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Department of Financial Protection and Innovation
Attn: Sandra Navarro
300 S. Spring Street, Suite 15513
Los Angeles, California 90013

***Re: Notice of Proposed Rule Making under the California Consumer Financial Protection Law:
Consumer Complaints and Inquiries (PRO 03-21)***

Via Electronic Mail at regulations@dfpi.ca.gov; cc: David Bae, Bae@dfpi.ca.gov

Dear Ms. Navarro:

The Consumer Data Industry Association ("CDIA")¹ is pleased to offer its comments in response to the Notice of Proposed Rulemaking ("NPRM")² cited above by the Department of Financial Protection and Innovation ("Department") concerning the implementation of regulations to implement, interpret and make specific Cal. Financial Code Section 90008, Subdivisions (a), (b), and (d)(2)(D) ("Proposed Regulations")³ of the California Consumer Financial Protection Law ("CCFPL"). CDIA members are concerned generally about the prescriptive nature of the Proposed Rules and specifically, the impact to consumers for entities that already have specific federally required processes (e.g., the Fair Credit Reporting Act) that are exempted out of the application of the Proposed Rules and under which such entities already handle consumer complaints and inquiries for services that may not be exempted out of the application of the Proposed Rules.

CDIA's Interest in the NPRM

CDIA has an interest in the issues raised in the NPRM because its members are entities who will be impacted by the Proposed Regulations even though they seemingly are not directly subject to them. These entities' corporate structures present nuanced issues under the Proposed Rules. Specifically, these

¹ Consumer Data Industry Association ("CDIA") is the voice of the consumer reporting industry, including the nationwide consumer reporting agencies, regional and specialized consumer reporting agencies, background check and residential screening companies, and others. CDIA promotes the responsible use of consumer data to help consumers achieve their financial goals and to help businesses, governments and volunteer organizations assess risk and avoid fraud. CDIA members help to ensure fair and safe transactions for consumers, facilitate competition, locate crime victims and fugitives, reunite consumers with lost financial assets, help tenants secure apartments, assist employers in the hiring process and expand consumers' access to financial and other products suited to their unique needs.

² Cal. Dep't of Fin. Protection and Innovation, Notice of Proposed Rulemaking, Consumer Complaints and Inquiries under the California Consumer Financial Protection Law (May 20, 2022), <https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/05/PRO-03-21-Notice-of-Proposed-Rulemaking-5-17-22.pdf>.

³ Cal. Dep't of Fin. Protection and Innovation, Consumer Complaints and Inquiries under the California Consumer Financial Protection Law (proposed May 20, 2022), <https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/05/PRO-03-21-Draft-Text-CCFPL-Complaints-5-2-22.pdf>.

entities provide consumer report services as consumer reporting agencies (“CRAs”), as defined under Section 603(f) of the Fair Credit Reporting Act (“FCRA”),⁴ which are exempted out of the requirements of the Proposed Rule for these consumer report services.⁵ These entities, as CRAs, are required to have reasonable procedures under the FCRA to meet their regulatory requirements, which includes processes for reinvestigating consumer disputes of the accuracy of information contained in the consumer’s file (“FCRA Disputes”).⁶ They also often provide other services to consumers, some at no cost, that are not governed by the FCRA (“Non-FCRA Services”).

CDIA member entities, and other covered persons, will be negatively impacted by the requirements currently in the Proposed Regulations, despite the explicit exemption for CRAs,⁷ in a manner that is not equally counterbalanced with consumer benefit. CDIA member entities are concerned that the Proposed Regulations would serve as an alternate channel for consumers to submit FCRA Disputes. CDIA offers these comments to the Department to help the Department understand the impact of the requirements in the Proposed Regulations and offer its suggestions with the hope that the Department is able to revise the Proposed Regulations to meet the Problem Statement⁸ identified by the Department while limiting the unintended consequences to consumers and to entities that provide FCRA services and Non-FCRA Services.

