Ruben Franco, President and Chief Executive Officer, Orange County Hispanic Chamber of Commerce; Kyle Knight, Executive Director, Retailers and Store Owners United to Rebuild Our Communities' Economies (RESOURCE); Sunder Ramani, Co-Owner, Westwind Media (dated May 17, 2023)

Comment 1.39: The commenters are representatives of California's business community and strongly opposed the proposed regulations regarding earned wage access (EWA) services. The regulations are unnecessary and unwarranted and will only serve to harm hard-working Californians trying to make ends meet during the highest inflation experienced in 40 years. The

proposal is ill-timed and a solution seeking a problem because a review of the federal Consumer Financial Protection Bureau's statistics demonstrates that of the 3.5 million complaints received, complaints against EWA companies are so few that there is not even a category for tracking them. EWA services are not loans, do not charge interest, and do not impact consumers' credit ratings. Technology innovation has allowed EWA providers to give employees the option of accessing their earned wages, to which they are legally entitled, before their regularly scheduled paycheck. With a current unemployment rate of 4.4%, below the recent historical mean, California businesses are facing a significant labor shortage, particularly in service industries. EWA is preferred by many small and large employers because it helps employees without adding additional burdens, as the process is automated and facilitated by technology, and it is a value employers can offer employees in this tight labor market. As business leaders, the commenters are doing everything in their power to recover from the pandemic, address inflation, and become more prosperous so they can increase wages and help their employees grow wealth. As they work toward that goal, EWA services help relieve increased debt and other financial burdens along the way. EWA, thus, is an actual diversity, equity, and inclusion program because EWA users are working Californians, middle-class, often college-educated, full-time workers. More than half of EWA users are people of color and more than 60% are women. A majority are also Millennials aged 25 to 40, many of whom have small children. The commenters urged the Department to withdraw the proposed rule and allow California workers to continue using critically needed EWA services in these economically challenging times because while the commenters understand the need to protect our employees and share this goal and welcome the dialogue, the proposed rule is a sledgehammer to our economy at the worst possible time.

Response to comment 1.39: No changes were made in response to this comment for the reasons described in the Department's response to comment 1.22.1. The Department has not received credible evidence from any commenter that these regulations (as initially proposed or as revised) would result in IBA providers' inability to offer IBA products. These regulations do not prohibit IBA providers from continuing to offer their services and are not intended to limit consumer access to these services. The Department did not rely upon the number of complaints generated by IBA providers in its reasoning for determining that IBAs are loans under California law.

Comment letter 1.40 – California Employment Lawyers Association (CELA), CA Labor Federation, CA League of United Latin American Citizens (CA LULAC), California Low-Income Consumer Coalition (CLICC), California Reinvestment Coalition (CRC), Center for Responsible Lending (CRL), Consumers for Auto Reliability and Safety (CARS), Consumer Federation of California (CFC), Consumer Reports, Dolores Huerta Foundation, East Bay Community Law Center, Greater Sacramento Urban League (GSUL), Housing and Economic Rights Advocates (HERA), Manfred APC, MyPath, National Consumer Law Center (NCLC), NextGen California, Office of Kat Taylor, Public Counsel, San Francisco Office of Financial Empowerment, SEIU CA, Student Borrower Protection Center (SBPC), UFCW Western States Council, and Western Center on Law and Poverty (dated May 17, 2023)

Comment 1.40.1: The commenters are consumer, civil rights, and labor groups in California, which know from firsthand experience that low-income and marginalized communities, especially Black and Latino ones, are more likely to be at risk from these predatory products that have been pushed on underserved communities in the name of "access to credit" and "financial

innovation." The harmful characteristics of these products include high APRs, consumers being pushed to tip, and very little credit extended. The commenters supported the Department's determination that earned wage advances are loans, without regard to means of collection, whether the provider has legal recourse, or whether the consumer has the right to cancel collection. If the Department does not conclude that these products are loans, then it will not be able to effectively regulate these products. This conclusion applies equally to loans that are offered by fintech companies that cannot register with the Department as employer-integrated "income-based advance" providers as defined in this rulemaking.

Response to comment 1.40.1: The Department appreciates the comment of support. No change was made in response to this comment because it concurred with the proposed regulations.

Comment 1.40.2: The commenters supported defining all monies paid, including expedite fees, subscription fees, and gratuities, as "charges" and mandating that all monies paid cannot exceed the CFL's rate caps. The Department should vigorously enforce the rate caps to ensure that California's most vulnerable consumers are not harmed. EWA providers use various ruses to disguise the true cost of their products, including advertising the product as free but demanding an "expedite fee" to receive instant access and using behavioral economics techniques to solicit tips.

Response to comment 1.40.2: The Department appreciates the comment of support. No change was made in response to this comment because it concurred with the proposed regulations.

Comment letter 1.41 – Adam VanWagner, Chief Legal Officer, MoneyLion Technologies Inc. (dated May 17, 2023)

Comment 1.41.1: MoneyLion cannot support the Department's decision to classify EWA services as loans. The proposed regulations would apply inapposite lending requirements to a consumer-friendly service that—if properly structured and offered like MoneyLion's EWA product—is not a credit product.

Instead of moving forward with the proposed regulations, the Department ideally should engage with the Legislature to enact a new legislative framework, such as the proposed California Earned Wage Access Regulation Act (attached as Exhibit A to the comment letter). Alternatively, as discussed in more detail later, the Department should "reconsider" the proposed regulations' approach and, at a minimum, modify section 1461 to exclude bona fide EWA products from being loans subject to the CFL, in the same way it currently excludes bona fide EWA products offered by obligors. A bona fide EWA product is one for which the consumer has no contractual obligation to repay an advance, the provider has no legal or contractual claim or remedy against a consumer who chooses not to repay the advance, and the advance has no mandatory fees or interest.

Response to comment 1.41.1: For the reasons stated in the ISOR, the Department did not make any changes in response to the recommendation to withdraw the IBA-related regulations proposed under the CFL. Additionally, the Department incorporates by reference its responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Comment 1.41.2: MoneyLion's Instacash product is a direct-to-consumer service that allows customers to access a portion of their earned income in advance with no interest, no mandatory fees, and no credit check. Customers may choose to receive their advance more quickly by paying an optional expedited-transfer fee and may pay a "tip" to MoneyLion in appreciation of the service. Both the expedited-transfer fees and tips are entirely optional, and choosing not to pay the transfer fee or leave a tip has no impact on a customer's eligibility for the service or their approved advance limit.

Instacash is offered on a no-obligation-to-repay basis, as provided in the Instacash terms and conditions entered into with customers. This means that MoneyLion does not legally have a right to compel repayment of an Instacash advance. Customers cannot rollover or "refinance" advances. If customers choose not to repay their advances, they will not be able to request any more advances. In this way, Instacash prevents customers from getting into debt traps and permanently living beyond their means. Customers can choose not to repay their Instacash advances by simply revoking their automatic-payment authorization at least three business days before the scheduled repayment date. Thus, the choice of whether to continue using Instacash stays fully within the customer's control. MoneyLion does not report repayment activity or outstanding payments to any consumer reporting agency. Customers can access Instacash advances without paying any of the optional fees, without signing up for a monthly subscription, and without being obligated to repay the amount they requested.

Response to comment 1.41.2: The Department did not make any changes in response to this comment because it was an observation rather than a recommendation to change the regulation.

Comment 1.41.3: MoneyLion stated that the CFL is the wrong legislative framework to govern income-based advances. Classifying nearly all EWA services as loans will lead to "perverse incentives for the industry" and worse outcomes for consumers, as described in more detail later. Thus, it is more appropriate to persuade the California Legislature to create a legislative framework to govern and provide consumer protections tailored for EWA services.

Response to comment 1.41.3: For the reasons stated in the ISOR, the Department did not make any changes in response to this comment, which was construed as a recommendation to withdraw the IBA-related regulations proposed under the CFL. Additionally, the Department incorporates by reference its responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Comment 1.41.4: MoneyLion stated that "loan" is not defined in the CFL but is defined in Civil Code section 1912 as a delivery of money to one who "agrees to return" it in the future. EWA services like Instacash are not loans because there is no obligation to repay. MoneyLion "affirmatively discloses" to customers that they have no obligation to repay and that MoneyLion will not take legal action to collect payments.

Response to comment 1.41.4: For the reasons stated in the ISOR, the Department did not make any changes in response to this comment, which was construed as a recommendation to withdraw the IBA-related regulations proposed under the CFL. Additionally, the Department incorporates by reference its responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Comment 1.41.5: MoneyLion stated that the proposed regulations would lead to perverse outcomes for the industry that will ultimately harm consumers. EWA providers would have to choose either CCFPL registration or CFL licensure. Both would require customers to make a contractual promise to repay, but because under CCFPL registration providers would be unable to compel repayment or report nonrepayment to credit reporting agencies, while being subject to "inapplicable loan-like requirements," providers would be forced to opt for the traditional lending regulatory framework of the CFL, with higher fees and charges, more debt collection, and negative credit reporting.

Response to comment 1.41.5: The Department did not make any changes in response to this comment because it was an observation rather than a recommendation to change the regulation. To the extent that MoneyLion recommended withdrawing the proposed regulations regarding EWA, the Department declined to do so for the reasons stated in the ISOR. MoneyLion mistakenly asserts that as CCFPL registrants, providers would be subject to loan-like requirements; rate and fee caps are the only substantive requirements of the CFL that CCFPL registrants would have been subject to under section 1462 as initially proposed. In any event, that provision was deleted. Additionally, EWA providers who choose CFL licensure would not need to eliminate the purportedly consumer-friendly aspects of their products to comply with the CFL. Nothing in the CFL prevents EWA products from being offered on a nonrecourse basis.

Comment 1.41.6: MoneyLion recommended modifying section 1465 to: (1) exclude optional or voluntary charges from the definition of "charges" just as certain other optional fees are excluded under Financial Code sections 22320 (dishonored-check fee) and 22320.5 (delinquency fee) or, (2) in the alternative, exclude optional or voluntary charges from determining the applicable maximum charges allowable under the CFL. The CFL's exclusion of the dishonored-check fee and delinquency fee from "charges" makes sense because such fees are avoidable by the customer, just as optional gratuities and expedited-transfer fees are. The only revenue MoneyLion receives in connection with its provision of Instacash is from optional gratuities and expedited-transfer fees. The currently proposed regulations would result in providers' switching from optional to mandatory fees.

Response to comment 1.41.6: The Department did not make any changes in response to this comment. The dishonored-check fee and delinquency fee are discretionary fees that the Legislature intended to be treated separately from finance charges. Optional gratuities and expedited-transfer fees, however, operate in effect as finance charges because they are providers' only source of revenue in connection with the provision of their EWA product, as MoneyLion acknowledges is the case for Instacash. As discussed in the ISOR, the Legislature could have but did not specify optional or voluntary payments as discretionary fees that are excluded from "charges." That some fees deemed to be excluded from "charges" by the Legislature are "avoidable" militates against MoneyLion's argument: If the Legislature was able to specify certain avoidable fees to be excluded, then the Legislature could have done so for optional or voluntary payments such as tips, gratuities, and expedited-transfer (or expedited-funds) fees. But it did not. Instead, the Legislature intended that all fees or costs received in connection with a loan are included in "charges."

Comment 1.41.7: MoneyLion recommended modifying section 1461 to exclude from the CFL's definition of "loan" not only obligors but all "bona fide" EWA services. EWA services provided

by employers for their employees are “in principle the exact same service” as other bona fide EWA services, which “do not charge any interest, and are provided on a no-obligation-to-repay basis,” so they should be treated the same. The proposed regulations’ “disparate treatment” is “arbitrary and capricious” and “would unfairly pick winners and losers in the marketplace.”

Response to comment 1.41.7: The Department did not make any changes in response to this comment. As explained in the ISOR, whether the party whose funds are advanced is a consumer’s obligor or a third party is material to whether an income-based advance is money provided for temporary use. This key difference is the basis for the different treatment of obligor-funded and third-party-funded advances in section 1461. Section 1461 is intended to interpret the law, not pick winners and losers in the marketplace.

Comment 1.41.8: MoneyLion recommended modifying section 1461 to: (1) exclude from the CFL’s definition of “loan” EWA services with no mandatory fees or interest and no obligation to repay, “with limited exceptions for fraud, abuse, or errors,” and (2) allow providers to offer EWA as part of a “financial membership” with a mandatory subscription fee and to receive voluntary or optional charges as long as customers have at least one no-cost option.

Response to comment 1.41.8: The Department did not make any changes in response to this comment generally for the reasons stated in the ISOR. In particular, the Department declined to consider “limited exceptions for fraud, abuse, or errors” to be relevant in excluding certain income-based advances from being deemed loans because such language could be interpreted by providers so expansively as to apply in almost any circumstance. The initially proposed regulations already authorized monthly subscription fees for “financial membership” programs that offer income-based advances in addition to other products or services, as long as the programs complied with the requirements of section 1464, so the Department construed the comment as recommending again that voluntary or optional payments be excluded from “charges.” The Department declined to make such changes for the reasons discussed in the response to comment 1.41.6.

Comment 1.41.9: MoneyLion recommended modifying section 1004, subdivision (g)(3)(B), to clarify that a provider’s representation to consumers that it will not engage in any “debt collection activities” does not include seeking repayment of outstanding proceeds from a customer’s authorized payment method, including electronic transfer.

Response to comment 1.41.9: The Department amended section 1004, subdivision (g)(3)(B), to accommodate this recommendation, by adding that “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.”

Comment 1.41.10: This comment is substantially similar to comment 1.41.6.

Response to comment 1.41.10: See response to comment 1.41.6.

Comment 1.41.11: MoneyLion recommended deleting section 1464, which governs subscription fees, in its entirety because it would cause many providers to avoid adding EWA services to their “financial memberships.” If section 1464 is not deleted, MoneyLion recommended modifying it

to provide that a provider may include EWA services as part of a "financial membership" and charge mandatory subscription fees, as long as the consumer has at least one other option of receiving EWA services at no cost. Additional recommended changes include deleting subdivision (a)(1) ($12 maximum monthly subscription fee), clarifying subdivision (a)(2) (whether the program must include access to other, non-EWA products or services), deleting or relaxing subdivision (a)(3) (to require only that the EWA service be provided in compliance with the proposed regulations), deleting subdivision (a)(5) (requiring borrower acknowledgment that the subscription is optional), and deleting subdivision (a)(6) (requiring that subscription fees be credited against administrative fees first and then to permitted charges).

Response to comment 1.41.11: The Department deleted section 1464 not in response to this comment but for the reasons stated in this FSOR. MoneyLion's recommended approach to subscriptions appeared not to recognize that, as explained in the ISOR, section 1464 was intended to streamline other-business authorization under Financial Code section 22154 and specify a particular subscription-fee-based model that would comply with the CFL's various requirements. Section 1464 was not intended to prescribe the only subscription-fee-based model that could be authorized under Financial Code section 22154.

Comment 1.41.12: MoneyLion recommended modifying section 1040 to change the annual assessment from a pro rata calculation to a flat amount. Alternatively, MoneyLion recommended modifying the pro rata calculation in three respects: (1) basing it on the proportion of the registrant's total payments received in connection with each subject product, rather than gross income, (2) assessing it on a subject-product-by-subject-product basis, so that assessments would be based on registrants' market share for the subject product they offer, rather than the market share for all subject products, and (3) requiring payment by January 31 rather than December 31, to give registrants adequate time to plan for a cash outflow at the end of the calendar year that cannot be estimated by the registrant alone.

Response to comment 1.41.12: The Department did not make any changes in response to this comment. As stated in the ISOR, the Department rejected a flat-fee approach because it would not be equitable to registrants who did less business in California. The Department declined to base the calculation of the assessment on something other than gross income because in its experience administering the CFL, which bases the calculation of the assessment on gross income (Fin. Code, § 22107, subd. (a)), the Department has not had any problems related to inconsistent interpretations of the term. The Department declined to calculate the assessment on a subject-product-by-subject-product basis because including the gross income from all subject products in a single pool is easier to administer and will likely result in less volatility. The Department declined to change the due date because the assessment should be collected in the same year that registrants are notified of the amount assessed.

Comment 1.41.13: MoneyLion recommended modifying section 1022, subdivision (a)(5), to require EWA applicants to provide, instead of gross income, total advance payments received on all income-based advances offered during a calendar year, plus any optional or voluntary fees received. This metric is more objective and consistent across different providers and more

accurately reflects activity.

Response to comment 1.41.13: The Department did not make any changes in response to this comment. In its experience administering myriad other programs that rely on reporting of gross income, the Department found that gross income accurately reflects activity, and the Department has not identified any problems related to inconsistent interpretations of the term.

Comment letter 1.42 – Herman Donner, Associate Professor, KTH Royal Institute of Technology (dated May 11, 2023)

Comment 1.42: Donner co-authored a paper in 2021 that analyzed the impact of earned wage access (EWA) on household financial well-being. Equating EWA to credit and making it subject to the regulatory burdens of the CFL ignores EWA's potentially positive impact on the financial well-being of users. Notably, the proposal does not distinguish between payment of earned but unpaid wages, which does not meet the definition of credit, and advances of unearned wages. For households that lack access to low-cost credit (such as 30-day, 0% APR credit cards), the ability to access earned wages provides an affordable alternative to other means of managing cash flow, such as payday loans or bank overdraft fees. Lower-income households that lack access to affordable consumer credit are likely to be a significant fraction of EWA users. Not only are lower-income households likely to face higher costs of credit, but the overall cost also constitutes a much larger fraction of their overall income compared to higher-income households. The cost of credit to manage spending between paychecks can be considered a direct cost of managing household liquidity that EWA has the potential to substantially decrease. EWA therefore provides a net benefit to users. EWA fees and their implicit APR also need to be considered relative to very high indirect costs of managing household liquidity.

The positive effects on household financial well-being requires that EWA is designed appropriately to mitigate an individual's increased perception of wealth, which might increase spending and result in financial hardship. EWA providers are aware of this and often bundle their tools with solutions for budgeting and financial planning, in addition to limiting the fraction of earned wages that are accessible (typically 50% to 60%). The pervasiveness of these potential negative effects needs to be evaluated further, as well as the potential for EWA to increase financial literacy when bundled with budgeting solutions. Empirical studies that evaluate the impact of EWA are needed. EWA is likely to have an impact that varies considerably across user characteristics, depending on how it is designed. It is unlikely that a uniform conclusion that applies to all users and all forms of EWA is appropriate. That EWA increases employee satisfaction and retention, however, indicates that the positives often outweigh the negatives.

Response to comment 1.42: For the reasons stated in the ISOR, the Department did not make any changes in response to the recommendation to withdraw the IBA-related regulations proposed under the CFL. Additionally, the Department incorporates by reference its responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

To the extent Donner argues that IBAs should be exempt from credit regulation because less expensive forms of credit are allowed under existing state and federal laws, the Department notes that its data analysis (cited in the ISOR) reflected that IBAs are on average as expensive on an

annualized basis as payday loans offered by CDDTL-licensed payday lenders. Even to the extent that IBAs are less expensive than some other credit alternatives, this argument alone does not support the conclusion that IBAs are not loans, as the CFL covers many low-APR loans, including buy-now, pay-later loans that often have 0% APRs.

Comment letter 1.43 – Pete Isberg, President, National Payroll Reporting Consortium, Inc. (dated May 17, 2023)

Comment 1.43.1: The National Payroll Reporting Consortium (NPRC) is a non-profit trade association whose member organizations provide payroll processing and related services to over three million U.S. employers, representing over 48% of the U.S. workforce and improve efficiency through electronic payroll and tax collections and reporting, and employer compliance. NPRC recommended exempting payroll service providers whose role is limited to verifying available earnings and other related facilitation functions but who are not EWA service providers. NPRC does not believe that the proposed regulations are intended to include payroll service providers, but it is unclear whether they would be considered to be "engaged in the business" of providing income-based advances, notwithstanding that their role may include only limited support functions. This uncertainty could have substantial impact on the EWA market and availability of such services to California employers and consumers. The most recent legislative attempt to address this issue (See Sen. Bill No. 472 (2019-2020 Reg. Sess.) § 51) specifically excluded payroll service providers from the definition of "provider" unless the provider was separately engaged in the business of providing income-based advances. Although SB 472 was not enacted into law, the clarification being requested is consistent with the approach taken in that prior legislative effort.

Payroll service providers serve as an essential enabler of EWA services, facilitating but not providing EWA services in most cases since payroll firms act only on behalf of the employee and employer as authorized and instructed. The role of a payroll service provider is primarily to assist by verifying (upon authorization by both the obligor/employer and employee) the amount of any wages earned to date by the employee and may include other supporting functions, such as, when authorized, facilitating a deduction from wages or other mechanism to recover EWA amounts, furnishing marketing materials and disclosures, recordkeeping (e.g., to document disclosures and consent), and facilitating enrollments. Without the ability to efficiently and accurately verify earned wage amounts and arrange for recovery of any amounts accessed, EWA services would cease to function efficiently, as many EWA service providers now offer such services to users at no cost or a nominal cost. This model has proven invaluable to consumers, whose alternatives prior to EWA were limited to high-cost payday loans or car title loans or asking their employer or friends or family for help. A 2018 study noted that the EWA provider's ability to access an employee's salary directly to ensure repayment of advances, or the "salary link," made EWA services more efficient and beneficial to employees than other market alternatives such as the typical $35 overdraft fee charged by banks and payday loans, which typically cost $15 per $100 borrowed. EWA services represent a dramatic improvement over virtually every alternative for consumers in resolving unanticipated financial needs.

If payroll service providers were considered to be "engaged in the business" of providing income-based advances, even if providing only limited support functions, the vast majority of them might simply decline to offer support services for EWA rather than undertake the

substantial burdens and costs of registration. For those providers that choose not to register, this would automatically make EWA services unavailable to every employee of every client employer. There are thousands of payroll firms that may wish to facilitate EWA services, and more than four out of five payroll service providers are small businesses, i.e., with fewer than 40 clients. If registration and added regulatory burdens (registration, fees, renewals, reporting, audits, proportionate shares of the Department's operating expenses) became necessary even to provide limited support roles, most payroll service providers may find it infeasible to support EWA services. Requiring reporting from payroll service providers would simply duplicate information already reported by EWA providers, making actual volume, costs, and impact less clear and complicate an accurate assessment of EWA volume and related data. Payroll service providers would not be able to comply with several reporting requirements because they would likely not have access to the information, such as cost to consumers, average length of time between each EWA advance and the collection date, number of times that amount collected was less than the amount due, number of California residents who received no EWA advances but paid a charge and the total of charges paid, and the number of residents who received a specified number of EWA advances and the amount advanced and amount of charges.

Response to comment 1.43.1: The Department accommodated this recommendation by amending section 1010, subdivision (b)(6), to exempt from registration a payroll service provider when verifying available earnings or performing other related facilitation activities on behalf of an obligor or provider in connection with income-based advances, provided that the payroll service provider does not provide the funds for the income-based advances or control the activities of the provider.

Comment 1.43.2: NPRC recommended clarifying that only persons contractually obligated to supply funds for EWA payments to users require registration under section 1010, by making the following revision to section 1010, subdivision (b)(6): "With respect to Income-based advances as defined in Section 1004, service providers, including without limitation, payroll service providers, whose role may include verifying available earnings and other facilitation functions, but who are not contractually obligated to supply funds for EWA payments to users." "Offering" is undefined in section 1010, subdivision (a), and some payroll service providers may offer limited supportive services to EWA providers, which could include simply making client employers and/or employees aware that EWA is available in any number of forms, such as advertisements, website banners, emails, employee payroll or time-keeping portals, in-App messages, etc. If the term is not clarified, it could result in payroll service providers refusing to permit any information to flow through the normal channels of communications between employers and employees regarding EWA services that may be available through third-party EWA service providers. The revision would clarify that a person is not "engaged in the business" of "offering" or "providing income-based advances" based merely on their facilitation of such services.

Response to comment 1.43.2: This comment was rendered moot by the addition of the exemption for payroll service providers in section 1010, subdivision (b)(6), which is discussed in the response to comment 1.43.1.

Comment 1.43.3: NPRC recommended clarifying in sections 1044, subdivision (b), and 1045 that a registrant need only report account transfer fees assessed directly for an EWA transaction.

Guidance may be necessary to enable registrants to report account transfer fees because account transfer fees are costs of outbound funds transfers to other financial accounts, which may be only partially funded by EWA transactions. As an example, when employees use prepaid debit cards to receive net payroll amounts and EWA amounts, they may receive payroll or contract payments from other employers or payers on such cards or government benefits, tax refunds, and funds transfers from friends and family on the same prepaid debit card, and if an account transfer fee applies to an outbound funds transfer, the amount may be composed of multiple sources and it may not be possible to isolate account transfer fees attributed exclusively to any EWA transactions. Such fees might be charged by banks or other financial institutions or service providers, not by the EWA provider, which may be unaware of such fees.

While section 1022 requires that registrants report, as part of the registration application, the applicant's gross income for the prior calendar year from subject products provided to residents of this state, many EWA programs are offered at no cost to users if they receive EWA amounts on a prepaid debit card and therefore the registrant's gross income from EWA services often includes interchange fees, which are paid by merchants. As with account transfer fees, interchange fees are associated with spending, which could be funded by many other income sources in addition to EWA and therefore it may not be possible for registrants to report this form of income, or it may bear no relation to the EWA amounts, which may obscure any statistics.

Response to comment 1.43.3: To accommodate this recommendation, the Department amended section 1004, subdivision (b), to add that for purposes of reporting account transfer fees, registrants need only report known account transfer fees for funds received from income-based advances.

Comment letter 1.44 – 6,271 customers of Payactiv, Inc., DailyPay, Inc., and Activehours, Inc., doing business as EarnIn (dated May 17, 2023)

Comment 1.44: Customers of Payactiv, DailyPay, and EarnIn recommended issuing a revised proposal "that adequately takes into account the needs of Californians already using EWA." The proposed EWA regulations would result in fewer EWA providers, higher costs and fees, and usage of more-expensive alternatives.

Response to comment 1.44: The Department recognizes this comment as an example of a consumer who has found value in an IBA product. However, no changes were made in response to this comment for the reasons described in the Department's response to comment 1.22.1. The Department has not received credible evidence from any commenter that these regulations (as initially proposed or as revised) would result in IBA providers' inability to offer IBA products. These regulations do not prohibit IBA providers from continuing to offer their services and are not intended to limit consumer access to these services. The Department also incorporates by reference its responses to other comments that argued that these regulations would reduce the availability of IBAs, including but not limited to comment 2.22.4.

Comment letter 1.45 – Aaron Marienthal, General Counsel, Payactiv, Inc. (dated May 17, 2023)

Comment 1.45.1: Payactiv appreciated the opportunity to provide feedback to the Department

on the proposed regulations related to income-based advances (IBA), also referred to as earned wage access (EWA) products. As discussed in more detail later, Payactiv strongly opposed the proposed regulations for five reasons and recommends several alternatives for the Department to consider.

In section I of its comment letter, Payactiv provided an executive summary. In section II of its comment letter, Payactiv summarized differences between the current proposed regulations and those proposed in November 2021 during preliminary public discussions. The major difference is that the 2021 proposed regulations involved only registration under the CCFPL, while the current proposed regulations deem virtually all EWA products to be loans and require EWA providers to comply with the CFL and either register under the CCFPL or become licensed under the CFL.

Response to comment 1.45.1: For the reasons stated in the ISOR and as discussed in more detail below, the Department did not make any changes in response to this comment, which was construed as a recommendation to withdraw the IBA-related regulations proposed under the CFL.

Comment 1.45.2: In section III of its comment letter, Payactiv provided an overview of EWA and Payactiv's employer-integrated EWA product. EWA provides employees voluntary, on-demand access to their own earned but unpaid wages at little or no cost and eliminates their need for other, expensive products—payday loans, pawn shops, installment loans, auto title loans, and bank overdrafts—that create cycles of debt and often worsen consumers' financial situations.

Unlike "traditional liquidity products," EWA is nonrecourse, does not impact credit scores, has no fair-lending concerns, and is based on earned wages. EWA's costs, if any, "pale in comparison to traditional forms of liquidity." Payactiv compares the features and costs of EWA with those of loans under the CFL and CDDTL, demonstrating EWA's numerous benefits to consumers.

Payactiv offers EWA only to employees of companies with whom it has a contractual relationship. Payactiv offers multiple ways for consumers to access their earned wages for free, including transfers to a bank account through ACH, transfers to an Amazon account, transfers to pay for an Uber ride, instant transfers to pay a bill through a bill-pay service, and instant transfers to Payactiv Visa cards with direct deposit. Consumers can also pay an optional fee of $1.99 to $2.99 to instantly transfer their wages to any debit card or to pick up their EWA balance in cash at a Walmart. There is no interest, no monthly subscription, and no tips. Payactiv does not charge any recurring, automatic, hidden, late, penalty, or "junk" fees, has no installment payment plans or credit features, and does not limit employee eligibility. Payactiv can limit the amount consumers can withdraw to a percentage of their earned wages to ensure that a portion of their paychecks can be allocated to monthly expenses.

Payactiv recoups the EWA transaction, plus any applicable fees, through an employer-facilitated payroll deduction on the consumer's next scheduled payday. The consumer authorizes each deduction in writing. Consumers cannot incur any overdraft or NSF fees from their banks because there are no bank-account debits. Payactiv's EWA program does not include any assignment of earned or unearned wages, nor does it involve creation of a debt. Instead, Payactiv's EWA transaction is "a simple factoring transaction—Payactiv purchases a future

receivable on account of earned wage payments actually received by the employee, but Payactiv has no right, title, nor interest in the wages themselves."

Payactiv has no recourse against the consumer if settlement of the EWA transaction through payroll deduction fails or is insufficient. Payactiv does not pursue collections against a consumer, on its own or through a debt collector, and does not report EWA activity to any consumer reporting agency.

"Payactiv partners with more than 1,000 employers in California and has facilitated over $60 million in earned wages for California workers." Employer-integrated EWA programs are a widely popular employee benefit and have been adopted by almost every major payroll company and human resource management company, including UKG, ADP, Paychex, Intuit, Paycor, and SAP. In addition to employers, a wide range of third-party experts have highlighted the benefits of employer-integrated EWA as a "safe, responsible alternative for workers in need of short-term liquidity."

Response to comment 1.45.2: For the reasons stated in the ISOR, the Department did not make any changes in response to this comment, which was construed as a recommendation to withdraw the IBA-related regulations proposed under the CFL. Additionally, the Department incorporates by reference its responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Comment 1.45.3: In section IV of its comment letter, Payactiv stated that regulating employer-integrated EWA products as loans would adversely impact consumers and businesses. The proposed regulations would adversely affect consumer welfare, consumer wealth creation, and fair competition in California, each described in more detail.

First, the proposed regulations would adversely affect consumer welfare and wealth creation by transforming EWA into a recourse-lending product. EWA providers would choose CFL licensure over CCFPL registration because CFL licensure would afford an exemption from the usury restrictions of the California Constitution, while obtaining either would require "virtually the same effort." Because the Legislature did not exempt CCFPL registrants from the usury law, an EWA provider that obtained a registration would ostensibly be subject to both CCFPL regulations and the usury law. Moreover, a CFL licensee would have no reason to offer EWA on a nonrecourse basis.

