March 2, 2021

Commissioner Manuel P. Alvarez
Department of Financial Protection and Innovation
2101 Arena Blvd.
Sacramento, CA 95834

Submitted Electronically

Re: PRO-01-21

Dear Commissioner Alvarez:

We appreciate the opportunity to provide input on some of the many important decisions facing the Department of Financial Protection and Innovation (DFPI) as it implements the California Consumer Financial Protection Law (CCFPL) under Division 24 of the Financial Code. This comment letter addresses topics related to the consumer protection infrastructure that the DFPI is charged with creating. We offer input and recommendations for rules on registration prioritization, record retention, and standards for timely response to consumer complaints and inquiries. We suggest that it would be premature to develop a general rule on UDAP and abusive practices. While we do not recommend a disclosure rule, we offer input on determining disclosure efficacy.

Summary of Recommendations

Registration priorities

Registration should be prioritized for providers that pose a high risk of harm to consumers using four factors. The first three factors concern how the provider's financial products and services: 1) relate to consumer problems that have been exacerbated by the economic fallout from the COVID-19 pandemic, particularly for households experiencing economic instability; 2) have the potential to affect, or form a barrier to, economic opportunity and mobility; or 3) are selected by an entity other than the consumer. The fourth factor is the regulatory and legal history of the provider, its principals, and any predecessor entity. This factor could apply to any type of provider.

Vetting of Registrants

Vetting of registrants should consider information similar to that used in other licensing statutes administered by the Department. It should look at the applying entity, any predecessor entities, and the principals, officers, and owners of a ten percent or more interest. For all of these entities and individuals related to the applicant, the vetting should include their history with other regulators and enforcement bodies.

Record retention

The DFPI should require that records be retained in a form electronically usable by the DFPI for 5 years after the later of the end of the customer relationship or the last contact with the consumer. The DFPI should define a baseline set of records that should be retained regardless of provider or product type, and also a set of additional information to be retained tied to categories of consumer demand, such as money management, obtaining credit, and repaying credit.

Complaints

We recommend that the DFPI define a timely complaint response as a responsible complaint response. The DFPI should include these specific elements in a responsible complaint response: timeliness, examining the facts and materials offered by the consumer; ascertaining the facts by going beyond its own customer account status notations; investigating the cause of the consumer issue and whether a practice by the financial services provider or an associated third party affected other consumers; remediating for the complaining consumer and others who are similarly affected; taking preventative steps against recurrence; and, where the provider finds the complaint to be unjustified, giving a clear explanation of the reason for the denial and how the consumer can avoid the problem in the future.

To facilitate and promote compliance, we recommend that the DFPI develop a complaint response compliance checklist that covered persons would retain in their files about complaints made directly to them, with aggregate reporting. For complaints made to the DFPI, the periodic reporting would include the checklist for each complaint.

We further recommend that the complaint response rule impose an obligation on covered persons to respond to consumer complaints in a manner that achieves equitable patterns of response across consumers regardless of race, color, ancestry, national origin, citizenship, immigration status, primary language, age, religion, disability, sex, gender, sexual orientation, gender identity, gender expression, genetic information, marital status, familial status, source of income, military or veteran status, or status as new Californians.

UDAP

We do not recommend defining UDAP or abusiveness by rule at this time, and we note that this is not necessary to the DFPI's exercise of its UDAP or abusiveness authority.

Disclosure

We do not believe that disclosures are likely to be the best form of consumer protection. Where they are used, disclosures should be rigorously user tested to see if it in fact can shape consumer expectations. Then, the actual use and cost of the product should be compared to what was disclosed.

Registration

Below, we address these questions posed in the request for comment: registration priorities; standards for vetting registrants; and records retention requirements for registrants.

Registration Priorities

Registration priorities should be based on the DFPI's perspective on which types of providers and products pose a high potential for posing harm to consumers. We offer four factors, any one of which should make registration a priority.

The first proposed registration priority factor is to register providers whose financial products and services relate to consumer problems that have been exacerbated by the economic fallout from COVID-19, particularly for households experiencing economic instability. The second proposed factor is to register providers whose financial products and services have the potential to affect, or form a barrier to, economic opportunity and mobility. The third factor we suggest for prioritization is providers of financial products or services where the consumer does not select, and cannot "fire" the provider of the service. Someone other than the consumer selects a provider whose activities will become part of the consumer's financial life. There is substantial overlap when these factors are applied to specific providers and their products.

