March 8, 2021

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

Via electronic mail - ATTN: Charles Carriere, Senior Counsel

Dear Commissioner Alvarez:

Our broad coalition of consumer and business organizations thanks you for the opportunity to comment regarding how the DFPI can best implement AB 1864 (Limón), the California

Consumer Financial Protection Law (CCFPL). The CCFPL is an important and significant step forward for California and offers the promise of a bold consumer-facing department that can be at the forefront of consumer protection. We look forward to partnering with you and your team to help make that promise a reality.

We must first acknowledge that the on-going COVID-19 pandemic has exacerbated disparities for low and moderate income (LMI) households and communities of color, as it became very clear early on that this was not only a public health crisis, but an economic one, as well. Millions of individuals are facing unemployment, reduced income and heightened financial insecurity. The issues we are highlighting are brought to your attention by organizations that represent communities across California who have been historically harmed by the worst behavior from bad actors in the financial marketplace, and for whom DFPI can make a positive impact in their daily lives. We urge DFPI to take this opportunity to help even the playing field for individuals, families, and communities across the state.

DFPI, working with this unique coalition, has an opportunity to target thoughtful policy interventions to help get those struggling consumers to a better place than prior to the pandemic's arrival a year ago. DFPI's role in this work is extremely vital, and the formation into this new agency after passage of AB 1864 comes at a critical and opportune time. With that, here are the issues and recommendations that we'd like to bring to your attention. We should note that many of the groups signing onto this letter will also be providing more detailed comments under separate cover regarding some of these issues.

Earned Wage Access (EWA)

We appreciate the DFPI taking a look at this growing industry sector, which has been aggressively working to expand and escape regulation throughout the state and country. Importantly, the DFPI is collecting data first and has not reached a conclusion about what issues EWA products pose, how they should be treated, and whether they should be regulated as credit. We also appreciate that DFPI made a public announcement regarding its early look at EWA. We strongly believe that that should be the rule and not the exception when it comes to departmental transparency. However, we are concerned that the announcement of the department's five Memoranda of Understanding (MOU) with major industry participants, as well as several of DFPI's public statements, gives the appearance that a conclusion about industry practices and applicable regulations and laws has already been determined. Use of the phrase "best practices" exemplifies this concern, particularly as it appeared prior to any meaningful gathering of information from the five EWA MOU signers to actually verify any industry practices, let alone "best" practices. While EWAs may not yet have the depth and breadth of anti-consumer complaints when compared to the payday lending industry, there are still a number of significant regulatory questions. These issues include whether EWA companies, whether direct to consumers or via employers, are offering credit and should therefore be subject to laws such as California's usury laws (we strongly believe they are and should be); what practices harm consumers and

should be prohibited or limited; and, how to account for purportedly voluntary "tips," as these are growing in popularity by the companies offering these products. The implications for the evasion of usury laws and consumer protections go beyond the treatment of this industry. These issues should be addressed when gathering data and monitoring industry activities. DFPI should also affirmatively seek broader public input before coming to any conclusions. We believe that a comprehensive look at the EWA industry is fully warranted and that EWA must be subject to all relevant consumer laws triggered by the very function of the industry.

Small Business Protections

The need for UDAAP protections in small business financing is urgent. California's small businesses are closing at tragic rates in the COVID-19 crisis, with minority-owned businesses closing at much greater rates.[1] Absent meaningful jurisdiction from the federal Consumer Financial Protection Bureau (CFPB), other than some narrow data collection, due to a limiting provision of Dodd-Frank, a growing predatory small business financing industry is destroying family wealth, economic mobility, jobs, and the fabric of our local communities. Federal Reserve research has found that Black and Hispanic entrepreneurs are twice as likely to be affected by "potentially higher-cost and less-transparent credit products."[2] The economic harm from this predatory lending industry is estimated to be in the billions of dollars each year.[3]

Given CFPB's inability to adequately protect small businesses, the DFPI is the only agency that can act to prevent this evisceration of community wealth in California. The DFPI was explicitly granted the unique authority to provide this protection by the California legislature. If unaddressed, predatory practices in small business financing may also spread to consumer financing. Establishing and enforcing UDAAP protections for small businesses would help the DFPI identify several specific abuses discussed in greater detail in a comment submitted by the Responsible Business Lending Coalition.