Response to comment 1.45.3: For the reasons stated in the ISOR, the Department did not make any changes in response to this comment, which was construed as a recommendation to withdraw the IBA-related regulations proposed under the CFL. Additionally, Payactiv simplistically reduces an IBA provider's decision to choose between CFL licensure or CCFPL registration to a consideration of the effort involved in the application process and overlooks consideration of the CFL's various substantive requirements. Payactiv correctly observes that CFL licensure exempts a lender from California's constitutional usury provisions but overstates the implications of a lack of a similar exemption in the CCFPL. The proposed regulations are intended only to interpret what is a "loan" under the CFL, not what is a "loan or forbearance of money" under article XV of the California Constitution. Furthermore, Payactiv ignores that the

regulations will provide legal clarity with respect to IBA providers' compliance obligations where IBA providers previously operated without such clarity.

In any event, in response to other comments, the Department added section 1461, subdivision (d), which clarifies that section 1461 should not be construed to interpret what is considered a loan or forbearance of money under article XV of the California Constitution, among other things.

Finally, nothing in the CFL prevents IBA products from being offered on a nonrecourse basis. IBA providers have represented that consumers value the nonrecourse nature of their products, and inserting recourse provisions into IBA contracts would implicate various new legal obligations related to federal and state debt-collection protections. Therefore, IBA providers would still have incentives to offer IBAs on a nonrecourse basis.

Comment 1.45.4: Payactiv stated that the proposed regulations would adversely affect consumer welfare and wealth creation because providers would increase fees in response to increased underwriting and compliance costs. Additionally, the cost disclosures that would be required under the CFL would "likely become convoluted and far more difficult for the average consumer to effectively comprehend." Payactiv provided a side-by-side comparison of confirmation screens disclosing costs for a $200 transaction—Payactiv's current disclosure and a hypothetical disclosure under the CFL.

Response to comment 1.45.4: For the reasons stated in the ISOR, the Department did not make any changes in response to this comment, which was construed as a recommendation to withdraw the IBA-related regulations proposed under the CFL. Additionally, the Department disagrees that capping fees for providers would result in increased fees, particularly when the risk of default is so low.

Payactiv compares its current disclosure with a straw-man hypothetical CFL disclosure, which appears to have been made unnecessarily confusing—for example, by disclosing "total potential cost including late fees" rather than total actual cost. Additionally, Payactiv would not be required under the CFL to charge an "origination" fee of 5%, or $10, or charge such a fee as a percentage of the loan amount. Five percent is simply the maximum allowed under the CFL, and the fee could be a flat amount rather than a percentage. Comparing a maximum allowed fee of $10, plus a "potential" delinquency fee of $10, with a Payactiv transaction that doesn't include any of Payactiv's similarly "potential" fees, whether $1.99 or $2.99, is not a helpful comparison.

Comment 1.45.5: Payactiv stated that classifying EWA transactions as a "sale or assignment of wages" under Financial Code section 22335 would negatively impact consumers by making EWA incompatible with the Labor Code's burdensome requirements for valid wage assignments (Lab. Code, § 300), with the potential to effectively eliminate EWA in California.

Response to comment 1.45.5: For the reasons stated in the ISOR, the Department did not make any changes in response to this comment, which was construed as a recommendation to withdraw the IBA-related regulations proposed under the CFL. Additionally, the proposed regulations are intended only to interpret what is a "loan" or "assignment of wages" under the CFL, specifically Financial Code section 22335, not what is a "wage assignment" under the

Labor Code. Indeed, section 22335 provides: “This section shall not be construed as modifying or affecting existing statutes governing wage assignments in the state, or as authorizing those assignments.” Thus, Payactiv’s concerns are unfounded.

In any event, in response to other comments, the Department added section 1461, subdivision (d), which clarifies that section 1461 should not be construed to interpret what is considered a wage assignment under the Labor Code, among other things.

Comment 1.45.6: Payactiv stated that the proposed regulations would inhibit consumer wealth creation by reducing or eliminating EWA access and forcing consumers to turn to more expensive, predatory forms of liquidity such as payday loans, overdraft fees, credit cards, pawn shops, and borrowing from family and friends, which “may not carry interest or fees” but “may stifle financial independence and may harm dignity and feelings of self-worth.”

Response to comment 1.45.6: For the reasons stated in the ISOR, the Department did not make any changes in response to this comment, which was construed as a recommendation to withdraw the IBA-related regulations proposed under the CFL. Additionally, Payactiv acknowledges that even no-fee access to liquidity “may stifle financial independence.” To the extent that Payactiv implies that substantive regulation of IBAs will decrease access to IBAs, the Department has not received credible evidence from any commenter that these regulations (as initially proposed or as revised) would result in IBA providers’ inability to offer IBA products. As noted in response to other comments, the low default risk on IBA products suggests that they should be sustainable even when substantive regulations are applied.

Comment 1.45.7: Payactiv stated that the proposed regulations would result in a decrease in fair competition because EWA providers would have to “completely overhaul their products” and incur significant new and additional costs to develop compliant products. Providers would incur costs to establish underwriting operations, buy and analyze credit reports, invest in fair-lending compliance, establish a loan-servicing platform, and establish credit-reporting and debt-collection processes.

Response to comment 1.45.7: For the reasons stated in the ISOR, the Department did not make any changes in response to this comment, which was construed as a recommendation to withdraw the IBA-related regulations proposed under the CFL. Again, Payactiv advances a straw-man argument, claiming that new underwriting, credit reports, loan servicing, credit reporting, and debt collection would be required. Payactiv offered no support for its claims, which are not convincing. The CFL requires underwriting, but Payactiv already underwrites its loans by ascertaining a consumer’s earned wages and arranging repayment through the consumer’s employer. This renders a credit report unnecessary. With respect to “loan servicing,” Payactiv already engages in servicing by communicating with consumers and collecting on its advances. Credit reporting is generally not required under the CFL, and as noted in previous responses, nothing in these regulations would require IBA providers to expand their debt-collection activities. With respect to fair-lending concerns, Payactiv fails to articulate with specificity what new costs or risks these regulations would introduce for IBA providers.

Comment 1.45.8: Payactiv stated that the proposed regulations would result in a decrease in fair competition because they would constrict, not expand, fee models and may force some providers

out of the state, reducing the number of EWA providers in California.

Response to comment 1.45.8: For the reasons stated in the ISOR, the Department did not make any changes in response to this comment, which was construed as a recommendation to withdraw the IBA-related regulations proposed under the CFL. Additionally, although regulations impose constraints to protect consumers, they do not eliminate providers' ability to innovate new and different fee models within those constraints. Even assuming that the proposed regulations would result in a decrease in the number of providers, that would not necessarily mean a decrease in fair competition. Imposing uniform definitions and rules, including rules that treat all fees as reportable charges, on all providers would increase *fair* competition.

Comment 1.45.9: Payactiv stated that consumer advocates' claims are factually and legally unfounded and unsubstantiated and discussed three such claims in detail. Payactiv also pointed to congressional testimony in which a consumer-advocacy group cited its own employees' conversations and work as sources, sources that are "devoid of actual evidence."

First, consumer advocates claim that EWA products, even free or nominal-fee products, can be unaffordable, trigger a cycle of debt, and make financial management more difficult. But Payactiv states that EWA actually frees employees from cycles of debt created by traditional lending products. Unlike high-interest loans that require consumers to take out new loans to repay their old ones, EWA products do not incur interest and create no such cycle. Consumers are not forced to access their earned wages in successive pay periods in order to repay accumulating interest and fees.

Second, consumer advocates claim that regulating EWA as anything other than credit would lead to erosion of consumer-protection and fair-lending laws. But advocates have been making this unsupported claim for more than five years without citing any evidence of actual erosion. Additionally, no conceivable interpretation of Payactiv's EWA program or the programs of its competitors could trigger fair-lending issues because there is no underwriting and no credit impact. In fact, consumer groups have advocated against legislation that would have created important consumer protections.

Third, consumer advocates claim that the traditional, full biweekly paycheck works well as a forced savings device for consumers. Taking an advance on the next paycheck when a consumer cannot cover an expense with the current paycheck creates a hole in the next paycheck. According to Payactiv, this claim is patronizing, paternalistic, and out of touch with the reality that a biweekly pay cycle creates a temporal mismatch between income and fixed monthly bills. EWA gives workers access to their earned wages when they need them, not when their employer decides to pay them.

These and other claims from EWA opponents are unsupported by research, and they have not played out in reality for employer-integrated EWA providers like Payactiv. In sum, regulating EWA as a lending product would not benefit consumers and any contrary claims are based on misunderstandings of the product, the law, or both.

Response to comment 1.45.9: For the reasons stated in the ISOR, the Department did not make any changes in response to this comment, which was construed as a recommendation to

withdraw the IBA-related regulations proposed under the CFL. Additionally, the Department notes that while asserting that consumer advocates cite their own knowledge rather than "actual evidence," Payactiv cites its own knowledge.

Comment 1.45.10: In section V of its comment letter, Payactiv stated that as a matter of law, EWA is neither credit nor a wage assignment. Payactiv's program involves "factoring transactions to purchase future receivables from consumers, and these transactions are non-recourse to the consumer." This is the purchase and sale of a future receivable, not a debt, and the customer has no contractual obligation to return funds to Payactiv. Payactiv assumes all risk of nonpayment and in the event of nonpayment has no recourse, direct or indirect, against the employee. No California court has ever held such a transaction to be a loan. The Department's rulemaking "never explains why it has the authority or justification" to deem Payactiv's program to be credit, to involve debt, or to be a loan.

There is no evidence the Legislature ever sought to address factoring in the CFL, and if it had intended to substantively regulate consumer factoring, it would and could have. Instead, the Legislature "chose a different path" by adopting the CCFPL, which authorized the Department to create a new registration regime for new and innovative financial products. Registration and monitoring would allow the Department to gather evidence that could be shared with the Legislature, which could then determine whether to adopt new substantive regulations. "It is not clear the Legislature wanted the [Department] to take on substantive regulation itself." Without clear guidance from the Legislature that it considers factoring to be consumer credit, the rulemaking exceeds the Department's authority under the CCFPL.

The Department fails to establish that EWA involves a "debt," which is necessary to establish a product as "credit" and a "consumer loan" under the CFL. The statutory definition of "credit" incorporates the statutory definition of "debt," which clearly provides that all debts involve an "obligation." (Fin. Code, §§ 90005, subds. (g), (h).) The Civil Code defines "obligation" as "a legal duty, by which a person is bound to do or not to do a certain thing." (Civ. Code, § 1427.) Thus, for a contract to involve "credit" there must be a "debt," which must include an "obligation" (whether "absolute or contingent"). The Department concludes that income-based advances meet the definition of "credit" because consumers "receive money today in exchange for agreeing to an arrangement in which the advance provider is repaid in the future." However, an arrangement is not an obligation or a legal duty by which the user is bound to do or not to do a certain thing.

Most IBA providers like Payactiv do not establish an obligation. To the contrary, a Payactiv user provides a revocable authorization for a payroll deduction, which is not an obligation or a legal duty to pay money. The user has no obligation to make other arrangements for payment in the event there are no such funds available to deduct on payday, if the deduction fails, or if the authorization is revoked. As the CFPB stated in its (since withdrawn) Approval Order to Payactiv, "'there is no independent obligation to repay' a Payactiv EWA Transaction, since Payactiv recovers corresponding EWA amounts via employer-facilitated payroll deductions and will never seek repayment from an employee directly or through a payment authorization from the employee's account." (Consumer Fin. Protection Bur., Compliance Assistance Sandbox Approval Order (Dec. 30, 2020) pp. 5-6 (hereafter CFPB Payactiv Approval Order) <https://files.consumerfinance.gov/f/documents/cfpb_payactiv_approval-order_2020-12.pdf>;

Consumer Fin. Protection Bur., Order to Terminate Sandbox Approval Order (June 30, 2022) <https://files.consumerfinance.gov/f/documents/cfpb_payactiv_termination-order_2022-06.pdf>.) While Payactiv cannot speak for the rest of the industry, "its agreement with customers expressly disclaims the creation of a debt."

Payactiv is aware of statements made by consumer groups that the fact providers like Payactiv reserve the right to pursue fraud claims against users who breach their representations and warranties transforms the transaction into a debt. These unsupported statements intentionally misread Payactiv's terms and conditions. As Payactiv explained at length in its Compliance Assistance Sandbox application to the CFPB, Payactiv includes this language to reserve the right to pursue fraud. Notably, Payactiv has never once relied on this clause. Regardless, preserving the right to pursue a fraud claim does not transform an EWA transaction into a debt—fraud is prohibited regardless. Neither does a user's revocable authorization for Payactiv to re-submit a failed deduction for the same reasons stated herein.

If a user fails to repay a loan, on the other hand, the user remains obligated to repay or suffer the consequences of default. And Payactiv's agreement with customers expressly disclaims the creation of a debt. All cases in California where a court has found a debt exists involve a transaction where the borrower has provided some sort of guarantee of repayment. (*Refinance Corp. v. Northern Lumber Sales, Inc.* (1958) 163 Cal.App.2d 73, 80 [sale was not a loan where "there was a real purchase [and] no guaranty of repayment of the purchase price"]; *Advance Indus. Finance Co. v. Western Equities, Inc.* (1959) 173 Cal.App.2d 420, 429 [sale of accounts was not a loan]; cf. *Milana v. Credit Discount Co.* (1945) 27 Cal.2d 335, 342 [transactions deemed not to be sales of accounts receivable but loans because the plaintiff provided a "guarantee" of repayment].) Payactiv has no such guarantee from its customers.

Payactiv's customers have no "contingent" obligation, either. Courts have interpreted a "contingent obligation" to be one where a subsequent act obligates a party to do something. (See *Kizer v. Hanna* (1989) 48 Cal.3d 1, 10 [explaining that a debt is a sum "certainly and in all events payable" now and a "contingent" debt is a debt "not payable until the contingency occurs" (citations omitted)]; see also *State ex rel. Pension Obligation Bond Com. v. All Persons Interested etc.* (2007) 152 Cal.App.4th 1386, 1398 [quoting *Doland v. Clark* (1904) 143 Cal. 176, 181 ("A sum payable upon a contingency is not a debt, nor does it become a debt until the contingency happens.")].) As no subsequent act obligates the consumer in Payactiv's Terms and Conditions, its product cannot involve any contingent obligation. As for a "variable obligation," there is no guidance on what it means or why an EWA provider's factoring transaction could involve a variable obligation.

The law is clear: there is no credit without a debt, and there is no debt without an obligation. Because there is no "obligation" in an EWA transaction, the Department improperly interpreted the CFL.

Response to comment 1.45.10: For the reasons stated in the ISOR, the Department did not make any changes in response to this comment, which was construed as a recommendation to withdraw all IBA-related regulations proposed under both the CCFPL and CFL. Additionally, contrary to Payactiv's assertion that the Department never explained its authority or justification

for these regulations, the Department explained in the ISOR how IBA products meet the definition of "credit" under the CCFPL (at pp. 24-25) and "loan" under the CFL (at pp. 53-54).

Payactiv asserts that IBA products do not meet the definition of "credit" under the CCFPL because the transaction does not involve "debt," which means any "obligation," whether absolute or contingent, to pay the IBA provider. Payactiv asserts that providing a revocable authorization for a paycheck deduction does not constitute an "obligation" to pay. Payactiv, however, does not describe how often consumers avail themselves of the ability to revoke authorizations for deductions or otherwise cancel repayment. Payactiv does not explain whether consumers even know about the option to cancel repayment or whether it discloses the option to consumers in a meaningful, effective manner.

Payactiv cites two cases to support its claim that an obligation is contingent if a subsequent act obligates a party to do something: *Kizer v. Hanna* (1989) 48 Cal.3d 1 and *State ex rel. Pension Obligation Bond Com. v. All Persons Interested etc.* (2007) 152 Cal.App.4th 1386 (*Pension Obligation Bond Com.*). Both cases are distinguishable. *Kizer* concerned the applicability of a Welfare and Institutions Code statute to the reimbursement of certain Medi-Cal payments and held that a narrow definition of "debt" that excludes contingent obligations is often appropriate, but in other cases a broader definition is warranted. (48 Cal.3d at pp. 10-11.) *Pension Obligation Bond Com.* had nothing to do with consumer finance; the case and authorities cited within were about state constitutional limits on local governments' ability to incur debt and exceptions for contingent obligations. (152 Cal.App.4th at pp. 1397-1398.) Neither case dealt with an arrangement like Payactiv's, in which Payactiv requires consumers to agree to a repayment arrangement as a condition of making a loan and only through a subsequent act can consumers avoid repayment.

Payactiv also asserts that IBA products are not loans under the CFL because they do not involve a "debt" or "credit." But whether a transaction is a loan under the CFL generally does not involve determining whether "credit" or "debt" exists. The Department incorporates by reference its responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.11, and provides additional responses below.

As an initial matter, in arguing that its IBA product is not subject to the CCFPL or CFL, Payactiv refers to the product's "Terms and Conditions" and describes the product's features as presumably reflected in those contractual provisions. Payactiv, however, did not provide a copy of the Terms and Conditions to the Department during this rulemaking, including during preliminary public discussions. The Department relies on information about Payactiv's IBA contract from Payactiv itself (see, e.g., comment 1.45.10 [stating that it "explained at length in its Compliance Assistance Sandbox application to the CFPB" certain contractual language and citing and quoting CFPB's subsequent orders approving and terminating approval]) and from other public comments (see, e.g., comment 1.32.2 [citing and quoting Payactiv, Compliance Assistance Sandbox Submission to CFPB from Payactiv, Inc. (hereafter Payactiv Sandbox Application) (Dec. 2020) appen. A at p. 3 (Program Terms and Conditions) (hereafter Payactiv Terms) https://files.consumerfinance.gov/f/documents/cfpb_payactiv_approval-request_2020-12.PDF]).

Payactiv cites three cases to assert that all California cases that have found that a debt exists involved a guarantee of repayment. (*Milana v. Credit Discount Co.* (1945) 27 Cal.2d 335; *Refinance Corp. v. Northern Lumber Sales, Inc.* (1958) 163 Cal.App.2d 73; *Advance Indus. Finance Co. v. Western Equities, Inc.* (1959) 173 Cal.App.2d 420.) But all three cases concerned whether the transaction in question was in substance a sale or loan, not whether a debt existed. Moreover, all three cases involved the purported sale of commercial accounts receivable (also called factoring), not of consumer wages. In any event, the existence of a contractual guarantee of repayment was not dispositive in any of these cases. In *Refinance Corp.*, the contract had no guarantee of repayment, and in practice, some purchases were without recourse and others were with recourse. The arrangement was held to be a sale. (*Refinance Corp.*, *supra*, 163 Cal.App.2d at pp. 78-80.) In *Milana*, the contract had a guarantee of repayment, and in practice, the buyer had recourse for unpaid accounts. The arrangement was held to be a loan. (*Milana*, *supra*, 27 Cal.2d at pp. 338, 340, 342.) In *Advance Indus. Finance Co.*, however, although the contract had a guarantee of repayment, the payment guaranteed was the discounted purchase price, not the face invoice amount. The arrangement was held to be a sale. (*Advance Indus. Finance Co.*, *supra*, 173 Cal.App.2d at pp. 423-424, 428-430.) Together, these cases show only that a guarantee of repayment is merely a factor to be considered and not determinative. (*Id.* at p. 429; *Refinance Corp.*, *supra*, 163 Cal.App.2d at p. 80.)

Although commercial-factoring advances differ substantially from income-based advances, the features of contract and practice considered in those cases are instructive. In *Milana*, the contract contained a warranty by the seller that the debtor of each account was solvent and a guarantee that debtors would pay their accounts. (*Milana*, *supra*, 27 Cal.2d at p. 338.) In practice, the unpaid accounts were returned to the seller for payment. (*Id.* at p. 340.) Thus, the advance providers "by their contracts and practice secured themselves against loss and protected a return . . . for each [period] during which their advances were in use." (*Ibid.*) The seller's guarantees and warranties amounted in substance to a "promise to repay . . . amounts loaned with interest." (*Id.* at p. 342.)

In its IBA contract, Payactiv has described the transaction as a sale of a consumer's "future received wage payment (not wages themselves)" and has expressly disclaimed that the transaction is credit or involves a sale or assignment of wages. (Payactiv Terms, *supra*, at pp. 3, 5.) Consumers, however, provide representations and warranties that they have earned their wages, will receive those wages at their next scheduled payday, and that those wages are not subject to garnishment or other reductions. (*Id.* at p. 4.) And in practice, consumers all but agree to repay advanced amounts plus applicable charges with their wages, by authorizing deductions from their paychecks or bank account debits that are timed to coincide with deposits of wages. (*Id.* at p. 5.) In addition to the application of loan-characterization principles from California usury case law, Financial Code section 22335 demonstrates the Legislature's specific intent to regulate loans based on the payment of consumers' wages, whether earned or to be earned.

Thus, as explained in the ISOR, IBA transactions are in substance loans, and this interpretation is supported by the text of Financial Code section 22335, the CFL's mandate to liberally construe its provisions to protect borrowers, and courts' long-established practice of looking beyond the form of a transaction to its substance to prevent evasions of usury and lending laws. (See *Milana v. Credit Discount Co.*, *supra*, 27 Cal.2d at p. 340 ["The courts have been alert to pierce the veil of any plan designed to evade the usury law and in doing so to disregard the form and consider

the substance.”]; *Haines v. Commercial Mortgage Co.* (1927) 200 Cal. 609, 616 [noting that courts will “carefully scrutinize the whole transaction,” disregard its form, and look to its substance “despite any disguise it may wear”]; *Scott v. Lloyd* (1835) 34 U.S. 418, 419 [“The ingenuity of lenders has devised many contrivances by which, under forms sanctioned by law, the [usury] statute may be evaded. . . . Courts, therefore, perceived the necessity of disregarding the form, and examining into the real nature of the transaction. If that be in fact a loan, no shift or device will protect it.”]; *Floyer v. Edwards* (K.B. 1774) 98 Eng.Rep. 995, 996 [1774 WL 265] [“Therefore in all questions in whatever respect repugnant to the [usury] statute, we must get at the nature and substance of the transaction: the view of the parties must be ascertained, to satisfy the Court that there is a loan and borrowing; and that the substance was to borrow on the one part and to lend on the other: and where the real truth is a loan of money, the wit of man cannot find a shift to take it out of the statute. If the substance is a loan of money, nothing will protect the taking more than 5 per cent.”]; *Daw v. Niles* (1894) 104 Cal. 106, 113 [discussing *Floyer v. Edwards*, including that “it was a matter of familiar knowledge to Lord Mansfield that not only this particular device, but a great number of others, had been practiced by money lenders from the very beginning of the legislation against usury, for the purpose of evading the statutory penalties, and no doubt he had those practices in mind”].)

According to Payactiv, it “is not clear the Legislature wanted the [Department] to take on substantive regulation” of IBAs. But as described in the ISOR, the Legislature has authorized the Department to make rules for the registration of covered persons under the CCFPL (Fin. Code, § 90009, subds. (a), (b), (f)) and to make general rules and regulations to enforce and further the purposes of the CFL (§ 22150), which includes substantive regulations. Accordingly, this rulemaking does not exceed the Department’s authority.

Comment 1.45.11: Payactiv stated that the Department asserts without analysis that a nonrecourse EWA product meets the statutory definition of a “consumer loan.” The Department’s interpretation disregarded the Civil Code’s plain definition of “loan of money” as “a contract by which one delivers a sum of money to another, and the latter agrees to return at a future time a sum equivalent to that which he borrowed.” (§ 1912.) Just as there is no “obligation” to repay an EWA transaction, Payactiv’s EWA transaction “expressly lacks” any agreement “to return at a future time a sum equivalent to that which he borrowed.” Instead, consumers provide a revocable authorization that their employer may perform a payroll deduction if funds are available in the consumers’ subsequent paycheck. And, as noted, Payactiv “expressly disclaims” any such agreement to repay.

California courts have long agreed with this distinction. (*Refinance Corp.*, *supra*, 163 Cal.App.2d at 80; *Advance Indus. Finance Co.*, *supra*, 173 Cal.App.2d at p. 429.) As the Supreme Court explained in *Milana v. Credit Discount Co.*, a sale of a receivable and a loan are different things. (*Milana*, *supra*, 27 Cal.2d at p. 339 [comparing sale, or “transfer of the property in a thing for a price in money,” with loan, or “delivery of a sum of money to another under a contract to return at some future time an equivalent amount with or without an additional sum agreed upon for its use; and if such be the intent of the parties the transaction will be deemed a loan regardless of its form”].)

When courts have looked at the intent of the parties, they have held a “sale” was really a loan because there was recourse or other guarantee of repayment. (See e.g., *West Pico Furniture Co.*

of Los Angeles v. Pacific Finance Loans (Cal.Ct.App. 1969) 76 Cal.Rptr. 30, 33, revd. (1970) 2 Cal.3d 594 [side letter providing recourse indicates sale was actually a loan].) In every case where a transaction was found to be a loan, the provider had some form of recourse. (See *Bistro Executive, Inc. v. Rewards Network, Inc.* (C.D. Cal., July 19, 2006, No. CV 04-4640 CBM MCX) 2006 WL 6849825, at *8.) The intent here is clear: Payactiv's customers provide no guarantee and Payactiv has no recourse. "And, in practice, Payactiv is unable to recoup thousands of dollars in EWA transactions every month."

The Department does not identify the basis for its determination that a nonrecourse transaction can be a loan. The closest it comes is when it says that the risk of capital loss to income-based-advance providers is "low" and, therefore, concludes that while the product does not establish a debt, it is close enough and can be a loan. The Department's sole support for this "close enough" theory is an unpublished decision from 2006, *Bistro Executive, Inc. v. Rewards Network, Inc.* (C.D. Cal., July 19, 2006, No. CV 04-4640 CBM MCX) 2006 WL 6849825. However, *Bistro Executive* actually undermines the Department's position. There, the court deemed the transactions at issue to be loans because there was no risk of loss to the lender—it had a contractual right of recourse against the borrower. The parties' contract permitted the lenders to "call" the loan, assuring that, at a minimum, they would receive the amount of their cash advance. (*Id.* at *7.) No such assurance exists for income-based-advance providers, who, as the Department notes, have no means of recovering funds approximately 3% of the time. "In Payactiv's case, this amounts to hundreds of thousands of dollars in unrecovered transactions just in California."

Additionally, the court in *Bistro Executive* relied on additional factors not present with income-based-advance transactions: (1) the provider had policies and procedures used in administering their cash advance program that were similar to those of a traditional lender (not present here), (2) the provider typically required that restaurant owners sign a "personal guaranty" and execute a "security agreement" under which the provider took a broad security interest in all of the restaurant's property" (not present here), and (3) the provider employed underwriters and referred to the transactions as loans in various materials (also not present here). (2006 WL 6849825 at *8.) None of these facts make the loans in *Bistro Executive* remotely similar to income-based-advance products as described in the ISOR. In the end, *Bistro Executive* better aligns with cases cited above that require recourse for a transaction to be a loan.

Finally, as noted above, other indicia of consumer loans are lacking with Payactiv's EWA product, including interest charges, risk of debt collection, and credit reporting. Under *Milana* and its progeny like *Bistro Executive*, the Department cannot conclude that Payactiv's EWA service is a consumer loan "without disregarding the plain language of the CFL that requires the existence of a debt."

Response to comment 1.45.11: For the reasons stated in the ISOR, the Department did not make any changes in response to this comment, which was construed as a recommendation to withdraw the IBA-related regulations proposed under the CFL. Additionally, the Department incorporates by reference its responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10, and provides additional responses below.

Payactiv incorrectly asserts that the Department did not analyze or identify the basis for its determination that a nonrecourse transaction can be a loan. In the ISOR, the Department cited *Bistro Executive* for the proposition that courts often consider risk of capital loss as one of several factors in assessing whether a product should be treated as a loan. Contractual provisions that provide recourse are just one way that a lender can insulate itself against risk of loss. By various mechanisms in its arrangement, the lender in *Bistro Executive* was "guaranteed of recouping" its money. (2006 WL 6849825 at *8.) Similarly, various mechanisms in IBA transactions result in a very low risk that providers will not recoup their capital. As noted in the ISOR, IBA default rates suggest a lower risk of loss than for loans provided under the Department's other lending laws. Payactiv itself has acknowledged that "the risk Payactiv is taking on any one consumer is quite low as employers rarely fail to pay their employees their earned wages."[9] (Payactiv Sandbox Application, *supra*, at p. 12.) Repayment is virtually guaranteed because if a paycheck deduction or debit fails, Payactiv can make up to two more attempts until it succeeds. (*Id.* at p. 9; Payactiv Terms, *supra*, at p. 3.) The low risk of loss for IBA products generally, along with several other factors, formed the basis of the Department's determination that purportedly nonrecourse IBAs are loans.

Payactiv also incorrectly asserts that the plain language of the CFL requires the existence of a debt. The word "debt" does not appear in any of the CFL's definitional provisions. As stated in the response to comment 1.45.10, whether a transaction is a loan under the CFL generally does not involve determining whether "credit" or "debt" exists.

As noted in other comments, Payactiv and its competitors have effectively locked consumers out of the courts so that case law on these products is unlikely to arise. In a technology-driven environment in which IBA providers have access to data and payment mechanisms that enable them to collect what they lend in the ordinary course with de minimis default risk, it is appropriate to find that their products are loans. The Department incorporates by reference its response to comment 1.45.10, in particular its description of the measures Payactiv has taken to virtually eliminate default risk.

Comment 1.45.12: Payactiv stated that the proposed regulations rely on misplaced and inapplicable authority to justify an improper reading of the CFL's definition of a sale or assignment of wages in Financial Code section 22335. A nonrecourse program such as Payactiv's is not close to the type of "sale," "assignment," or "order" for the payment of wages that the Legislature sought to root out. Regardless, section 22335 necessarily requires an actual sale of wages from the seller to the buyer and, as a result, the creation of a "debt."

Black's Law Dictionary defines an "assignment" as an "Act by which one person transfers to another, or causes to vest in that other, the whole of the right, interest, or property which he has in any realty or personalty, in possession or in action, or any share, interest, or subsidiary estate therein." There is no evidence, cited in the ISOR or otherwise, that income-based-advance providers, including Payactiv, acquire any "right, interest, or property" in a consumer's wages themselves. By establishing its transactions as nonrecourse, and by making the authorization for

[9] Payactiv states that it "is unable to recoup thousands of dollars in EWA transactions every month" and points to "hundreds of thousands of dollars in unrecovered transactions in California." But "hundreds of thousands of dollars" not recouped out of a total of $60 million in transactions (see comment 1.45.2) is, at most, even less than the 3% figure cited by the Department.

a payroll deduction revocable, Payactiv's transaction does not meet this definition of an assignment. Just as a revocable authorization to perform a payroll deduction cannot constitute a "debt," "loan," or "obligation," it can constitute neither a sale nor an assignment of wages. The Department cites no authority establishing that the Legislature intended to ensnare products with such features. What legislative history does exist shows the Legislature sought to regulate loan sharking activities where employees sold yet-to-be earned wages at a substantial discount that trapped them in a cycle of debt.

Instead, the Department relies on dated, inapplicable, and irrelevant authorities that sought to address conduct quite different from what is at issue in this rulemaking. First, the Department puts substantial weight on an article from 1941 titled "The Development of Regulatory Small Loan Laws." This article, written by an industry lawyer after the adoption of the provision at issue, does not cite any California statutes or any California-specific legislative history. Instead, the article explains that wage assignment laws of that era were adopted to address predatory lending practices where employees were provided loans they could never repay and, as a result, the borrower was caught in a cycle of debt. Even assuming the Legislature's goal was to address these practices, there is no indication that California intended its wage assignment law to reach transactions that do not involve an actual assignment, do not trap workers in a cycle of debt, and do not impose any kind of predatory fees. Nor could it, as the wage assignment law predated EWA products by more than 70 years. The Department appears to imply the wage sale products at issue in the 1930s are similar to the income-advance products of today. The available evidence indicates this is far from the case. Indeed, the example cited in the 1941 article involves the purchase of wages at a steep discount. But Payactiv does not purchase anything at a discount—it gives free, early access to wages.