The fourth prioritization factor is different in type and could apply to a provider of any type of covered product or service. It is whether the provider, or any of its principals, has a history of license discipline, fines, court or administrative orders directing a change in conduct, refund, restitution, disgorgement, fines or penalties in this state, in another state, or federally.

Applying the proposed prioritization factors

The first proposed registration priority factor of COVID recovery impact supports early registration for providers of financial products including credit reporting, credit "repair," debt relief or debt settlement, foreclosure or modification services, and financial products, such as payday loans and wage advances, that pose an increased risk to consumers during the pandemic.

The second proposed registration priority factor is providers of products impacting or posing barriers to economic opportunity and mobility. This factor supports early registration of providers of credit reporting, credit products with high rates of default, rollover, or repeat usage, wage advances (which we believe meet the definition of credit, but which fall in this category regardless of their status as credit), and "buy now, pay later" instant lending (BNPL) or "point-of-sale loans" offered to consumers for purchases of everyday household needs.

BNPL products are a particular concern. Their usage has grown during the pandemic with minimal oversight from state and federal regulators. As an emerging product, consumers may not fully understand the risks associated with these installment loans, such as fees and interest charges for late payments or the impact when a financed product is unsatisfactory. (See for example this by Penelope Wong, *The Hidden Risk of Buy-Now, Pay-Later Plans*, Consumer Reports (February 14, 2021), *available at* https://www.consumerreports.org/shopping-retail/hidden-risks-of-buy-now-pay-later-plans/. There is also a high potential for abuse with consumers turning to BNPLs to finance items they can't afford, as it is unclear how companies are ensuring consumers' ability to repay these loans.

The third proposed registration priority factor is whether the provider is selected by someone other than the consumer. The provider has a customer other than the consumer, for example, a prospective creditor ordering a credit report or score, a creditor or owner of an interest in a debt desiring loan servicing or debt collection, or a student loan servicer managing student loans on behalf of the federal government.

This factor is important because the use of third party servicers can pose additional risks to consumers. Consumers aren't involved in selecting the service providers they deal with. That decision belongs to the financial institution and creates a dynamic where the servicer's primary objective may be pleasing their client. In these third party relationships, the consumer's interests become secondary. CFPB Bulletin, *CFPB to Hold Financial Institutions and their Service Providers Accountable*, (April 13, 2012), *available at* https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-to-hold-financial-institutions-and-their-service-providers-accountable/.

Former CFPB Director Richard Cordray identified financial services in which the consumer does not select the service provider several times in the early 2010s, including this statement in speeches to the National Baptist Convention in 2013, and to the

National Association of Attorneys General in 2015, "When consumers have limited clout because they cannot choose the business they are dealing with, they lack the ultimate control of being able to sever their ties and take their business elsewhere. This is true even though what goes on in those markets can have a profound influence on their lives." CFPB, *Director Cordray Remarks at the National Baptist Convention*, (September 4, 2013), *available at* https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-to-hold-financial-institutions-and-their-service-providers-accountable/. See also CFPB, *Prepared Remarks of CFPB Director Richard Cordray at the National Association of Attorneys General*, (Feb. 23, 2015), *available at* https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-at-the-national-association-of-attorneys-general-2/.

The fourth factor is different in type and could apply to a provider of any product. That proposed registration factor is whether the provider, or any predecessor entity, or any of its principals, has a history of license discipline, revocation, or denial; or court or administrative orders directing a change in conduct, refund, restitution, disgorgement, fines or penalties in this state, in another state, or federally. Using a measure of potential harm to consumers supports this factor because a history of regulatory difficulty in other parts of the country may suggest that closer attention is warranted to ensure that California consumers are protected. Status as a successor company to an entity that had regulatory difficulty is included to reduce evasion.

After addressing registration for providers meeting one of these four suggested registration priorities, the DFPI should also consider other factors, such as whether the product meets a consumer need that is also met by other entities who are licensed. There may be a greater risk of consumer harm when licensed and unlicensed providers compete, since the history of licensing and related oversight in the regulated sector before the entry of new providers might have led consumers to expect that a certain level of consumer protection applies across the board to providers of the product or service.

An additional supplemental factor could be how established the business model has become. While some commenters might suggest waiting to register providers of emerging products, we disagree. When a provider is still new in the marketplace, getting that provider acclimated to oversight might well contribute to thinking inside the company as it evaluates new features and products, and as the provider balances its internal view about consumer risks and its own regulatory risk, and may make it less likely that new features will be developed without consistent thought to the question of risk for consumers.

