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CALIFORNIA ENACTS NEW CONSUMER FINANCIAL PROTECTION LAW, INCREASING AUTHORITY OF ITS FINANCIAL REGULATOR

To Our Clients and Friends:

On September 25, 2020, California Governor Gavin Newsom signed into law the California Consumer Financial Protection Law (CCFPL), which was passed by the state legislature on August 31, 2020.^[1] Under the CCFPL, California's Department of Business Oversight (DBO) has been renamed the Department of Financial Protection and Innovation (DFPI). Modeled after the Consumer Financial Protection Bureau (CFPB) provisions in the Dodd-Frank Act, the CCFPL aims to strengthen consumer protections by expanding the regulatory authority of the DFPI and promoting access to responsible and affordable credit. The substantive provisions of the CCFPL go into effect on January 1, 2021.

The effects of the CCFPL will be felt most immediately by certain nonbank financial companies – for example, payday lenders and student loan servicers – as well as affiliated “service providers” to financial companies, because of statutory exclusions for regulated banks and many other current DBO nonbank licensees. This said, the CCFPL also gives the DFPI the authority to define other financial services whose providers would thereby become subject to its jurisdiction, and it includes new provisions relating to unfair, deceptive and abusive acts and practices enforcement authority (UDAAP) over statutorily covered persons and service providers. The DFPI will also have the authority to bring civil actions under the Dodd-Frank Act's consumer protection provisions against all state-licensed banks and nonbank financial companies. As a result, financial institutions doing business in California are now facing a potentially powerful and reinvigorated regulatory authority.

I. Jurisdiction

The CCFPL grants authority to the DFPI to regulate the offering and provision of consumer financial products or services under California's consumer financial laws, to exercise nonexclusive oversight and enforcement authority under California's consumer financial laws, and, to the extent permissible under federal consumer financial laws, nonexclusive oversight and enforcement under federal consumer financial laws as well.^[2]

The CCFPL's definition of “consumer financial products and services” closely parallels the broad definition in Title X of the Dodd-Frank Act and its implementing regulations;^[3] these include any financial product or service that is delivered, offered, or provided for use by consumers primarily for personal, family, or household purposes.^[4] The definition also includes brokering the offer or sale of a franchise in California on behalf of another.^[5] Similar to the authority granted to the CFPB under the Dodd-Frank Act, the DFPI will have authority to issue regulations defining any other financial product

or service when the financial product or service (i) is entered into or conducted as a subterfuge or with a purpose to evade consumer financial law or (ii) will likely have a material impact on consumers, in each case, subject to certain exceptions.[6]

As a general matter, the CCFPL applies to “covered persons.” Subject to the important exclusions discussed immediately below, this includes (1) any person that engages in offering or providing a consumer financial product or service to a resident of California, (2) any affiliate of a covered person that acts as a service provider, and (3) any service provider to the extent that person offers or provides its own consumer financial product or service.[7] A “service provider” is any person that provides a material service to a covered person in connection with the covered person’s offering or provision of a consumer financial product or service.[8]

Reflecting a legislative compromise, the CCFPL does not apply to the following entities that were previously subject to licensing and DBO regulation: banks, bank holding companies, trust companies, savings and loan associations, savings and loan holding companies, credit unions, industrial loan corporations, insurers, certain electronic financial data transmitters, escrow agents, finance lenders and brokers, mortgage loan originators, broker-dealers, investment advisers, residential mortgage lenders, mortgage servicers, and money transmitters.[9] Payday lenders and student loan servicers, however, are *not* excluded. Also excluded are licensees of other state agencies and their employees where the licensee or employee is acting under the authority of the other state agency’s license (for example, real estate brokers).[10]

II. UDAAP

Like Title X of Dodd-Frank, the CCFPL contains expanded UDAAP (unfair, deceptive or abusive acts and practices) authority over “covered persons” and “service providers.” The CCFPL permits the DFPI to take action against a covered person or service provider that engages, has engaged, or proposes to engage in UDAAPs with respect to consumer financial products or services.[11] In addition to enforcement authority, the CCFPL authorizes the DFPI to prescribe rules applicable to any covered person or service provider regarding UDAAP, subject to the following limitations.[12] The DFPI must interpret “unfair” and “deceptive” in a manner consistent with California’s broad Unfair Competition Law and case law thereunder.[13] In this area, the definition of “unfair” remains unsettled.[14] Courts typically use one of two tests to determine “unfairness”: (1) an “examination of [the practice’s] impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer”[15] or (2) the Federal Trade Commission’s definition of “unfair” conduct.[16] As for the term “abusive,” the CCFPL requires that it must be interpreted consistently with Title X of the Dodd-Frank Act, and any inconsistency must be resolved in favor of greater protections to the consumer and more expansive coverage.[17]