The Department's reliance on the 1943 case *Lande v. Jurisich* is similarly misplaced. That case involved a former Labor Code provision addressing assignment only of future, unearned wages. (59 Cal.App.2d 613, 618.) The Department provides no basis to extend that holding to already earned wages. This is not merely a semantic difference—the policy reasons addressed in *Lande* concern harm to consumers when they give away their yet-to-be earned wages because it meant individuals would be completing work in the future having already given up the right to be paid for that work. At issue here, however, is whether consumers have a right to access their own, already earned wages. Neither *Lande* nor the 1941 Hubachek article support a finding that the Legislature sought to treat this sort of activity as a wage assignment.

Response to comment 1.45.12: For the reasons stated in the ISOR, the Department did not make any changes in response to this comment, which was construed as a recommendation to withdraw the IBA-related regulations proposed under the CFL. Additionally, Payactiv asserts that the Department provides no basis to extend the holding in *Lande* to already earned wages. But as discussed in the ISOR, Financial Code section 22335 applies to wages "whether earned or to be earned," and section 1461 of these regulations reflects the Legislature's mandate to liberally construe and apply the CFL's provisions to promote its underlying purposes, including consumer protection. (Fin. Code, § 22001, subd. (a)(4).) Accordingly, an arrangement that is "not technically an assignment" of wages "in a sense may be regarded" as one. (*Lande v. Jurisich* (1943) 59 Cal.App.2d 613, 619; see Fin. Code, § 22335 ["any sale or assignment of . . . the payment of wages"]; Payactiv Terms, *supra*, at p. 3 [describing transaction as "sale" and "transfer" of consumer's right, not to "wages themselves" but to "proceeds of your future wage

payment(s)" and "amounts that you have actually received from Employer"]; *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1291-1292 [courts will not adopt narrow meaning of statute if it would result in evasion of statute, when broader meaning would prevent evasion and carry out that purpose].)

Comment 1.45.13: Payactiv stated that in the near-decade history of EWA, no regulatory or legislative body has determined that EWA is a loan, although several have reached contrary conclusions, including the Consumer Financial Protection Bureau (CFPB), U.S. Department of the Treasury, Arizona Attorney General, Kansas Office of the State Bank Commissioner, and the Department itself. Payactiv provided a timeline and summary of relevant IBA-related regulatory and legislative developments in this section as well as in Appendix I to its comment letter. Payactiv recommended reexamining these developments and revising the proposed regulations accordingly.

Response to comment 1.45.13: For the reasons stated in the ISOR, the Department did not make any changes in response to this comment, which was construed as a recommendation to withdraw the IBA-related regulations proposed under the CFL. Additionally, the 2020 CFPB advisory opinion interpreted whether EWA was "credit" under the federal Truth in Lending Act, not whether it was a "loan" under state law. The CFPB itself, in its November 27, 2023 comment letter in this rulemaking, observed that it is critically important that IBA providers be subject to state oversight and that treating these products as loans under the CFL is a similar regulatory approach to that of the Truth in Lending Act and Regulation Z. (See comments 2.14.2, 2.14.3, 2.14.4 [cautioning against misrepresenting "very narrow scope" of advisory opinion].) The Arizona Attorney General, in interpreting whether EWA is a "loan" under Arizona law, relied heavily on the CFPB's analysis of "credit" under federal law. The Treasury's purported clarification is a proposed amendment to the treatment of EWA under federal employment tax law that the U.S. Department of the Treasury explicitly stated is not intended to create any inferences regarding current law.[10] The Department's interpretive opinion in 2022 was a specific ruling concerning an EWA product that is materially different from Payactiv's employer-integrated EWA product. That other EWA product was also the subject of the Kansas bank commissioner's interpretive opinion.

Comment 1.45.14: In section VI of its comment letter, Payactiv objected that the proposed regulations have various flaws that should be addressed even if the basic framework (including the classification of EWA as a wage assignment and loan) remains.

Payactiv objected that the proposed regulations are based on faulty data and analysis. Payactiv disagreed with the Department's observation that annual percentage rates (APR) for providers that accepted tips and those that did not were generally similar to the average APRs for licensed payday lenders in California.

As an initial matter, using an APR for EWA is neither accurate nor helpful because EWA is not credit or associated with interest, nor does the Department compare EWA APRs with comparable

[10] See https://home.treasury.gov/system/files/131/General-Explanations-FY2024.pdf *at* VI.

CFL loans. The Department cites no precedent to support the theory that an APR should be applied to a noncredit product, such as bank overdraft fees and ATM fees.

The Department's observations are false because the APR of an average Payactiv transaction in 2021 was about one-fourth of the APRs for non-tip-based companies stated in the Department's "2021 Earned Wage Access Data Findings, March 2023" (Data Findings). The Data Findings also appear fundamentally flawed and incomplete for the following reasons.

First, the Department does not explain its methodology for the data analysis. The Data Findings do not clarify whether (a) the Department calculated the APR on each individually reported EWA transaction and averaged those individual APR figures to come up with an average APR figure or (b) used each company's average fee amount, average transaction amount, and average days to repay to come up with an average APR. Payactiv's understanding is that the Department used method (a). Both methodologies offer important and distinct takeaways for interpretation of the findings. The Department failed to provide any statistical support for the methodology it used.

Second, the sample size of companies used in the APR calculations is wholly insufficient to represent an average for the EWA industry. For example, the Department used data from only two providers in its analysis for non-tip-based companies, and it is not clear which ones. These could be employer-integrated providers, direct-to-consumer providers, or both. There is a wide range of provider types and pricing models, and a sample set of only two companies is vastly insufficient to make a sweeping conclusion regarding an "average annual APR" for an entire industry. Nor does the Department explain how it weighted the data from these two providers.

Third, the Department used outdated data from 2021 when many providers, including Payactiv, had different fee structures in place. Notably, Payactiv now provides EWA at no cost and only charges between $1.99 and $2.99 for certain types of expedited delivery. Even if an APR calculation was an appropriate construct for EWA (it is not) and even assuming an expedited-delivery fee should be included in such an APR calculation (it should not), the APR for some of the most common Payactiv transactions is significantly less than the Department's stated figures. Payactiv provides a table of illustrative APRs.

Fourth, it appears that the Department excluded no-fee transactions from its calculations. Confusingly, the Data Findings state that transactions with zeros or blank number of days to repay were removed for this report. A significant share of users opt for free EWA transactions, and thus these 0% APR transactions should be included in any analysis.

Fifth, the Department groups companies into two categories, tip-based and non-tip-based, without explanation. While the use of "tips" raises important consumer-protection considerations, grouping data this way fails to appropriately distinguish between two inherently distinct EWA products—those that integrate with the employer's time-and-attendance payroll systems and those that market directly to consumers and estimate wages. When conducting analyses on these products, third-party experts, including the U.S. Government Accountability Office, have distinguished between EWA providers based on whether the provider offers employer-integrated EWA or direct-to-consumer advances—and not based only on whether they solicit "tips." The Department should do APR comparisons by distinguishing between employer-integrated EWA and direct-to-consumer advances, not tips.

Finally, the Department omitted the average fee amount from its findings while publicizing the average advanced amount, time to repay, and tip amount. It is disingenuous to omit the flat, low-cost, optional fee that users elect to pay for EWA services. As the free and low-cost nature of EWA is one of its primary benefits for consumers, this information should be included in the Data Findings.

The Department has failed to disclose its statistical methodology and rationale. Payactiv sought clarification in writing and in phone conversations with the Department's staff regarding the data the Department relied on in connection with the Data Findings. Payactiv provides a copy of its April 2023 letter to the Department regarding these requests as Appendix II. In particular, Payactiv asked which method the Department used to calculate APR, whether Payactiv's data was included in the Department's calculations, whether no-fee transactions were considered (and if not, why not), and why the Department limited its calculations to data that is now more than 18 months old despite having newer data in its possession. Despite Payactiv's repeated requests for transparency, the Department did not provide an official response to any of its requests. The Department should not rely on the faulty APR it calculated to justify or promote the proposed regulations.

Response to comment 1.45.14: For the reasons stated in the ISOR, the Department did not make any changes in response to this comment, which was construed as a recommendation to withdraw the IBA-related regulations proposed under the CFL. Additionally, Payactiv implies that the Department's average-APR findings are inaccurately high but does not explain why a lower actual average APR for either Payactiv or the industry would invalidate the stated purpose of and necessity for the proposed regulations. The Department incorporates by reference its response to other comments arguing that analyzing APR is inappropriate for IBA products. With respect to Payactiv's transparency concerns, the Department notes that it was Payactiv and other IBA providers who demanded confidentiality in negotiation of their MOUs with the Department, and the Department was therefore limited in what it could share with Payactiv without disclosing confidential data of other IBA providers.

Comment 1.45.15: Payactiv objected that this rulemaking has not complied with the Administrative Procedure Act (APA). The Department failed to sufficiently include an explanation for why the proposed regulations are not major, an economic-impact assessment, an initial determination that the action will not have a significant adverse economic impact, and a consideration of reasonable alternatives. Each is described in more detail below. This failure should, at the very least, be cause for the Department to reconsider its approach and the evidence that supports it. If the Department does not, and instead finalizes the proposed regulations, a court would likely invalidate them for substantially failing to comply with the APA.

First, the Department does not explain why the regulations are not major or provide any calculations about the total amount of economic impact imposed by the proposed regulations. As demonstrated herein, the proposed regulations would have significant and ongoing impacts on California businesses and consumers in an amount that is likely to exceed $50 million. The Department should explain why the proposed regulations are or are not major.

Response to comment 1.45.15: For the reasons stated in the ISOR, the Department did not make any changes in response to this comment, which was construed as a recommendation to

withdraw the IBA-related regulations proposed under the CFL. Additionally, Payactiv asserts that these regulations are major “as demonstrated herein” but does not provide any supporting data or analysis in section VI of its comment letter.

Comment 1.45.16: Payactiv objected that the Department failed to provide an adequate economic-impact assessment. The Department concluded, without supporting evidence or data, that the proposed regulations’ requirements will not affect job creation or elimination, the creation of new businesses or elimination of existing businesses, or the expansion of businesses currently doing business. The Department addressed all of these impacts in one paragraph, for a total of three conclusory paragraphs asserting that the registration and reporting requirements would have no impact on businesses in the state. The Department cited no data or analyses in these conclusions.

The ISOR was similarly lacking with respect to the benefits of the regulation to the health and welfare of California residents, stating only that the Department “anticipates that the CFL regulations will benefit consumers and protect them from unfair practices by clarifying that the CFL’s protections apply to advances secured by a consumer’s wages. The regulations will also benefit consumers and businesses by clarifying the law with respect to subscription fees, tips, single-payment collections, repayment plans, and education forbearances.” However, the Department never identified a single unfair practice concerning EWA products in the ISOR.

Accordingly, the Department also failed to satisfy the APA’s requirement to make an economic-impact assessment using “an evaluation based on facts.” As set forth above, the facts resulted in opposite conclusions.

Response to comment 1.45.16: For the reasons stated in the ISOR, the Department did not make any changes in response to this comment, which was construed as a recommendation to withdraw the IBA-related regulations proposed under the CFL. Additionally, contrary to Payactiv’s assertion that the Department never identified an unfair practice concerning IBA products, the Department described practices by providers of tip-based financing, which includes tip-based IBAs, to make tips almost as certain as required fees. (ISOR, at pp. 61-62.) However, to address Payactiv’s comments concerning the adequacy of the Department’s initial economic-impact analysis, the Department removed the requirement that IBA providers comply with CFL rate caps. In addition, these regulations will allow providers to operate outside the CFL notwithstanding that the Department’s analysis reflects that IBA providers are offering loans under California law.

Comment 1.45.17: Payactiv objected that the Department did not provide sufficient evidence to support its conclusion of no significant adverse economic impact on business. It provided only a conclusory statement that lacked any “real evidence or support” other than two comment letters to the previously proposed regulations from consumer-advocacy groups, who “cite themselves as source material,” rather than from any businesses that would actually be subject to the regulations or their customers. These letters do not themselves contain the facts, evidence, documents, or testimony required by the APA. Instead, they asserted without evidence that the previously proposed requirements “would impose minimal costs on industry” and would be “commensurate with supervision needs.” In other words, the Department relied on multiple levels of speculation—its own speculative belief that there is no significant adverse economic

impact and third-party commenters' uninformed beliefs that no adverse economic impact would result from the prior proposal. Citation to a commenter's "mere speculative belief" is speculation all the same and will not survive judicial review under the APA.

Response to comment 1.45.17: For the reasons stated in the ISOR, the Department did not make any changes in response to this comment, which was construed as a recommendation to withdraw the IBA-related regulations proposed under the CFL. Additionally, in its own comment letter to the regulations proposed in November 2021 during preliminary public discussions, which included only registration under the CCFPL, Payactiv did not mention any economic impact from the reporting requirements and identified as burdensome only one of the application requirements, although it was a business that would be subject to the regulations and was invited to comment on 10 separate questions related to economic impact.

In any event, in response to this and other comments about the Department's determinations concerning economic impact on the IBA industry, the Department removed the requirement that IBA providers comply with the CFL's rate caps to be exempt from licensure and provided that when the CCFPL registration requirements expire, IBA providers will continue to be exempt from licensure. The Department also deleted sections 1463 (guidance regarding prohibition on requiring the first payment in less than 15 days for single-payment loans) and 1464 (guidance regarding "charges" for subscription-fee-based IBA models). As described in this FSOR, these changes do not reflect a determination that IBAs are not loans or that the CFL's rate and fee caps or other requirements are not appropriate for IBAs. Rather, the Department needs the additional time and data that a registration period will afford to study associated economic impacts.

Comment 1.45.18: Payactiv objected that the Department did not provide sufficient discussion of reasonable alternatives. In the section of the ISOR nominally titled "Consideration of Alternatives," the Department summarized comments on its much narrower proposal from 2021 instead of considering any meaningful alternatives to the current proposal. The "changes or additions" requested to the 2021 proposal were largely minor wordsmithing or technical changes. Even if such relatively minor changes could be considered "alternatives," they were alternatives to an earlier, much different proposal, not to the one currently being considered. The Department's obligation under the APA was to consider whether there is a less burdensome way to accomplish the purposes of the regulation currently at issue. Considering alternatives on a prior proposal did not meet that standard.

The Department did not consider the prior framework of the 2021 proposal as a reasonable alternative or address why it abandoned the proposal in favor of one that is "exponentially more burdensome." The Department should have explained, but did not, why the 2021 proposal does not accomplish the Department's policy goals, especially given the Department previously commented that the 2021 Proposal "would have "strengthen[ed] its ability to protect California consumers through compliance examinations of registrants and regular reporting."

As for the additional requirement under the APA that the Department explain its reasons for rejecting any reasonable alternatives that would lessen any adverse impact on small businesses, the Department simply restated that requirement with a perfunctory conclusion. It did not address whether any of the companies that would be covered by the proposed regulations are small companies as defined in the APA or cite any data or evidence about the size of the companies

that will be covered. A bald assertion that there were no reasonable alternatives as to small businesses did not meet the Department's obligations under the APA.

Response to comment 1.45.18: For the reasons stated in the ISOR, the Department did not make any changes in response to this comment, which was construed as a recommendation to withdraw the IBA-related regulations proposed under the CFL. The Department did consider and provide reasoning for rejecting an alternative substantially similar to the no-CFL, registration-only framework of the 2021 proposed regulations. (ISOR, at p. 10 [describing request by two commenters "to exempt free, non-recourse advances from the CFL" and rejecting it for reasons described in purpose-and-necessity statement for section 1461].) This and other alternatives were not reasonable alternatives within the meaning of Government Code section 11346.2, subdivision (b)(4)(A), but the Department nonetheless provided explanations for rejecting them. (ISOR, at pp. 10-11 [explaining that no requested change was less burdensome and equally effective but responding to "requested changes to the extent practicable" under "Other Alternatives Considered"]; Gov. Code, § 11346.2, subd. (b)(4)(C) [agency not required to describe unreasonable alternatives].)

Comment 1.45.19: Payactiv recommended distinguishing between employer-integrated EWA providers and direct-to-consumer advance providers and objected that the proposed regulations fail to recognize the differences between them. For example, most employer-integrated providers, like Payactiv, utilize wage and census data, facilitated by their employer-partners, to determine a user's earned-wage balance. This data integration ensures that consumers do not access more than they have actually earned. Employer-integrated providers also do not expose employees to overdraft risks because they recoup disbursements through payroll. Direct-to-consumer providers, on the other hand, generally estimate a user's earned-wage balance by reviewing prior direct-deposit amounts through bank-account integrations or by using geolocation technology. Thus, direct-to-consumer advances are a fundamentally different product and pose distinct risks to consumers (e.g., overdraft fees and advances based on unearned income). The proposed regulations addressed none of these critical consumer protections, and even seem to indicate that no wage-verification standard should exist at all.

Specifically, the phrase "based on income" in the definition of "income-based advance" in section 1004, subdivision (g)(1), can be interpreted to cover any or all of the various types of income-based-advance providers, including direct-to-consumer providers that do not purport to provide earned wage access. As a result, the definition makes no cognizable distinction between employer-integrated EWA providers that receive time and attendance data from the consumer's employer and providers that may do little or nothing to verify that a consumer is entitled to funds from their employer. The proposed regulations leave ambiguous whether providers like Payactiv would be covered, while non-integrated advance providers (who recoup funds from a consumer's bank account on payday but otherwise have no connection to a consumer's earned wages) would not.

Response to comment 1.45.19: The Department did not make any changes in response to this comment for the reasons described in the response to comment 1.20.4.

Comment 1.45.20: Payactiv recommended clarifying the proposed restriction on IBA providers'

recourse in section 1004, subdivision (g)(3)(A).

First, it is unclear (a) why such a restriction is necessary for registrants as they will not also be reporting on CDDTL loan transactions and (b) whether this limitation on recourse would also apply to otherwise exempt CFL licensees—i.e., whether the Department intended to create a new category of loans offered by licenses with restricted recourse. As it stands, the exemption for CFL licensees applies "to the extent the licensee offers and provides . . . income-based advances as defined by Section 1004." It is unclear if this is intended to mean that if a CFL licensee offers an income-based advance, it must be nonrecourse.

Second, it is unclear whether the proposed definition would effectively exclude income-based advances that do include recourse, and if so, why? As it stands, proposed section 1010, subdivision (a), provides that no person shall engage in the business of offering or providing subject products, including income-based advances, to California residents without first registering, and section 1004 defines "income-based advance" to include only those without recourse.

Response to comment 1.45.20: The Department did not make any changes in response to this comment. The purpose of the definition of "income-based advance" is not to dictate a specific business model but to specify characteristics of a particular business model that distinguish income-based advances from deferred-deposit transactions under the CDDTL.

Comment 1.45.21: Payactiv recommended clarifying that "no legal or contractual claim or remedy" in section 1004, subdivision (g)(3)(A), does not restrict providers from re-presenting a payroll deduction when necessary because of technical or human error. The Department explained that this provision allows for "limited remedies" but didn't explain what that or "contractual claim" means. The Department explained that this provision mirrors the CFPB's 2017 Small Dollar Lending Rule (12 C.F.R. § 1041.3(d)(7)(ii)(B)), but that rule includes guidance permitting employers to obtain a one-time authorization to seek repayment.

Response to comment 1.45.21: The Department amended section 1004, subdivision (g)(3)(B), to accommodate this recommendation, by adding that "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.

Comment 1.45.22: Payactiv recommended defining and clarifying which entities are considered "business partners" in section 1004, subdivision (g)(3). The ISOR is silent on the term's meaning.

Response to comment 1.45.22: The Department did not make any changes in response to this comment. Payactiv did not explain how the lack of a definition is problematic for compliance, and the Department believes that the term is sufficiently clear in the context of the regulation.

Comment 1.45.23: Payactiv recommended clarifying in section 1004, subdivision (g)(3)(B), that "debt collection activities" is limited to debt collection from consumers, not employers. Some EWA providers have a contractual right to pursue claims against employers if they fail to remit payroll-deducted funds. The provision is not clear as to whether the restriction on "debt collection" would be limited to collections from consumers or if it would also apply to a

provider's collection attempts against employers.

Response to comment 1.45.23: The Department did not make any changes in response to this comment. Section 1004, subdivision (g)(3), sets forth a provider's warranties to the consumer, so adding language regarding the provider's ability to collect from the consumer's employer could be confusing to consumers.

Comment 1.45.24: Payactiv recommended modifying section 1465 to exclude expedited-transfer fees from "charges." The Department proposes to include expedited-funds fees in the definition of "charges" under section 1004, subdivision (c), but only to clarify CCFPL reporting requirements under section 1045. To minimize confusion, the Department should clarify that expedited-transfer fees are not "charges" under section 1465. In addition, as it did for certain subscription fees, the Department should clarify that expedited-transfer fees are excluded from "charges" under Financial Code section 22202, subdivision (f), and authorized under section 22154. In the event the Department intended to characterize expedited-funds fees as "charges" under the CFL, it should reconsider for at least three reasons.

First, Payactiv's expedited-funds fee is not charged "in connection with []investigating, arranging, negotiating, procuring, guaranteeing, making, servicing, collecting, and enforcing [] a loan" because an EWA transaction is not a loan as set forth above and the Legislature clearly intended to permit optional and voluntary fees under the CFL in section 22202, subdivision (f). As the ISOR recognizes, "the CFL expressly excludes certain such costs and fees from the definition of 'charges,'" including "money paid for the sale of goods, services, and insurance." Here, an expedited-transfer charge is just that—a charge for a separate service—i.e., instant payment delivery through private payment rails, such as Visa Direct, or for delivery of cash to a Walmart. Unlike tips or gratuities, such expedited-delivery services have an associated, underlying cost to the provider.

Second, classifying expedited-transfer fees as "charges" under section 1465 would not solve for the Department's stated concerns about rate caps, especially given that the CFL permits much higher fees than EWA providers charge today.

Third, the Department should not adopt a rule forbidding a provider from utilizing the statutory exemption outlined in section 22202, subdivision (f), especially without analysis. The Department should instead pursue registration and data collection and defer to the Legislature for any regulation around rate caps.

Response to comment 1.45.24: The Department did not make any changes in response to this comment. As discussed in the ISOR, the Legislature could have but did not specify that all discretionary fees, such as tips, gratuities, or other optional or voluntary fees, are excluded from "charges." Instead, it specified that only certain fees are excluded, including payments for the sale of services that are a licensee's authorized "other business" (Fin. Code, §§ 22202, subd. (f), 22154, subd. (a).) Except for these specifically excluded fees, the Legislature intended that all fees or costs received in connection with a loan are included in the expansive definition of "charges." (§ 22200.)

Contrary to Payactiv's claim, section 1465 does not bar providers from using the Financial Code section 22202, subdivision (f) exclusion. The former provision concerns fees in connection with the business of lending, while the latter concerns fees in connection with a business other than lending.

The Department also incorporates by reference its responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Comment 1.45.25: Payactiv recommended reconsidering and clarifying section 1464 and its $12 subscription-fee cap. First, the Department does not explain how it determined $12 as a permissible subscription fee. Without this information, it appeared arbitrary and it was difficult to provide meaningful comment on whether this proposed rule would adversely affect Payactiv's customers or products in the long run. Providers subject to the rule are left to guess why $12 is permissible while $13 is not.

Second, the structure of the proposed exception operated as a de facto rate cap because fees over the proposed cap would be subject to the CFL, and may therefore be prohibited, while fees below the cap are not. The CCFPL prohibits this. (Fin. Code, § 90009, subd. (f)(3) ["Nothing in this paragraph shall be construed to give the department authority to establish a usury limit applicable to an extension of credit."].) The Department's statement that a fee in excess of $12 may still be permissible pursuant to section 22202, subdivision (f), did not change the practical reality that the exception still operates as a de facto cap.

Third, it was not clear how the exemption would actually work in practice. As proposed, the fee must allow access to other products and services (§ 1464, subd. (a)(2)) and cannot affect the terms of the income-based advance (§ 1464, subd. (a)(3)). To the extent the purpose is to allow providers to sell a subscription for income-based advance services, it is not clear why a consumer would purchase a subscription if the provider must offer an income-based advance under the same terms without the subscription. And if the purpose is to allow providers to sell other goods and services for a monthly subscription fee, the Department identified nothing in the record to support such a fee. Put simply, it was not clear what problem section 1464 was intended to solve or actually solves, other than allowing providers to charge $144 per year for other goods and services.

Response to comment 1.45.25: To the extent the recommendation was to remove section 1464, the Department declined to do so for the reasons stated in the ISOR. To the extent the comment was an objection to section 1464, the Department did not make any changes in response. As the Department explained in the ISOR, a maximum subscription fee higher than $12 would increase financial incentives for providers to operate to evade the CFL's rate limitations. As to Payactiv's second concern, that the CCFPL does not authorize the Department to establish a usury limit is irrelevant because section 1464 is authorized under the CFL. Payactiv's third concern is a straw man. A provider would not offer an IBA product with a subscription fee and the same IBA product without a subscription fee. It would offer a bundle of financial products that includes IBAs with a subscription fee and IBAs without a subscription fee. The purposes of the provisions in section 1464 are explained in the ISOR and generally include preventing evasions of the CFL

and providing guidance for complying with Financial Code sections 22202, subdivision (f), and 22154.

Comment 1.45.26: Payactiv recommended excluding employer-integrated products in section 1461, subdivision (a), just as employer-funded products are. The Department's "temporary use" distinction is unnecessary and artificial. Specifically, the Department does not explain why funds advanced from a third party's bank account (including on the employer's behalf) are any more "temporary" than funds advanced from the employer's bank account. In both cases, the employee receives funds prior to their scheduled payday. In both cases, the employer deducts the amount of the advance from the employee's paycheck. In both cases, the employee has no legal obligation to repay the funds. The mere fact that the employer then reimburses a third party (the provider) does not make the disbursed funds more for "temporary use" as compared to a situation without such reimbursement. The ISOR goes on to indicate that "regulation under the CFL may not be appropriate due to the employer's preexisting obligation to pay the employee based upon services rendered," but it is not clear how the employer's preexisting obligation to pay an employee has any bearing on which entity—the provider or the employer—funds the advance.

The exclusion for employer-funded programs is also arbitrary because it abandons cost as a factor in evaluating CFL coverage, a determining factor in its 2022 EWA opinion letter. In its 2022 opinion letter, the Department said that the subject provider's "cost also counsels against application of the CFL" to the provider's EWA program. A year later, the Department curiously omitted this reason from a rule that would apply to other EWA programs. Providers that would be subject to the proposed regulations, such as Payactiv, charge the same or lower fees than the provider in the 2022 opinion, who charged a maximum of $3.50 or $5.00 per transaction (depending on an employee's pay cycle). These fees are higher than Payactiv's maximum $2.99 optional fee.

Response to comment 1.45.26: The Department did not make any changes in response to this comment for the reasons described in the ISOR. The Department's interpretive opinion in 2022 was a specific ruling that applied only to the specific facts identified in the request for ruling, including the cost of the EWA product. Regarding temporary use, an employer who pays earned wages in advance of payday may not be providing money for temporary use, after which the money will be returned, but rather for permanent use. As for cost, it is a relevant factor to the extent that it may indicate evasion of the CFL, but this evaluation can be done only on a case-by-case basis and is not determinative for an entire type of income-based advances, whether employer-funded advances or employer-integrated advances. To the extent that the recommendation was to withdraw the IBA-related regulations proposed under the CFL, the Department did not make any changes in response for the reasons stated in the ISOR. The Department incorporates by reference its responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Comment 1.45.27: In section VII of its comment letter, Payactiv recommended three alternatives to the proposed regulations. The first alternative was adopting the no-CFL, CCFPL-

registration-only framework of the 2021 proposed regulations.

As noted earlier, the Department does not explain why the 2021 proposal would no longer be adequate to accomplish its stated goals or how a broader substantive attempt to regulate non-loan products under a lending regime could accomplish them, especially as regulating EWA as a credit product would in fact reduce or eliminate consumer protections already present in most EWA products. In short, the 2021 proposal would have been as effective and less burdensome and would have lessened any adverse impact on small businesses.

To the extent the Department believes compliance with the CFL's rate caps is necessary to ensure consumer protections, it has not established that providers charge fees for EWA services that materially exceed those rate caps. Even Payactiv's highest fee of $2.99 for expedited delivery of funds on an average transaction of approximately $90, for example, is far less than the CFL's 5% origination-fee cap, not to mention interest charges or late fees that CFL lenders can charge. The Department does not explain why imposing those caps on providers would necessarily result in consumers paying lower fees.

Response to comment 1.45.27: See response to comment 1.45.18. Additionally, the Department's mandate is not to determine whether IBA providers now charge fees exceeding the CFL's rate caps but to determine whether IBA products are loans under the CFL. If they are, then consumers are entitled to the CFL's statutory protections established by the Legislature, including rate caps, as explained in the ISOR. (At p. 53.) The Department notes that some of its largest CFL licensees (buy-now, pay-later providers) charge no fees in connection with many of their loans. In the ISOR, the Department explained in detail its purposes for adopting the CFL portion of its regulations and the goals associated with those sections.

Comment 1.45.28: The second alternative recommended by Payactiv is seeking consumer protections through legislation instead of regulations. The Department could utilize data from registered providers and recommend legislation that creates important consumer protections that are not outlined in the proposed regulations. Pending legislation in Nevada, Vermont, Texas, and Wisconsin provides a model framework for California to adopt. Included as Appendix III is Texas House Bill 3827. Such legislation would be highly effective in meeting the Department's stated goals of oversight and consumer protection and would involve far fewer negative consequences and negative impacts than the proposed regulations.

Response to comment 1.45.28: To the extent that the comment recommended regulating IBA providers under a registration-only regime, the Department declined to do so for the reasons stated in the ISOR and in its responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Comment 1.45.29: The third alternative recommended by Payactiv is expanding the exclusion in section 1461, subdivision (a), to also cover employer-integrated products, not just employer-funded products.

Response to comment 1.45.29: See response to comment 1.45.26.

Comment 1.45.30: Regardless of how the Department approaches alternatives to the proposed

regulations, it should follow several principles in adopting regulations that affect the entire EWA industry, which now comprises upwards of 50 different providers and an array of fee structures, wage verification mechanisms, and repayment methods.

The first principle is to have a fulsome understanding of trends and risks by collecting additional consumer-level data before making any regulations.

Response to comment 1.45.30: The Department acknowledges the note. The Department did not make any changes in response to this comment because it was an observation rather than a recommendation to change the regulation. Before proposing these regulations, beginning in at least 2020, the Department studied data, trends, and risks through memoranda of understanding with several IBA providers and two invitations for comments.

Comment 1.45.31: The second principle recommended by Payactiv is to distinguish between employer-integrated EWA and direct-to-consumer advances. Failing to make a distinction leaves several consumer protections unaddressed and equates an employee benefit (that employers want to offer their employees to enhance employee financial wellness) with cash advance apps and loans (that employers are not interested in offering to their employees). The Department should look to state legislatures considering EWA regulation and consumer protections in Nevada, Vermont, Virginia, Texas, and Wisconsin, which all make this important distinction.