CDIA’s Comments on Issues Raised in the NPRM

CDIA agrees with the Department that complaint management is often beneficial for consumers and the entities that serve them;⁹ however, the Proposed Regulations are so prescriptive that member entities will need to overhaul systems, written procedures, and internal staffing requirements to meet the requirements of handling complaints or inquiries about Non-FCRA Services. Rather, CDIA believes that the rules would be more effective if they allow for covered persons to handle consumer complaints and inquiries in the manner that can be incorporated into the entities’ current systems and processes. More importantly, as is discussed in more detail below, the prescriptive nature of several requirements (e.g., notice on the main page of the website) will likely create consumer confusion rather than “improve the quality of financial services and products offered.”¹⁰ Therefore, CDIA respectfully requests that the Department reconsider its rigid approach in favor of a more flexible one that addresses only necessary requirements which will provide benefits to consumers while balancing the size and complexity of the entities that serve them by not mandating the way in which these requirements are implemented.

CDIA makes the following additional comments on issues raised in the NPRM, with reference to the Proposed Regulation Section.

⁴ 15 U.S.C. §§ 1681 *et seq.*

⁵ Proposed Regulations at 1, see Proposed Section 1070(a).

⁶ 15 U.S.C. § 1681(b); 15 U.S.C. § 1681i.

⁷ Proposed Regulations at 1, see Proposed Section 1070(a).

⁸ Cal. Dep’t of Fin. Protection and Innovation, Initial Statement of Reasons for the Adoption of Rules Under the California Consumer Financial Protection Law: Consumer Complaints and Inquiries (May 20, 2022), <https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/05/PRO-03-21-Initial-Statement-of-Reasons-CCFPL-Complaints-5-2-22.pdf> at 2, section II.

⁹ See *generally*, Initial Statement of Reasons, Section III (Benefits Anticipated from Regulatory Action) at 3.

¹⁰ *Id.*

1. Cal. Code of Regulations Title 10, Section 1072(a)(2): Identifying Information

Section 1072(a)(2) of the Proposed Regulations requires that a covered person:

not request additional personal identifying information beyond [the complainant's name, telephone number, mailing address and email address] and shall not request financial information unrelated to the specific complaint of the consumer.¹¹

This prohibition could make it very difficult, if not impossible, for a covered person to determine which of its consumers has submitted a complaint and to appropriately respond to the complaint. Certain covered persons need a consumer's Social Security number or date of birth to distinguish the complainant from another consumer with the same or similar name living at the same address. This prohibition could inhibit a covered person's ability to effectively resolve the complaint for the complainant. Thus, CDIA requests that the Department remove this prohibition so that covered persons may request the information needed to identify the particular complainant.

2. Cal. Code of Regulations Title 10, Section 1072(a)(4): Website Notice

Section 1072(a)(4) of the Proposed Regulations requires that a covered person:

prominently display, at or near the top of the [main] page [of the covered person's website], a link to the complaint form and to instructions on how complainants may submit their oral and written complaints, including the telephone number, email address, mailing address, and website for filing a complaint [{"Website Notice"}].¹²

CDIA urges the Department to remove this requirement for four reasons. First, member entities are concerned that consumers may think the Website Notice applies to all the services provided by the entity, not just Non-FCRA Services. Many CDIA members maintain website pages (which are not typically considered the "main page") dedicated to the consumer dispute process, including educational information, links to dispute forms and portals through which consumers may obtain copies of their consumer reports and submit related disputes. Requiring the Website Notice, and especially the prescriptive requirements related to the display of the notice on the main page, could mislead consumers into thinking that the Website Notice relates to FCRA Disputes, which are the vast majority of "complaints or inquiries" received by member entities. Consumers may see the Website Notice and not understand that there is a different channel to submit an FCRA Dispute. Thus, the Website Notice could create immense confusion for consumers and severely impede a member entity's ability to process complaints, inquiries and FCRA Disputes effectively and efficiently according to the entities' existing processes.