[1] See, e.g. National Geographic, "More than half of Black-owned businesses may not survive COVID-19," July 2020. https://www.nationalgeographic.com/history/article/black-owned-businesses-may-not-survive-covid-19
[1]2 Federal Reserve Bank of Atlanta, "Small Business Credit Survey: Report on Minority-Owned Firms," Dec 2019. https://www.fedsmallbusiness.org/medialibrary/fedsmallbusiness/files/2019/20191211-ced-minority-owned-firms-report.pdf
3 Responsible Business Lending Coalition, "Third Invitation for Comment on Proposed Rulemaking for Commercial Financing Disclosures, "January 31, 2020. http://www.borrowersbillofrights.org/uploads/1/0/0/4/100447618/rblc_comment_-_commercial_financing_disclosures_pro_01-18.pdf

Bail

The bail industry unfortunately has a long history of preying on communities of color and low-income communities. Many of the groups on this letter support the ending of cash bail completely, but our focus in this communication is the critically important role that DFPI can play in cracking down some of the most egregious aspects of the bail industry.

The average bail amount in California is $50,000, which is far out of reach for the vast majority of consumers. People therefore contract with bail bond companies and pay a non-refundable premium, commonly set at 10% of the bail amount, rather than paying the full bail amount to the court. Since many consumers are unable to pay the full cost of the premium, bail bond companies frequently extend 'credit bail' by financing the premium amount. Bail bond companies collect a down payment from consumers, followed by monthly installment payments under severe financial terms. Bail bond companies often require arrestees to use family members and/or friends as co-signers to the credit bail contract, without providing the disclosures required by law. As a result, co-signers are unaware of-or misled by bail agents about-their obligations under the contract.

These credit bail arrangements are absolutely a "consumer financial product or service," and should be administered and enforced as such, particularly given DFPI's role in enforcing UDAAP, most recently reinforced and strengthened in AB 1864 (Limón), the very measure for which you are seeking input. Bail financing provisions lie well within the jurisdiction of DFPI. We urge you to sign an MOU or otherwise profoundly collaborate with the California Department of Insurance (CDI) to enforce each entity's respective role, given that CDI also has important duties in the administration of bail but is not the primary regulator of consumer financial products or services. We urge you to not be dissuaded by the disingenuous argument that DFPI has no role in bail due to Section 90002 (a) of the Financial Code. That very section makes it clear that DFPI can take action in coordination with CDI and is completely consistent with looking at the function of the financial product or service in question. Finally, we note that these same bail contracts that constitute a financial product or service also far too frequently become documented debt collection nightmares. DFPI should ensure that all applicable bail companies and agents, some of whom have a long history of renegade activity that flouts relevant laws and regulations, also register as debt collectors pursuant to SB 908 (Wieckowski) based on their debt collection actions and activities.

Mortgage Servicing/Foreclosures

Part of the economic fallout of the COVID-19 pandemic has been the impact on homeowners' ability to keep up with mortgage payments. AB 3088 and the CARES Act helped provide access to forbearances for struggling homeowners. However, there remain many homeowners who are still unaware of and do not take advantage of those protections. Further, the transition from forbearance to reinstatement of mortgage payments will likely add further complexities for impacted consumers. Mortgage servicers play a key role in implementing the post-forbearance options that apply to each type of loan. Based on experience from the last foreclosure crisis, we

know that without effective oversight the servicers are likely to derail many of these protections, causing borrowers to lose their homes unnecessarily; this could cause disproportionate harm to homeowners of color.

We urge the DFPI to use its leadership and guidance role to require mortgage servicers to 1) provide borrowers with information on how to contact the DFPI and about mortgage relief programs on each written communication; 2) clearly and conspicuously provide information about mortgage relief options on their websites, including applications for such relief for borrowers to download; 3) either accept third-party authorizations from non-profit advocates or provide their own third-party authorizations on their websites for advocates to access and return.