Registrant vetting

Before licensing covered persons under the new CCFPL, the Department must develop standards to verify their legitimacy and ability to adequately perform their obligations to consumers. Vetting of registrants should be similar to vetting of licensees under other statutes, a process in which the DFPI has deep expertise. The standards can be developed with reference to the concepts found in the statutes governing licensing for other types of entities whose operations affect consumers' financial lives. The Legislature's most recent expression about vetting in a financial services area appears to be SB 908 of 2020, Chapter 163, codified in relevant part at Financial Code 100009. Subsections (a)(1) and (2) of that section direct a focus on the applicant, general partners, principal officers, directors, trustee, managing members, and individuals who own or control, directly or indirectly, ten percent or more of the outstanding interests in the entity or of the outstanding equity securities issued by the entity, and "any individual responsible for the conduct of the applicant's" specific activities in this state. Cal. Fin. Code §§ 100009(a)(1), (2). Principal officers are defined there as: "President, chief executive officer, Treasurer, and chief financial officer, as may be applicable, and any other officer with direct responsibility for the conduct" of the covered activities in this state. Cal. Fin. Code § 100009(c).

That new statute also includes a reasonably detailed list of the basis for a denial of licensing, in § 100012. That list could be adapted by the DFPI for use under the CCFPL. It includes traditional licensing factors such as a false statement of material fact in the application, failure to meet a material requirement of the application after notice, convictions and nolo pleas to non-traffic crimes in the past ten years, acts involving dishonesty, fraud, or deceit, violation of orders of the commissioner, certain final civil judgments, and more. It expressly recognizes as a basis for denial that the entity or relevant associated person "has violated…any similar regulatory scheme of this or a foreign jurisdiction." Cal. Fin. Code § 100012(b)(5).

We suggest adding a focus on the conduct of any predecessor entity and of the regulatory history of the companies with whom the key individuals were previously associated because many of the entities subject to registration may be newer in business and have a more limited track record to be used for vetting. We suggest looking at open, ongoing investigations of registrant applicants for the same reason. It could take a period of months or years to complete those actions, and they may be the most relevant information about the activities of covered persons entering new markets or developing new types of financial services, products, or features.

Finally, Cal. Fin. Code § 100012(b)(7) specifies that the Commissioner may deny an application for a license "based on its investigation of the applicant, is unable to find that the financial responsibility, criminal records, experience, character, and general fitness of the applicant and its general partners, managing members, principal officers and directors, and individuals owning or controlling, directly or indirectly, ten percent or more of the outstanding interests or equity securities of the applicant, support a finding that the business will be operated honestly, fairly, efficiently, and in accordance with the requirements of this division." This discretionary authority granted to the Commissioner should be duplicated and exercised under the new CCFPL.

Record retention

The DFPI has several sources of authority to require record retention. It may require covered persons who are required to register under its registration rules to "generate, provide, or retain records for the purposes of facilitating oversight of those persons and assessing and detecting risks to consumers." Cal. Fin. Code § 90009(b)(2). Separately, § 90003(a)(3)(B) makes it unlawful for a covered person or a service provider to fail to comply with a rule or order issued under a consumer financial law to establish or maintain records.

Unlike some of the other sections relating to authority, § 90009(b)(2) does not specifically state that it can only be exercised by rule, and § 90003(a)(3)(B) expressly states that it applies to both rules and orders on records. However, it may make sense to inform registrants not later than when they register what records they are required to retain. These record retention standards could make them be augmented as needed at a later time by rule amendment or by an order supplementing the rule, as products and practices change and as the DFPI further develops its expertise in the changing practices and products of covered persons.

Record retention requirements matter because a covered person's records will show how it treated consumers, may provide evidence of how consumers used or understood the product, may provide other valuable information for supervisory oversight and enforcement, and may be of use to the DFPI in deciding where to expend its precious enforcement resources. Strong record retention requirements may also provide an incentive within companies who are covered persons to build a culture of compliance. Knowing that records are being retained that the supervisory agency can ask to see may provide an incentive for covered persons who are providers of financial products and services to look for and act upon patterns in their own records before their regulator does so.

Principles for developing a record retention rule

In addition to what must be retained, four other areas that the record retention rule should address are:

1) maintaining the records in a form usable and analyzable electronically by the DFPI;
2) requiring record retention for a defined term of years after the last contact with the customer or end of the financial services relationship;
3) providing a single time period for retention across all types of covered providers, products and services; and
4) defining what should be retained by setting a baseline for all covered persons plus additional requirements for products and services tied to categories of consumer demand, such as money management, obtaining credit, and repaying credit.

