

May 17, 2023

Department of Financial Protection and Innovation
Attn: Araceli Dyson
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VIA ELECTRONIC SUBMISSION

Re: Proposed rulemaking under the California Consumer Financial Protection Law and the California Financing Law, California Deferred Deposit Transaction Law, and California Student Loan Servicing Act, Pro 01-21

Dear Commissioner Hewlett:

The undersigned twelve organizations, representing California consumers, borrowers, and students, thank you for the opportunity to comment on the Department of Financial Protection and Innovation's (DFPI) proposed regulations for the registration and oversight of providers of certain subject products under the California Consumer Financial Protection Law (CCFPL) and related California laws.¹ We applaud the proposed regulations, which reflect the DFPI's commitment to consumer protection and to ensuring a safe and well-monitored marketplace for consumer financial products and services. The DFPI is already a leading consumer protection agency nationally, and its proposed registry will serve as a standard for what consumers and policymakers should expect from their financial regulators.

We have previously submitted comments that speak to the great need for increased oversight and accountability over the student debt market in California, which provide additional details about the risks to consumers from predatory schemes when regulators are not equipped with sufficient information and tools. Those earlier comments are available on the DFPI's website and are incorporated here by reference.² We write now to offer comments on the recently proposed regulations for a registry of financial services providers, and focus specifically on providers of

¹ Cal. Dep't of Fin. Prot. & Innovation, *Proposed Regulations Under the California Consumer Financial Protection Law and the California Financing Law, California Deferred Deposit Transaction Law, and California Student Loan Servicing Act*, PRO 01-21 (March 2023), <https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/03/PRO-01-21-TEXT.pdf?emrc=cf5bce>. ("Proposed" regulation).

² Campaign for California Borrowers' Rights, *Letter to Commissioner Alvarez* (March 8, 2021), https://dfpi.ca.gov/wp-content/uploads/sites/337/2021/03/3-8-21-Samantha-Seng-DFPI-Comment_CA-Campaign-for-Borrowers-Rights.pdf; Student Borrower Protection Center, Center for Responsible Lending, Consumer Federation of California, Consumer Reports, Student Debt Crisis Center, National Consumer Law Center, NextGen California, & Young Invincibles, *Comment on Proposed Rulemaking under the California Consumer Financial Protection Law (PRO 01-21)* (Dec. 20, 2021), <https://dfpi.ca.gov/wp-content/uploads/sites/337/2021/12/Joint-Comments-SBPC-CRL-CFC-CR-SDCC-NCLC-Nextgen-CA-YI-12.20.21.pdf>.

education financing and student debt relief services. We also address responses from the DFPI to comments made about previously noticed versions of the proposed regulations, and urge the agency to incorporate earlier suggestions.

Comments on the DFPI’s proposed regulations for education financing.

The education financing market is generally composed of federal student loans and non-federal private education debt. The private student debt component of the market is extremely opaque, with little authoritative data and minimal regular market monitoring by any reliable third party. It is also a large market. Over four million Californians owe nearly \$160 billion in student loan debt, of which approximately \$149 billion is federal student debt and \$11 billion is private student debt.³ Unlike the federal student loan portfolio—which is almost entirely held by the federal government,⁴ operates pursuant to the federal Higher Education Act,⁵ and about which data are routinely made available⁶—the private student lending industry, including refinance lenders, operates outside the U.S. Department of Education’s oversight and offers little transparency. Further, the private student loan industry even lacks many of the catch-all data reporting requirements and similar oversight mechanisms applicable to other consumer credit markets.

As a result, there exists little data about the private student debt industry. Due to “limitations on available data” concerning “non-federal student loan origination activity,” even the annual report from the federal Consumer Financial Protection Bureau’s Education Loan Ombudsman relies only on estimates about private student loans based on reporting by a variety of private and non-profit third parties.⁷ Although the various regional Federal Reserve Banks publish data related to the broader student loan market,⁸ these reports extrapolate using consumer credit panel data from credit reporting agencies that only represent 5 percent of the national population with credit

³ Fed. Student Aid, U.S. Dep’t of Educ., *Portfolio by Location* December 31, 2022), <https://studentaid.gov/sites/default/files/fsawg/datacenter/library/Portfolio-by-Location.xls>; private student loan balance and overall student loan balance as estimated by Student Borrower Protection Center as of 12/31/2022 using federal *Portfolio by Location* data, *see id.*, and Daniel Mangrum, Joelle Scally, & Crystal Wang, Fed. Reserve Bank of N.Y., *2022 Student Loan Update* (Aug. 9, 2022), https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/xls/student-loan_update_2022_mangrum.xlsx.