Debt Collection

Given that debt collectors are already trying to evade the DFPI's implementation of SB 908 (Wieckowski), we urge the DFPI to aggressively and broadly enforce and administer the provisions of this new licensing law. Even before the coronavirus pandemic, thousands of low-income consumers and consumers of color were facing increased collection efforts, including lawsuits, that left consumers voluntarily or involuntarily making payments on questionable debts. Debt collectors appear to be taking advantage of the fear and uncertainty caused by the pandemic by obtaining default judgments with minimal evidence, or scaring consumers into making voluntary payments so that they are not forced to put their health at risk by going to court. Using its authority over unfair, deceptive or abusive practices as well as its leadership and guidance role, the DFPI should prohibit anyone collecting a consumer debt from certain practices, including: 1) attempting to collect, filing lawsuits, or pursuing default judgments on debts for which they cannot prove each and every transaction on which they are trying to collect; 2) pursuing or enforcing wage garnishments or bank levies and opposing claims of exemption; and 3) renewing judgments they have not enforced for years. In addition, the DFPI should require debt collectors to: 1) with each written or verbal communication to consumers, provide information on how to contact the DFPI in the consumer's preferred language; and 2) with each written or verbal communication to consumers, provide information on hardship programs offered by the debt collector in the consumer's preferred language. The failure to provide these disclosures should subject debt collectors to enforcement actions. Finally, the DFPI should require debt buyers and debt collectors to provide consumers equal access to any hardship programs.

Auto Loans / Auto Repossessions

Auto lending warrants particular attention and enforcement by the DFPI. Auto dealers, with the narrow exception of "Buy Here Pay Here" dealers who do their own lending, were exempted by Congress from oversight and enforcement by the CFPB. This has left a regulatory vacuum that the DFPI urgently needs to fill. Further, predatory practices are rampant in auto transactions,

particularly in subprime auto lending, such as: falsifying loan applications after they have been signed; forging signatures on documents; "churning" cars - selling overpriced junkers that break down soon after purchase, at unconscionably high interest rates, so that buyers are unable to make the payments, and the vehicles are repossessed. This has negative implication for consumer credit.

In one prominent case brought in California, Santander, the nation's largest subprime auto lender, "violated California law by approving loans that it expected would default at rates of greater than 70 percent. Santander exposed these borrowers to unnecessarily high levels of risk through high loan-to-value ratios, significant back-end fees, and high payment-to-income ratios...turning a blind eye to dealer abuse..." Santander agreed to pay over $550 million to settle claims filed by California and 33 other states. DFPI should be active in enforcing consumer financial products and services in this area.

Accordingly, we urge the DFPI to 1) create regulations and enforce them against auto dealers; 2) use its UDAAP powers to address predatory lending practices that unfairly discriminate against car buyers based on race; and 3) use its UDAAP powers to investigate and pursue enforcement actions against predatory practices such as falsifying loan applications after they have been signed, forging signatures on documents, "churning" cars, and financing loans at unconscionable interest rates.

Finally, along with our previous recommendations for debt collection generally, we urge the DFPI to increase enforcement actions against debt collectors and buyers seeking to collect on auto deficiencies based on notices of intent to dispose of or sell motor vehicles (“NOIs”) and notices of deficiencies (“NODs”) that do not comply with California’s Rees-Levering Automobile Sales Finance Act. Too often, lawsuits are filed by debt buyers when the NOI or NOD did not comply with California law. These lawsuits are often filed against low-income consumers, consumers of color, and consumers whose primary language is not English. The result is a default judgment, which leads to a wage garnishment or a bank levy even though the debt is not collectible based on the violations of law. Under current court procedures, these judgments often cannot be vacated. We urge the DFPI to increase enforcement actions to help provide consumers relief.