In addition, the proposed record retention rule should also make it clear that the DFPI's authority to require record production by order is independent of the general records retention rule – that the order power can be exercised by the DFPI before and after the retention rule is finalized.

1) Records usable electronically by DFPI

Records must be electronically transmissible to the DFPI in an analyzable form. The rule should require that those records be retained in a manner in which they can be transmitted directly to the DFPI upon request in a form in which the DFPI can analyze them electronically; or in the alternative that they be maintained in a form in which they can be promptly and accurately converted into such a usable, analyzable form. This usability portion of the rule should reach records required to be retained under the record retention rule, by any relevant order of the DFPI, and also as a result of an administrative or court order related to a DFPI proceeding or matter, including a consent order. The DFPI may have to issue and maintain a data standard or provide other information to industry to facilitate compliance. The obligation to retain records can begin sooner, with the usability obligation arising once the DFPI has published a rule on what parameters need to be met to provide usability, with a period for technical ramp up before use of the data standard is required.

2) Period for retention extending beyond customer relationship

The time period for required record retention should cover the span of the contacts with the consumer and of the customer relationship plus a defined number of years after the last contact and the end of the relationship. Consumers may become aware of problems only close in time to the end of a loan, for example, if they are told that they owe more than they expected. Consumers might end a financial services relationship due to a problem or dissatisfaction. An issue for consumers may take some time to emerge into the public eye or for the DFPI to become aware of it. At that point, the DFPI may need to order provision of records of closed customer relationships as well as open ones. When a company is acting internally to remediate an issue that spans a segment of its customer base, perhaps as the result of complaints that reveal an unexpected or unintended problem, the company itself may also benefit from having retained records of past customer relationships.

The newly chaptered bill on student loan servicing is illustrative. It requires that all records about a borrower's account be maintained for the period of time during which a person performs student loan servicing for a borrower's account and for a minimum of three years after the loan serviced has been paid in full, assigned to collection, or the servicing rights have been transferred. Cal. Civ. Code § 1788.102(h).

Similarly, the CFPB has adopted some record retention periods that are tied to the end of the relationship or last contact. For example, CFPB regulations going into effect later in 2021, require a debt collector to retain records that are evidence of compliance or noncompliance with the FDCPA starting on the date that the debt collector begins collection activity on a debt until three years after the debt collector's last collection activity on the debt. 12 CFR 1006.100(a).

3) Single period for retention

The DFPI will have to make a policy choice about whether it should impose a simple bright line time period for retention for all registrants or covered persons, or a variable time period by the type of product or service. A simple rule could be, for example, that records must be retained in a form electronically usable by the DFPI five years after the later of either the end of the customer relationship or the last contact with the consumer.

One reason for a retention period of five years is that the CCFPL gives the DFPI a statute of limitations period of four years from discovery of a violation. Cal. Fin. Code § 90014(a). Since discovery might take some time, even a five year period from last contact or the end of the customer relationship might not cover the full period which is covered by this statute of limitations.

An alternative with varying time periods by product or service could create headaches for providers who offer emerging products that may have elements from more than one category, and reduce compliance by adding complexity. Both for ease of compliance by providers and for ease of enforcement by the DFPI, we believe that a single time period is preferable to a complicated retention schedule by product type.

4) Baseline record retention requirements

We recommend that the DFPI impose baseline and supplemental record retention requirements for all covered persons at the earliest appropriate time, and starting no later than registration. The baseline record retention requirements would apply to all covered persons, and the supplemental requirements would be targeted by product segments according to the type of consumer need that the product addresses. Thus, covered providers of all products offered or used to meet a particular broad category of consumer need would be subject to the same record retention requirements regardless of platform, technologies, or approach. All entities subject to the record retention requirements should have to maintain information about volume; features; revenue; terms and conditions; advertising; user testing; fee policies; employee scripts and training; consumer complaint and inquiry data; information related to vetting and performance monitoring of third parties including lead generators, referral recipients, and service providers; and such other information as the DFPI determines. With both lead generation and referral to a third party, the consumer may believe that they are dealing with one party, when in fact they are to be offered services by someone else – the lead generator handing off to the covered person, or the covered person handing off to the referral recipient. In both cases the records showing the level of care and vetting in selecting and monitoring those third parties should be retained.

The second group of record retention requirements could be more tailored to the types of data likely to be relevant to the product category, such as for money transfers and other payments, credit, and all forms of money management.