⁴ Consumer Fin. Prot. Bureau, *Report of the CFPB Education Loan Ombudsman* 8 (Oct. 2022), https://files.consumerfinance.gov/f/documents/cfpb_education-loan-ombudsman_report_2022-10.pdf (“CFPB Education Loan Ombudsman Report”) (distinguishing between the 84 percent of student loans held by the federal government and the 8 percent of federal student loans held by commercial lenders).

⁵ *See* 20 U.S.C. §§ 1070-1099d.

⁶ *See Federal Student Loan Portfolio*, Fed. Student Aid, U.S. Dep’t of Educ., <https://studentaid.gov/data-center/student/portfolio>.

⁷ CFPB Education Loan Ombudsman Report at 9.

⁸ *See, e.g., Liberty Street Economics*, Fed. Reserve Bank of N.Y., <https://libertystreeteconomics.newyorkfed.org/student-loans/> (last visited Dec. 6, 2022) (“Liberty Street Economics: Student Loans”); Fed. Reserve Bank of San. Fran., *Student Loan Debt in the Bay Area: Interactive Maps*, <https://www.frbsf.org/community-development/data/student-loan-debt-bay-area/> (last visited Dec. 6, 2022).

reports,⁹ and that are not broken down by industry actor or loan subtypes. There are other reports by private and/or industry groups,¹⁰ which provide helpful insights into the larger private student loan market, but again these reports do not offer a complete overview of the market, and in any case are not updated regularly.¹¹ They also focus on “loans” and may therefore underestimate the total private student debt, as some debts may not take the form of a traditional loan or may be marketed under a different name.

Still, what we do know about the student debt market makes clear that the industry is growing at an alarming rate. Since the financial crisis of 2008, student loan balances’ growth has outpaced every other type of household consumer credit, and today is the second largest type of household credit after only home mortgages.¹² In the years following the Great Recession, between the 2010-11 and 2018-19 academic years, when federal student loan origination declined by more than 25 percent, annual private student loan originations grew by almost 78 percent.¹³ According to one study of data provided by 14 private student loan companies, 89 percent of private student loans origination in academic year 2021-22 were cosigned, up from 73 percent in 2008-09.¹⁴

These rates are concerning in large part because evidence suggests that this market is rife with harm and abuse, with lenders regularly misleading borrowers about their rights and pushing them to pay on unenforceable debts. Notable examples of misconduct in the private student loan market have taken place in California.¹⁵

For these reasons, we commend the DFPI for including education financing in its registry regulations. Once the registry is operational, California will have the most data on its student debt market of any jurisdiction in the United States. The DFPI will know what actors are

⁹ Daniel Mangrum, Joelle Scally, and Crystal Wang, *Liberty Street Economics*, Fed. Reserve Bank of N.Y., “Three Key Facts from the Center for Microeconomic Data’s 2022 Student Loan Update,” (Aug. 9, 2022), <https://libertystreeteconomics.newyorkfed.org/2022/08/three-key-facts-from-the-center-for-microeconomic-datas-2022-student-loan-update/>.

¹⁰ See, e.g., MeasureOne, *Private Student Loan Report Q3 2021* (Dec. 15, 2021), <https://fs.hubspotusercontent00.net/hubfs/6171800/assets/downloads/MeasureOne%20Private%20Student%20Loan%20Report%20Q3%202021%20FINAL%20VERSION.pdf> (“MeasureOne Report”); Student Borrower Prot. Center, *Private Student Lending* (April 2020), <https://protectborrowers.org/private-student-lending-report/> (“SBPC Private Student Lending Report”); Navient, *SF Vegas 2022 - Investor Presentation* (July 2022), https://navient.com/Images/SFVegas-2022-Investor-Presentation_tcm5-25984.pdf#page=7.

¹¹ It appears, for example, that the main industry group that was once relied on to publish a quarterly report covering private student loan industry data—MeasureOne—has not published such a report since the end of 2021. See PR Newswire, *Latest MeasureOne Data Confirms Private Student Loan Market Returning to Pre-Pandemic Norms* (Dec. 21, 2021), <https://www.prnewswire.com/news-releases/latest-measureone-data-confirms-private-student-loan-market-returning-to-pre-pandemic-norms-301447849.html>.