Response to comment 1.45.31: The Department did not make any changes in response to this comment for the reasons described in the response to comment 1.20.4.

Comment 1.45.32: The third principle recommended by Payactiv is to collaborate with the "Department of Labor," or Department of Industrial Relations, regarding any proposal that purports to equate an EWA transaction with a wage assignment, which should clarify that the Department's interpretations in this rulemaking are not applicable to the Labor Code.

Response to comment 1.45.32: The Department acknowledges the note. The Department did not make any changes in response to this comment because it was an observation rather than a recommendation to change the regulation. As explained in this FSOR, Financial Code section 22335 provides that the CFL's treatment of wage assignments does not affect their treatment under other statutes.

Comment 1.45.33: The fourth principle recommended by Payactiv is to specify the effective date of the regulations and how long providers would have to comply with the rules after they are finalized. A provider like Payactiv would have to carefully decide if it still wanted to do business in California as a lender. (As noted above, registration appears to add few benefits over CFL licensure.) The proposed regulations would likely require an overhaul to Payactiv's products in California. These changes would significantly impact compliance, legal, product, engineering, finance, marketing, partnerships, and operations teams. Any final proposal should clearly reflect effective dates commensurate with the amount of work involved in ensuring compliance. For reference, if the current proposal were finalized, it could take Payactiv 12 to 18 months to be ready to comply with the new rule, not including the time the Department would need to review a license application. The Department should allow providers at least that long to

come into compliance with any final rule.

Response to comment 1.45.33: The Department construed this comment as a recommendation to delay the effective date of the regulations for the purpose of filing a CFL license application. In response to other comments, the Department amended section 1462 by deleting the requirement that IBA providers comply with the CFL's rate caps to be exempt from licensure (subdivision (a)(3)) and by providing that when the CCFPL registration requirements expire, IBA providers continue to be exempt from licensure (subdivision (a)(2)). These changes had the effect of addressing the concerns raised in this comment.

Comment letter 1.46 – Garth McAdam, General Counsel, ZayZoon US Inc. (dated May 17, 2023)

Comment 1.46.1: ZayZoon partners with payroll providers and employers, predominantly in the small to midsize business space, to provide earned wage access (EWA) services to consumers. ZayZoon supported the development of a regulatory framework for EWA, including registration, reasonable reporting requirements, and responsible behavior towards consumers and their finances. However, concluding that all EWA disbursements are "loans" and "wage assignments" for purposes of the CFL, will mean consumers and employers in California will no longer be able to receive EWA services, and will be forced to fall back on using high-cost alternatives, such as payday loans and overdraft fees. This approach should only be undertaken with a full understanding of the effects of any new regulations on industry stakeholders, businesses, and, most importantly, consumers. The Department should avoid taking any action that may ultimately harm California consumers by impeding access to EWA services and should develop a framework that encourages responsible provision of EWA services. It is inappropriate to consider all EWA services to be loans. The Department should reconsider its proposed rule and clarify that, considering the characteristics of certain EWA models, not all EWA models automatically fall under the scope of the CFL. The Department should establish a distinct registration obligation for those EWA models that differ from traditional credit arrangements, specifically those that are directly integrated with payroll or employers, and explicitly acknowledge that transactions made under such models are not considered "loans" under the purview of the CFL.

EWA services should be viewed as low-cost access to liquidity, not credit, because it is a different financial product. A more analogous financial product is a bank account being accessed through an ATM. The Department should compare the costs of various financial products to consumers as it looks to regulate EWA. Average NSF fees and payday loans are costly financial products for consumers, and the Department should consider the benefits of EWA products. ZayZoon recommended aligning the proposed rule with the advisory opinion issued by the CFPB in 2020, which set forth the parameters that EWA products may adopt to avoid being deemed to "credit" under the Truth in Lending Act (TILA) and Regulation Z. The Department should consider permitting direct-to-consumer models to operate in California because they may have unique benefits to consumers and generally offer their services to employees whose employers have not partnered with an employer-based EWA provider. Indirect competition between the various EWA models will offer many benefits to consumers, such as broader coverage, increased competition, expanded consumer choice, and lower-cost delivery.

Response to comment 1.46.1: For the reasons stated in the ISOR, the Department did not make any changes in response to this comment, which was construed as a recommendation to withdraw all IBA-related regulations proposed under both the CCFPL and CFL. Additionally, the Department incorporates by reference its responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10. The Department also incorporates by reference its responses to other comments that argued that these regulations would reduce the availability of IBAs, including but not limited to comment 2.22.4.

As explained in response to comment 1.45.13, the 2020 CFPB advisory opinion interpreted whether EWA was "credit" under the federal Truth in Lending Act, not whether it was a "loan" under state law. And whether a transaction is a loan under the CFL generally does not involve determining whether "credit" or "debt" exists. The CFPB itself, in its November 27, 2023 comment letter in this rulemaking, observed that it is critically important that IBA providers be subject to state oversight and that treating these products as loans under the CFL is a similar regulatory approach to that of TILA and Regulation Z. (See comments 2.14.2, 2.14.3, 2.14.4 [cautioning against misrepresenting "very narrow scope" of advisory opinion].) The Department further notes that while the CFPB is the primary authority on TILA, the Department is the primary authority on California's lending laws—including the CFL. While TILA and the CFL cover many of the same transactions, their scope is not necessarily coextensive, as TILA covers consumer credit and the CFL governs loans.

Comment 1.46.2: ZayZoon expressed concern that the Department has not properly considered the potential consequences to consumers should the final rule restrict or outright prevent California consumers' access to responsible, low-cost products like EWA. Nothing in the economic impact assessment indicates that any analysis has been conducted on the negative impacts to consumers of inhibiting their access to EWA services. The Department should not regulate EWA solely as a product but rather consider it in light of the alternatives available to consumers. This analysis is critical for prioritizing the prevention of unethical businesses from harming the most vulnerable populations.

Response to comment 1.46.2: The Department notes that this comment was resolved because the requirement that IBA providers comply with CFL rate caps was removed to address procedural arguments related to economic impact made by this commenter and others.

Comment 1.46.3: ZayZoon expressed concern that because the Department has previously ruled that a certain EWA model is not subject to the CFL, the proposed rule will effectively push EWA providers to adopt this model. The Department has failed to consider the economic impact that this would have on businesses operating in the state. The requirement that EWA be "employer-funded" in order to not be subject to the CFL would negatively impact small to midsize businesses in California, with the greatest negative effect felt by businesses in predominantly minority-populated communities. Employees working for these employers would have significantly reduced, or no, access to EWA services. The Department should expand its exemption for employer-funded, employer-based EWA models to include all employer-based EWA models. While ZayZoon agreed with the Department's analysis in the specific ruling that, by satisfying an existing financial obligation from the employer to the employee, an EWA

disbursement is not “for temporary use” and therefore should not be considered a “loan,”

The Department should reconsider the scope of the specific ruling because the analysis should not be the source of funds but instead be the idea of “satisfies part of an existing financial obligation from the employer to the employee.” Because employer-based EWA providers have a relationship with both the employer and the employee, disbursements made under employer-based EWA models can, upon the agreement of all parties, satisfy part of an existing financial obligation from the employer to the employee. Therefore, such disbursements are not for temporary use. This analysis would expand the number of EWA models that can operate without being considered a loan under the CFL, foster competition between EWA providers, lower the cost of delivery of the services, and protect California businesses, in particular small to midsize businesses, operating in the state of California without increasing any risks faced by consumers. The Department should reconsider the special distinction for employer-funded models and instead focus on the relationship between the consumer, employer, and EWA provider. If all parties agree that the EWA advance is satisfying an existing obligation to the employee, the advance is not “for temporary use” and therefore should not be deemed a loan. This would foster competition, lower cost of delivery, elevate substance over form, increase consumer access to responsible EWA services, and protect small to midsize businesses, particularly in Black and Hispanic communities, from the risks of taking on additional debt.

Response to comment 1.46.3: See response to comment 1.46.2. To the extent that the recommendation was to withdraw the IBA-related regulations proposed under the CFL, the Department did not make any changes in response for the reasons stated in the ISOR. The Department incorporates by reference its responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10. IBAs made by employer-integrated providers are still advances “for temporary use” because the IBA provider expects repayment of the amount advanced on the consumer’s payday.

The Department also incorporates by reference its responses to other comments that argued that these regulations would reduce the availability of IBAs, including but not limited to comment 2.22.4.

Comment letter 1.47 – Allison Mather (dated May 8, 2023)

Comment 1.47: Mather commented on the benefits of EWA. Living in the Bay Area, there are countless times Mather was completely broke and anxious about having enough money for gas to get to work or food for the night, and it was thanks to the EarnIn app that Mather was able to stretch to pay day and have less worry in life. Working-class people deserve to have access to the funds they have earned in a timely manner and the value of being able to request your own funds when you need it without having to deal with insane interest rates from small term loans is peace of mind that is priceless.

Response to comment 1.47: The Department recognizes this comment as an example of a consumer who has found value in an IBA product. However, no changes were made in response to this comment for the reasons described in the Department’s response to comment 1.22.1. The Department has not received credible evidence from any commenter that these regulations (as initially proposed or as revised) would result in IBA providers’ inability to offer IBA products.

These regulations do not prohibit IBA providers from continuing to offer their services and are not intended to limit consumer access to these services.

Comment letter 1.48 – Isaac Galindo (dated May 8, 2023)

Comment 1.48: Do not regulate EWA unless you want the economy to fail.

Response to comment 1.48: For the reasons stated in the ISOR, the Department did not make any changes in response to this comment, which was construed as a recommendation to withdraw all IBA-related regulations proposed under both the CCFPL and CFL. Additionally, the Department incorporates by reference its responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Comment letter 1.49 – Stephanie Gelman (dated May 8, 2023)

Comment 1.49: Gelman makes what used to be a good wage, and now if anything unusual pops up, like car repairs or the cost of prescriptions and medical care, Gelman won't make it to the next paycheck. This used to be ungodly stressful because Gelman had no idea where to get the cash to eat and put gas into the car. With EWA, Gelman can get cash without having to beg friends and family for help, and the money is paid back at Gelman's next paycheck. It does not become a cycle that Gelman can't get out of because Gelman plans the next paycheck's expenses around it, and it's much easier to make financial decisions with a bit of a lead time than to deal with emergencies one after another. The Department should not take away EWA because it gives peace of mind Gelman never had before.

Response to comment 1.49: The Department recognizes this comment as an example of a consumer who has found value in an IBA product. However, no changes were made in response to this comment for the reasons described in the Department's response to comment 1.22.1. The Department has not received credible evidence from any commenter that these regulations (as initially proposed or as revised) would result in IBA providers' inability to offer IBA products. These regulations do not prohibit IBA providers from continuing to offer their services and are not intended to limit consumer access to these services.

Comment letter 1.50 – EDreana Black (dated May 8, 2023)

Comment 1.50: Black strongly opposed the proposed rulemaking on earned wage access services. Black is like millions of Californians who live paycheck and need this app. EarnIn helps when Black, a single mother, is short on buying groceries and prevents her from overdrafting her bank account when an emergency comes up. The Department should rethink its decision and keep EarnIn to help the little people out.

Response to comment 1.50: The Department recognizes this comment as an example of a consumer who has found value in an IBA product. However, no changes were made in response to this comment for the reasons described in the Department's response to comment 1.22.1. The Department has not received credible evidence from any commenter that these regulations (as initially proposed or as revised) would result in IBA providers' inability to offer IBA products.

These regulations do not prohibit IBA providers from continuing to offer their services and are not intended to limit consumer access to these services.

Comment letter 1.51 – Sanjiv Ranjan Das, Professor, Santa Clara University (dated May 9, 2023)

Comment 1.51.1: Das is the William and Janice Terry Professor of Finance and Data Science at Santa Clara University, and previously held appointments as Professor at Harvard University and University of California, Berkeley. Das's background is in quantitative finance, theoretical computer science, and applied computer science. Das previously was an advisor to Payactiv, a long-standing provider of EWA and financial wellness products and also served as a contractor with the Department of Justice and the Office of the California State Attorney General. The proposed regulations for EWA are likely to increase costs for providers, which would cause consumer fees to increase and decrease competitiveness in the marketplace. EWA is provided in coordination with employers, and providers already operate in a transparent manner given they have signed a Memorandum of Understanding with the Department. New registration requirements will standardize and regularize reporting, which will improve efficiency and transparency in the delivery of EWA products. However, this will come at additional costs that have been outlined in the proposed regulations as not being excessive, though it will clearly tilt the balance in favor of larger providers and may become harder to bear for smaller providers. This may reduce competitiveness in the marketplace, which usually leads to oligopolies/monopolies that are not in the interests of consumers, especially the more vulnerable ones. Das hoped that the final version of these regulations will be designed to provide a Pareto-optimal tradeoff such that all parties (consumers, providers, and taxpayers) are all better off.

Response to comment 1.51.1: The Department disagrees with this comment to the extent that it suggests that the regulations will harm the industry or consumers. The regulations require providers to register and annually report on their business activities. The Department does not expect these requirements to adversely impact the industry or consumer access.

Comment 1.51.2: Das commented that defining earned wage access as a loan is ill-framed. Employees with earned wages are effectively owed compensation by employers and are not borrowers, as EWA only accelerates access to money already owed to employees. By designating EWA as a loan, the regulation would change the status of employees from (quasi) creditors into debtors, arguably a perverse interpretation and outcome. In bankruptcy, it is already established that earned wages (and benefits) become priority unsecured debt, reflecting the legal position that far from being given a loan, it is employees who already own their wages. Several features of EWA demarcate it from being a loan. The employee does not "repay" the loan because they receive the remainder of their earned wages, including wages that were not earned when they gained access to earned wages earlier. The only thing that EWA does is change the timing of wage payments, which is very different from taking a loan. Employers set aside the amount of the accessed wages in escrow for the provider and at no time is employee debt created. No interest is charged and only an optional, nominal processing fee is charged, which is the same irrespective of the timing and amount granted under earned wage access and is analogous to an ATM fee for covering the cost of access and convenience. An employee is simply using a benefit offered by the employer to access wages early. The proposed regulation's verbiage that such arrangements still involve an agreement in which the consumer receives money that they agree to

repay in the future semantically attempts to paint EWA as an extension of credit. But this is logically unconvincing because all consumers and employers have done is agree to change the timing of wage payments.

Response to comment 1.51.2: For the reasons stated in the ISOR, the Department did not make any changes in response to this comment, which was construed as a recommendation to withdraw the IBA-related regulations proposed under the CFL. Additionally, the Department incorporates by reference its responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Comment 1.51.3: Das strongly recommended that the Department revisit the nomenclature concerning earned wage access before moving forward. Lumping earned and unearned income into the definition above ignores the difference between the two, which is critical because earned pay is owed to employees, whereas unearned pay is not. For this reason, the nomenclature "income-based advance" (IBA) is too broad and mischaracterizes the product being offered. In contrast, earned wage access (EWA) clearly specifies that the wages in question are "earned" and hence "owed to" the employees, which logically sets it far apart from being a loan. The term "income-based advance" makes no distinction between earned and unearned wages and uses the word "advance" that makes it sound like a loan. In doing so, it seeks to cast a wider net, eschewing sharper and clearer definition of the EWA marketplace, risking imposing additional regulations that may only make the marketplace less efficient, less competitive, and more costly.

Response to comment 1.51.3: The Department declined to make the recommended change because the term "income-based advance" is necessary to ensure that all providers that hold themselves out to consumers as providing advances to be repaid by the consumer's earned wages are subject to regulation, regardless of label or name of the product. The Department disagrees that IBAs are not loans for the reasons stated in the ISOR and as discussed in the Department's responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10. Last, the Department rejected the argument that IBAs should not be treated as loans because they are based on "earned" wages, because Financial Code section 22335 plainly applies to "earned" wages, and Das offered no legal analysis or precedent to support the argument that cash advances underwritten solely with earned wages are not loans.

Comment 1.51.4: Das observed that without access to earned wages, consumers must turn to high-cost traditional lending products like payday loans, title loans, and bank account overdraft. The EWA marketplace has successfully rescued thousands of consumers from the clutches of these predatory products. It is truly a benefit that is provided to employees at no cost to their employers, especially given that employers are not interested in providing loans to their employees. Designating EWA as a loan will disincentivize employers from adding this benefit for their employees, making them considerably worse off, and millions of employees will lose access to free or low-cost access to liquidity. This position strongly contradicts the goals of consumer access and protection and drives consumers away to more costly alternatives.

Response to comment 1.51.4: The Department declined to make changes in response to this comment for a variety of reasons. First, the Department notes (as reflected in the ISOR) that its analysis of data provided by IBA providers indicated that IBAs can be, and often are, as

expensive on an annualized rate basis as the payday loans offered by CDDTL-licensed payday lenders. With respect to concerns about employer interest in IBA programs, the Department incorporates by reference its response to comment 2.22.4. Furthermore, the Department disagrees that the regulations as drafted discourage employers from offering IBAs to their employees. It is EWA providers' argument that they are paying consumers' wages that creates legal uncertainty for employers, as such an arrangement would necessarily implicate employer and third-party obligations under the Labor Code. By finding that IBAs are loans and not the early payment of wages, the Department reduces the risk that employers and third parties will be held liable for violations of the Labor Code.

Comment 1.51.5: Das applauded the Department for seeking to standardize the marketplace in a manner that supports both businesses and their employees by improving accountability and transparency of financial products and services and protecting consumers from abusive business practices and high-cost products. However, because EWA products are not loans, designating them as such would make employers and employees worse off. Designating EWA as lending is not necessary to achieve the goals set out above and may, in fact, detract from those goals. Onerous licensing and registration requirements will increase costs that will be passed on to consumers through higher processing fees. Designating EWA as a loan will attract lending regulations, which will impose further costs that will also be passed on. As costs rise, smaller players in the EWA market will be pushed out, reducing access to this benefit, or leading to some players using lending market comparables to charge excessive fees. Costly oligopolies will also reduce competition in the EWA market, with declining access and choice for consumers. EWA is a different product than many of the other lending products that the proposed regulation seeks to regulate, and it should be handled differently because the EWA marketplace has been a lifesaver for vulnerable consumers and has been well regulated so far.

Response to comment 1.51.5: For the reasons stated in the ISOR, the Department did not make any changes in response to this comment, which was construed as a recommendation to withdraw the IBA-related regulations proposed under the CFL. Additionally, the Department incorporates by reference its responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Comment letter 1.52 – Jenn Woodcock (dated May 9, 2023)

Comment 1.52: Woodcock urged the Department to listen to consumers because many use EWA to help them get through tough times and they cannot afford to lose access to these apps, nor can they afford them as short-term loans. The proposed regulations will result in further ruining consumers' credit and also cost more money to consumers, and it is unfair to consumers to remove low-cost or no-cost options to help them, particularly since consumers just came out of a three-year-long pandemic. Woodcock urged the Department to do what is right.

Response to comment 1.52: The Department recognizes this comment as an example of a consumer who has found value in an IBA product. However, no changes were made in response to this comment for the reasons described in the Department's response to comment 1.22.1. The Department has not received credible evidence from any commenter that these regulations (as initially proposed or as revised) would result in IBA providers' inability to offer IBA products.

Comment letter 1.53 – Lauren Libas (dated May 9, 2023)

Comment 1.53: Libas's comment letter is not a pre-written statement done by an EarnIn representative but Libas's own story, which Libas is telling because it is necessary to fight to keep apps like EarnIn alive. Libas had EarnIn on Libas's phone for years, but it hadn't helped out immensely until after moving into Libas's current house. Libas lives with four roommates, and no one in the household earns enough to pay the rent by themselves. Many of their peers have moved out of state or live with roommates or their parents because it is too expensive to live in California. EarnIn has been a godsend because it provides access to Libas's paycheck days before payday and helped when Libas's roommates were laid off and when they all got COVID at the same time, and it helped to pay for food and gas to get to work. Libas pleaded to keep apps like EarnIn because people are only trying to survive and urged the Department to not make drastic regulations until it truly understands the consequences of the loss of this lifeline.

Response to comment 1.53: The Department recognizes this comment as an example of a consumer who has found value in an IBA product. However, no changes were made in response to this comment for the reasons described in the Department's response to comment 1.22.1. The Department has not received credible evidence from any commenter that these regulations (as initially proposed or as revised) would result in IBA providers' inability to offer IBA products. These regulations do not prohibit IBA providers from continuing to offer their services and are not intended to limit consumer access to these services.

Comment letter 1.54 – Maryann Boller (dated May 9, 2023)

Comment 1.54: Boller is a 25-year veteran payroll professional who has long held the position that the benefits being promoted concerning Earned Wage Access currently pose serious questions around taxes and Department of Labor concerns around timely payment of wages. Key to this deliberation is the concept of constructive receipt because some vendors that offer the benefit appear to assume the liability and some do not. The employer is always ultimately responsible for all aspects of an employee's pay. Boller expressed strong concerns that the agreements made with such vendors could be interpreted differently than communicated during the sales process. Boller suggested that the Department call upon payroll professionals for a grass roots look at the real-life consequences of providing on demand pay.

Response to comment 1.54: The Department considered this comment but made no changes in response to the comment because the Department disagrees that IBAs involve the early payment of wages when a third party (i.e., not the employer) is the source of funding. The Department disagrees that IBAs are not loans for the reasons stated in the ISOR and as discussed in the Department's responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10. IBA providers contend that they are simply facilitating early payment of wages to argue that no existing regulatory framework applies to their loan products. This contention is unpersuasive for a variety of reasons, including that IBA providers do not contend that they pay wages as agents of employers or comply with applicable labor laws relating to wage payments.

Form Comment Letter 1.1 – 6,146 Commenters

Form comment 1.1: I use Earnin to access my money when I need it and am worried the Department isn't fully considering why hundreds of thousands of Californians use earned wage access products.

These services aren't loans. EWA is innovation that allows us to access wages we've already earned at our discretion. The Department has essentially ruled that they are better equipped than us to make important financial decisions that affect our families.

I strongly encourage you to consider a different approach for this important workers' rights issue because this does more harm than good.

Response to form comment 1.1: The Department recognizes this comment as an example of a consumer who has found value in an IBA product. The Department had no intention of preventing consumers from accessing IBA products that comply with California's credit-cost limitations. However, no changes were made in response to this comment for the reasons described in the Department's response to comment 1.22.1. It appears that an IBA provider represented to California customers that the initially proposed regulations would prevent it from lending to consumers even though the Department had proposed reasonable rate caps (approximately $5 on each $100 advanced) on IBA loans that carry de minimis risk of nonpayment. The Department has not received credible evidence from any commenter that these regulations (as initially proposed or as revised) would result in IBA providers' inability to offer IBA products. The Department disagrees that IBAs are not loans for the reasons stated in the ISOR and as discussed in the Department's responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Form Comment Letter 1.2 – 9,863 Commenters

Form comment 1.2: I write in strong opposition to the proposed rulemaking on Earned Wage Access services. Like millions of Californians who live paycheck to paycheck, my EWA app allows me to manage my finances and helps me avoid having to choose which bills to pay, just because my paycheck hasn't landed in my account yet. This means I no longer stress over choosing between a car payment or groceries, or between rent or monthly prescriptions.

Having access to my money in real-time also saves me from overdrafting and even allows me to proactively put away some money for a rainy day.

Most importantly, the peace of mind from knowing I'll have a safety net to help make it through the month is irreplaceable.

I know I'm not alone, and it is unacceptable to propose such sweeping changes without any regard for the impact it will have on the thousands of Californians in a similar financial situation.

I strongly encourage you to rethink your decision before it is too late.

Response to form comment 1.2: The Department recognizes this comment as an example of a consumer who has found value in an IBA product. The Department had no intention of preventing consumers from accessing IBA products that comply with California's credit-cost limitations. However, no changes were made in response to this comment for the reasons described in the Department's response to comment 1.22.1. It appears that an IBA provider represented to California customers that the initially proposed regulations would prevent it from lending to consumers even though the Department had proposed reasonable rate caps (approximately $5 on each $100 advanced) on IBA loans that carry de minimis risk of nonpayment. The Department has not received credible evidence from any commenter that these regulations (as initially proposed or as revised) would result in IBA providers' inability to offer IBA products. The Department disagrees that IBAs are not loans for the reasons stated in the ISOR and as discussed in the Department's responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Form Comment Letter 1.3 – 12,070 Commenters

Form comment 1.3: I write in strong opposition to the proposed action on Earned Wage Access products.

I, like countless other Californians, struggle every month to keep up with the mountain of bills and manage a balanced budget. EarnIn has been such a relief. I no longer worry about stretching my finances to reach payday. Without EarnIn I would have to turn to payday loans or another credit card to bridge the paycheck gap. The Department is supposed to protect consumers, I worry this rulemaking will have the opposite effect.

If I need to access my money to meet my financial obligations, I should be able to. I strongly encourage you to do everything in your power to stop this proposed rule.

Thank you for your consideration.

Response to form comment 1.3: The Department recognizes this comment as an example of a consumer who has found value in an IBA product. The Department had no intention of preventing consumers from accessing IBA products that comply with California's credit-cost limitations. However, no changes were made in response to this comment for the reasons described in the Department's response to comment 1.22.1. It appears that an IBA provider represented to California customers that the initially proposed regulations would prevent it from lending to consumers even though the Department had proposed reasonable rate caps (approximately $5 on each $100 advanced) on IBA loans that carry de minimis risk of nonpayment. The Department has not received credible evidence from any commenter that these regulations (as initially proposed or as revised) would result in IBA providers' inability to offer IBA products. The Department disagrees that IBAs are not loans for the reasons stated in the ISOR and as discussed in the Department's responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Form Comment Letter 1.4 – 15 Commenters

Form comment 1.4: I urge you to reject PRO 01-21 and defend workers' rights. We have already had too many of our freedoms taken away by state regulators, and this proposed rule would make it even harder for us to manage our finances.

We all experience difficult times where we need quick access to our pay, but payday lenders can be too expensive. Tools that let us access our earned pay free of charge should be protected.

It is essential that we stand up for ourselves and protect what is rightfully ours. Please do not let PRO 01-21 pass - reject it and safeguard the rights of workers everywhere.

Response to form comment 1.4: The Department recognizes this comment as an example of a consumer who has found value in an IBA product. The Department had no intention of preventing consumers from accessing IBA products that comply with California's credit-cost limitations. However, no changes were made in response to this comment for the reasons described in the Department's response to comment 1.22.1. It appears that an IBA provider represented to California customers that the initially proposed regulations would prevent it from lending to consumers even though the Department had proposed reasonable rate caps (approximately $5 on each $100 advanced) on IBA loans that carry de minimis risk of nonpayment. The Department has not received credible evidence from any commenter that these regulations (as initially proposed or as revised) would result in IBA providers' inability to offer IBA products. The Department disagrees that IBAs are not loans for the reasons stated in the ISOR and as discussed in the Department's responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Form Comment Letter 1.5 – 16 Commenters

Form comment 1.5: Earned wage access should be a right for all workers, and PRO 01-21 would make it difficult for them to get by. I've been in tricky situations where I had to access my paycheck before payday. The current system that allows employees to access their wages with no charge or an optional tip, provides them with financial freedom. But, PRO 01-21 would take away this power from workers and give it to banks and payday lenders instead.

PRO 01-21 is bad news for workers. Please don't approve this rule and stand up for California's workforce and families.

Response to form comment 1.5: The Department recognizes this comment as an example of a consumer who has found value in an IBA product. The Department had no intention of preventing consumers from accessing IBA products that comply with California's credit-cost limitations. However, no changes were made in response to this comment for the reasons described in the Department's response to comment 1.22.1. It appears that an IBA provider represented to California customers that the initially proposed regulations would prevent it from lending to consumers even though the Department had proposed reasonable rate caps (approximately $5 on each $100 advanced) on IBA loans that carry de minimis risk of nonpayment. The Department has not received credible evidence from any commenter that these

regulations (as initially proposed or as revised) would result in IBA providers' inability to offer IBA products. The Department disagrees that IBAs are not loans for the reasons stated in the ISOR and as discussed in the Department's responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Form Comment Letter 1.6 – 15 Commenters

Form comment 1.6: Earned wage access is a right that all workers should have access to. Unfortunately, PRO 01-21 would make it harder for people to get by.

I have been in situations where I needed access to my wages before payday and the current system which allows free access or an optional tip, gives me the power to control my financial freedom. If this rule was passed it would shift that power away from us and into the hands of big banks and payday lenders.

This rule would have serious consequences for California workers and families - please reject it and stand up for what's right.

Response to form comment 1.6: The Department recognizes this comment as an example of a consumer who has found value in an IBA product. The Department had no intention of preventing consumers from accessing IBA products that comply with California's credit-cost limitations. However, no changes were made in response to this comment for the reasons described in the Department's response to comment 1.22.1. It appears that an IBA provider represented to California customers that the initially proposed regulations would prevent it from lending to consumers even though the Department had proposed reasonable rate caps (approximately $5 on each $100 advanced) on IBA loans that carry de minimis risk of nonpayment. The Department has not received credible evidence from any commenter that these regulations (as initially proposed or as revised) would result in IBA providers' inability to offer IBA products. The Department disagrees that IBAs are not loans for the reasons stated in the ISOR and as discussed in the Department's responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Form Comment Letter 1.7 – 6 Commenters

Form comment 1.7: I strongly oppose PRO 01-21. Too much of our freedom has already been taken away and this rule will make it more difficult to handle our finances as we see fit.

When times are tough and I need access to my pay, I don't want to be subjected to the expensive rates and fees of payday lenders. It's important that we keep solutions that allow us to access our earned wages without added costs.

Please reject PRO 01-21 and safeguard workers' rights.

Response to form comment 1.7: The Department recognizes this comment as an example of a consumer who has found value in an IBA product. The Department had no intention of preventing consumers from accessing IBA products that comply with California's credit-cost

limitations. However, no changes were made in response to this comment for the reasons described in the Department's response to comment 1.22.1. It appears that an IBA provider represented to California customers that the initially proposed regulations would prevent it from lending to consumers even though the Department had proposed reasonable rate caps (approximately $5 on each $100 advanced) on IBA loans that carry de minimis risk of nonpayment. The Department has not received credible evidence from any commenter that these regulations (as initially proposed or as revised) would result in IBA providers' inability to offer IBA products. The Department disagrees that IBAs are not loans for the reasons stated in the ISOR and as discussed in the Department's responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Form Comment Letter 1.8 – 7 Commenters

Form comment 1.8: I am expressing my deep concern about the proposed rule PRO 01-21. Workers should not be charged fees or have to pay high-interest rates in order to access the pay they've earned. Earned Wage Access is a right and this rule would make it harder for Californians to make ends meet.

Enough freedoms have been taken away from workers, they should not be subject to rules that take away their financial freedom too.

Please reconsider PRO 01-21 and protect Earned Wage Access.

Response to form comment 1.8: The Department recognizes this comment as an example of a consumer who has found value in an IBA product. The Department had no intention of preventing consumers from accessing IBA products that comply with California's credit-cost limitations. However, no changes were made in response to this comment for the reasons described in the Department's response to comment 1.22.1. It appears that an IBA provider represented to California customers that the initially proposed regulations would prevent it from lending to consumers even though the Department had proposed reasonable rate caps (approximately $5 on each $100 advanced) on IBA loans that carry de minimis risk of nonpayment. The Department has not received credible evidence from any commenter that these regulations (as initially proposed or as revised) would result in IBA providers' inability to offer IBA products. The Department disagrees that IBAs are not loans for the reasons stated in the ISOR and as discussed in the Department's responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Form Comment Letter 1.9 – 19 Commenters

Form comment 1.9: Earned wage access is a fundamental right for workers, and PRO 01-21 would make it difficult for them to make ends meet.