Second, covered persons often serve consumers that are not California residents. A Website Notice only applicable to a subset of consumers could lead to confusion for consumers to whom the notice is not meant to apply and a delay in response time for the consumers to whom the notice does apply. Other states require certain disclosures to be provided to their residents via a company's website; however, there is flexibility in the placement of the links containing these state-specific disclosures,

¹¹ Proposed Regulations at 3, see Proposed Section 1072(a)(2).

¹² Proposed Regulations at 3, see Proposed Section 1072(a)(4).

leaving entities with the ability to place the notice where it makes sense given the entity's website and consumer-base. This flexibility could eliminate consumer confusion and potential delays in response time.

Third, the Website Notice requirement is unnecessary because covered persons are already required to post a complaint form on the website. Specifically, the Proposed Regulations already require a covered person to:

prepare a complaint form for consumers to use in submitting written complaints. The complaint form shall be available in electronic format on the covered person's website...[and] shall include, at a minimum... a description of the complaint process.¹³

Thus, a complainant, by virtue of this requirement alone, would have access to an electronic version of the complaint form with instructions on how to submit a complaint, even absent the Website Notice. Therefore, the additional Website Notice is superfluous.

Fourth, this proposed requirement appears to go beyond the scope of the Department's authority under the Financial Code.¹⁴ The Financial Code requires that the Department "establish reasonable procedures to *provide a timely response* to consumers, in writing where appropriate to complaints against or inquiries concerning, a covered person."¹⁵ The Financial Code indicates that the Department rules should address the response to consumers; it does not, however, indicate that the Department has the authority to require pre-complaint or pre-inquiry notices to consumers.

If the Department determines that a Website Notice is necessary, then CDIA urges the Department to take a more reasonable approach to this requirement by removing the prescriptive location at which the Website Notice must be displayed. For example, the Department may determine that the Website Notice must be included on a covered person's website page, but not specify that the page must be the "main page" or that it be "at or near the top" of such page.

3. Cal. Code of Regulations Title 10, Section 1072(a)(3): All written communications

Section 1072(a)(3) of the Proposed Regulations requires that "all written communications, except electronic text messages, ... to each consumer of a financial product or service shall in at least 12-point font disclose the procedures for filing both oral and written complaints with the covered person."¹⁶

CDIA understand California has an interest in ensuring its consumers are informed of how complaints can be filed; however, the requirement that "all written communications" contain a disclosure of the procedures for filing oral and written complaints is overbroad and does not advance the consumer interest. As discussed previously, many covered persons maintain multiple lines of business, not all of which are considered financial products or services. The Proposed Regulations as drafted would require the disclosure to be included with a consumer communication, even if that communication is unrelated to a financial product or service. Such a disclosure could be confusing to consumers and could detract

¹³ Proposed Regulations at 3, see Proposed Section 1072(a)(1).

¹⁴ See Fin. Code, § 90008.

¹⁵ Fin. Code, § 90008(a) (emphasis added).

¹⁶ Proposed Regulations at 3, see Proposed Section 1072(a)(3).

from the purpose of the communication. Thus, we encourage the Department to limit the written communication requirement to communications related to the particular Non-FCRA Service that the consumer uses.

4. Section 1072(a)(5): Telephone Number; Live Representative; 24-hour response time

Section 1072(a)(5) of the Proposed Regulations requires that a covered person:

maintain a telephone number, which complainants can use to file complaints orally with a live representative during regular business hours. If a live representative is unavailable to take the call, the covered person shall provide complainants with the option to leave a voicemail message with the telephone number for a call back from a live representative within 24 hours of the voicemail message...¹⁷

CDIA urges the Department to remove this requirement for four reasons. First, the requirement that a covered person have available a “live representative” may not be the best way to serve consumers. CDIA member entities are concerned that they would need to significantly increase their staff to comply with this requirement, anticipating that many of the calls received would be related to FCRA Disputes not covered by the Proposed Regulations. CDIA believes covered persons should have the flexibility to implement processes that would serve their consumers in the most efficient and effective way.