Consumer complaints

The CCFPL permits the Department to set standards and require information both with respect to complaints received by the product or service provider and complaints made directly to the Department. Both types of complaints provide sources of information for the company and for the DFPI about developments in the marketplace. The requirement for a timely response has two distinct elements – timeliness and that there be a response. Thus, the DFPI will need to define what constitutes a response to a complaint, as well as when that response must be given.

This section proposes elements of a complaint response, including obligations related to remediation and prevention when a complaint surfaces an issue affecting more than the complaining consumer. We propose a requirement for a checklist to document the response and form the basis for periodic reports, and an obligation to treat consumers equitably across protected and social classes.

Elements of a responsible complaint response

The rule should expressly state that the provider has an obligation to respond to consumer complaints and should define required elements of a responsible complaint response. A responsible complaint response by a provider should be defined to include timeliness, examining the facts and materials offered by the consumer; ascertaining the facts by going beyond its own customer account status notations; investigating the cause of the consumer issue and whether that practice affected other consumers; remediating for the complaining consumer and others who are similarly affected; taking preventative steps against recurrence; and, where the provider finds the complaint to be unjustified, giving a clear explanation of the reason for the denial and how the consumer can avoid the problem in the future.

Timeliness

There should be a specific standard for timeliness for response and resolution to the individual consumer (initial response) with an allowance for additional time after the individual response for wide prevention and remediation steps when the issue surfaced in the complaint affected other consumers of the financial services provider. The DFPI should select a relatively short period for the response to the individual consumer, such as three to five business days. Financial services products commonly promise ease and speed, and may affect access to needed household funds. For these reasons, the ten business day period, for example, from the federal Electronic Funds Transfer Act and accompanying Regulation E seems too long.

Investigation

A responsible complaint response should include these elements: examining what the consumer has submitted and alleged; looking into the reported problem by doing more than simply checking the account status; and determining whether the facts reported, unless disproved by the provider, adversely affected other consumers.

A covered provider of financial products or services who chooses to make a full and prompt refund of the amount at issue, for example, refunding a fee, could be treated as having made a responsible complaint response without a full investigation, with one exception. The provider should still have specific obligations for investigation, remediation, and prevention related to how the issue in the complaint affected other consumers. This is described further below in the subsection on remediation and prevention.

Additional investigation element when third party conduct may underlie the complaint

There should be an additional required element of the complaint investigation when a consumer complaint appears to be in whole or in part about the conduct of a third party service provider, a third party to whom the provider has referred the consumer, or when the consumer was brought to the provider through lead generation. Here, the complaint investigation should include looking at whether the provider has and applies standards for vetting and monitoring service providers, lead generators and referral partners; whether those standards were met; and whether the complaint provides reason to believe that those standards should be augmented or tightened. Consumers will not necessarily use technical terms like "lead generator" in the complaint. A complaint such as "Where did you get my information?" or "How did you know I needed X?" is likely to relate to a lack of effective transparency in the process by which the lead generator acquired that consumer's information. When receiving a complaint from a consumer grounded in the conduct of a third party with whom the covered financial services provider has an arrangement, the investigation should include the practices of the third party and the provider's own vetting and monitoring practices.

A complaint to a financial services provider about a service provider or a referral partner may indicate that the provider should examine the appropriateness of continuing to use that service provider or to refer to that third party, particularly if the complaint is one of many. When receiving a complaint about a third party, the provider should look at the substance of the complaint, not simply send it on to the third party. The provider should look at whether the third party's conduct meets the standards it has set for qualifying for serving or obtaining access to its customers, and if not, should take appropriate steps both to determine how many other consumers experienced the same conduct and what remedy should be provided to them. It should also take steps to prevent a recurrence, and evaluate whether to continue to do business with that third party.

Remediation and prevention of recurrence

The complaint rule should state that complaint response is not complete until the appropriate remediation has been made to all affected consumers and steps have been taken to prevent recurrence. Whether or not the individual complainant receives a refund, the company's obligation for responsible complaint response must include investigating how widely a policy, or the omission of a needed policy, or a mistake in applying the covered provider's internal policy affected other consumers; remediating by providing an appropriate remedy to those other affected consumers, such as an account adjustment, credit, or refund; and taking steps to prevent a recurrence such as policy changes, employee training, or technological changes.