I've been in tight spots where I needed to access my paycheck before payday. The current system that allows free access or an optional tip gives the workers autonomy over their financial

situation. If PRO 01-21 passes, this power will be taken away from them and given back to banks and payday lenders.

PRO 01-21 doesn't help workers; it hurts them. Please reject this rule and stand up for California's workforce and families.

Response to form comment 1.9: The Department recognizes this comment as an example of a consumer who has found value in an IBA product. The Department had no intention of preventing consumers from accessing IBA products that comply with California's credit-cost limitations. However, no changes were made in response to this comment for the reasons described in the Department's response to comment 1.22.1. It appears that an IBA provider represented to California customers that the initially proposed regulations would prevent it from lending to consumers even though the Department had proposed reasonable rate caps (approximately $5 on each $100 advanced) on IBA loans that carry de minimis risk of nonpayment. The Department has not received credible evidence from any commenter that these regulations (as initially proposed or as revised) would result in IBA providers' inability to offer IBA products. The Department disagrees that IBAs are not loans for the reasons stated in the ISOR and as discussed in the Department's responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Form Comment Letter 1.10 – 5 Commenters

Form comment 1.10: I am writing to voice my strong disapproval of the new proposed rule, PRO 01-21. I believe that workers should have access to their pay without added fees or high-interest rates that can be detrimental.

Earned Wage Access is a basic right, and rule PRO 01-21 would make it much harder for Californians to get by.

Workers have already sacrificed too much. The state government should not implement rules that take away our financial freedom as well.

I urge you to reconsider PRO 01-21 and protect Earned Wage Access.

Response to form comment 1.10: The Department recognizes this comment as an example of a consumer who has found value in an IBA product. The Department had no intention of preventing consumers from accessing IBA products that comply with California's credit-cost limitations. However, no changes were made in response to this comment for the reasons described in the Department's response to comment 1.22.1. It appears that an IBA provider represented to California customers that the initially proposed regulations would prevent it from lending to consumers even though the Department had proposed reasonable rate caps (approximately $5 on each $100 advanced) on IBA loans that carry de minimis risk of nonpayment. The Department has not received credible evidence from any commenter that these regulations (as initially proposed or as revised) would result in IBA providers' inability to offer IBA products. The Department disagrees that IBAs are not loans for the reasons stated in the ISOR and as discussed in the Department's responses to other comments that argued that IBAs

are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Form Comment Letter 1.11 – 13 Commenters

Form comment 1.11: I am writing to express my deep concern about the proposed rule, PRO 01-21. I firmly believe that workers should be able to access the wages they have earned without facing mandatory fees or high-interest rates that cause more harm than good.

Earned Wage Access is a right that should not be taken away from Californians. Unfortunately, PRO 01-21 would make it much harder for them to get by.

Workers have already given up too many freedoms and it's unfair to create new rules that deny them financial freedom, too.

Please reconsider PRO 01-21 and protect Earned Wage Access.

Response to form comment 1.11: The Department recognizes this comment as an example of a consumer who has found value in an IBA product. The Department had no intention of preventing consumers from accessing IBA products that comply with California's credit-cost limitations. However, no changes were made in response to this comment for the reasons described in the Department's response to comment 1.22.1. It appears that an IBA provider represented to California customers that the initially proposed regulations would prevent it from lending to consumers even though the Department had proposed reasonable rate caps (approximately $5 on each $100 advanced) on IBA loans that carry de minimis risk of nonpayment. The Department has not received credible evidence from any commenter that these regulations (as initially proposed or as revised) would result in IBA providers' inability to offer IBA products. The Department disagrees that IBAs are not loans for the reasons stated in the ISOR and as discussed in the Department's responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Form Comment Letter 1.12 – 13 Commenters

Form comment 1.12: I'm writing to express my deep-seated worry regarding the proposed rule, PRO 01-21. Workers have a right to access their wages without any additional fees or high-interest rates that end up doing more harm than good.

Earned Wage Access should be a given, but this new rule would make it increasingly difficult for Californians to make ends meet.

Too many liberties have already been taken away from workers; the state government must not create any new laws that take away our financial autonomy as well.

Please reconsider PRO 01-21 and safeguard Earned Wage Access for all.

Response to form comment 1.12: The Department recognizes this comment as an example of a consumer who has found value in an IBA product. The Department had no intention of

preventing consumers from accessing IBA products that comply with California's credit-cost limitations. However, no changes were made in response to this comment for the reasons described in the Department's response to comment 1.22.1. It appears that an IBA provider represented to California customers that the initially proposed regulations would prevent it from lending to consumers even though the Department had proposed reasonable rate caps (approximately $5 on each $100 advanced) on IBA loans that carry de minimis risk of nonpayment. The Department has not received credible evidence from any commenter that these regulations (as initially proposed or as revised) would result in IBA providers' inability to offer IBA products. The Department disagrees that IBAs are not loans for the reasons stated in the ISOR and as discussed in the Department's responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Form Comment Letter 1.13 – 78 Commenters

Form comment 1.13: Earned wage access is a workers' right, and rule PRO 01-21 would make it harder for workers to get by.

I've been caught in tight spots before where I needed access to my paycheck before payday. The current structure that allows workers to access their wages for free, or an optional tip, empowers workers to control their financial freedom. PRO 01-21 would take power AWAY from workers and back in the hands of big banks and payday lenders.

PRO 01-21 hurts workers. Please reject this rule and stand up for California workers and families.

Response to form comment 1.13: The Department recognizes this comment as an example of a consumer who has found value in an IBA product. The Department had no intention of preventing consumers from accessing IBA products that comply with California's credit-cost limitations. However, no changes were made in response to this comment for the reasons described in the Department's response to comment 1.22.1. It appears that an IBA provider represented to California customers that the initially proposed regulations would prevent it from lending to consumers even though the Department had proposed reasonable rate caps (approximately $5 on each $100 advanced) on IBA loans that carry de minimis risk of nonpayment. The Department has not received credible evidence from any commenter that these regulations (as initially proposed or as revised) would result in IBA providers' inability to offer IBA products. The Department disagrees that IBAs are not loans for the reasons stated in the ISOR and as discussed in the Department's responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Form Comment Letter 1.14 – 24 Commenters

Form comment 1.14: The potential introduction of mandatory fees on Earned Wage Access (EWA) services could severely impact California families' ability to access their earned wages without incurring additional costs. This would adversely affect workers who rely on EWA for cash flow management and debt avoidance. I urge you to oppose this rule change in order to

preserve financial freedom for all Californians. Thank you.

Response to form comment 1.14: The Department recognizes this comment as an example of a consumer who has found value in an IBA product. The Department had no intention of preventing consumers from accessing IBA products that comply with California's credit-cost limitations. However, no changes were made in response to this comment for the reasons described in the Department's response to comment 1.22.1. It appears that an IBA provider represented to California customers that the initially proposed regulations would prevent it from lending to consumers even though the Department had proposed reasonable rate caps (approximately $5 on each $100 advanced) on IBA loans that carry de minimis risk of nonpayment. The Department has not received credible evidence from any commenter that these regulations (as initially proposed or as revised) would result in IBA providers' inability to offer IBA products. The Department disagrees that IBAs are not loans for the reasons stated in the ISOR and as discussed in the Department's responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Form Comment Letter 1.15 – 27 Commenters

Form comment 1.15: I'm a California citizen, and I just heard about the proposed rule change for mandatory fees on Earned Wage Access (EWA). Californians don't want to be charged fees just to access our hard-earned wages when we need them.

EWA is a tool that helps people avoid unnecessary debt and payday lenders. People rely on it to get through tough times and we don't want to be limited in our access to it. I know I'm not alone in this belief.

So, I'm urging you to reject the proposed rule change and keep EWA free from mandatory fees. Thanks for listening.

Response to form comment 1.15: The Department recognizes this comment as an example of a consumer who has found value in an IBA product. The Department had no intention of preventing consumers from accessing IBA products that comply with California's credit-cost limitations. However, no changes were made in response to this comment for the reasons described in the Department's response to comment 1.22.1. It appears that an IBA provider represented to California customers that the initially proposed regulations would prevent it from lending to consumers even though the Department had proposed reasonable rate caps (approximately $5 on each $100 advanced) on IBA loans that carry de minimis risk of nonpayment. The Department has not received credible evidence from any commenter that these regulations (as initially proposed or as revised) would result in IBA providers' inability to offer IBA products. The Department disagrees that IBAs are not loans for the reasons stated in the ISOR and as discussed in the Department's responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Form Comment Letter 1.16 – 35 Commenters

Form comment 1.16: I'm writing to express my sincere concern about the new proposed rule, PRO 01-21. I believe that workers deserve to access the pay they've rightfully earned without mandatory fees or high-interest rates that end up doing more harm than good.

Earned Wage Access is a worker's right, and rule PRO 01-21 would make it harder for Californians to get by.

Workers have surrendered too many freedoms already. State government shouldn't create new rules that take away our financial freedom, too.

Please reconsider PRO 01-21 and protect Earned Wage Access.

Response to form comment 1.16: The Department recognizes this comment as an example of a consumer who has found value in an IBA product. The Department had no intention of preventing consumers from accessing IBA products that comply with California's credit-cost limitations. However, no changes were made in response to this comment for the reasons described in the Department's response to comment 1.22.1. It appears that an IBA provider represented to California customers that the initially proposed regulations would prevent it from lending to consumers even though the Department had proposed reasonable rate caps (approximately $5 on each $100 advanced) on IBA loans that carry de minimis risk of nonpayment. The Department has not received credible evidence from any commenter that these regulations (as initially proposed or as revised) would result in IBA providers' inability to offer IBA products. The Department disagrees that IBAs are not loans for the reasons stated in the ISOR and as discussed in the Department's responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Form Comment Letter 1.17 – 22 Commenters

Form comment 1.17: I am writing to request your support for a cause that affects many Californians - access to their hard-earned wages.

It is unfortunate that a significant percentage of people have to wait until payday to access the money they worked for. That's why we need to advocate for innovation that can make instant wage access possible.

I'm asking you to consider supporting this cause to ensure that Californian workers have access to the wages they earned when they need it. Your support can make a difference for the 64% of Americans who are living paycheck to paycheck.

Thank you for your time and consideration.

Response to form comment 1.17: The Department recognizes this comment as an example of a consumer who has found value in an IBA product. The Department had no intention of preventing consumers from accessing IBA products that comply with California's credit-cost limitations. However, no changes were made in response to this comment for the reasons

described in the Department's response to comment 1.22.1. It appears that an IBA provider represented to California customers that the initially proposed regulations would prevent it from lending to consumers even though the Department had proposed reasonable rate caps (approximately $5 on each $100 advanced) on IBA loans that carry de minimis risk of nonpayment. The Department has not received credible evidence from any commenter that these regulations (as initially proposed or as revised) would result in IBA providers' inability to offer IBA products. The Department disagrees that IBAs are not loans for the reasons stated in the ISOR and as discussed in the Department's responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Form Comment Letter 1.18 – 11 Commenters

Form comment 1.18: I am strongly against the proposed rule, PRO 01-21. Workers have already surrendered too many freedoms. We don't need state regulators to continue to take our power away and make it harder for us to control our financial future.

I've been caught on hard times where I need access to my pay and can't afford to be hit with the high-interest rates or fees of payday lenders. Tools that let me access pay I've rightfully earned for free deserve to be protected.

Please reject PRO 01-21 and protect workers' rights.

Response to form comment 1.18: The Department recognizes this comment as an example of a consumer who has found value in an IBA product. The Department had no intention of preventing consumers from accessing IBA products that comply with California's credit-cost limitations. However, no changes were made in response to this comment for the reasons described in the Department's response to comment 1.22.1. It appears that an IBA provider represented to California customers that the initially proposed regulations would prevent it from lending to consumers even though the Department had proposed reasonable rate caps (approximately $5 on each $100 advanced) on IBA loans that carry de minimis risk of nonpayment. The Department has not received credible evidence from any commenter that these regulations (as initially proposed or as revised) would result in IBA providers' inability to offer IBA products. The Department disagrees that IBAs are not loans for the reasons stated in the ISOR and as discussed in the Department's responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Form Comment Letter 1.19 – 21 Commenters

Form comment 1.19: I'm writing to express my support for Earned Wage Access (EWA) and urge you to continue supporting it. EWA is an innovative financial tool that empowers workers by giving them control over their finances.

Californians saved about $243.83 million in overdraft fees in 2021 and 2022, thanks to EWA. That's a significant amount of money that could have gone towards financial hardship. I believe

EWA is an essential tool that helps workers manage cash flow, pay bills, and avoid costly financial options.

As a Californian citizen, I'm confident that we can work together to create a solution that supports EWA and promotes financial well-being for all workers. I encourage you to keep the power of EWA in the hands of workers.

Thank you for your consideration.

Response to form comment 1.19: The Department recognizes this comment as an example of a consumer who has found value in an IBA product. The Department had no intention of preventing consumers from accessing IBA products that comply with California's credit-cost limitations. However, no changes were made in response to this comment for the reasons described in the Department's response to comment 1.22.1. It appears that an IBA provider represented to California customers that the initially proposed regulations would prevent it from lending to consumers even though the Department had proposed reasonable rate caps (approximately $5 on each $100 advanced) on IBA loans that carry de minimis risk of nonpayment. The Department has not received credible evidence from any commenter that these regulations (as initially proposed or as revised) would result in IBA providers' inability to offer IBA products. The Department disagrees that IBAs are not loans for the reasons stated in the ISOR and as discussed in the Department's responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Form Comment Letter 1.20 – 18 Commenters

Form comment 1.20: Families across California rely on EWA to manage unexpected expenses and avoid debt traps. If the proposed rule is implemented, it would limit the accessibility and affordability of EWA, creating unnecessary financial strain for working families.

I urge you to reject the mandatory fees and stand up for California workers' financial freedom.

Response to form comment 1.20: The Department recognizes this comment as an example of a consumer who has found value in an IBA product. The Department had no intention of preventing consumers from accessing IBA products that comply with California's credit-cost limitations. However, no changes were made in response to this comment for the reasons described in the Department's response to comment 1.22.1. It appears that an IBA provider represented to California customers that the initially proposed regulations would prevent it from lending to consumers even though the Department had proposed reasonable rate caps (approximately $5 on each $100 advanced) on IBA loans that carry de minimis risk of nonpayment. The Department has not received credible evidence from any commenter that these regulations (as initially proposed or as revised) would result in IBA providers' inability to offer IBA products. The Department disagrees that IBAs are not loans for the reasons stated in the ISOR and as discussed in the Department's responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Form Comment Letter 1.21 – 30 Commenters

Form comment 1.21: I am writing to you about the proposed rule change, PRO 01-21. This rule could introduce mandatory fees on earned wage access transactions and significantly diminish the benefits of this service. This would limit access to financial freedom and flexibility for Californians who rely on EWA to manage their finances responsibly.

I urge you to reconsider this proposed rule change and stand up for workers' right to access their hard-earned wages without additional costs.

Response to form comment 1.21: The Department recognizes this comment as an example of a consumer who has found value in an IBA product. The Department had no intention of preventing consumers from accessing IBA products that comply with California's credit-cost limitations. However, no changes were made in response to this comment for the reasons described in the Department's response to comment 1.22.1. It appears that an IBA provider represented to California customers that the initially proposed regulations would prevent it from lending to consumers even though the Department had proposed reasonable rate caps (approximately $5 on each $100 advanced) on IBA loans that carry de minimis risk of nonpayment. The Department has not received credible evidence from any commenter that these regulations (as initially proposed or as revised) would result in IBA providers' inability to offer IBA products. The Department disagrees that IBAs are not loans for the reasons stated in the ISOR and as discussed in the Department's responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Form Comment Letter 1.22 – 9 Commenters

Form comment 1.22: I strongly oppose the proposed rule, PRO 01-21. It would further diminish our rights as workers and make it more difficult to manage our finances.

I have had to rely on payday lenders in the past when I needed access to my pay and was unable to wait for my next paycheck. These lenders charge excessive interest rates and fees that can be hard to afford. It is important that we have access to tools that let us access our wages without these types of financial burdens.

Please reject PRO 01-21 and protect workers' rights.

Response to form comment 1.22: The Department recognizes this comment as an example of a consumer who has found value in an IBA product. The Department had no intention of preventing consumers from accessing IBA products that comply with California's credit-cost limitations. However, no changes were made in response to this comment for the reasons described in the Department's response to comment 1.22.1. It appears that an IBA provider represented to California customers that the initially proposed regulations would prevent it from lending to consumers even though the Department had proposed reasonable rate caps (approximately $5 on each $100 advanced) on IBA loans that carry de minimis risk of nonpayment. The Department has not received credible evidence from any commenter that these regulations (as initially proposed or as revised) would result in IBA providers' inability to offer

IBA products. The Department disagrees that IBAs are not loans for the reasons stated in the ISOR and as discussed in the Department's responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Form Comment Letter 1.23 – 26 Commenters

Form comment 1.23: I heard about the proposed rule, PRO 01-21, that will impose fees on earned wage access. But people need EWA to get their pay when they need it. We need access to our pay to manage our finances, especially since 64% of Americans are living paycheck to paycheck.

EWA gives us financial freedom, and we don't want to lose it.

Please don't take away our access to our pay. It's important to me and many other Californians.

Thank you for listening.

Response to form comment 1.23: The Department recognizes this comment as an example of a consumer who has found value in an IBA product. The Department had no intention of preventing consumers from accessing IBA products that comply with California's credit-cost limitations. However, no changes were made in response to this comment for the reasons described in the Department's response to comment 1.22.1. It appears that an IBA provider represented to California customers that the initially proposed regulations would prevent it from lending to consumers even though the Department had proposed reasonable rate caps (approximately $5 on each $100 advanced) on IBA loans that carry de minimis risk of nonpayment. The Department has not received credible evidence from any commenter that these regulations (as initially proposed or as revised) would result in IBA providers' inability to offer IBA products. The Department disagrees that IBAs are not loans for the reasons stated in the ISOR and as discussed in the Department's responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Form Comment Letter 1.24 – 20 Commenters

Form comment 1.24: Can you imagine working hard every day and not being able to access your hard-earned cash until payday? It's a tough situation that many Californians face, especially when 64% of Americans are living paycheck to paycheck.

That's why we need to keep up with innovation and continue to offer earned wage access. It's an option that empowers workers and helps them avoid overdraft fees and debt.

Please don't take away this tool that helps so many people in our state. Let's make sure hardworking Californians aren't left stranded until payday.

Thanks for your consideration.

Response to form comment 1.24: The Department recognizes this comment as an example of a consumer who has found value in an IBA product. The Department had no intention of preventing consumers from accessing IBA products that comply with California's credit-cost limitations. However, no changes were made in response to this comment for the reasons described in the Department's response to comment 1.22.1. It appears that an IBA provider represented to California customers that the initially proposed regulations would prevent it from lending to consumers even though the Department had proposed reasonable rate caps (approximately $5 on each $100 advanced) on IBA loans that carry de minimis risk of nonpayment. The Department has not received credible evidence from any commenter that these regulations (as initially proposed or as revised) would result in IBA providers' inability to offer IBA products. The Department disagrees that IBAs are not loans for the reasons stated in the ISOR and as discussed in the Department's responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Form Comment Letter 1.25 – 17 Commenters

Form comment 1.25: I urge you to reconsider any proposed rules or regulations that would force fees upon Californians for accessing their hard-earned wages. Let's work together to create a fair system that benefits everyone.

Access to our hard-earned wages should be a given, not something we have to pay for. These fees are especially unfair to those who are already struggling to make ends meet. Please reconsider PRO 01-21.

Response to form comment 1.25: The Department recognizes this comment as an example of a consumer who has found value in an IBA product. The Department had no intention of preventing consumers from accessing IBA products that comply with California's credit-cost limitations. However, no changes were made in response to this comment for the reasons described in the Department's response to comment 1.22.1. It appears that an IBA provider represented to California customers that the initially proposed regulations would prevent it from lending to consumers even though the Department had proposed reasonable rate caps (approximately $5 on each $100 advanced) on IBA loans that carry de minimis risk of nonpayment. The Department has not received credible evidence from any commenter that these regulations (as initially proposed or as revised) would result in IBA providers' inability to offer IBA products. The Department disagrees that IBAs are not loans for the reasons stated in the ISOR and as discussed in the Department's responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Form Comment Letter 1.26 – 16 Commenters

Form comment 1.26: I'm writing on behalf of California workers across the state who rely on Earned Wage Access (EWA) to manage their finances. EWA is an innovation that empowers workers by allowing them to access their hard-earned wages when they need them. It promotes

financial freedom and independence, especially for those who live paycheck to paycheck.

I understand that there is a proposed rule change to introduce mandatory fees for using EWA. This would limit access to a service that has helped many workers avoid costly financial options and debt. It would be a significant setback for California workers who have come to rely on EWA as a tool for financial flexibility and control.

I urge you to reconsider the proposed rule change and ensure that California workers can continue to access their earned wages without being burdened by mandatory fees.

Thank you for your consideration.

Response to form comment 1.26: The Department recognizes this comment as an example of a consumer who has found value in an IBA product. The Department had no intention of preventing consumers from accessing IBA products that comply with California's credit-cost limitations. However, no changes were made in response to this comment for the reasons described in the Department's response to comment 1.22.1. It appears that an IBA provider represented to California customers that the initially proposed regulations would prevent it from lending to consumers even though the Department had proposed reasonable rate caps (approximately $5 on each $100 advanced) on IBA loans that carry de minimis risk of nonpayment. The Department has not received credible evidence from any commenter that these regulations (as initially proposed or as revised) would result in IBA providers' inability to offer IBA products. The Department disagrees that IBAs are not loans for the reasons stated in the ISOR and as discussed in the Department's responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Form Comment Letter 1.27 – 18 Commenters

Form comment 1.27: I'm a California citizen who values financial freedom. I'm writing to express my concern about the proposed rule change, PRO 01-21.

This change could limit access to Earned Wage Access (EWA), making it harder for Californians to manage their finances and avoid debt traps.

We need to protect our right to access our earned wages without undue fees. EWA provides a flexible way for Californians to manage their finances, without the involvement of credit agencies or debt collectors. By opposing the proposed rule change, you can stand up for our financial well-being and ensure that financial freedom remains accessible to all.

Thank you for your attention.

Response to form comment 1.27: The Department recognizes this comment as an example of a consumer who has found value in an IBA product. The Department had no intention of preventing consumers from accessing IBA products that comply with California's credit-cost limitations. However, no changes were made in response to this comment for the reasons described in the Department's response to comment 1.22.1. It appears that an IBA provider represented to California customers that the initially proposed regulations would prevent it from

lending to consumers even though the Department had proposed reasonable rate caps (approximately $5 on each $100 advanced) on IBA loans that carry de minimis risk of nonpayment. The Department has not received credible evidence from any commenter that these regulations (as initially proposed or as revised) would result in IBA providers' inability to offer IBA products. The Department disagrees that IBAs are not loans for the reasons stated in the ISOR and as discussed in the Department's responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Form Comment Letter 1.28 – 17 Commenters

Form comment 1.28: As a Californian citizen concerned about financial freedom, I urge you not to proceed with the proposed rule change – PRO 01-21 – that would introduce mandatory fees on Earned Wage Access (EWA). This service provides much-needed flexibility for working families experiencing cash flow issues or unexpected expenses; however, if imposed with fees, it may no longer be affordable or accessible – thus diminishing its effectiveness as a financial tool while undermining Californians' rights over their own earnings. Please do not proceed with this proposal and help protect our right to financial independence!

Response to form comment 1.28: The Department recognizes this comment as an example of a consumer who has found value in an IBA product. The Department had no intention of preventing consumers from accessing IBA products that comply with California's credit-cost limitations. However, no changes were made in response to this comment for the reasons described in the Department's response to comment 1.22.1. It appears that an IBA provider represented to California customers that the initially proposed regulations would prevent it from lending to consumers even though the Department had proposed reasonable rate caps (approximately $5 on each $100 advanced) on IBA loans that carry de minimis risk of nonpayment. The Department has not received credible evidence from any commenter that these regulations (as initially proposed or as revised) would result in IBA providers' inability to offer IBA products. The Department disagrees that IBAs are not loans for the reasons stated in the ISOR and as discussed in the Department's responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Form Comment Letter 1.29 – 36 Commenters

Form comment 1.29: Earned wage access is a fundamental right of workers, but unfortunately, PRO 01-21 would make it more difficult for them to get by.

I've been in situations where I needed to access my wages before payday and the current system that allows free access or an optional tip gives me control over my finances. PRO 01-21 would take this power away from me and give it back to banks and payday lenders.

PRO 01-21 harms workers. Please reject this rule and show your support for California's workforce and their families.

Response to form comment 1.29: The Department recognizes this comment as an example of a consumer who has found value in an IBA product. The Department had no intention of preventing consumers from accessing IBA products that comply with California's credit-cost limitations. However, no changes were made in response to this comment for the reasons described in the Department's response to comment 1.22.1. It appears that an IBA provider represented to California customers that the initially proposed regulations would prevent it from lending to consumers even though the Department had proposed reasonable rate caps (approximately $5 on each $100 advanced) on IBA loans that carry de minimis risk of nonpayment. The Department has not received credible evidence from any commenter that these regulations (as initially proposed or as revised) would result in IBA providers' inability to offer IBA products. The Department disagrees that IBAs are not loans for the reasons stated in the ISOR and as discussed in the Department's responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Form Comment Letter 1.30 – 5 Commenters

Form comment 1.30: The rule change you are considering (PRO 01-21) would be detrimental to Californian families who rely on EWA for financial flexibility and control. Please reconsider this proposal.

Response to form comment 1.30: The Department recognizes this comment as an example of a consumer who has found value in an IBA product. The Department had no intention of preventing consumers from accessing IBA products that comply with California's credit-cost limitations. However, no changes were made in response to this comment for the reasons described in the Department's response to comment 1.22.1. It appears that an IBA provider represented to California customers that the initially proposed regulations would prevent it from lending to consumers even though the Department had proposed reasonable rate caps (approximately $5 on each $100 advanced) on IBA loans that carry de minimis risk of nonpayment. The Department has not received credible evidence from any commenter that these regulations (as initially proposed or as revised) would result in IBA providers' inability to offer IBA products. The Department disagrees that IBAs are not loans for the reasons stated in the ISOR and as discussed in the Department's responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Form Comment Letter 1.31 – 7 Commenters

Form comment 1.31: I am strongly opposed to the proposed rule, PRO 01-21. Too many of our freedoms have already been taken away by state regulators. This proposed rule would only make it more difficult for us to manage our finances with confidence.

Times can be tough and we should not be forced to rely on payday lenders with their exorbitant interest rates and fees. We need access to our hard-earned pay without incurring these costs.

Let's protect workers' rights and reject PRO 01-21!

Response to form comment 1.31: The Department recognizes this comment as an example of a consumer who has found value in an IBA product. The Department had no intention of preventing consumers from accessing IBA products that comply with California's credit-cost limitations. However, no changes were made in response to this comment for the reasons described in the Department's response to comment 1.22.1. It appears that an IBA provider represented to California customers that the initially proposed regulations would prevent it from lending to consumers even though the Department had proposed reasonable rate caps (approximately $5 on each $100 advanced) on IBA loans that carry de minimis risk of nonpayment. The Department has not received credible evidence from any commenter that these regulations (as initially proposed or as revised) would result in IBA providers' inability to offer IBA products. The Department disagrees that IBAs are not loans for the reasons stated in the ISOR and as discussed in the Department's responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Form Comment Letter 1.32 – 7 Commenters

Form comment 1.32: I'm writing to express my deep concern about the proposed rule PRO 01-21. It's wrong that workers should be charged extra fees or pay high-interest rates on wages they've already earned - this only makes it tougher for them to make ends meet.

Earned Wage Access is a basic right and it shouldn't be taken away by a new state government rule. People have already lost so much during this time - we can't afford to lose our financial freedom too.

Please reconsider PRO 01-21 and defend Earned Wage Access.

Response to form comment 1.32: The Department recognizes this comment as an example of a consumer who has found value in an IBA product. The Department had no intention of preventing consumers from accessing IBA products that comply with California's credit-cost limitations. However, no changes were made in response to this comment for the reasons described in the Department's response to comment 1.22.1. It appears that an IBA provider represented to California customers that the initially proposed regulations would prevent it from lending to consumers even though the Department had proposed reasonable rate caps (approximately $5 on each $100 advanced) on IBA loans that carry de minimis risk of nonpayment. The Department has not received credible evidence from any commenter that these regulations (as initially proposed or as revised) would result in IBA providers' inability to offer IBA products. The Department disagrees that IBAs are not loans for the reasons stated in the ISOR and as discussed in the Department's responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Form Comment Letter 1.33 – 10 Commenters

Form comment 1.33: I firmly oppose PRO 01-21. Workers have already been deprived of many of their rights. We cannot allow state regulators to take away our autonomy and make it

increasingly difficult for us to manage our finances.

I have experienced financial hardship and needed access to my salary urgently, but due to the exorbitant rates and fees charged by payday lenders, I was unable to do so. Therefore, it is important that we protect services that enable us to access our earned wages without any additional costs.

Therefore, I urge you to reject PRO 01-21 and safeguard workers' rights.

Response to form comment 1.33: The Department recognizes this comment as an example of a consumer who has found value in an IBA product. The Department had no intention of preventing consumers from accessing IBA products that comply with California's credit-cost limitations. However, no changes were made in response to this comment for the reasons described in the Department's response to comment 1.22.1. It appears that an IBA provider represented to California customers that the initially proposed regulations would prevent it from lending to consumers even though the Department had proposed reasonable rate caps (approximately $5 on each $100 advanced) on IBA loans that carry de minimis risk of nonpayment. The Department has not received credible evidence from any commenter that these regulations (as initially proposed or as revised) would result in IBA providers' inability to offer IBA products. The Department disagrees that IBAs are not loans for the reasons stated in the ISOR and as discussed in the Department's responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

SUMMARY OF AND RESPONSE TO COMMENTS SUBMITTED DURING FIRST 15-DAY COMMENT PERIOD (NOVEMBER 6 TO 27, 2023)

The modified proposed regulations were made available for public review and comment from November 6 to 27, 2023. The following persons submitted comments to the Department for this period:

1. Brian Tate, President and Chief Executive Officer, Innovative Payments Association, dated November 17, 2023.
2. Alice P. Jacobsohn, Director, Government Relations, PayrollOrg, dated November 20, 2023.
3. Scott Govenar, Partner, Governmental Advocates, Inc., on behalf of California Financial Services Association, dated November 26, 2023.
4. Darrell Feil, Owner and Vice President, Abate-A-Weed, dated November 27, 2023.
5. Denise Dunckel, Chief Executive Officer, American Association for Debt Resolution (formerly the American Fair Credit Council), dated November 27, 2023.
6. Ian P. Moloney, Senior Vice President, Head of Federal and State Policy, American Fintech Council, dated November 27, 2023.
7. Phil Goldfeder, Chief Executive Officer, Ian P. Moloney, Senior Vice President, Head of Federal and State Policy, American Fintech Council; Bridge IT, Inc., doing business as Brigit; DailyPay, Inc.; Activehours, Inc., doing business as EarnIn; MoneyLion Technologies Inc.; Payactiv, Inc.; Wagestream, Inc.; ZayZoon US Inc.; et al., dated November 27, 2023.
8. Better Future Forward, Inc.; Jobs for the Future; Stride Funding Inc.; and Social Finance, Inc., dated November 27, 2023.