In addition to UDAAP authority, the DFPI is authorized to bring civil actions or other appropriate proceedings to enforce the consumer protection provisions of Title X of the Dodd-Frank Act and the CFPB’s regulations thereunder, with respect to any entity licensed, registered or subject to DFPI oversight.[18]

III. Other Enforcement Powers

In addition to its UDAAP authority, the DFPI may enforce consumer financial laws with respect to covered persons, service providers, and – broadening its authority substantially – persons who knowingly or recklessly provide substantial assistance to a covered person or service provider in violating consumer financial law.[19] This authority applies only to acts or practices engaged in on or after the January 1, 2021.[20]

The DFPI also has the power to bring administrative and civil actions, issue subpoenas, hold hearings, issue publications, and conduct investigations.[21] It may issue orders directing a person to desist and refrain from engaging in an activity, act, practice or course of business; such injunctive orders become effective and final if a respondent does not request a hearing within 30 days.[22] After notice and an opportunity for a hearing, the DFPI can suspend or revoke the license or registration of a covered person or service provider.[23] The DFPI can also apply to the appropriate superior court for an order compelling the cited licensee or person to comply with its orders.[24]

No civil action can be brought by the DFPI more than four years after the date of discovery of the violation to which an action relates.[25] What constitutes the “date of discovery” is undefined in the CCFPL and similarly undefined in Title X of the Dodd-Frank Act. The United States District Court for the Northern District of California, however, has held that the CFPB’s limitations period begins running when the CFPB “actually” discovers facts constituting a violation or when a “reasonably diligent plaintiff would have” discovered those facts.[26] If, however, an action arises solely under a California or federal consumer financial law, the limitations period under such consumer financial law will apply.[27]

With respect to UDAAP violations, the DFPI will have at its disposal the same wide-ranging remedial tools as the CFPB, including rescission or reformation of contracts, refund of moneys or return of real property, restitution, disgorgement or compensation for unjust enrichment, payment of damages, public notification regarding the violation, and limits on the activities or functions of the violator.[28] Like Title X of the Dodd-Frank Act, the CCFPL does not authorize exemplary or punitive damages,[29] but does empower the DFPI to impose considerable penalties for violations.[30]

CCFPL Penalties		
	<i>May not exceed the greater of</i>	
Violation	\$5,000 for each day the violation continues	\$2,500 for each act or omission in violation
Reckless Violation	\$25,000 for each day the violation continues	\$10,000 for each act or omission in violation

	<i>May not exceed the lesser of</i>		
Knowing Violation	\$1,000,000 for each day the violation continues	\$25,000 for each act or omission in violation	1% of the violator's total assets

IV. Consumer Complaints

The CCFPL authorizes the DFPI to promulgate regulations to round out its investigatory authority. Like the CFPB, the DFPI may promulgate rules and procedures governing informational requests from covered persons concerning consumer complaints or inquiries.[31] The DFPI is required to finalize its complaint response procedures before it may commence an enforcement action against a covered person or service provider for a violation of these provisions.[32] The DFPI may, however, make the information requests themselves beginning on January 1, 2021. Notably, these provisions do not apply to consumer complaints regarding credit reporting agencies.

V. Registration

Covered persons engaged in the business of offering or providing a consumer financial product or service may become subject to new registration requirements and attendant fees, as the latter will help support the DFPI's operating budget.[33] The authority to promulgate rules related to the registration and reporting of covered persons will expand the reach of the DFPI to oversee entities that are not currently subject to licensure or registration. In order to deter regulation by enforcement, the CCFPL requires the DFPI to promulgate registration rules no later than three years following the initiation of its second action to enforce a violation of the CCFPL by persons providing the same or substantially similar consumer financial product or service.[34]

VI. Covered Person Reporting

Like the CFPB, the DFPI can require a covered person to generate, provide, or retain records for the purposes of facilitating oversight and assessing and detecting risks to consumers.[35] In conducting any monitoring, regulatory or assessment activity, the DFPI can also gather information regarding the organization, business conduct, markets, and activities of any covered persons or service providers.[36]