Second, the requirement that voicemails be returned within 24 hours is completely infeasible for many covered persons generally, especially those smaller entities that do not operate 7 days a week. At a minimum, this timeframe, and all timeframes referenced in the NPRM should be updated to reflect business days, not calendar days, or provide for a minimum 4-day period during which to comply with the requirement to account for weekends and holidays.

The Department has referenced several third-party websites which proclaim that voicemails should be returned within 24 hours.¹⁸ CDIA cautions against the Department’s reliance on these websites, some of which are geared towards marketing a call back service for profit. Call back services are going to indicate a very short window during which a voicemail should be returned to more effectively market their services as something without which entities cannot operate. Rather, CDIA encourages the Department to rely on precedent found in other similar regulations. The Department indicates that many of the requirements found in the Proposed Regulations were modeled off Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act,¹⁹ which established the Consumer Financial Protection Bureau (“CFPB”). The CFPB has not indicated, and no other consumer protection regulation known to CDIA requires, that voicemails should be acknowledged within 24 hours. Rather, the CFPB allows entities

¹⁷ Proposed Regulations at 4, see Proposed Section 1072(a)(5).

¹⁸ Initial Statement of Reasons at 9, note 25.

¹⁹ Pub.L. No. 111-203 (July 21, 2010) 124 Stat. 1955.

15 days²⁰ within which to respond to a consumer complaint and the FCRA allows CRAs 30 days to reinvestigate an FCRA Dispute.²¹

Third, it may be impossible for a representative to determine based on a name and telephone number left in a voicemail whether the caller would like to file a complaint or inquiry that is subject to the rules. Thus, a covered person would need to return every voicemail left with the entity within 24 hours. This would likely be a huge burden on covered persons generally, especially those with limited resources or those entities that are not open 7 days per week.

Fourth, this proposed requirement appears to go beyond the scope of the Department's authority under the Financial Code.²² The Financial Code requires that the Department "establish reasonable procedures to provide a timely response to consumers, *in writing where appropriate* to complaints against or inquiries concerning, a covered person."²³ The Financial Code indicates that the Department rules should address when a writing is appropriate; it does not, however, indicate that the Department may issue rules prescribing that covered persons must accept complaints or inquiries via telephone. Thus, CDIA urges the Department to remove this requirement.

5. Section 1072(b): Method of Complaint Acknowledgment

Section 1072(b) of the Proposed Regulation requires:

For complaints received via email or the internet, the covered person shall provide to the complainant... an email message confirming... the electronic submission of the complaint....²⁴ For complaints received via postal mail, the covered person shall provide the written acknowledgement of receipt...via postal mail....²⁵ For complaints received via telephone, the covered person shall... provide via postal mail the written acknowledgement....²⁶

CDIA requests that this rigid requirement be amended to allow for an acknowledgment to be provided to a complainant in the manner requested by the complainant and available to the covered person. While the covered person may include a field for the consumer to provide an email address on the complaint form, the consumer may not provide an email address for correspondence related to the complaint. The covered person may have this information in the consumer's records even though it is not provided by the consumer at the time of submitting the complaint, but the consumer may have provided the email address for specific reasons and may prefer to receive a response to their complaint via a particular and different method. In fact, consumers often request that entities correspond with them only via a particular method, which may change for certain communications, like corresponding on a

²⁰ CFPB, "Learn how the complaint process works,"

https://www.consumerfinance.gov/complaint/process/?_gl=1*7xo86h*_ga*Mjc5MjQ4MjU3LjE2MzE4ODU5MTQ.*_ga_DBYJL30CHS*MTY1NTczMjMzNi44OC4xLjE2NTU3MzI0MDMuMA.

²¹ 15 U.S.C. § 1681i(a)(1).

²² Fin. Code, § 90008(a) (emphasis added).

²³ Proposed Regulations at 3, see proposed section 1072(a)(1).

²⁴ Proposed Regulations at 4-5, see Proposed Section 1072(b)(1).