9. Hamel Kothari, Chief Technology Officer, Bridge IT, Inc., doing business as Brigit, dated November 27, 2023.
10. Jay King, President and Chief Executive Officer, California Black Chamber of Commerce, dated November 27, 2023.
11. Andrew Kushner, Policy Counsel, Center for Responsible Lending; Robert Herrell, Executive Director, Consumer Federation of California; Lauren Saunders, Associate Director, National Consumer Law Center; Ed Howard, Office of Kat Taylor, dated November 27, 2023.
12. Mark Troughton, Chief Operating Officer, Chime Financial, Inc., dated November 27, 2023.
13. John M. Erickson, Mayor Pro Tempore, City of West Hollywood, dated November 27, 2023.
14. Seth Frotman, General Counsel, Consumer Financial Protection Bureau, dated November 27, 2023.
15. Jared DeMatteis, Chief Legal & Strategy Officer, DailyPay, Inc., dated November 27, 2023.
16. David E. Durant, General Counsel, Activehours, Inc., doing business as EarnIn, dated November 27, 2023.
17. 1,496 customers of Activehours, Inc., doing business as EarnIn, dated November 27, 2023.
18. Eileen Newhall, Owner, Eileen Newhall Consulting LLC, dated November 27, 2023.
19. Penny Lee, President and Chief Executive Officer, Financial Technology Association, dated November 27, 2023.
20. Nancy Hoffman Vanyek, Chief Executive Officer, Greater San Fernando Valley Chamber of Commerce, dated November 27, 2023.
21. Tal Clark, Chief Executive Officer, Instant Financial USA Inc., dated November 27, 2023.
22. Aaron Marienthal, General Counsel, Payactiv, Inc., dated November 27, 2023.
23. Student Borrower Protection Center, California Low-Income Consumer Coalition, Center for Responsible Lending, Consumer Federation of California, Consumer Reports, Legal Aid Foundation of Los Angeles, National Consumer Law Center, NextGen California, Public Counsel, Student Debt Crisis, Center, The Institute for College Access and Success, and Young Invincibles, dated November 27, 2023.

Comment letter 2.1 – Brian Tate, President and Chief Executive Officer, Innovative Payments Association (IPA) (dated November 17, 2023)

Comment 2.1: IPA repeated the objections made in its first comment letter that the regulations continue to fail to acknowledge that not all EWA products are loans and that without such a declaration, the regulations would be inconsistent with the Consumer Financial Protection Bureau's 2020 EWA Advisory Opinion. IPA also repeated their comments requesting the Department to acknowledge that not all EWA models are loans and to adopt a separate registration requirement for EWA models that do not resemble credit rather than a one-size-fits-all regulatory solution.

Response to comment 2.1: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).)

Comment letter 2.2 – Alice P. Jacobsohn, Director, Government Relations, PayrollOrg (dated November 20, 2023)

Comment 2.2: PayrollOrg repeated the comments made in its first comment letter objecting to the terms "advances," "loans," and "finance lenders" as applied to employer-integrated EWA benefits because EWA is not a debt and while PayrollOrg agreed with the changes that eliminate the licensing requirement and fee caps because employers should have the flexibility to negotiate for employee EWA benefits, these changes do not resolve the problem with the definitions. PayrollOrg agreed with the change exempting payroll service providers from the EWA regulations.

Response to comment 2.2: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).)

Comment letter 2.3 – Scott Govenar, Partner, Governmental Advocates, Inc., on behalf of California Financial Services Association (CFSA) (dated November 26, 2023)

Comment 2.3.1: CFSA stated that many consumers are not made better by debt-settlement services. The reporting requirements of sections 1001 and 1042 will help identify bad actors in the space and ensure that consumers are presented with the best options when facing financial delinquency.

Response to comment 2.3.1: The Department did not make any changes in response to this comment because it was an observation rather than a recommendation to change the regulation.

Comment 2.3.2: CFSA recommended that section 1042, subdivision (a), also require that debt settlement service providers report "how delinquent each consumer was at the time they entered into a contract for debt settlement services."

Response to comment 2.3.2: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).)

Comment 2.3.3: CFSA recommended that a new subdivision be added to section 1042 that requires that debt settlement service providers report the number of consumers who received loans directly from the provider or were referred to unaffiliated third parties for prospective loans, the aggregate amount of any direct loans, and the average annual percentage rate (APR) of any such loans, as defined by the federal Truth in Lending Act and Regulation Z.

Response to comment 2.3.3: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).)

Comment 2.3.4: CFSA recommended that a new subdivision be added to section 1042 that requires that debt settlement service providers report the number of consumers who filed for

bankruptcy protection.

Response to comment 2.3.4: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).)

Comment letter 2.4 – Darrell Feil, Owner and Vice President, Abate-A-Weed (dated November 27, 2023)

Comment 2.4: Abate-A-Weed repeated the comments made in its first comment letter objecting to the characterization of EWA as a loan and again urged the Department to reconsider so that EWA is not treated as loans for the well-being of our workforce and the resilience of our community.

Response to comment 2.4: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).)

Comment letter 2.5 – Denise Dunckel, Chief Executive Officer, American Association for Debt Resolution (AADR) (formerly American Fair Credit Council) (dated November 27, 2023)

Comment 2.5.1: AADR commented that the Department's attempt to resolve the definitional inconsistency by amending section 1010 does not resolve the problem because "offering to provide or providing" would still require the registration of firms that do not actually offer to act or actually act as debt resolution service providers. AADR recommended revising the proposed rules to apply to persons who actually offer to act as debt resolution providers.

Response to comment 2.5.1: The Department declined to make the change because it is unnecessary. Section 1010, subdivision (a), is intended to require persons who are in the business of offering to provide or providing debt-settlement services to register. Whether a person is subject to registration is fact-specific. Section 1010, subdivision (a), however, is not intended to require marketing firms, newspapers, and other advertisers that advertise debt-settlement services on behalf of a debt-settlement business and who do not own or control the activities of the debt-settlement business to register under the CCFPL.

Comment 2.5.2: AADR repeated its recommendation to collect similar data from providers of other products and services that may be available to Californians in financial hardship to address their unmanageable debt burdens such as credit counseling, bankruptcy, creditor loan modifications, and short-term consumer loans (see comment 1.2.2).

Response to comment 2.5.2: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).)

Comment letter 2.6 – Ian P. Moloney, Senior Vice President, Head of Federal and State Policy, American Fintech Council (AFC) (dated November 27, 2023)

Comment 2.6.1: AFC recommended removing or amending language in section 1461 that characterizes earned wage access (EWA) as a loan. Because section 1461 characterizes income-based advances as loans but section 1004 does not, the proposed regulations create a "confusing and conflicting regulatory framework" for the EWA industry in California. Additional "ambiguity to the actual standing of EWA as a loan" comes from section 1461, subdivision (d), which provides that wage assignment, a "specific aspect of . . . which is a part of EWA services operations," is not consumer credit under the federal Truth in Lending Act or a loan or forbearance of money under the California Constitution's usury provisions.

Response to comment 2.6.1: No response is required to the recommendation because it was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).) In any event, the fact that section 1461, but not section 1004, characterizes income-based advances as loans does not create a conflicting regulatory framework. The CFL is a licensing regime that substantively regulates the manner and terms of the provision of loans by finance lenders, among other things. Section 1461 provides guidance to the EWA industry on whether its products (and cash-advance products) are loans under the CFL. Section 1462 provided guidance on whether EWA providers are required to be licensed under the CFL, including by referring to income-based advances as defined in section 1004, subdivision (g). Section 1004 does not characterize income-based advances as loans because whether a financial product is a loan is not a cognizable concept under the CCFPL. Ultimately, the proposed regulations, read together, clarify the applicability of the CCFPL and CFL to the EWA industry. Finally, AFC mischaracterizes subdivision (d), which provides only that section 1461 does not interpret other laws, namely, the Labor Code, federal consumer credit law such as the Truth in Lending Act, or the California Constitution.

Comment 2.6.2: AFC recommended changing "income-based advance" to "earned wage access" throughout the regulations.

Response to comment 2.6.2: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).)

Comment letter 2.7 – Phil Goldfeder, Chief Executive Officer, Ian P. Moloney, Senior Vice President, Head of Federal and State Policy, American Fintech Council; Bridge IT, Inc., doing business as Brigit; DailyPay, Inc.; Activehours, Inc., doing business as EarnIn; MoneyLion Technologies Inc.; Payactiv, Inc.; Wagestream, Inc.; ZayZoon US Inc.; et al. (EWA Industry) (dated November 27, 2023)

Comment 2.7.1: EWA Industry recommended simplifying the definition of "charges" in section 1004, subdivision (c), by changing "costs . . . 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" to "costs . . . received by a person in connection with an income-based advance." The phrase "any other service rendered"

could be interpreted to cover services unrelated to income-based advances.

Response to comment 2.7.1: The Department amended section 1004, subdivision (c), to accommodate this recommendation, by replacing “or any other service rendered” with “or otherwise in connection with an income-based advance.”

Comment 2.7.2: EWA Industry recommended changing “provider” to “person” in section 1004, subdivision (g), and section 1461, subdivision (b), to avoid circularity that would result if the Department accepted EWA Industry’s other proposed changes to the definition of “provider” in section 1004, subdivision (j).

Response to comment 2.7.2: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).)

Comment 2.7.3: EWA Industry recommended changing “the advance is scheduled for collection” to “the advance is scheduled or anticipated for collection” in the definition of “income-based advance” in section 1004, subdivision (g)(2).

Response to comment 2.7.3: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).) In any event, the Department did not make any changes in response to this comment because it gave no rationale for the proposed change and the Department is unable to ascertain one.

Comment 2.7.4: EWA Industry recommended changing “31 days” to “34 days” in section 1004, subdivision (g)(2), because for consumers who are paid monthly, bank holidays, weekends, and settlement cycles may delay the depositing of wages to more than 31 days.

Response to comment 2.7.4: The Department amended section 1004, subdivision (g)(2), as recommended.

Comment 2.7.5: EWA Industry recommended modifying section 1004, subdivision (g)(3)(A), to add that “this provision shall not prohibit a provider from suspending income-based advance services to a consumer as a result of the consumer’s failure to repay an income-based advance.

Response to comment 2.7.5: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).)

Comment 2.7.6: EWA Industry recommended adding what it calls consumer-protective “best practices” to the definition of “provider” in section 1004, subdivision (j). To meet the definition, a person who provides income-based advances would have to comply with the obligations and prohibitions proposed in new subdivision (j)(1) and (j)(2), respectively. New subdivision (j)(3) would provide that a person is not ineligible to meet the definition of “provider” if it pursues recourse against consumers for “fraudulent or other unlawful” conduct or against obligors for breaches of contract. Providers who meet this definition and their income-based advances would

then be excluded from the CFL under sections 1461 and 1462 as proposed to be modified.

Response to comment 2.7.6: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).)

Comment 2.7.7: EWA Industry recommended modifying section 1021, subdivision (a)(2)(D), to acknowledge that new business-activity definitions for income-based advances are being added to NMLS. Specifically, EWA Industry recommended adding "until such time as NMLS creates a separate product category for income-based advances which shall instead be selected at such time."

Response to comment 2.7.7: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).) In any event, the Department modified section 1021, subdivision (a)(2)(D), to require that applicants select "the applicable 'Earned Wage Access' business activity."

Comment 2.7.8: EWA Industry recommended modifying section 1461, subdivision (a), so that income-based advances from providers who meet the proposed modified definition of "provider" under section 1004, subdivision (j), are excluded from the CFL.

Response to comment 2.7.8: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).)

Comment 2.7.9: EWA Industry recommended modifying section 1461, subdivision (b), to be consistent with the proposed modified definitions of "provider" in section 1004, subdivision (j), and advances subject to the CFL in section 1461, subdivision (a). Specifically, EWA Industry recommended changing "provider" to "person" and "an advance under subdivision (a)" to "an advance of funds considered a loan under subdivision (a)."

Response to comment 2.7.9: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).)

Comment 2.7.10: EWA Industry recommended modifying the lead-in to section 1462, subdivision (a), to be consistent with the proposed modified definitions of "provider" in section 1004, subdivision (j), and advances subject to the CFL in section 1461, subdivision (a). Specifically, EWA Industry recommended changing "a provider of an advance of funds as described in section 1461" to "a provider, as defined by California Code of Regulations, title 10, Section 1004, subdivision (j) of an advance of funds."

Response to comment 2.7.10: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).)

Comment 2.7.11: EWA Industry recommended modifying section 1462 to: (1) add new

subdivision (a)(3), which would provide that an income-based provider is exempt from the CFL if it "has received written notification from the Commissioner that it is exempt" and (2) change the structure of the required criteria from a conjunctive list ("(a)(1) and (a)(2)") to a disjunctive list ("(a)(1), (a)(2), or (a)(3)").

Response to comment 2.7.11: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).) In any event, the Department did not make any changes in response to the second portion of the recommendation. Even assuming the Department added subdivision (a)(3) as recommended, the structure of the required criteria must be "either (a)(1) and (a)(2) both or (a)(3)" (when (a)(2) is in effect) and "(a)(1) or (a)(3)" (when (a)(2) has expired). The recommendation effectuates the latter but not the former.

Comment 2.7.12: EWA Industry recommended modifying section 1465 to add "in connection with a loan" after "or any other service rendered." The change would clarify that "or any other service rendered" must be in connection with a loan.

Response to comment 2.7.12: The Department amended section 1465 to accommodate this recommendation, by replacing "or any other service rendered" with "or otherwise in connection with a loan."

Comment letter 2.8 – Better Future Forward, Inc.; Jobs for the Future; Stride Funding Inc.; and Social Finance, Inc. (collectively, Better Future Forward) (dated November 27, 2023)

Comment 2.8.1: Better Future Forward recommended modifying the definition of "income-based repayment" in section 1003, subdivision (d), to add that it includes "an arrangement where a consumer's payments fall to $0 if they earn below a specific threshold." Although the definition can be interpreted to cover such "income-threshold" products, adding this clarification would provide more certainty.

Response to comment 2.8.1: The Department did not make any changes in response to this comment because, as it acknowledges, the definition of "income-driven repayment" already covers the described income-threshold products.

Comment 2.8.2: Better Future Forward recommended removing from the ISOR the assertion that income-share agreements (ISAs) "are, for all practical purposes, an assignment of a portion of the consumer's wages or earnings."

Response to comment 2.8.2: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).)

Comment 2.8.3: Better Future Forward recommended modifying section 1466, subdivision (a), to replace "A loan contract that provides the borrower with the option of making payments based upon a fixed percentage of the borrower's income" with "A loan contract with income-driven repayment," as well as a similar change later in the definition. Not using the defined term

“income-driven repayment” introduces inconsistency and could create uncertainty about which products are covered.

Response to comment 2.8.3: The Department amended section 1466, subdivision (a), as recommended, except instead of “income-driven repayment” it used “income-driven repayment provisions” as in section 1044 and changed “calculating” to “calculation” for additional clarity.

Comment 2.8.4: Better Future Forward recommended modifying section 1044, subdivision (c)(3), to clarify which of three possible interpretations is intended when requiring registrants to report the “total dollar amount that would be required to pay off the contracts at origination”: (1) the total amount needed to pay off the contract on the day the contract was originated; (2) the amount owed by the borrower at the time of origination, namely, $0; or (3) the maximum amount that might be needed to fully satisfy the contract “at the highest point.”

Response to comment 2.8.4: The Department did not make any changes in response to this comment because the second and third interpretations are not reasonable interpretations and the provision is clear as written.

Comment letter 2.9 – Hamel Kothari, Chief Technology Officer, Bridge IT, Inc., doing business as Brigit (dated November 27, 2023)

Comment 2.9.1: Brigit recommended deleting section 1045, subdivision (b), which requires reporting of consumers who paid subscription fees but did not receive at least one income-based advance (IBA). Such data “could distort cost valuations if the Department attempted to use it as a baseline in determining the actual subscription cost attributable to an IBA product within a bundle of services.”

Response to comment 2.9.1: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).) In any event, Brigit erroneously conjectures that the Department seeks to use the data required under section 1045, subdivision (b), to determine the cost of IBAs. As stated in the ISOR, the data is necessary for understanding the “costs associated with” IBAs, not only the costs of IBAs themselves. (At p. 48.)

Comment 2.9.2: Brigit recommended limiting the definition of “charges” in section 1004, subdivision (c), to include only those incurred in connection with IBAs.

Response to comment 2.9.2: The Department amended section 1004, subdivision (c), to accommodate this recommendation, by replacing “or any other service rendered” with “or otherwise in connection with an income-based advance.”

Comment 2.9.3: Brigit recommended limiting section 1045, subdivision (d)(1), to “only those consumers who have obtained an IBA in the prior calendar year, despite them not obtaining one in an applicable month or quarter.” This recommendation is consistent with reporting charges that are, in fact, related to IBAs.

Response to comment 2.9.3: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period.

(Gov. Code, § 11346.8, subd. (c).) To the extent the recommendation was specifically directed to the change to the definition of "charges" in section 1004, subdivision (c), the Department declined to amend section 1045, subdivision (d)(1), because Brigit's concerns were addressed by the amendments to section 1004, subdivision (c).

Comment 2.9.4: Brigit recommended limiting section 1041, subdivision (b), to include "only those bundled subscription fees received from consumers who obtained an IBA in the previous calendar year." Under the current language, so long as one California resident received an IBA, a registrant would need to report as gross income received from IBAs "all bundled subscription fees which include an IBA," including subscription fees from California residents who never obtained an IBA.

Response to comment 2.9.4: The Department did not make any changes in response to this comment. Brigit's concern arises from a misinterpretation of section 1041, subdivision (b). For a given period during which a subscription fee was paid by a California resident, if that resident obtained an IBA, the subscription fee must be included in gross income. Section 1041, subdivision (b), does not, as Brigit claims, require the inclusion of all California residents' subscription fees in gross income if just one resident receives an IBA.

Comment letter 2.10 – Jay King, President & Chief Executive Officer, California Black Chamber of Commerce (dated November 27, 2023)

Comment 2.10: The California Black Chamber of Commerce repeated the comments made in its first comment letter (see comment letter 1.22) that the regulations wrongfully categorize EWA as a loan and that the Department should support responsible innovation that meets the needs of families instead of trying to push the product back to the status quo causing confusion and setting a bad precedent across the country. The California Black Chamber of Commerce urged the Department to support an EWA industry proposal that will allow businesses to empower their workers and people of color to meet their short-term financial needs and protect the financial well-being of Black families.

Response to comment 2.10: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).)

Comment letter 2.11 – Andrew Kushner, Policy Counsel, Center for Responsible Lending; Robert Herrell, Executive Director, Consumer Federation of California; Lauren Saunders, Associate Director, National Consumer Law Center; Ed Howard, Office of Kat Taylor (collectively, CRL) (dated November 27, 2023)

Comment 2.11.1: CRL recommended restoring section 1462, subdivision (a)(3), which required IBA providers to comply with the CFL's rate caps to be exempt from CFL licensure, or, in the alternative, removing the exemption entirely by deleting subdivision (a). The CCFPL does not provide the Department with authority to waive or ignore the Legislature's statutory commands. The CFL's cost caps are the most important aspect of the Legislature's statutory scheme in the CFL, and nothing in the CCFPL allows businesses subject to the CFL to evade the CFL's core

protections.

Response to comment 2.11.1: The Department did not make any changes in response to this comment for the reasons discussed in its response to comment 1.45.17.

Comment 2.11.2: CRL recommended modifying section 1004, subdivision (g), to revert to the previous language, which did not include "reasonably determined," or, in the alternative, adopting the previous recommendation, which was to narrow the definition of "income-based advance" to cover only employer-integrated earned-wage-access providers and not direct-to-consumer, non-employer-integrated advance providers.

Response to comment 2.11.2: The Department did not make any changes in response to this comment. As stated in this FSOR, section 1004, subdivision (g)(1), was modified to add "reasonably determined" to the definition of "income-based advance" because the resulting language more clearly reflects that the provision is intended to capture all forms of income-based advances under the registration and reporting requirements of these regulations and is not intended to define a subset of IBA providers who may enjoy the CCFPL-registrant exemption from the CFL.

Comment 2.11.3: CRL recommended modifying section 1004, subdivision (g)(3), to add two consumer protections: (1) prohibition of re-presentment of failed bank debits and (2) $0 pre-set default tip amounts.

Response to comment 2.11.3: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).)

Comment 2.11.4: CRL recommended adding a new provision to the definition of "income-based advance" in section 1004, subdivision (g)(4), which would require that the "advance repayment, including all charges, is limited to $300 and is not a deferred deposit transaction." Removing CFL rate cap compliance as a requirement to be exempt from CFL licensure will incentivize payday lenders to refashion themselves as IBA providers to avoid the rate and amount limits of the California Deferred Deposit Transaction Law (CDDTL).

Response to comment 2.11.4: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).) In any event, CRL provides no evidence to support its assertion that payday lenders would change their business models to avoid the CDDTL, and the Department is not aware of any payday lenders who have done so to date.

Comment 2.11.5: CRL supported the retaining of sections 1461 and 1465.

Response to comment 2.11.5: The Department appreciates the comment of support. No change was made in response to this comment because it concurred with the proposed regulations.

Comment 2.11.6: CRL urged the Department not to wait four years before revisiting the

application of the CFL to income-based advances.

Response to comment 2.11.6: The Department did not make any changes in response to this comment because it is a recommendation regarding a future rulemaking, not the current one.

Comment 2.11.7: CRL supported the deletion of section 1463.

Response to comment 2.11.7: The Department appreciates the comment of support. No change was made in response to this comment because it concurred with the proposed regulations.

Comment 2.11.8: CRL repeated its recommendations from comments 1.32.9, 1.32.10, and 1.32.11 regarding the annual-reporting requirements of section 1045.

Response to comment 2.11.8: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).)

Comment letter 2.12 – Mark Troughton, Chief Operating Officer, Chime Financial, Inc. (Chime) (dated November 27, 2023)

Comment 2.12: Chime is a California-based company that provides financial products and is exploring ways to bring a safe and low-cost EWA offering that can democratize access to liquidity to consumers. Chime disagreed with the characterization of all EWA as a loan subject to the CFL and the exemption for employer-funded programs and observed that the exemption arbitrarily creates a very limited preference for certain employer-based models without any rationale or discussion of how the features of these models contribute to safe, consumer-friendly products. The mischaracterization of all EWA as loans will limit Chime's ability to offer safe, consumer-friendly products to California residents. Chime requested that its EWA product, which is based on core features of on-demand pay, be excluded from the definition of a loan.

Response to comment 2.12: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).)

Comment letter 2.13 – John M. Erickson, Mayor Pro Tempore, City of West Hollywood (dated November 27, 2023)

Comment 2.13: The City of West Hollywood commented that the proposal to classify EWA as a loan under the CFL will create negative consequences for California consumers and disrupt access to a product that has helped thousands of the City of West Hollywood's constituents maintain their financial well-being and avoid predatory products like payday loans. There are ways of improving the product for consumers without regulating it in the existing lending space and the City of West Hollywood suggested that it would be more beneficial to consumers to develop tailored regulations that preserve the advantages of EWA while installing guardrails that prevent the actual harms that may be present or offer an exemption from the lending law to the providers that register with the Department and commit to offering appropriate consumer

protections.

Response to comment 2.13: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).)

Comment letter 2.14 – Seth Frotman, General Counsel, Consumer Financial Protection Bureau (CFPB) (dated November 27, 2023)

Comment 2.14.1: The CFPB observed that income-based advance (IBA) products have long existed in the U.S. consumer lending market and have taken various forms, including "wage 'sales' or assignments"; payday loans, often promoted as "'deferred presentment' transactions"; "deposit advances"; and, more recently, "earned wage access" (EWA). With all these products, consumers receive funds that are typically repayable in full on their next payday. Thus, EWA products "share fundamental similarities with payday lending products," and "federal and state regulators have long administered laws and regulations that apply to income-based advance products such as payday loans."

Response to comment 2.14.1: The Department agrees with this comment but did not make any changes in response to it because it was an observation rather than a recommendation to change the regulation.

Comment 2.14.2: The CFPB observed that "states have long provided critical oversight of nondepository providers of consumer financial products and services, like those typically offering income-based advance products." It is "consistent with this longstanding practice to subject providers of income-based advances marketed as 'earned wage access' to state oversight." "Rigorous supervision of all income-based advance products helps to ensure that the label of a product does not determine how providers are held accountable, or the extent to which consumers are protected, under the law."

Response to comment 2.14.2: The Department agrees with this comment but did not make any changes in response to it because it was an observation rather than a recommendation to change the regulation.

Comment 2.14.3: The CFPB observed that treating income-based advances as loans and gratuities and expedited-funds fees as "charges" under the CFL is a similar approach to that of the federal Truth in Lending Act as implemented by Regulation Z, which generally applies to extensions of consumer credit and provides that a finance charge "includes any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit."

Response to comment 2.14.3: The Department agrees with this comment but did not make any changes in response to it because it was an observation rather than a recommendation to change the regulation.

Comment 2.14.4: The CFPB supported efforts to subject these products to rigorous oversight under existing state and federal consumer protection and lending laws. "The CFPB's previous

advisory opinion on this topic should not be misrepresented: Products that do not fit within its very narrow scope are not excluded from existing laws."

Response to comment 2.14.4: The Department agrees with this comment but did not make any changes in response to it because it was an observation rather than a recommendation to change the regulation.

Comment 2.14.5: The CFPB observed that "in light of the emergence of firms marketing 'earned wage access' income-based advance products, it is appropriate for states to ensure that these products are treated similarly to other income-based advance products with respect to supervision for compliance with applicable law."

Response to comment 2.14.5: The Department agrees with this comment but did not make any changes in response to it because it was an observation rather than a recommendation to change the regulation.

Comment letter 2.15 – Jared DeMatteis, Chief Legal & Strategy Officer, DailyPay, Inc. (dated November 27, 2023)

Comment 2.15.1: DailyPay recommended adding certain industry "best practices" to the definition of "provider" in section 1004, subdivision (j), and modifying section 1461 so that income-based advances from providers who meeting the proposed modified definition of "provider" are excluded from the CFL. This comment is substantially similar to comments 2.7.6 and 2.7.8, which DailyPay submitted jointly with American Fintech Council and other industry stakeholders.

Response to comment 2.15.1: This comment is substantially similar to comments 2.7.6 and 2.7.8, which DailyPay submitted jointly with American Fintech Council and other industry stakeholders. See responses to those comments.

Comment 2.15.2: DailyPay recommended modifying section 1021, subdivision (a)(2)(D), to acknowledge that new business-activity definitions for income-based advances are being added to NMLS. This comment is substantially similar to comment 2.7.7, which DailyPay submitted jointly with American Fintech Council and other industry stakeholders.

Response to comment 2.15.2: This comment is substantially similar to comment 2.7.7, which DailyPay submitted jointly with American Fintech Council and other industry stakeholders. See response to that comment.

Comment 2.15.3: DailyPay recommended restoring section 1463 if the Department rejects the proposed modifications in comment letter 2.7, which DailyPay submitted jointly with American Fintech Council and other industry stakeholders.

Response to comment 2.15.3: The Department did not make any changes in response to this comment. The need for section 1463 was made less compelling when the CFL-licensure exemption for income-based-advance providers was expanded so that it no longer expires when the registration period expires. Because income-based-advance providers will not need to be

licensed under the CFL, they also do not need clarification regarding the application of a substantive requirement of the CFL.

Comment 2.15.4: DailyPay recommended clarifications to the definitions of "charges" in sections 1004, subdivision (c), and 1465. This comment is substantially similar to comments 2.7.1 and 2.7.12, which DailyPay submitted jointly with American Fintech Council and other industry stakeholders.

Response to comment 2.15.4: This comment is substantially similar to comments 2.7.1 and 2.7.12, which DailyPay submitted jointly with American Fintech Council and other industry stakeholders. See responses to those comments.

Comment letter 2.16 – David E. Durant, General Counsel, Activehours, Inc., doing business as EarnIn (dated November 27, 2023)

Comment 2.16.1: EarnIn recommended modifying section 1461 to exclude nonrecourse advances from the CFL's definition of "loan" and to exclude "eligible IBA providers" from the definition of "finance lender."

Response to comment 2.16.1: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).)

Comment 2.16.2: EarnIn recommended modifying section 1021, subdivision (a)(2)(D), to give income-based advances their own "Income-Based Advance" category in the registration form.

Response to comment 2.16.2: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).) In any event, the Department modified section 1021, subdivision (a)(2)(D), to require that applicants select "the applicable 'Earned Wage Access' business activity."

Comment 2.16.3: EarnIn recommended modifying section 1465 to exclude from "charges" "truly voluntary" payments, which are payments made after clear and conspicuous disclosures and do not result in a difference in service if the consumer declines.

Response to comment 2.16.3: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).)

Comment 2.16.4: EarnIn recommended modifying section 1465 so that voluntary payments of optional expedited-transfer fees are not charges if three certain conditions are met.

Response to comment 2.16.4: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).)

Comment 2.16.5: This comment is substantially similar to comment 2.16.1, except for EarnIn's

observation that when the CCFPL registration requirement expires, IBA providers would "automatically become subject to full CFL licensing and fee restrictions."

Response to comment 2.16.5: See response to comment 2.16.1. The additional observation describes the initially proposed regulations, not the first modified proposed regulations.

Comment 2.16.6: EarnIn recommended that the proposed regulations' vetting of indirect owners align with the CFL's, which excludes indirect owners with only economic interests or who do not manage lending activities.

Response to comment 2.16.6: This comment is substantially similar to comment 1.25.9. See response to that comment.

Comment 2.16.7: EarnIn recommended excluding charges for "other services rendered" from reporting under section 1045. "Companies may offer products that are distinct and offered independently from IBAs, and unless such offerings are inextricably linked to the provision of IBAs, reporting information on such products is irrelevant and burdensome."

Response to comment 2.16.7: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).) In any event, in response to other comments on the definition of "charges" in section 1004, subdivision (c), the Department amended the provision with the effect of addressing this comment.

Comment 2.16.8: EarnIn recommended modifying section 1045 to exclude debit-card transactions from the requirement to report collection attempts or, in other words, to require reporting of only Automated Clearing House (ACH) transactions. According to the ISOR, debit rail attempts to recover IBAs is pertinent information to identify overdraft risks and resulting customer harm. "However, it is highly unlikely that a debit card 'attempt' could create an overdraft in a bank account," and debit-card transaction attempts are "more consumer-friendly than ACH transactions."

Response to comment 2.16.8: The Department did not make any changes in response to this comment, which was construed as specifically directed to section 1045, subdivision (c)(6). In the ISOR, the Department did not distinguish between ACH and debit-card collection attempts in explaining the purpose and necessity of section 1045, subdivision (c)(4) and (c)(5). In response to other, similar comments on these provisions, the Department added subdivision (c)(6), which allows registrants to separate ACH and debit-card transactions when reporting collection attempts under subdivision (c)(4) and (c)(5). Even assuming it is true that debit-card collection attempts are "highly unlikely" to result in bank overdrafts and are "more consumer-friendly," collecting data on what proportion of registrants' collection attempts is more consumer-friendly or less friendly is necessary for market monitoring, as described in the ISOR. In any event, EarnIn's assertion appears questionable. On its website, EarnIn states, "Yes, you absolutely can

overdraft a debit card," and describes several ways to "avoid overdraft fees," including by using EarnIn to "access up to $100 per day."[11]

Comment letter 2.17 – 1,496 customers of Activehours, Inc., doing business as EarnIn (dated November 27, 2023)

Comment 2.17.1: EarnIn's customers recommended that the proposed regulations reconsider the designation of earned-wage-access (EWA) products as loans.