Explanation of complaint denials

Every consumer whose complaint is denied should be given an understandable explanation of the reasons. If the provider denies the consumer's complaint and determines that no adjustment or other remedy will be offered, the response should notify the consumer of the reasons for that decision in plain language and with enough specificity for the consumer to understand the decision. For example, "You complained about being charged a fee for X. We did not charge you for X. We did charge you for Y. We describe the fee for Y on the page where we offer the product. You can avoid future fees for Y by (describe conduct in the use of the product)." The explanation of a denial is an element of completing the investigation.

Complaint response compliance checklist and reports

We suggest that the DFPI develop a compliance checklist of information that a company must develop and retain about its handling of each complaint it receives directly, and require annual or more frequent aggregate reporting of that information to the DFPI. A structured checklist could clarify expectations and may encourage financial services providers who are covered persons to examine their own complaint data in the areas covered by the checklist before filing periodic reports with the DFPI.

The checklist would start with basic information about the provider, product type and nature of the issue reported in the complaint. The checklist would then seek information on each element of a responsible complaint response, including times to initial and final response, investigation, denial, refund or account credit, whether there were other affected consumers and if so, what steps were taken to remediate and/or to prevent recurrence across the base of affected customers.

The periodic report would track the categories of the complaint checklist, giving the DFPI aggregate information such timeliness; rates of denial, refund, or account credit; and broader prevention and remediation. The periodic reporting should also address the provider's efforts to determine and ensure that complaint responses are not skewed against consumers in protected classes, including race, ethnicity, income and other factors. The reporting aspect of the complaint rule would recognize the right of the DFPI to request the underlying data.

For complaints made directly to the DFPI, the financial services provider who is a covered person could be required to provide the complaint response checklist for each complaint to the DFPI, as well as aggregate reporting, and to do so on a more frequent periodic basis, such as monthly. This structure would mean that less information (aggregate only) would be initially provided to the DFPI about complaints that go only to the financial service provider, and more information (complaint checklist plus aggregate reporting) would have to be provided when the consumer or his or her representative has taken the step of complaining to the DFPI.

This two category reporting approach may provide an incentive for providers to satisfy their consumers when they first complain. Consumers will usually try to reach and discuss an issue with the provider first, so this difference in timing and depth of reporting would indirectly reward companies who resolve complaints when they receive them, so that the complaint does not reach the DFPI. However, the DFPI would still receive aggregate reports including information about remediation and prevention steps affecting customers beyond the complaining consumer.

Obligation of equitable responsiveness to consumer complaints

The DFPI should impose by rule an obligation on covered persons to respond to consumer complaints in a manner that achieves equitable patterns of response across consumers regardless of race, color, ancestry, national origin, citizenship, immigration status, primary language, age, religion, disability, sex, gender, sexual orientation, gender identity, gender expression, genetic information, marital status, familial status, source of income, military or veteran status or status as new Californians. These factors come from Gov. Code § 12940(a), except we suggested adding new Californians, who may face barriers that make it harder to achieve resolution of their complaints.

A recent study suggests that companies provided inequitable results in complaint response by race and income of the complaining consumer, as proxied by the neighborhood of the complainant. In January 2021 MarketWatch covered a not yet published academic study raising significant concerns about disparities between race and income in neighborhoods where consumers live and the frequency of refunds received by consumers after filing a complaint with the CFPB during the Trump administration. Andrea Requier, *Black Americans suffered the most under Trump-era consumer-protection agency, study finds*, MarketWatch (February 1, 2021), *available at* https://www.marketwatch.com/story/black-americans-suffered-the-most-under-trump-era-consumer-protection-agency-study-finds-11610731211. The results are somewhat limited by the available data, since the race of the complainant was not available to the researchers and instead cross mapping had to be used to make proxy assumptions. Less than a month after this article was published, on Feb. 10, 2021, the Acting Director of the CFPB made public by blog post an internal directive indicating that consumer advocates had raised the issue of racial equity in complaint response to the CFPB. He stated: "I have asked Consumer Response to prepare a report highlighting the companies with a poor track record on these issues. We will be publishing this analysis and the senior leadership of these companies can expect to be hearing from me." David Uejio, *Consumers and their Experiences to be at the Foundation of CFPB Policymaking*, CFPB (February 10, 2021), *available at* https://www.consumerfinance.gov/about-us/blog/consumers-and-their-experiences-to-be-at-the-foundation-of-cfpb-policymaking/.

This recommendation for an express equity obligation in complaint responses does not suggest that the covered financial services providers collect information about race, ethnicity or other protected categories solely for complaint purposes. However, if the provider has collected this information for other business reasons, then the rule should require it to be analyzed with respect to complaint results. For providers who do not collect this data, the rule can require that they take other reasonable steps to analyze their own complaint response data for indications of unequal treatment among groups of persons with the relevant characteristics.