Use of Algorithms

Providers of financial products and services have aggressively utilized technology to make decisions about customers, while regulatory responses have not kept pace. In developing rules to implement the CCFPL, DFPI must pay close attention to algorithmic bias. The Department must focus particularly on the potentially abusive, unfair, and discriminatory use of alternative data sources in algorithmic underwriting and in the targeted marketing of financial products. These automated, data-driven practices are increasingly popular among both FinTech companies and traditional financial service providers. While these tools have the potential to increase economic

opportunity and lower costs, poor implementation of these technological innovations can drive inequality, entrench historical redlining, and increase financial instability.

Recent research shows that algorithmic lending platforms do not eliminate discrimination in lending against Black and Latinx though in some instances, could help reduce it.[1] Across both traditional and FinTech mortgage lenders, this discrimination costs borrowers of color $750 million a year in extra interest. Similar studies investigating algorithmic bias in underwriting are unavailable for non-mortgage lending due to lack of data.[2] To uncover and prevent this type of discrimination the Department should focus on developing regulations that require algorithmic accountability and impact assessments[3] from all covered lenders, particularly around the outputs of their consumer facing underwriting algorithms and any disparate impacts from their use.

Another key avenue for algorithmic bias in finance comes from targeted advertising practices.[4] Lenders may aggressively target subprime products to Black and Latinx borrowers as they did in the lead-up to the 2008 financial crisis or exclude them from seeing better priced offers.[5] A U.S. Senate investigation showed that predatory lenders and online advertisers have access to "sucker lists" of customers that are susceptible to paying high prices – this included lists targeting low-income seniors, immigrants and other vulnerable groups.[6] The Department's rulemaking should include regulations to collect data and investigate these practices to identify the types of targeting marketing techniques that should be considered abusive, deceptive, unfair or unlawful.

Resist Further Defining Already Clear UDAAP Terms

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[1] Bartlett, R., Morse, A., Stanton, R., & Wallace, N. (2019). *Consumer-lending discrimination in the FinTech era* (No. w25943). National Bureau of Economic Research. *available at* https://faculty.haas.berkeley.edu/morse/research/papers/discrim.pdf

[2] Bogen, M., Rieke, A., & Ahmed, S. (2020). Awareness in practice: tensions in access to sensitive attribute data for antidiscrimination. In *Proceedings of the 2020 Conference on Fairness, Accountability, and Transparency* (pp. 492-500). *available at* https://arxiv.org/pdf/1912.06171.pdf.

[3] *See e.g.* Article 35 of the EU General Data Protection Regulation (GDPR): Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016; The California Automated Decision Systems Accountability Act of 2021 (Chau, 2021) *available at* https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB13.

[4] Morse, A., & Pence, K. (2020). *Technological innovation and discrimination in household finance* (No. w26739). National Bureau of Economic Research *available at* https://www.federalreserve.gov/econres/feds/files/2020018pap.pdf.

[5] *Id.*

[6] Senate Hearing 113-693, "What Information Do Data Brokers Have On Consumers, And How Do They Use It?" *available at* https://www.govinfo.gov/content/pkg/CHRG-113shrg95838/pdf/CHRG-113shrg95838.pdf

We believe the DFPI should resist calls to define terms related to violations of the CCFPL. The prohibition on "unlawful, unfair, deceptive, or abusive act[s] or practice[s]" (Fin. Code 90005) echoes the state's Unfair Competition Law (UCL), which for almost a century has served the people of California as a broad and flexible statute able to adapt to new products and new practices. Just as the terms describing prohibited practices under the UCL have never been further defined by statute or by rule, DFPI should be vigilant in protecting the versatility and adaptability of the tools it has been provided. Case law has developed the boundaries and core meaning of the operative terms such that businesses are already aware of the general meaning of "unlawful," "deceptive," and "unfair." "Abusive" is a newer term but is explicitly defined in the Dodd-Frank Act and, identically, in Section 1788.101 of the Civil Code as part of the Student Borrower Bill of Rights. In other words, there is no particular ambiguity about the terms; there is, however, flexibility in their implementation.

That flexibility is necessary. As the California Supreme Court observed half a century ago with respect to the UCL, "the section was intentionally framed in its broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable new schemes which the fertility of man's invention would contrive." (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 112.) The Court continued, "[G]iven the creative nature of the scheming mind, the Legislature evidently concluded that a less inclusive standard would not be adequate." *Id*.