Response to comment 2.17.1: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).) For the reasons stated in the ISOR, the Department did not make any changes in response to this comment, which was construed as a recommendation to withdraw the IBA-related regulations proposed under the CFL. Additionally, the Department incorporates by reference its responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Comment 2.17.2: EarnIn's customers recommended that the Department engage with stakeholders to develop policies that balance consumer protection with the legitimate needs of the workforce.

Response to comment 2.17.2: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).) In any event, the Department engaged in extensive stakeholder engagement during this rulemaking process, including five comment rounds.

Comment 2.17.3: EarnIn's customers recommended that the proposed regulations treat voluntary or optional payments differently than mandatory fees.

Response to comment 2.17.3: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).) In any event, the comment did not describe any recommended changes with sufficient specificity.

Comment letter 2.18 – Eileen Newhall, Owner, Eileen Newhall Consulting LLC (dated November 27, 2023)

Comment 2.18.1: Newhall commented that sections 1461 and 1462 are in conflict with one another, confusing, and misleading because section 1461 states that a provider of an advance of funds is a lender while section 1462 states that the provider is not required to be licensed under the CFL, and IBA providers that do not hold CFL licenses when the registration requirements sunset will be considered unlicensed lenders. This regulatory "gotcha" imposes significant uncertainty on industry, obliges providers to apply for a CFL license to avoid violating the law

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[11] EarnIn, Can You Overdraft a Credit Card, Debit Card, or Savings Account? (Jan. 14, 2021) <www.earnin.com/blog/can-you-overdraft-a-credit-card-debit-card-or-savings-account>.

when the registration requirements sunset, forces the industry under the installment loan law, and hampers innovation with no resulting consumer benefit.

Response to comment 2.18.1: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).)

Comment 2.18.2: Newhall repeated the comments made in the previous comment letter that the regulations fall far short of describing the best practices currently in place in the income-based advance industry or codifying a comprehensive set of rules focused on consumer protection. Newhall suggested revising the definition of the term “provider” to mean an entity that adheres to a comprehensive set of specified consumer protections, adding consumer protections, describing more clearly who and what is subject to the CFL, and making other related changes, including changing the term of an income-based advance from 31 days to 34 days. The suggested changes are substantially the same comments submitted by industry stakeholders and summarized in comment letter 2.7. It is Newhall’s understanding that a majority of the income-based advance industry is comfortable with these suggested changes and that the changes accurately reflect best practices currently in use within the industry. Newhall, however, noted that she is not proposing the changes on behalf of any specific industry participants.

Response to comment 2.18.2: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).) In any case, the Department has changed the term of an IBA from 31 days to 34 days in section 1004, subdivision (g)(2). See also the Department’s responses to comment letter 2.7.

Comment 2.18.3: Newhall suggested adding a new section 1054 to address the effect of the sunset of the registration requirements to ensure that the other provisions in subchapter 4 survive. Newhall believes that the only effect of the sunset would be to render the registration requirements in section 1010 inapplicable, but that it may be valuable to include this in the regulations.

Response to comment 2.18.3: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).):

Comment letter 2.19 – Penny Lee, President and Chief Executive Officer, Financial Technology Association (FTA) (dated November 27, 2023)

Comment 2.19: FTA stated that EWA services, regardless of business model, should be treated similarly to avoid anti-competitive market developments and allow for consumer-friendly product innovation and supported the industry’s recommended changes to the first modified proposed regulations (see comment letter 2.7), including adding consumer protections and clarifying which EWA products are not loans.

Response to comment 2.19: See comment letter 2.7 and the Department’s responses to it.

Comment letter 2.20 – Nancy Hoffman Vanyek, Chief Executive Officer, Greater San Fernando Valley Chamber of Commerce (dated November 27, 2023)

Comment 2.20: The Greater San Fernando Valley Chamber of Commerce expressed concerns that classifying IBA (including an "earned wage advance") as a loan will have unintended consequences for consumers, including putting the product out of the reach of many consumers, burdening them with additional fees and unnecessary conditions, and sending many workers back to payday loans and less responsible financial products. Instead, the Department should craft tailored regulations that consider the product's unique features, benefits, and risks and build on the exemption from a lending license for providers that agree to provide consumers with appropriate protections.

Response to comment 2.20: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).)

Comment letter 2.21 – Tal Clark, Chief Executive Officer, Instant Financial USA Inc. (Instant Financial) (dated November 27, 2023)

Comment 2.21.1: Instant Financial supported Innovative Payments Association's comment letter and recommended removing the requirement in section 1045, subdivision (c), to report account transfer fees paid for IBAs because it would require reporting payroll-card fees as IBA fees. It is not possible for a provider to determine whether the commingled funds in an account came from wages, an IBA, or another source.

Response to comment 2.21.1: The Department did not make any changes in response to this comment. The change requested would create a loophole in the regulations' reporting requirements that would allow providers to impose substantial costs upon consumers without reporting those costs in their annual reports. Providers should make a good-faith attempt to report charges from IBAs.

Comment 2.21.2: Instant Financial recommended limiting the scope of "charges" in section 1004, subdivision (c), to those fees assessed for IBA services. The first modified proposed regulations added the phrase "or any other service rendered" so that "charges" would include fees for EWA and any other service provided by the provider.

Response to comment 2.21.2: The Department amended section 1004, subdivision (c), to accommodate this recommendation, by replacing "or any other service rendered" with "or otherwise in connection with an income-based advance."

Comment letter 2.22 – Aaron Marienthal, General Counsel, Payactiv, Inc. (dated November 27, 2023)

Comment 2.22.1: Payactiv appreciated the consideration that went into the modified proposed regulations, the Department's engagement and careful attention to comments, and its focus on

ensuring consumer protection while promoting innovation.

Response to comment 2.22.1: The Department acknowledges the comment of appreciation. The Department did not make any changes in response to this comment because it was an observation rather than a recommendation to change the regulation.

Comment 2.22.2: Payactiv recommended adding certain industry "best practices" to the definition of "provider" in section 1004, subdivision (j), and modifying section 1461 so that income-based advances from providers who meeting the proposed modified definition of "provider" are excluded from the CFL.

Response to comment 2.22.2: This comment is substantially similar to comments 2.7.6 and 2.7.8, which Payactiv submitted jointly with American Fintech Council and other industry stakeholders. See responses to those comments.

Comment 2.22.3: Payactiv observed that section 1461 "does not appear to serve a material purpose as written." The Department does not need to categorize earned wage access (EWA) as a loan to supervise it. EWA providers can be supervised under the CCFPL as covered persons who provide payment products or services (Fin. Code, § 90005, subd. (k)(7)), analyze consumer account information to provide a consumer financial product or service (§ 90005, subd. (k)(9)), or under the catch-all provision (§ 90005, subd. (k)(12)).

Response to comment 2.22.3: The Department did not make any changes in response to this comment because it was an observation rather than a recommendation to change the regulation. Furthermore, the Department disagrees that section 1461 does not serve a material purpose as written. On the contrary, section 1461 serves at least three critical purposes: (1) it prevents evasions of the registration regime established for income-based advance providers; (2) it prevents further evasions of the CFL by other lenders seeking to use the "limited recourse" reasoning IBA lenders have used to justify their decision not to become CFL-licensed lenders; and (3) it settles an important legal question under California law.

Section 1461 prevents evasions of the CCFPL's registration requirements by ensuring that companies that make advances to be repaid in whole or in part by receipt of a consumer's wages, or other earned income either have to obtain a CFL license or register under the CCFPL (until such time as registration requirements expire). Without compelling CFL licensure as the alternative to the CCFPL, any IBA provider could easily evade the IBA registration regime under the CCFPL by modifying its product slightly to fall outside the definition of an IBA, for example, by allowing repayment in installments.

Section 1461 also prevents future evasions of the CFL from other lenders relying upon the same flawed arguments IBA provider have used to avoid complying with the CFL. IBA providers argue that their products are not subject to the CFL because they do not have the full legal recourse against consumers that characterizes traditional loans. However, they still require consumers to agree that providers can collect amounts advanced through payroll deductions or bank debits on payday, and they premise their models on the assumption that consumers will repay amounts advanced. As noted in the ISOR, in practice, IBA providers appear more certain

to collect amounts advanced than the lenders the Department regulates under existing licensing laws. (At p. 54.)

The “limited recourse” arguments advanced by IBA providers threaten to undermine the CFL’s core protections for California consumers. This is evident from the Department’s experience with commercial credit transactions. In commercial credit, old state court precedents concerning sales of existing accounts receivable (e.g., *Milana v. Credit Discount Co.* (1945) 27 Cal.2d 335)) have been used by commercial financing providers to offer costly merchant cash advances without regulatory oversight or any rate protections. In the Department’s experience, these contracts are often performed just like traditional loans, just as IBAs are often performed just like payday loans, with a single cash advance repaid on payday.

To prevent the consumer credit market from evolving as the commercial credit market has, the Department has issued section 1461 to make clear that “limited recourse” arguments advanced by IBA providers are not applicable when analyzing whether a product is a consumer loan under the CFL. The Department is empowered to do this in the consumer credit market for the reasons set forth in the ISOR.

Furthermore, section 1461 is critical to address the “limited recourse” arguments made by IBA providers because judicial precedents on these topics are unlikely to arise in the absence of regulatory action. IBA providers entered the California market without a clear legal precedent applicable to their products or a Commissioner’s opinion that their products were not subject to the CFL. Precedents are unlikely to arise because IBA providers have largely barred consumers from pursuing legal claims against them in California courts that might set such precedents. (See, e.g., EarnIn, Terms of Service <www.earnin.com/privacyandterms/cash-out/terms-of-service> [requiring arbitration of claims]; Payactiv, Terms of Use <www.payactiv.com/terms-of-use> [requiring arbitration of claims]; MoneyLion, Terms of Service <www.moneylion.com/terms-and-conditions> [requiring arbitration of claims].)

Last, section 1461 settles with finality that those who offer third-party-funded “earned wage access” products, whether directly to consumers or with employer participation, are making loans. By making this determination after careful study and research, the Department resolves a question that would otherwise require future regulatory resources to resolve (either through another rulemaking or enforcement action). Delaying this determination would require unnecessary use of regulatory resources in the future.

Comment 2.22.4: Payactiv observed that unnecessarily deeming EWA to be a loan will (1) decrease employers’ interest in offering EWA as an employee benefit, leaving employees with less consumer-friendly or higher-cost alternatives, and (2) put contractual relationships between providers, partners, and employers at risk.

Response to comment 2.22.4: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).) The Department did not make any changes in response to this comment because it was an observation rather than a recommendation to change the regulation. Furthermore, the Department notes that Payactiv’s speculative concern about employer partners fails to acknowledge that the legal clarity provided by the regulations

may provide assurance to employers or that employer concern about offering loans could encourage employers to offer a better employee benefit—employer-paid early payment of wages without the charges imposed by IBA providers. The Department does not concede that IBA providers' employer partners will be deterred from using IBA providers' services.

Last, to the extent some providers do experience such consequences, those consequences will encourage compliance in consumer credit markets by encouraging future providers to seek legal clarity before building products for the California market that do not offer the credit cost protection offered for CFL loans. Conversely, failure to act now because of speculative market risks for IBA providers will encourage other actors to follow a familiar playbook: (1) Grow as fast as you can without oversight, legal clarity, or complying with California's credit cost protections; (2) lock consumers out of public litigation in California courts that might challenge the legality of your business model through comprehensive binding arbitration clauses; (3) discourage well-intentioned regulators to wait on any official actions so that your industry has runway to mature; and (4) when regulators take actions that are inconvenient for your business model, argue that due to your size, the risks associated with applying a regulatory framework are too great.

The Department notes that Payactiv and its competitors have long been on notice of the real potential that regulators might conclude that their products are loans or credit products, and continued to operate and expand their offerings without loan and credit protections despite this possibility. For example, when Payactiv executed its Memorandum of Understanding (MOU) Agreement with the Department, the agreement specifically enumerated one of the purposes of the agreement was to evaluate "whether the Company's EWA product is a loan, and whether the products subjects [Payactiv] to the California Financing Law or any other provision of California law."

Comment 2.22.5: If the Department does not accept the changes to section 1461, subdivision (a), that are recommended in comment 2.22.2, Payactiv recommended modifying subdivision (d) to include a broad catch-all list of laws and regulations that section 1461 should not be read to interpret, such as the Debt Collection Licensing Act, California Deferred Deposit Transaction Law, and federal Military Lending Act.

Response to comment 2.22.5: The Department amended section 1461, subdivision (d), to accommodate this recommendation, by replacing "consumer credit under the federal Truth in Lending Act" with "consumer credit or debt under federal law, including the Truth in Lending Act." Further changes are not necessary because section 1461 does not purport to interpret any law other than the CFL.

Comment letter 2.23 – Student Borrower Protection Center (SBPC), California Low-Income Consumer Coalition (CLICC), Center for Responsible Lending (CRL), Consumer Federation of California (CFC), Consumer Reports, Legal Aid Foundation of Los Angeles (LAFLA), National Consumer Law Center (NCLC), NextGen California, Public Counsel, Student Debt Crisis Center, The Institute for College Access and Success, and Young Invincibles (collectively, SBPC) (dated November 27, 2023)

Comment 2.23.1: SBPC repeated its recommendation to expand the definition of "education

financing” to include refinancing loans (see comment 1.38.4).

Response to comment 2.23.1: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).)

Comment 2.23.2: SBPC repeated its recommendation to require all schools that provide education financing to be required to register with the Department (see comment 1.38.6), adding that the modified text did not meaningfully address the commenters’ concerns about exempting schools.

Response to comment 2.23.2: The Department did not make any changes in response to this comment for the reasons stated in its response to comment 1.38.6.

Comment 2.23.3: SBPC repeated its recommendation to require all persons who are engaged in the business of “arranging” subject products to register (see comment 1.38.9).

Response to comment 2.23.3: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).)

Comment 2.23.4: SBPC objected to the modification to section 1012 that would only require registrants to disclose their registration status on a website whereas the initial proposed regulations required disclosure in any advertising or communication. SBPC requested the Department to require disclosure in any means of communication that is likely to result in a transaction with a consumer.

Response to comment 2.23.4: The Department declined to make the requested change. The Department has determined that limiting disclosure to the registrant’s website is sufficient to ensure the consumers are notified of the registrant’s registration information.

Comment 2.23.5: SBPC repeated its recommendation to require applicants to provide as part of the application information about any targeted marketing, including search terms and similar metrics that suggest marketing to specific protected classes (see comment 1.38.10).

Response to comment 2.23.5: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).)

Comment 2.23.6: SBPC repeated its recommendation to require registrants to annually file certain application materials, particularly those related to the Description of Business (see comment 1.38.11).

Response to comment 2.23.6: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).)

Comment 2.23.7: SBPC repeated its recommendation to require applicants to provide as part of

the application contracts providing for the sale of education financing from any postsecondary school that offers or provides education financing to third parties (see comment 1.38.12).

Response to comment 2.23.7: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).)

Comment 2.23.8: SBPC repeated its recommendation to require submission of any active agreements or contracts for any third-party service provider, not just servicers, involved in the origination, marketing, or administration of education financing (see comment 1.38.13).

Response to comment 2.23.8: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).)

Comment 2.23.9: SBPC repeated its recommendation to require applicants to include as part of the application images reflecting their marketing activities (see comment 1.38.14).

Response to comment 2.23.9: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).)

Comment 2.23.10: SBPC repeated its recommendation to revise sections 1030, 1041, subdivision (d), 1430.1, subdivision (c), and 2033.1, subdivision (a), to maximize transparency of the applications and annual reports (see comments 1.38.15 and 1.38.17).

Response to comment 2.23.10: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).)

Comment 2.23.11: SBPC repeated its recommendation to require registrants to report on their overall portfolio of outstanding education financing contracts and not just contracts entered into during the prior calendar year (see comment 1.38.18).

Response to comment 2.23.11: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).)

Comment 2.23.12: SBPC repeated its recommendation to include more granular information at the loan level in the annual reports about registrants' outstanding education financing contracts and the Californians who owe them (see comment 1.38.19).

Response to comment 2.23.12: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).)

Comment 2.23.13: SBPC repeated its recommendation to revise the method for calculating the cash price for school-based education financing with income-based repayment provision to

report the actual cash prices offered to Californians (see comment 1.38.21).

Response to comment 2.23.13: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).)

Comment 2.23.14: SBPC objected to the modification to section 1466, subdivision (a), that permits income-share agreements and other loan contracts with income-driven repayment terms to offer the borrower a predefined formula for calculating each payment during the contract term in place of a payment option with substantially equal periodic installments. The predefined formula would not ensure substantially equal periodic installments or help borrowers understand what their future payments are likely to be since the formula relies on unknown and variable future incomes.

Response to comment 2.23.14: The Department did not make any changes in response to this comment for the reasons described in the purpose-and-necessity statement for section 1466, subdivision (a), in this FSOR.

Comment 2.23.15: SBPC repeated its recommendation to require SLSA licensees to report on their education financing marketing activities in their special reports (see comment 1.38.28).

Response to comment 2.23.15: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).)

SUMMARY OF AND RESPONSE TO COMMENTS SUBMITTED DURING SECOND 15-DAY COMMENT PERIOD (JANUARY 17 TO FEBRUARY 6, 2024)

The modified proposed regulations were made available for public review and comment from January 17 to February 6, 2024. The following persons submitted comments to the Department for this period:

1. Brian Tate, President and Chief Executive Officer, Innovative Payments Association, dated February 1, 2024.
2. Nancy Hoffman Vanyek, President and Chief Executive Officer, Greater San Fernando Valley Chamber of Commerce, dated February 1, 2024.
3. Julian Canete, President and Chief Executive Officer, California Hispanic Chambers of Commerce, received February 1, 2024.
4. Sarah Wiltfong, dated February 2, 2024.
5. Dean Kirk, dated February 2, 2024.
6. Pat Fong Kushida, President and Chief Executive Officer, California Asian Pacific Chamber of Commerce, received February 2, 2024.
7. George Francisco, dated February 3, 2024.
8. Lucy Dunn, dated February 3, 2024.
9. Roberto Arnold, dated February 3, 2024.
10. Hannah Crum, dated February 3, 2024.
11. Claudia Oliveira, dated February 3, 2024.

12. Bill Lamarr, dated February 3, 2024.
13. Pat Anderson, dated February 3, 2024.
14. David Englin, dated February 4, 2024.
15. Tom Grable, dated February 5, 2024.
16. Eileen Newhall, Owner, Eileen Newhall Consulting LLC, received February 5, 2024.
17. Jheri Heetland, dated February 5, 2024.
18. Frank Dombroski, Founder and Chief Executive Officer, FlexWage Solutions LLC, dated February 6, 2024.
19. Penny Lee, President and Chief Executive Officer, Financial Technology Association, dated February 6, 2024.
20. Denise Dunckel, Chief Executive Officer, American Association for Debt Resolution (formerly American Fair Credit Council), dated February 6, 2024.
21. Aaron Marienthal, Senior Vice President and General Counsel, Payactiv, Inc., dated February 6, 2024.
22. Caleb Englin, dated February 6, 2024.
23. Ryan Naples, Director of Public Policy, DailyPay, Inc., dated February 6, 2024.
24. Dennise Mejia, dated February 6, 2024.
25. Andrew Kushner, Senior Policy Counsel, Center for Responsible Lending, and Lauren Saunders, Associate Director, National Consumer Law Center, dated February 6, 2024.
26. Brenda Bass, Policy Advocate, California Chamber of Commerce et al., dated February 6, 2024.
27. David E. Durant, General Counsel, Activehours, Inc., doing business as EarnIn, dated February 6, 2024.
28. Scott Govenar, Partner, Governmental Advocates, Inc., on behalf of California Financial Services Association, received February 6, 2024.
29. Timothy Alan Simon, Chairman of the Board of Directors, California African American Chamber of Commerce, dated February 6, 2024.
30. Tal Clark, Chief Executive Officer, Instant Financial USA, Inc., dated February 6, 2024, and received February 7, 2024, after the close of the comment period.

Comment letter 3.1 – Brian Tate, President and Chief Executive Officer, Innovative Payments Association (IPA) (dated February 1, 2024)

Comment 3.1.1: IPA stated that the Second Modification’s changes to the fee reporting requirements under sections 1045, subdivisions (c) and (d), and to the definitions of “account transfer fee” and “charges” under section 1004, subdivision (c), do not go far enough to distinguish between payroll-card fees and EWA fees and recommended further modifying the regulations to: (1) remove the “account transfer fee” altogether and (2) clearly state that the definition of “charges” under section 1004, subdivision (c), is limited to fees assessed directly for income-based-advance services and does not include any charges assessed in connection with a payroll card. Many EWA providers load EWA funds onto an employee’s payroll card and because payments are made to the payroll card, the provider is often able to offer the EWA service without a fee to the employee and when EWA funds are deposited on their payroll card, employees may access those funds in the same way they access any other funds on their card. Generally this includes the ability to make purchases via the card, to obtain cash back at the point-of-sale or through surcharge-free ATM networks, and to transfer funds to an alternative bank account and for this latter service, some providers may assess a fee for an “instant” transfer,

as opposed to a standard ACH transfer that is offered for free. Even as modified in the Second Modification, the Proposed Rule's reporting obligations and definitions of "account transfer fee" and "charges" are still broad enough to implicate the type of payroll card fee described above. Such conflation of payroll-card fees with other EWA fees may lead to the Department gathering and reporting misleading information about the EWA market that could potentially mislead consumers to believe that providers that offer EWA through a payroll card are "high-fee," when in fact those providers offer EWA services at no cost. The CFPB's Prepaid Account Final Rule, which went into effect in 2019 and covers prepaid cards (and payroll cards), mobile wallets, and peer-to-peer payment forms, already requires clear and conspicuous disclosure of all fees associated with any covered product, including payroll cards.

Response to comment 3.1.1: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).) In any event, the Department did not make any changes in response to this comment because payroll-card fees as described in this comment are within the definition of "charges." See response to comment 2.21.1.

Comment 3.1.2: IPA repeated the comments made in their previous comment letters that it is inappropriate to treat all EWA services in the marketplace as loans that would potentially be subject to the CFL and the Department should permit the wide variation in EWA models serving millions of Californians today when making regulatory policy and issuing policy statements (e.g., all EWA disbursements are loans.) IPA reiterated their request to the Department to continue to examine this aspect of the Proposed Rule, and to: (1) once and for all clarify that, based on the features and functionality of some EWA models, all EWA models are not per se covered by the CFL, and (2) adopt a separate registration requirement for EWA models that do not resemble credit and expressly recognize that disbursements under such models are not "loans" and should not be subject to CFL.

Response to comment 3.1.2: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).)

Comment letters 3.2, 3.3, 3.4, 3.5, 3.6, 3.7, 3.8, 3.9, 3.10, 3.11, 3.12, 3.13, 3.14, 3.15, 3.17, 3.22, and 3.24 – Nancy Hoffman Vanyek, President and Chief Executive Officer, Greater San Fernando Valley Chamber of Commerce; Julian Canete, President and Chief Executive Officer, California Hispanic Chambers of Commerce; Sarah Wiltfong; Dean Kirk; Pat Fong Kushida, President and Chief Executive Officer, California Asian Pacific Chamber of Commerce; George Francisco; Lucy Dunn; Roberto Arnold; Hannah Crum; Claudia Oliveira; Bill Lamarr; Pat Anderson; David Englin; Tom Grable; Jheri Heetland; Caleb Englin; and Dennise Mejia, respectively (variously dated from February 1 to 6, 2024)

Comments 3.2, 3.3, 3.4, 3.5, 3.6, 3.7, 3.8, 3.9, 3.10, 3.11, 3.12, 3.13, 3.14, 3.15, 3.17, 3.22, and 3.24: The commenters expressed continuing concern and opposition to the proposed regulations and commented that the second modified regulations remain ambiguous and confusing. Given just the size and scale of California's economy, at the very least, its employers should come to expect that state regulations provide a modicum of clarity for operating in the state. Unfortunately, the proposed regulations do the exact opposite and make it more confusing for

employers offering EWA and the EWA industry as a whole. The proposed revisions will cause significant problems for businesses and consumers across California because they still classify EWA as a loan under licensing laws but exempt EWA from the licensure requirements. While this construct may make sense to the Department philosophically, it is in practice against the best interest of California employers evaluating whether to offer an EWA service and what requirements they must follow. The regulations could accomplish everything else in its current form without this disputed definition of EWA as a "loan." EWA is not a loan, and the Department should clarify this in the regulations. However, if the Department insists on disagreeing with the multitude of stakeholders, the commenters requested that the Department simply provide a clean, full exemption from the lending law for EWA products because a full exemption would correct the confusion resulting from what is currently proposed and ensure that employers and employees who use EWA today in California can continue to access it. The unique aspects of EWA to employers and employees, including the ability to attract, retain, and help workers avoid bank overdrafts and payday debt and that EWA is used throughout the state by over thousands of employers and hundreds of thousands of employees.

Response to comments 3.2, 3.3, 3.4, 3.5, 3.6, 3.7, 3.8, 3.9, 3.10, 3.11, 3.12, 3.13, 3.14, 3.15, 3.17, 3.22, and 3.24: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).) The Department disagrees that IBAs are not loans for the reasons stated in the ISOR and as discussed in the Department's responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10. Additionally, the provisions defining the exemption are not confusing. Section 1461 clearly provides that providers that meet the specified requirements are not required to be licensed under the CFL even after the CCFPL registration requirement expires.

Comment letter 3.16 – Eileen Newhall, Owner, Eileen Newhall Consulting LLC (dated February 5, 2024)

Comment 3.16.1: Newhall expressed disappointment that the bulk of the First Modified Text remains unchanged. Although the initial years of the Department's proposed approach will be fairly benign to the IBA industry, the longer-term effect of the proposal threatens the viability of the IBA industry in the state and risks depriving California consumers of a product they actively use to reduce their reliance on high-cost credit. Newhall pointed to three main flaws in the regulations. First, the regulations create tremendous regulatory uncertainty for IBA providers because section 1461, subdivision (e), as redrafted states that a provider of an advance of funds as described in subdivision (a) does not require a CFL license if two conditions are met: (1) the advance of funds is an income-based advance, as defined in the CCFPL regulations, and (2) the provider is registered with the Department to offer IBAs under the CCFPL. Section 1461 goes on to say that the second condition expires when the registration requirement for IBA providers expires. The presence of the "and" between subdivision (e)(1) and (e)(2) is what creates the uncertainty because one of the two required conditions will be unattainable if registration requirements for IBA providers sunset and IBA 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. This regulatory "gotcha" imposes significant uncertainty on industry, obliges providers to apply for a CFL license to avoid violating the law when the registration

requirements sunset, forces the industry under the installment loan law, and hampers innovation with no resulting consumer benefit.

Newhall repeated the suggestion to replace the "and" between section 1461, subdivision (e)(1) and (e)(2), with an "or." Alternatively, Newhall recommended modifying subdivision (e) so that it continues with three "consumer protections" that are embedded in the registration scheme without forcing IBA providers under the requirements of the CFL upon the sunset of the registration requirements.

Response to comment 3.16.1: The Department declines to make the alternative recommended change because it was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).) The Department declines to change "and" to "or" because both conditions must be met while the CCFPL registration requirement is in effect. Newhall's reading of the effect of subdivision (e) is incorrect. The second modified proposed regulations provided that the CFL-licensure exemption for IBA providers would survive the expiration of the CCFPL registration requirement. This approach remains unchanged in the final regulations.

Comment 3.16.2: Second, Newhall repeated the comments made in previous comment letters that regulatory uncertainty thwarts rather than fosters innovation. In drafting section 1461 as it is proposing in its Second Modified Text, the Department is knowingly and intentionally creating a regulatory environment wrought with uncertainty. The income-based-advance industry currently relies on two primary sources of funding to support its advances: venture capital provided by venture capital firms and lines of credit made available by large depository institutions or their bank holding companies, and both types of funders are reluctant to place strong support behind industries whose continued existence is questionable. These venture capital firms and large depositories will likely withdraw or significantly reduce their funding to any companies that are violating California law by making "loans" subject to the CFL without having a license to do so and if the Department brings regulatory action against providers for acting in an unlicensed manner, these regulatory sanctions will threaten the ability of IBA providers to continue operating in other states. Even if an income-based-advance company does obtain a license under the CFL, it is entirely unclear what that means in a practical sense for the way in which that company must change its operations to operate under the CFL, which contemplates interest rates, origination fees, late fees, prepayment penalties, and refinancings, among many other concepts that are not a part of IBAs, and the confusion that is likely to result will impose even greater regulatory uncertainty. Any company that guesses wrong will be subject to disciplinary action. Newhall also repeated comments made in a previous comment letter that forcing IBA providers under the CFL makes a mockery of the Department's responsibility to support and appropriately regulate responsible financial innovation and it renounces California's opportunity to be the nation's most responsive and innovative consumer protection regulator in favor of the outdated status quo.

Response to comment 3.16.2: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).) In any case, the Department strongly disagrees with the comment that it knowingly and intentionally is creating regulatory confusion.

Section 1461 clearly provides that providers that meet the specified requirements are not required to be licensed under the CFL even when the CCFPL registration requirement expires.

Comment 3.16.3: Third, Newhall repeated the comment made in a previous comment letter that despite extensive statutory 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. The requirements in the regulations are bureaucratic but fall far short of representing a comprehensive regulatory scheme with extensive consumer protections. The Department would better protect consumers and better sustain an industry that has become important to several hundred thousand Californians if it were to adopt a version of the language proposed in Newhall's November comment letter.

Response to comment 3.16.3: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).) Additionally, see response to comment 1.5.1.

Comment 3.16.4: Newhall repeated the comment made in the previous comment letter that these regulations fail to clarify the effect of a sunset on article 1 of subchapter 4. While a strong case can be made that the entirety of subchapter 4 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, it may be valuable for the Department to include in its regulation some statement to that effect, which should help ensure that cross-references, both within regulations implementing the CCFPL and regulations implementing other laws administered by the Department, are not rendered meaningless following a possible sunset.

Response to comment 3.16.4: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).)

Comment letter 3.18 – Frank Dombroski, Chief Executive Officer and Founder, FlexWage Solutions LLC (FlexWage) dated February 6, 2024)

Comment 3.18: FlexWage supported the Department's focus on consumer protections and a path for safe innovation and continued pursuit of educating everyone on the EWA industry and the vast differences among all providers claiming to be EWA. The regulations clearly distinguish EWA from consumer lending services. Most in the industry do not adhere to the level of data accuracy and product construct that ensure consumer protection and that the data provided by the MOUs provide a clear picture of the consumer risks, complaints, and lack of transparency associated with some "EWA" services. While the February 2022 opinion the Department provided to FlexWage would not require the company to be registered as an IBA provider, it would voluntarily provide data to the Department annually for review and inclusion with all other data received.

Response to comment 3.18: The Department appreciates the comment of support.