Equal treatment of consumers in complaint response based on protected class would to be in addition to, and not replace, other obligations of non-discrimination and fair credit already part of California or other law.

Complaint Intake

The request invites input on whether a covered financial product or services provider should be required to establish a specific mailing address, email address, or internet portal by which California consumers can submit complaints and inquiries. While we do not believe that a single address must be mandated, the rule should include four requirements. First, the rule should clearly state that if a provider does not establish such an access point for complaints, then it must honor complaints received through any channel and any address, paper or electronic, which it uses to do business. Second, the rule should require that the provider's website display an easy to find and use address or other method to submit complaints. Third, the rule should require a non-electronic based method for submitting complaints, since consumers who use the public library or other shared locations for internet services should not have to send the details of a financial product or account through such a device. It would be extremely unfortunate to have some complaints to providers subject to the DFPI procedures and requirements, and others not. Whether or not the company chooses to establish a portal, it should treat complaints the same whether they enter through the portal or by other means. Fourth, the rule should also require that the provider's website, bills, emails, messages and other communications should include an address where consumers may file a complaint with the company.

While the business model for some products offered by covered persons may be based in online communication, it is important for covered persons to establish a customer service phone line in order to compete with scammers who will do so. Consumer Reports saw unfortunate instances after the start of COVID-19 when consumers who were unable to find a customer service phone number on the provider's website would search the internet for a number, get a number than in fact was offered by a scammer, and give their account information. Penelope Wang, T*he Hidden Risks of Online Savings Tools*, Consumer Reports (March 9, 2020), *available at* https://inventory.consumerreports.org/financial-planning/hidden-risks-of-online-savings-tools/ see also Catherine Park, *BBB: Cash App users scammed out of thousands of dollars after calling fake customer service number*, Better Business Bureau (September 22, 2020), *available at* https://www.fox5atlanta.com/news/bbb-cash-app-users-scammed-out-of-thousands-of-dollars-after-calling-fake-customer-service-number. Even if a phone line is fully automated, offering that number on the provider's site may reduce the number of consumers who will find a scammer number instead as they seek the provider's phone number.

Inquires

The statute and the request for input refer to both complaints and inquiries. Inquiries can be an early warning sign of issues or consumer problems with a financial product or service. Inquires in the nature of "Why was I charged a fee?" when the fee was allowable under the contract might indicate a lack of consumer understanding of the product, a deception in the marketing, or that consumers are using the product differently than the provider anticipated at the design stage, thus incurring higher or more frequent fees than contemplated or than consumers were led to expect. Tracking this type of inquiry over time may provide business intelligence for both the provider and the regulator. Thus, we suggest that inquiries about why the provider treated the consumer a certain way, or a product feature operated a certain way, be tracked and categorized by product feature, and whether the inquiry concerned cost, access to funds, or similar factors.

Despite the need for some information about inquiries, generally the processes and reporting for inquiries should be more streamlined than for complaints, since answering consumer's questions should be an everyday part of customer service. The rule should permit the DFPI to order treatment of inquiries under the complaint standard in its sole discretion if it deems this advisable due to a concern that complaints are being categorized as inquiries. Finally, the obligation of equitable treatment discussed above should apply to inquiries as well as to complaints.

UDAP

The request invites comment on specific marketplace acts or practices that the commenters believe are unlawful, unfair, deceptive, and abusive, and also whether the DFPI should identify such acts and practices by rule. We believe that there are practices in the marketplace that are unlawful, unfair, deceptive, or abusive, and we anticipate that other consumer and community group commentators may describe some of those acts and practices. We also believe that a general rule defining unfair and deceptive acts and practices would be premature. This is for two reasons. First, the statute identifies the caselaw under Cal. Bus. and Prof. Code § 17200 as a source to identify what is an unfair or deceptive act or practices, and that caselaw is extensive. Second, the DFPI will need flexibility to address a fast changing marketplace, particularly as it undertakes oversight of entities that may not have been subject to state oversight before in California. This is consistent with the purposes of California UDAP as discussed in the caselaw on § 17200 and similar flexibility will be needed in addressing abusive practices.