²⁵ Proposed Regulations at 5, see Proposed Section 1072(b)(2).

²⁶ Proposed Regulations at 5, see Proposed Section 1072(b)(3).

complaint. For example, a consumer may prefer that all standard and routine communications be made via email, but correspondence related to the consumer's complaint be made via postal mail. Additionally, the consumer may use postal mail to submit the complaint because it is easier for the consumer to include supporting materials. This method of submission of the complaint by the consumer, however, should not limit the way the covered person is able to respond to the consumer. Given the requirement in the Proposed Regulations, the covered person would not be able to respect a consumer's request to correspond in a manner different from the prescribed manner imposed in the Proposed Regulations.

Thus, CDIA believes a more flexible approach would be beneficial for consumers, especially for those who request a response using a particular method, as available to the covered person.

6. Section 1072(c)(2): Complaints Related to Third Party Conduct

Section 1072(c)(2) of the Proposed Regulation requires:

For complaints involving the conduct of a third party who has been contracted to provide a good or service *in connection with the financial product or service* being complained about, the covered person shall, in addition to performing its own investigation of the alleged conduct, require the third party to investigate each complaint...²⁷

CDIA requests that the Department amend this requirement to use language consistent with other provisions of the Proposed Regulations. The Proposed Regulation appears to draw a distinction between service providers and other third parties.²⁸ The language included in this section (i.e., "contracted to provide a good or service in connection with a financial product or service"), however, is unique to this section and it is unclear which third parties are subject to this requirement. As drafted, it would appear to allow a covered person to send a complaint to a CRA and require the CRA to investigate the complaint as service provider to the covered person, even though CRAs are exempted from the application of the rules.²⁹

7. Section 1072(f): Retention of Written Record

Section 1072(f) of the Proposed Regulation requires:

The complaint process shall require a covered person to maintain a written record of each complaint for at least five (5) years from the time the complaint was initially filed... [including] (2) [t]he name, phone number, mailing, address, and e-mail address of the complainant, if provided... (11) [i]f no investigation was performed, the name of all persons who decided not to investigate....³⁰

²⁷ Proposed Regulations at 6, see Proposed Section 1072(c)(2) (emphasis added).

²⁸ - Proposed Regulations at 10, see Proposed Sections 1072(h)(13)(B) – (D) where service providers, third parties other than service providers and third party lead generators all appear to be different entities.

²⁹ Proposed Regulations at 1, see Proposed Section 1070(a).

³⁰ Proposed Regulations at 8, see Proposed Section 1072(f).

CDIA is concerned that this record retention requirement is contrary to most, if not all, current data privacy and data security regulations. For example, the Federal Trade Commission's Safeguards Rule requires that information be destroyed "no later than two years after the last date the information is used..., unless such information is necessary for business operations or for other legitimate business purposes."³¹ Here, the purpose for covered persons obtaining this information is to track and respond to complaints and inquiries. Once the covered person has tracked the complaint in accordance with Proposed Section 1072(h) and responded to the complaint, the covered person should be able to delete the record in accordance with the covered person's data retention policies, or at a minimum delete the consumer's personal information in accordance with such policies. Additionally, the Proposed Regulations require the covered person to retain the names of employees associated with complaints not investigated, even if the person is no longer employed. Covered entities should have the flexibility to remove this information in accordance with their data retention and human resources policies. Thus, CDIA requests that the Department amend this requirement in favor of a more privacy-centric approach.

Conclusion

CDIA appreciates the opportunity to comment and provide the perspective of the consumer reporting industry on this NPRM and how we can best support the financial services industry.

CDIA would be happy to make itself available for a meeting to discuss any of the above issues or any other issues that come up in the development of the rules.

Please contact us if you have any questions or we can provide any additional information.

Sincerely,

A handwritten signature in blue ink, appearing to read 'E. Ellman', with a long horizontal flourish extending to the right.

Eric J. Ellman
Senior Vice President, Public Policy & Legal Affairs

³¹ 16 C.F.R. § 314.4(c)(6)(i).