VII. DFPI Reporting

The DFPI must prepare and publish an online annual report detailing actions taken during the prior year.[37] The report must include information on actions with respect to rulemaking, enforcement, oversight, consumer complaints and resolutions, education, research, and the activities of the Financial Technology Innovation Office.[38] The report may also include recommendations, including those intended to result in improved oversight, greater transparency, or increased availability of beneficial financial products and services in the marketplace.[39]

VIII. Conclusion

Notwithstanding its exclusions for many entities previously subject to DBO oversight, the CCFPL creates a more powerful state financial services regulator with new registration authority, expanded enforcement authority, and UDAAP authority. If it makes full use of the CCFPL's powers, the DFPI will become a significant consumer regulator. Firms that offer consumer financial products and services in California will therefore need to pay close attention to the DFPI in 2021 as it begins to implement its new statutory authority.

[1] California Assembly Bill 1864 (passed August 31, 2020), *available* [here](#).

[2] *Id.* § 90006.

[3] *See* 12 C.F.R. § 1091.101 (definition of “consumer financial product or service”) and 12 U.S.C. § 5481(15) (definition of “financial product or service”).

[4] New Cal. Fin. Code § 90005(c).

[5] *Id.* § 90005(e). For a complete list of “financial products or services,” *see id.* § 90005(k).

[6] *Compare* New Cal. Fin. Code § 90005(k)(12) *with* 12 U.S.C. § 5481(15)(A)(xi).

[7] New Cal. Fin. Code § 90005(f).

[8] *Id.* § 90005(n).

[9] *Id.* § 90002.

[10] *Id.*

[11] *Id.* §§ 90012(a); 90009(c); 12 U.S.C. § 5531(a), (b).

[12] New Cal. Fin. Code § 90009(c). The statute further authorizes the DFPI to define UDAAP in connection with the offering or provision of commercial financing or other financial products and services to small business recipients, nonprofits, and family farms. *Id.* § 90009(c)(3).

[13] *Id.* § 90009(c)(1).

[14] *See, e.g., Mui Ho v. Toyota Motor Corp.*, 931 F. Supp. 2d 987, 1000 n.5 (N.D. Cal. 2013) (“California courts and the legislature have not specified which of several possible ‘unfairness’ standards is the proper one.”); *Ferrington v. McAfee, Inc.*, No. 10-CV-01455-LHK, 2010 WL 3910169, at *11 (N.D. Cal. Oct. 5, 2010) (“California law is currently unsettled with regard to the correct standard to apply to consumer suits alleging claims under the unfair prong of the UCL.”).

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[15] *Motors, Inc. v. Times Mirror Co.*, 102 Cal. App. 3d 735, 740 (1980).

[16] The Federal Trade Commission Act provides that an act or practice is unfair when (1) it causes or is likely to cause substantial injury to consumers, (2) the injury is not reasonably avoidable by consumers and (3) the injury is not outweighed by countervailing benefits to consumers or to competition. 15 U.S.C. § 45(n). The CFPB uses the same standard for unfairness. 12 U.S.C. § 5531(c).

[17] New Cal. Fin. Code § 90009(c)(3).

[18] *Id.* § 326(b).

[19] *Id.* §§ 90003, 90012(a).

[20] CCFPL Section 9.

[21] *Id.* § 90006.

[22] *Id.* § 90015(d).

[23] *Id.* § 90015(f).

[24] *Id.* § 90015(g).

[25] *Id.* § 90014 (a).

[26] *See Consumer Financial Protection Bureau v. Nationwide Biweekly Administration, Inc.*, et. al., No. 15-cv-02106-RS (N.D. Cal. Sep. 8, 2017)

[27] New Cal. Fin. Code § 90014.

[28] *Id.* § 900012.

[29] *Compare* New Cal. Fin. Code § 90013(d) *with* 12 U.S.C. § 5565(a)(3).

[30] New Cal. Fin. Code § 90013(d).

[31] *Id.* § 90008. Notably, these provisions do not apply to consumer complaints regarding consumer reporting agencies. *Id.*

[32] *Id.* § 90008(e).

[33] *Id.* § 90009.

[34] *Id.* § 90009.5.

[35] *Id.* § 90009(b); 12 U.S.C. § 5514(b)(7)(B).

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[36] New Cal. Fin. Code § 90010(f).

[37] *Id.* § 90018.

[38] *Id.*

[39] *Id.*



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