The Court's recognition of the signal importance of maintaining flexible and inclusive terms in an enforcement statute extends back even further, to cases going all the way back to 1895 and 1935, and recurring and advancing anew every decade or two. The upshot of these cases is that overly defining certain terms serves mostly to unnecessarily limit the ability of a regulator to effectively respond to the human ingenuity and chicanery that defines the constant evolution of fraud and fraudulent schemes. None of this precludes the Department, of course, from specifying that for its own enforcement purposes a certain practice will be considered unfair (or unlawful or deceptive). The key is to maintain flexibility in the words themselves.

Student Loans/Student Loan Servicers

Education is a huge and expensive investment, and is now the second largest type of consumer debt (behind only housing debt). According to the Federal Reserve Bank of New York, as of 2020 outstanding debt for CA student loans was close to $150 billion. Data suggest that for students who entered school in 2004, nearly 40 percent may default on their loans within 20 years of starting.[i] There are disparities in the harm to borrowers of color: "Debt and default among black college students is at crisis levels…black BA graduates default at five times the rate

[i] Judith Scott-Clayton, "The looming student loan default crisis is worse than we thought," Brookings Institute, Evidence Speaks Reports, Vol. 2, #34 (2018), https://www.brookings.edu/wp-content/uploads/2018/01/scot-clayton-report.pdf.

of white BA graduates (21% versus 4%) and are more likely to default than white dropouts."[ii] These high debt loads and defaults, due in part to the racial wealth gap, also prevent progress in closing that gap.

Current protections for borrowers are wholly inadequate given the large and increasingly ravenous for-profit entities that are targeting this market. The DFPI can and should play a critically important role in ending predatory practices in the student loan market, including as they relate to student loan servicing, for-profit schools, private student loan debt collection, income share agreements (ISAs, pegged to future earnings), and private student loan origination, including "shadow" student lending. DFPI can achieve this comprehensive oversight in a number of ways, including but not limited to:

- Increasing numbers of private nonprofit and for-profit schools either make loans, including ISAs, or broker very expensive private loans. Many of these loan products violate California law, including the Unruh Act. Others, particularly ISAs, are being fashioned to deceptively avoid the application of state and federal law. DFPI should regulate as these entities covered persons and service providers as part of a larger effort to increase transparency across the entire student finance market.
- Currently, default judgments for private student loan debt are being entered against thousands of unrepresented borrowers throughout California for significant sums, often in the 6 digits, which results in a lifetime of wage garnishment. Of specific concern is that the companies often pursue debts that they have no legal right to collect on, either because it is time-barred or the company cannot prove that it owns the debt. Collectors target borrowers in communities with the least access to legal representation and engage in a volume-based practice predicated on pursuing those who are most likely to end up with a default judgment. We are particularly concerned about disproportionate impact this practice has on communities of color. DFPI should take action to ensure that collectors cannot pursue borrowers without first proving that they have a legal right to collect on the debt.
- Debt collection tactics engaged in by many schools may well be considered abusive or unfair practices. DFPI should use its authority to broadly pursue predatory schools as covered persons and end their unscrupulous practices. A forthcoming deeper dive into this topic will include specific cases and recommendations as to how DFPI can coordinate with the court system in these areas to get more comprehensive data.
- Relatedly, DFPI should aggressively utilize its market monitoring and data collection capabilities to require annual reporting from all actors in the student finance market, including schools, loan holders, lenders, and servicers.
- The recent passage of California's Student Loan Borrower Bill of Rights (AB 376, Stone), as well as 2016's Student Loan Servicing Act, give DFPI broad authority to oversee student loan companies that are responsible for managing the day-to-day aspects of repayment—the aspects that are critical to determining borrower outcomes and ultimate borrower success. Unfortunately, when these companies fail to adequately service student loan accounts, borrowers suffer the fallout. Accordingly, DFPI should use the full range of tools at its

[ii] Id.

disposal to scrutinize these companies to ensure compliance with applicable laws, thereby ensuring borrowers can access their repayment protections and successfully navigate student loan repayment.