Comment letter 3.19 – Penny Lee, President and Chief Executive Officer, Financial Technology Association (FTA) (dated February 6, 2024)

Comment 3.19: FTA commended the past changes made to the proposed rule to reflect the differences between EWA products and loans but continues to disagree with the Department's continued characterization of EWA as "loans." FTA repeated comments made in previous comment letters that the characterization is contrary to California law and unnecessary for the Department to license and supervise providers, and to label EWA as a loan is likely to confuse and not aid consumers. FTA reiterated its request to reconsider adopting the whole industry proposal submitted during the last comment period, which would enshrine these protections while supporting regulatory oversight.

Response to comment 3.19: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).)

Comment letter 3.20 – Denise Dunckel, Chief Executive Officer, American Association for Debt Resolution (AADR) (formerly American Fair Credit Council) (dated February 6, 2024)

Comment 3.20.1: AADR repeated the comment made in previous comment letters that the Department's regulations as amended do not align with the statutory definition of "debt settlement services" in the Civil Code and would require a broad set of market participants who do not provide debt resolution services to register with the Department. AADR reiterated their request to the Department to amend section 1010 to more effectively align the Department's proposed registration requirements with the existing statutory definition that applies to persons who actually offer to act as debt resolution providers. AADR further commented that the regulations were not changed despite it previously raising the concern and requested an opportunity to discuss this or to provide further explanation of the Department's reasoning for creating a new definition for "debt settlement services."

Response to comment 3.20.1: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).)

Comment 3.20.2: AADR repeated their request made in previous comment letters that the Department exercise its authority to collect comparable data from providers of other products and services such as credit counseling, bankruptcy, creditor loan modifications, and short-term consumer loans, and not just from debt resolution firms to provide a complete and comparative picture of the value debt resolution companies play in California.

Response to comment 3.20.2: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).)

Comment letter 3.21 – Aaron Marienthal, Senior Vice President and General Counsel, Payactiv, Inc. (dated February 6, 2024)

Comment 3.21.1: Payactiv reiterated its recommendations to the first modified proposed regulations, including modifying section 1461 to expand the definition of income-based advance to be more consumer-friendly and exclude from the CFL products and providers that meet this expanded definition.

Response to comment 3.21.1: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).)

Comment 3.21.2: Payactiv appreciates the consideration that went into the modified proposed regulations, the Department's engagement and careful attention to comments, and its focus on ensuring consumer protection while promoting innovation.

Response to comment 3.21.2: The Department acknowledges the comment of appreciation. The Department did not make any changes in response to this comment because it was an observation rather than a recommendation to change the regulation.

Comment 3.21.3: Payactiv stated that the basis for section 1461, subdivision (a), and new subdivision (f), remains contrary to well-established California law regarding "credit" and "debt." Payactiv recommended excluding employer-integrated EWA products from being classified as loans under the CFL. These are fundamentally distinct products from loans or advance products because, for example, they use actual data from an employer to ensure that a user is accessing already earned but unpaid wages and pose no risk of overdrafts, recourse, late fees, or credit impact.

Payactiv also stated that it is not clear why in section 1461 the Department added subdivision (f), which effectively repeats what is already stated in subdivision (a). Payactiv requested that the Department explain in the FSOR why it views even employer-integrated products as loans under California law.

Response to comment 3.21.3: The Department did not make any changes in response to this comment for the reasons described in the response to comment 1.20.4. As explained in this FSOR, subdivision (f) was added in section 1461 to clarify that an advance that meets the definition of "income-based advance" under section 1004, subdivision (g), also meets the definition of a loan secured by an assignment of wages under section 1461, subdivision (a). Section 1461, subdivision (f), obviates the need to compare the two definitions, which are not exactly the same.

Comment 3.21.4: Payactiv continued to assert that section 1461 "does not appear to serve a material purpose as written."

Response to comment 3.21.4: To the extent that the comment recommended withdrawing the IBA-related regulations proposed under the CFL, the Department declined to do so for the reasons stated in the ISOR. See also the Department's response to comment 2.22.3.

Comment 3.21.5: Payactiv also stated that it is not clear why the second modified proposed regulations delete former section 1462 (providing that a registered provider is not "in the business" of a finance lender for purposes of licensure under the CFL) in favor of section 1461, subdivision (e) (providing that a registered provider "does not require a license under" the CFL).

Response to comment 3.21.5: The Department did not make any changes in response to this comment because it was an observation rather than a recommendation to change the regulation. As explained in this FSOR, the modified language is less technical and easier to understand.

Comment 3.21.6: Payactiv stated that section 1465, which would define optional payments as "charges" under Financial Code section 22200, is confusing and seemingly unnecessary in light of the licensing exemption in section 1461, subdivision (e).

Response to comment 3.21.6: To the extent that the comment recommended deleting section 1465, the Department declined to do so. Section 1465 is not limited only to optional payments to providers in connection with income-based advances; rather, it applies to any optional payment to any person in connection with a loan.

Comment 3.21.7: Payactiv continued to object to section 1461, subdivision (d), because it omits other credit and debt-collection laws, such as the Rosenthal Fair Debt Collection Practices Act. It is also not clear how a court would interpret or defer to this provision. While the Department is entitled to deference in its interpretation of ambiguous terms in the Financial Code, it is unclear whether its interpretation of the usury provision of the California Constitution, for example, would be entitled to the same level of deference. (See *Dobbins v. San Diego County Civil Service Com.* (1999) 75 Cal.App.4th 125, 131 ["Generally, a court will defer to the construction given to an ambiguous statute or rule by the agency charged with its enforcement if that construction has a reasonable basis"].) Article XV of the Constitution is not a statute the Legislature empowered the Department to enforce. It is also not clear what level of deference would apply to the Department's statement regarding federal law. This is a recipe for confusion.

Response to comment 3.21.7: The Department did not make any changes in response to this comment. Payactiv implies that the Department's interpretation of laws outside its jurisdiction is not entitled to deference. But subdivision (d), and indeed the entirety of section 1461, do not purport to interpret any law other than the CFL. As explained in this FSOR, subdivision (d) was added in response to concerns raised in public comments that not having such a clarification would lead to considerable uncertainty regarding the treatment of income-based advances under other laws, including laws not under the Department's jurisdiction. A court would not defer to the Department's interpretation of loan under the CFL to interpret the usury provisions of the California Constitution, but it may find it persuasive. In this context, subdivision (d) offers clarity, not confusion.

Comment letter 3.23 – Ryan Naples, Director of Public Policy, DailyPay, Inc. (dated February 6, 2024)

Comment 3.23.1: DailyPay again objected to characterizing income-based advances as loans under the CFL, the framing of CCFPL registration as merely an exemption from the CFL, and

the inclusion of optional fees in the definitions of "charges."

Response to comment 3.23.1: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).)

Comment 3.23.2: DailyPay stated that the second modified proposed regulations send conflicting signals and will still result in confusion. Sections 1461, subdivisions (a) and (f), suggest that IBA products will generally be considered loans under the CFL. On the other hand, they also asserted that IBA providers registered under the CCFPL are exempt from CFL licensure "but without confirming the inapplicability of [the] rest of the CFL." The proposed rules would already require IBA providers to register with the Department under the CCFPL, which empowers the Department to exercise a host of administrative, oversight, and supervisory powers over such providers and their products. Accordingly, there is no significant regulatory purpose for including such a confusing characterization of all IBA products offered by registrants as loans for purposes of the CFL.

Response to comment 3.23.2: For the reasons stated in the ISOR, the Department did not make any changes in response to this comment, which was construed as a recommendation to withdraw the IBA-related regulations proposed under the CFL. DailyPay did not offer any reasoning for why the CFL's requirements would apply to a company not subject to the CFL. Therefore, the Department has no reason to believe that a regulatory framework that describes requirements for licensees would apply to unlicensed entities. (See, e.g., Fin. Code, §§ 22300, 22301, 22303.) Thus, the proposed regulations need not confirm the inapplicability of the rest of the CFL while providing that IBAs are loans under the CFL.

Comment 3.23.3: DailyPay recommended modifying section 1461, subdivision (f), to exclude from being characterized as a loan IBAs from employer-integrated providers when the advance is an "obligor-based advance" within the meaning of section 1004, subdivision (h) (i.e., settlement occurs directly from the employer), the provider has contracted with the employer, the worker's earnings are verified by the employer, and the provider has registered with the Department.

Excluding employer-integrated products would ensure regulatory clarity and recognize the difference between accessing verified earned but unpaid wages and promising to repay a debt from income that might have been earned or has not yet been earned by a worker. The employer-integrated model relies on actual and current earnings information that has been verified by the consumer's employer and does not rely on speculation or prediction to determine what a consumer's earnings might be. Consumers understand this difference and prefer to use a product that does the former.

The proposed "loan" label would likely increase the cost of capital for the EWA industry, leading to increased costs for consumers. Warehouse credit facilities and other capital sources that support the distribution of EWA products would likely assess and price their risk similarly to unsecured consumer loans, which is expected to lead to an escalation in costs for consumers or even the potential restriction of product availability.

DailyPay understands that some commenters do not agree that EWA services are not "loans" and the consequences of labelling them as such. However, even some of the most vocal of such commenters have acknowledged that employer-integrated EWA poses less risk of consumer harm and can be treated differently from direct-to-consumer EWA under the CFL.

Response to comment 3.23.3: The Department did not make any changes in response to this comment for the reasons described in the response to comment 1.20.4 and 2.22.4.

Comment 3.23.4: DailyPay recommended restoring section 1463, with "loans" changed to "income-based advances."

Response to comment 3.23.4: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).) In any event, if DailyPay is concerned that deeming IBAs to be loans without including section 1463 renders IBAs in violation of Financial Code section 22307, subdivision (b)—section 22307 applies to CFL loans made by licensees. (*Id.*, subd. (a) ["loans made under this division"].)

Comment letter 3.25 – Andrew Kushner, Senior Policy Counsel, Center for Responsible Lending (CRL), and Lauren Saunders, Associate Director, National Consumer Law Center (NCLC) (dated February 6, 2024)

Comment 3.25.1: CRL and NCLC recommended that the Department clarify that the entirety of subdivision (e) of section 1461 expires when the registration requirement expires. As the text is currently drafted and formatted, it is potentially unclear whether all of subdivision (e) expires upon the expiration of the registration requirement, or just subdivision (e)(2), and it is unfathomable that the Department would propose that the registration requirement would expire without also sunsetting the exemption from CFL licensure, especially in light of the Department's conclusion that income-based advances are loans. CRL and NCLC also repeated their objection to removing the requirement that IBA providers that register under the CCFPL comply with the CFL's rate caps.

Response to comment 3.25.1: The Department did not make any changes in response to this comment. As explained in this FSOR, modifying the exemption to survive expiration of the CCFPL registration requirements is necessary to address APA-related economic-impact arguments made by some commenters and not because the Department agreed with IBA providers' arguments that application of the CFL's rate caps or other requirements was inappropriate for IBAs or would adversely affect consumers. The exemption from the CFL provided in section 1461, subdivision (e), will remain unless the Department addresses it in a future rulemaking.

Comment 3.25.2: CRL and NCLC supported the modified section 1461, subdivision (e), which provides that an IBA provider that registers "does not require a license" under the CFL. This new language is clearer, more succinct and, most important, more accurate, as IBA providers are clearly "in the business" of offering loans under the CFL, as the Department itself understands.

Response to comment 3.25.2: The Department appreciates the comment of support.

Comment letter 3.26 – Brenda Bass, Policy Advocate, California Chamber of Commerce; Jay King, President and Chief Executive Officer, California Black Chamber of Commerce; Pat Fong Kushida, President and Chief Executive Officer, California Asian Pacific Chamber of Commerce; and Julian Canete, President and Chief Executive Officer, California Hispanic Chambers of Commerce (dated February 6, 2024)

Comment 3.26: The commenters represent the interests of businesses of all sizes and companies from every industry within the state, and consequently comprise a significant portion of the private sector jobs in California and are committed to helping California businesses thrive while complying with complex laws and regulations. The revised regulations submitted by the Department on January 17, 2024, remain ambiguous and confusing and while they appreciate the Department's commitment to monitoring and collecting data on the EWA market, the proposed regulation will cause significant problems for businesses and consumers across California. Given the size and scale of California's economy, employers expect that state regulations provide clarity for operating in the state and unfortunately, these proposed regulations do the opposite and make it more confusing for employers offering EWA, and the EWA industry as a whole. Specifically, the draft regulations still classify EWA as a loan under licensing laws but exempts EWA from licensure requirements. This regulatory approach is against the best interest of each California employer evaluating whether to offer an EWA service and what requirements they must follow. Providing only a partial exception will make it confusing for businesses and EWA providers to understand exactly what their obligations are. As an example, there is a question as to whether a company that uses an EWA platform might need a data broker license if they are sharing relevant data. This is unclear and would unfortunately not become settled until the Department takes enforcement actions based on the proposed regulation. The regulations also raise questions about compliance and perceptions in our sister states and since businesses are compliance-driven, it is critical that they know at the outset how to comply properly. The Department's regulations could accomplish everything else in its current form without this disputed definition of EWA as "loan," and thus resolve this ambiguity. EWA and particularly employer-integrated EWA, is a tool utilized throughout the state by over thousands of employers and hundreds of thousands of employees and it benefits businesses by enabling them to attract new talent and decrease worker absenteeism and helps people avoid overdrafting their bank accounts, paying bills late, and getting trapped in payday loan debt. EWA is not a loan and the commenters requested that the Department clarify this and provide a clean, full exemption from the lending law for EWA products because a full exemption would correct confusion resulting from what is currently proposed and ensure employers and employees who use EWA today in California can continue to access it. The commenters recommended the same changes as in comments 3.23.3 and 3.23.4.

Response to comment 3.26: The Department did not make any changes in response to this comment for the reasons discussed in its responses to comments 3.23.3 and 3.23.4. The Department disagrees that IBAs are not loans for the reasons stated in the ISOR and as discussed in the Department's responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10. Additionally, the provisions defining the exemption are not confusing. Section 1461 clearly provides that providers that meet the specified requirements are not required to be licensed under the CFL even after the CCFPL registration requirement expires. Last, the Department notes that the commenters' concerns about the negative implications of the Department's regulations appear to

lack merit. For example, the commenters' argument that the Department's regulations may result in employers being consider data brokers under California law does not explain how the Department's regulations would lead to this result given that the definition is set by Civil Code section 1798.99.80. The Department's regulations do not interpret "data broker" or any other word used in the Civil Code definition.

Comment letter 3.27 – David E. Durant, General Counsel, Activehours, Inc., doing business as EarnIn (dated February 6, 2024)

Comment 3.27.1: In section I of its comment letter, EarnIn reiterated that nonrecourse advances such as EarnIn's Cash Out are not loans under the CFL or California law, as described in more detail below, and recommended that the regulations reflect the same. To this end, in section III of its comment letter, EarnIn recommended deleting section 1461, subdivisions (e) and (f), and modifying subdivision (a) to exclude nonrecourse advances.

As previously communicated to the Department, EarnIn Cash Outs create no legal obligation to repay that can be enforced. Concerns associated with enforcement, e.g., foreclosure, repossession, payment of mandatory fees, drive lending law. Eliminating the possibility of enforcement eliminates consumer-protection concerns and the need for regulation.

Other state entities have confirmed that IBAs are not loans. The Arizona Attorney General issued an opinion that an IBA "that is offered as a no-interest and non-recourse product" is not a consumer loan under state law. Similarly, Kansas issued an interpretive opinion to an IBA provider, finding it to not be issuing a "debt." Missouri and Nevada also passed comprehensive legislation to explicitly exempt IBAs from traditional lending laws. This list has grown since our last letter, with the Montana Attorney General opining that IBAs are not loans under the relevant state laws because they lack a right to repayment. This guidance rightly recognizes the meaningful distinctions between IBAs and loans.

Indeed, the rationale in these letters is also present in the Department's own 2022 CFL opinion letter regarding a product offered by one of EarnIn's competitors. Notably, the Department's opinion resembles that of the Attorneys General of Arizona and Montana. Each of the three opinions evaluated the relevant statutory definition of "loan" by looking to Black's Law Dictionary and relevant case law to support similar conclusions that the product in question was not a "loan" in the absence of an enforceable obligation to repay. This reasoning applies equally in distinguishing IBAs from loans. Advances that do not create a legally enforceable repayment obligation are not loans in Arizona, Montana, or California and such distinction should be reflected in this rulemaking.

Response to comment 3.27.1: For the reasons stated in the ISOR, the Department did not make any changes in response to this comment. Additionally, as explained in response to comment 1.45.13, the 2020 CFPB advisory opinion interpreted whether EWA was "credit" under the federal Truth in Lending Act, not whether it was a "loan" under state law. The Arizona Attorney General, in interpreting whether EWA is a "loan" under Arizona law, relied heavily on the CFPB's analysis of "credit" under federal law. The Treasury's purported clarification is a proposed amendment to the treatment of EWA under federal employment tax law that is not intended to create any inferences regarding current law. The Department's interpretive opinion in

2022 was a specific ruling concerning an EWA product that is materially different from Payactiv's employer-integrated EWA product. That other EWA product was also the subject of the Kansas bank commissioner's interpretive opinion.

Further, the Department's interpretive opinion in 2022 was a specific ruling concerning a product that is materially different from EarnIn's direct-to-consumer, non-employer-integrated product. In the opinion, the Department explicitly disclaimed that a third party with no financial obligation to an employee (like EarnIn) could rely upon its reasoning. In December 2023, the Montana Attorney General cited as persuasive the CFPB's Payday Lending Rule, which excludes "certain types of credit" from coverage under the rule, including "wage advance programs" and "no-cost advances." (12 C.F.R. § 1041.3(d), (d)(7), (d)(8).) But the CFPB excluded such advances "to the extent they constitute credit," which means that their exclusion cannot be interpreted to imply that they do not constitute credit under federal law, much less a loan under state law. (82 Fed.Reg. 54472, 54547 (Nov. 17, 2017); 12 C.F.R. § 1041.3(d)(7) [excluding wage advances "that constitute credit"], (d)(8) [excluding no-cost advances "that constitute credit"].) Moreover, the Montana opinion did not involve the interpretation of a state law concerning loans secured by an assignment of wages like Financial Code section 22335.

Comment 3.27.2: In section II of its comment letter, EarnIn provided additional support for its recommendation in comment 3.27.1. EarnIn stated that characterizing IBAs as loans under the CFL would be harmful to consumers and providers.

First, it would confuse consumers. A lender's recourse—the possibility of liens, wage garnishment, negative credit reporting, third-party debt collection—inspires fear in many consumers and causes them to be wary of taking out loan obligations. But because EarnIn has no recourse against consumers, customer fear of lenders is not properly attributed to EarnIn. According to an internal survey of 1,343 customers, over a third responded that they were less likely to use an EarnIn product structured as a loan. More than half of EarnIn's customers further responded that in the absence of Cash Out and similar IBAs, they would be "disappointed" and would likely turn to other liquidity options for which they would incur fees, such as paying a bill late, overdrawing an account, paying with a credit card, or taking out a payday loan.

Calling IBAs loans would undermine consumers' ability to make informed decisions about how best to organize their payment obligations. Cash-strapped consumers may choose to repay IBAs and default on other loan obligations. Repaying an IBA ahead of a mortgage payment could have significantly more detrimental effects than nonpayment of the IBA.

Second, calling IBAs loans would have a deleterious effect on IBA providers. California has long been a leader in financial services regulation and a state that other states look to for guidance. If California considers IBAs to be loans, other states may assume the same without further inquiry or nuance. In turn, this could lead other states or private plaintiffs to pursue IBA providers for unlicensed lending, usury, or other legal violations. Imposition of traditional lending requirements would make it impossible for IBA providers to operate in certain jurisdictions, thus depriving consumers of a valuable liquidity option and forcing those consumers to turn to payday lenders, overdrafts, or credit cards—options that are categorically worse for the consumer than IBAs.

There would also be uncertainty regarding the application of the usury provisions of the California Constitution to IBAs, notwithstanding language to the contrary in the proposal. The Legislature intended this rulemaking to increase clarity and not add ambiguity.

The Legislature also sought to encourage, not limit, innovative solutions. But the proposed regulations would materially restrict IBA providers' ability to operate in the state—for example, by harming and possibly eliminating providers' business with advertising and other platforms. As a notable example, in 2019, Google banned applications for loans that require repayment in full in 60 days from Google Play, Google's official pre-installed app store on Android-certified devices. IBAs are not loans and do not "require" repayment at any point, but if the Department calls IBAs loans, consumers may find IBA products banned from the Google Play app store, unnecessarily forcing those consumers to less favorable and predatory alternatives.

Third, calling IBAs loans does not align with historical or academic conceptions of lending. What is a loan if it does not engender an obligation to repay? What consumer-protection concerns associated with a nonrecourse transaction are served by using the term "loan" that cannot otherwise be served through disclosure requirements? California law has long recognized nuanced distinctions between loans, sales, credit sales, and other types of transactions based on the recourse available to the parties. Ignoring these distinctions in the IBA context is out of line with past precedent and blurs the legal definition of a loan.

Finally, EarnIn reiterated that the Department need not characterize IBA as loans to regulate or supervise IBA providers. The Department may supervise and impose various consumer-protection obligations on providers without utilizing inaccurate and divisive terminology, which affords the Department no substantive advantage.

Response to comment 3.27.2: For the reasons stated in the ISOR, the Department did not make any changes in response to this comment, which was construed as a recommendation to withdraw the IBA-related regulations proposed under the CFL. Additionally, the Department incorporates by reference its responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10. Although other states may follow the Department's approach, several states have already gone in another direction, as EarnIn itself has noted. As for the Google Play app store policy, EarnIn appears to have identified more than one way to challenge the policy's application.

Comment 3.27.3: EarnIn recommended expanding section 1461, subdivision (d), to provide that section 1461 shall not be read to interpret "any other law, including but not limited to" the enumerated laws, and to add other terms from article XV of the California Constitution to the enumerated list ("interest" and "fee, bonus, commission, discount or other compensation").

While the Department has included a variety of authorities for which it expressly disclaims an issuance of interpretative guidance, which EarnIn supports, further revision is necessary to avoid inadvertent inferences that the rulemaking can or should be used to interpret other provisions of California (or other) law. And although the Department's clarification regarding the usury provisions of the California Constitution may be helpful, it "might unintentionally suggest the section *may* be read to interpret [the Department's] rulemaking as interpreting *other* terms in the

California Constitution, such as what is considered a charge, interest, or fee, bonus, commission, discount or other compensation for purposes of California's usury law."

Response to comment 3.27.3: The Department did not make any changes in response to this comment. EarnIn's concerns are not reasonable. Section 1461 is clear: its provisions concern whether an advance is a loan "subject to the California Financing Law," whether a person is a finance lender "within the meaning of the California Financing Law," and whether such persons require a license "under the California Financing Law." Disclaiming the interpretation of interest, fees, discounts, or other terms in article XV of the California Constitution is not necessary because section 1461 contains no interpretations of the sort.

Comment letter 3.28 – Scott Govenar, Partner, Governmental Advocates, Inc., on behalf of California Financial Services Association (CFSA) (received February 6, 2024)

Comment 3.28: CFSA repeated the comments made in a previous comment letter to add additional reporting requirements in sections 1001 and 1042, including requiring reporting on delinquency at enrollment, information on loans the registrant made to consumers, and the number of consumers who filed for bankruptcy. These changes will allow bad actors to be identified more easily and ensure that consumers are presented with the best options when faced with impediments to making their loan payments on time. Loans offered by debt-settlement service providers or their third-party affiliates often have APRs that create a new debt obligation at nearly the same amount as the original loan held by the debtor, trapping consumers in a cycle of debt.

Response to comment 3.28: No response is required because this comment was not specifically directed to a change to the text that was made available to the public during this comment period. (Gov. Code, § 11346.8, subd. (c).)

Comment letter 3.29 – Timothy Alan Simon, Esq., Chairman of the Board of Directors, California African American Chamber of Commerce (dated February 6, 2024)

Comment 3.29: California African American Chamber of Commerce stated that given the substantial impact of California's economy, state regulations need to provide clarity for businesses operating within our borders. However, the proposed regulations confuse employers offering EWA and the broader EWA industry. There is a sense of ambiguity and confusion about the proposed revisions and the classification of EWA as a loan under licensing laws and its exemption from licensure requirements poses a challenge for businesses and consumers across California. The Department should provide "further clarification." If reaching an agreement with stakeholders on this issue proves challenging, the Department should consider a complete exemption from lending laws for EWA products because such an exemption would address confusion concerns and enable California employers and employees to continue benefiting from EWA without unnecessary hindrance. The EWA sector has evolved to address a critical gap created by traditional banking institutions' historical denial of equitable access to capital for African Americans, thus addressing the longstanding inequity in banking and financial services. The unique aspects of EWA include enabling businesses to attract talent, retain staff, and reduce worker absenteeism and benefiting employees, from the convenience of accessing their earned

wages when needed and preventing financial challenges like overdrafts and late bill payments.

Response to comment 3.29: To the extent that this comment recommended further clarifying the exemption in section 1461, subdivision (e), the Department declined to do so because it is not confusing. Section 1461, subdivision (e), clearly provides that providers that meet the specified requirements are not required to be licensed under the CFL even after the CCFPL registration requirement expires. To the extent that the recommendation was to withdraw the IBA-related regulations proposed under the CFL, the Department did not make any changes in response for the reasons stated in the ISOR. The Department incorporates by reference its responses to other comments that argued that IBAs are not loans under the CFL, including but not limited to comments 1.10.1, 1.10.2, 1.10.4, and 1.45.10.

Comment letter 3.30 – Tal Clark, Chief Executive Officer, Instant Financial USA Inc. (received on February 7, 2024, after the close of the February 6 comment period)

Comment 3.30: Instant Financial recommended removing the reporting requirement for account transfer fees and to make it explicitly clear that "charges" for IBA services do not include payroll-card fees. While the second modification attempted to address this concern by replacing the phrase "or any other service rendered" with "or otherwise in connection with an income-based advance," this change does not resolve the issue because the modified regulation still conflates payroll-card and other account fees with IBA fees, and the second modification fails to articulate any standard for distinguishing account transfer fees from other payroll-card fees and if a bank transfer from a payroll card is sufficiently connected to an income-based advance deposited to trigger fee reporting, then out-of-network ATM or other fees could also be deemed sufficiently connected to the IBA so as to fall within the ambit of the second modified regulations. Categorizing payroll-card fees as IBA will lead to consumer confusion about whether certain fees are payroll-card fees or EWA fees, and they may think that such fees are being assessed twice, and this confusion over fees may cause some consumers to use EWA providers who charge fees, membership dues, or solicit tips, when they could have received an EWA for free from Instant Financial or other providers.

Response to comment 3.30: This comment was not timely submitted within the comment period. In any event, the Department did not make any changes in response to this comment for the reasons stated in its response to comment 2.21.1.

ALTERNATIVES DETERMINATIONS

Alternatives Generally (§ 11346.9, subd. (a)(4))

The Department considered alternatives to various aspects of the initial proposed regulations, including alternatives identified and recommended by the public. The Department rejected or accepted and incorporated recommended alternatives as explained in the sections above. The Department's chosen approach balanced the interests of both providers and recipients of the subject consumer financial products or services and the purposes of the CCFPL, CFL, CDDTL, or SLSA. No remaining reasonable alternative to these regulations would be more effective in carrying out the purpose for which these regulations were proposed, as effective and less

burdensome to affected private persons, or more cost-effective to affected private persons and equally effective in implementing the policy of the CCFPL, CFL, CDDTL, or SLSA.

The Department's chosen approach in the CCFPL portion of these regulations accomplishes the goal of protecting California residents by ensuring that persons engaged in the business of offering or providing subject products meet the eligibility requirements for registration and are registered and comply with the annual-reporting requirements. No reasonable alternatives to the registration or annual-reporting requirements have been proposed or otherwise brought to the Department's attention.

As for the CFL portion of these regulations, the Department considered proceeding without section 1461. However, the Department determined that section 1461 continued to serve multiple critical purposes that could not be achieved in section 1461's absence, including preventing evasions of the Department's registration regime, preventing evasions of the CFL, and settling a critical question of law concerning the CFL's scope. The Department incorporates by reference its response to comment 2.22.3.

Alternatives Relating to Small Business (§ 11346.9, subd. (a)(5))

As an initial matter, certain financing providers that would be subject to the proposed regulations are not "small businesses" within the meaning of the APA because a "consumer finance company" is excluded from the definition of "small business."[12] To the extent that these regulations would have an adverse economic impact on small businesses that offer or provide the financial products or services subject to registration, the Department considered alternatives that would lessen such adverse economic impact and accepted some and rejected others. When the Department rejected an alternative, it did so because the alternative would not be as effective in achieving the purposes of the CCFPL—which includes promoting consumer welfare, fair competition, and wealth creation; improving accountability and transparency in California's financial marketplace; and protecting California residents from abuses in that marketplace—or as effective in achieving the purposes of the CFL—which includes protecting borrowers against unfair practices by some lenders, clarifying and modernizing the law governing finance lenders, fostering competition among finance lenders, and encouraging the development of fair and economically sound lending practices.

LOCAL MANDATES (§ 11346.9, subd. (a)(2))

The proposed regulations do not impose any mandate on local agencies or school districts.

FORMS INCORPORATED BY REFERENCE (Cal. Code Regs., tit. 1, § 20, subd. (c)(3))

These regulations incorporate by reference the following documents in their entirety:

1. NMLS Company Form (Form MU1), Version 11.0, dated 9/12/2015.
2. NMLS Individual Form (Form MU2), Version 9, dated 9/12/2016.

[12] Gov. Code, § 11342.610, subd. (b)(1).

The Department has determined that it would be cumbersome, burdensome, and impractical to publish the NMLS forms in the California Code of Regulations because the forms are lengthy with specific formatting requirements. The forms are uniform for every Department licensing law that requires the use of NMLS, and therefore it would be impractical and unduly expensive to include the same uniform forms within each licensing law's regulations. The application forms are the basis for an interactive electronic filing of the information contained in the forms, and publishing the forms in the California Code of Regulations may confuse an applicant or registrant and result in the applicant or registrant attempting to file the form rather than submitting the information electronically. Further, NMLS provides extensive information to applicants and registrants on how to navigate the NMLS system and file or upload the requested information, and publishing the forms may confuse an applicant or registrant seeking information on how to submit the information. The forms are readily available to the public through the NMLS website. Live links to the forms are provided on the Department's website, and both the Department and NMLS maintain call centers to assist applicants and registrants in accessing the uniform forms. Applicants who operate businesses in other states are likely already familiar with the NMLS forms because many states require registration or licensure of businesses through NMLS.

UPDATE TO COST IMPACTS ON PERSON OR BUSINESS

The Department made no changes to the estimated initial costs of $5,790 to register and annual costs of $12,944 to maintain registration, including approximately $544 to annually prepare and file reports with the Department. One commenter, DailyPay, challenged the Department's estimate of $544 and estimated the cost to be at least $10,000 to $25,000 per year and the cost to prepare the initial annual report to be even more, asserting that the reporting requirements are extensive and burdensome. (See comment 1.35.3.) DailyPay, however, did not quantify or explain how it arrived at these estimates and no other commenter provided similar cost estimates. In addition, the Department removed or revised certain reporting requirements when the information could be obtained from registrants outside of annual reporting, such as during a registrant's examination.

UPDATE TO COST OR SAVINGS TO STATE AGENCY

The estimated cost to any state agency was revised from $9,032,644 to $9,882,491.