California caselaw has frequently noted that § 17200 was "intentionally framed in its broad, sweeping language" to allow for flexibility in dealing with new and emerging business practices. Barquis v. Merchants Collection Assn., 7 Cal.3d 94, 101 (1972) see also Nationwide Biweekly Admin., Inc. v. Superior Court, 9 Cal.5th 279, 300 (2020). "The expansive scope of the California consumer statutes is well established. The California Legislature used sweeping language for the purpose of allowing the courts to deal with the innumerable new schemes which the fertility of man's invention would contrive." Sharpe v. Puritan's Pride, 466 F.Supp.3d 1066, 1070 (N.D. Cal. 2020) quoting Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 181 (1999).

Our view that a general UDAP and abusiveness rule is not needed now should not contradict input that other consumer and community groups might offer about addressing by rule specific practices. However, if specific practices are defined by rule to be a UDAP or to be abusive, that rule must indicate that this is not exhaustive, and that both similar and dissimilar practices to those identified in the rule may be UDAPs or abusive under the general standards set forth in the statute.

Disclosure rules

We believe that disclosure is not a strong tool for consumer protection, particularly as compared with clear standards of conduct, market oversight for emerging and existing practices posing risk of harm to consumers, and vigorous supervisory and enforcement activity. However, to the extent that the DFPI pursues a disclosure based approach to certain products or consumer problems, or implements disclosure requirements imposed by law, the focus should be on overall effectiveness.

Disclosures should be developed with and supported by robust consumer testing. There is an established science of how companies get consumers to focus on those messages that they wish to convey. Simple language, effective fonts and colors, placement on a page or website, and many other factors go into this. There are also tactics companies deploy when disclosing information that are designed to trick users into acting against their interests. Arushi Jaiswal, *Dark patterns in UX: how designers should be responsible for their actions*, UX Collective (April 15, 2018), *available at* https://uxdesign.cc/dark-patterns-in-ux-design-7009a83b233c. These discrete yet effective schemes use human psychology to deceive consumers and advance the company business model. Indeed, on Feb. 25, 2021, the Federal Trade Commission announced a public virtual workshop on "Dark Patterns," which it said "have been used to describe a range of potentially manipulative user interface designs used on websites and mobile apps." FTC, *FTC to Hold Virtual Workshop Exploring Digital Dark Patterns*, (Feb. 24, 2021), *available at* https://www.ftc.gov/news-events/press-releases/2021/02/ftc-hold-virtual-workshop-exploring-digital-dark-patterns.

In addition to whatever else is required at a later time with respect to disclosure, the bottom line for both disclosures that the Department requires and that a provider may bring to the Department's attention when asserting that its treatment of consumers was acceptable should include two questions, with supporting data. The first question is whether there was user testing showing expected effectiveness of the disclosure with the target population for the product. That question has two parts: 1a) Was there user testing of the disclosure, including text, timing, manner of presentation, topics addressed, and other factors, documenting that the types of consumers expected to use the product understood the key elements of the information being disclosed? 1b) If so, did that user testing demonstrate that consumers understood the product or feature after receiving the disclosure?

There is a second key question that the DFPI should ask about any disclosure that a provider relies on related to its product or conduct, and also about any model or mandated disclosure that the DFPI itself may develop. That question is this: Is the evidence of how consumers actually use the product, service or feature, and what they pay for it in fees and charges, consistent with the consumer's reasonable expectations about that product, service, or feature and its cost? In other words: Are consumers in fact using the product, service, or feature in a way that is consistent with the expectations created by or supported by the information in the disclosure? For example, if a product is described in a disclosure, or in marketing, as for occasional emergencies, but the actual usage patterns indicate that it is used far more often by a segment of consumers; that suggests a failure of product design leading to false advertising, and a failure of disclosure. Similarly, if a product disclosure describes one type of fee but omits other fees that segments of the population using the product incur with some regularity, that suggests an inadequate disclosure.

About the Authors

This comment was prepared for Consumer Reports by Gail Hillebrand and Antonio Carrejo. Ms. Hillebrand contributed as a consultant. She was associated with Consumer Reports for over 25 years and led one of the Consumer Financial Protection Bureau's six divisions from 2011 to 2020. Mr. Carrejo is a policy counsel with Consumer Reports. After March 2, 2021, the contact at Consumer Reports is Christina Tetreault, who can be reached at christina.tetreault@consumer.org.

Conclusion

In conclusion, we believe the DFPI should prioritize registration by adopting factors that may indicate a high risk to consumers and develop record retention requirements based on transparency and accountability. We also recommend that the DFPI define the elements of a complaint response. We look forward to working with the Department and providing further input on CCFPL implementation.

Sincerely,

Gail Hillebrand

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Cc: Charles Carriere, Senior Counsel for the Commissioner