- Private student loan holders (including for loans not made by DFPI preempted banks) are refusing to meaningfully respond to demand letters and evidence from borrowers providing extensive facts about why and how state law was violated by their schools. Borrowers are requesting, under the FTC Holder Rule clause, that these loan holders cancel their debts and refund payments when allowed by state law, but the loan holders are ignoring these requests. A lawsuit has been filed against Navient in California state court regarding this practice, in *Villalba v. Navient*. The failure by loan holders to evaluate these requests, in good faith as required by contract law, should be treated as an abusive practice. Additional details in a forthcoming communication will detail how DFPI can take action to protect these victimized consumers.

Complaints

The DFPI has a significant role to play now that AB 1864 is law and the department is much more consumer focused than it has been in the various iterations of its history. This pivot point is extremely important because consumer trust and reliability is directly linked to viewing DFPI as an effective agent that is actively seeking to protect consumers. On this point the parallels with the federal Consumer Financial Protection Bureau (CFPB) are critical. We strongly urge DFPI to be as transparent as possible with its complaint data and follow the CFPB model of making complaint information public (with very few necessary exceptions). This would assist DFPI in being viewed as a trusted advocate for consumers and committed to fair marketplace dealings. We also urge DFPI to utilize aggressive outreach in seeking not just complaints but feedback from consumers and groups who don't normally get outreach from governmental entities, especially those from communities in which English is not the primary language spoken. We know that impacted industries have resources not available to the average consumer, and a heavy presence in policymaking circles; this access must be counterbalanced with determined outreach to those many consumers and organizations who may not be familiar with DFPI yet. For every complaint that actually arrives at DFPI it should be acknowledged that there are many other consumers facing the same situation who don't get all the way through that process based on embarrassment, lack of information, bureaucratic confusion, and many other barriers. Finally, it is important that DFPI's administrative structure and outreach efforts make it easy to get feedback from consumers, and value and utilize that feedback in a timely manner.

General Management and Implementation

When it comes to consumer protection, DFPI should seek to be a nimble 21st century regulatory entity. That includes not overly defining certain terms such that companies and covered persons are incentivized to evade those definitions and seek "new and innovative" ways to deliver

products that merely serve as a way to avoid regulation and enforcement of fundamental consumer protection laws. The way that DFPI views, for example, 90002(a) will be the best example of this. Concurrent and shared jurisdiction between multiple state entities is common and necessary in the modern economy. With the possible exception of federal preemption, what an entity or covered person does is far more important than who the entity or covered person is or what other regulator that entity or covered person may touch. Being a nimble regulator also means robustly using the data collection and market monitoring capabilities and authority that DFPI has and using that information to stop fraud and dishonest dealing before it reaches the kind of scale that creates a crisis. DFPI should serve as an early warning system before large-scale financial fraud and tragedy strike. Finally, while innovation can be helpful, so-called "sandboxes" where consumer protections are ignored for certain "new" industry sectors are often not so much innovative as a pathway to evade necessary consumer guardrails.

We thank you very much for your attention to these important topics and reiterate our desire to work with DFPI to ensure that consumers are protected by your new reinvented department. Please don't hesitate to contact Marisabel Torres with the Center for Responsible Lending or Robert Herrell with the Consumer Federation of California with any additional questions or comments regarding our comments as a whole or specific comment provisions. We remain committed to a successful first few years of DFPI.

Sincerely,

Accion Opportunity Fund
Bet Tzedek
California Asset Building Coalition
California Association for Micro Enterprise Opportunity (CAMEO)
California Low-Income Consumer Coalition (CLICC)
California Public Interest Research Group (CalPIRG)
Californians for Economic Justice
Center for Responsible Lending
Consumer Action
Consumer Federation of California
Consumers for Auto Reliability and Safety (CARS)
The Greenlining Institute
National Consumer Law Center
NextGen California
Office of Kat Taylor
Public Counsel
Responsible Business Lending Coalition
Small Business Majority
Student Borrower Protection Center
The Institute for College Access & Success (TICAS)
United Parents & Students