¹² CFPB Education Loan Ombudsman Report at 6.

¹³ SBPC Private Student Lending Report at 6.

¹⁴ MeasureOne Report at 24.

¹⁵ See, e.g., Press Release, Cal. Dep’t of Justice, *Attorney General Bonta Announces Multistate Settlement Against Student Loan Servicer Navient* (Jan. 13, 2022), <https://oag.ca.gov/news/press-releases/attorney-general-bonta-announces-multistate-settlement-against-student-loan> (addressing misconduct related to servicing and private student loans).

operating in California, what products they offer, how they offer them, their terms, and how many California residents use these products. As discussed below, by broadly categorizing the student debt market as “education financing,” the DFPI will successfully cover the market.

The lack of information currently available about this industry and the known consumer harms that it has inflicted make it an appropriate “subject product” for these regulations, as discussed in greater detail in the DFPI’s Initial Statement of Reasons.¹⁶ We therefore urge the DFPI to use this opportunity to gather all the data that it will need to effectively monitor the education financing market and ensure consumer protection compliance from market participants.

In the following comments, we provide feedback about the proposed regulations and offer suggestions that we believe will result in the most effective regulation of education financing providers. We address the proposed regulations for student debt relief services in a subsequent section.

Section 1003: Definitions - Education Financing

The undersigned offer the following comments about the proposed definitions for education financing found in section 1003:

- **We applaud the DFPI’s definition of education financing.** The student debt marketplace is diverse and includes an array of products and services that may not fit neatly into the traditional understanding of what constitutes a “private student loan” or similar product.¹⁷ By focusing on “education financing” and defining that term to mean extensions of “credit” used for postsecondary education, the DFPI’s proposed registry will cover the landscape of financial products that result in student debt. Critically, the DFPI has defined “credit” to include obligations to pay money that are absolute or contingent, as well as fixed or variable.¹⁸ This reflects the CCFPL’s own definitions of “credit” and “debt,”¹⁹ and preempts putative education financing providers’ potential claims that their products are somehow not covered because the amount of repayment is not certain. These claims are particularly relevant for income share agreement (ISA) providers, which for years attempted to evade regulations by claiming that their product was not credit, debt, or a loan.²⁰

¹⁶ Initial Statement of Reasons at 2.

¹⁷ Student Borrower Protection Center, *Shadow Student Debt* (July 2020), <https://protectborrowers.org/wp-content/uploads/2020/12/Shadow-Student-Debt.pdf>.

¹⁸ Proposed § 1000(f).

¹⁹ See Fin. Code §§ 90005(g), 90005(h).

²⁰ See Press Release, Consumer Financial Protection Bureau, *CFPB Takes Action Against Student Lender Misleading Borrowers about Income Share Agreement* (Sept. 7, 2021), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-student-lender-for-misleading-borrowers-about-income-share-agreements/> (addressing false claims that ISAs are not loan products and do not create debt); see also *Consent Order*, Cal. Dep’t of Fin. Prot. & Innovation, *In re Meritas Inc.* ¶ E (Aug. 5, 2021), <https://dfpi.ca.gov/wp->

- **The proposed definition of “postsecondary education” appropriately covers the range of programs for which Californian’s use education financing.** To shed light on the most concerning and regulation-evading education financing products, it is critical that the DFPI’s registry capture products used to finance non-degree granting programs, such as vocational programs and coding bootcamps. Unfortunately these environments are often overrun with predatory actors.²¹ The DFPI’s proposed definition therefore appropriately encompasses non-degree granting programs.²² As both types of programs—credential-granting and non-credential-granting—may require education financing, this broad definition is needed.

The term is also broadly defined to cover programs that serve individuals beyond the compulsory age of secondary education. This is important because it applies both to programs that require high school degrees or equivalents and to programs that do not require high school completion but cater to students beyond the age of high school. The California law that requires licensure of primarily for-profit institutions allows these schools to enroll students who have not graduated from high school.²³ While these students are only eligible for federal financial aid if they can demonstrate an ability to benefit from their education by passing a test prior to enrollment, schools may still enroll these students and arrange for or provide private education financing without ensuring that they received a sufficient education prior to enrollment to benefit from their program of instruction. For this reason, this particularly vulnerable student population who dropped out of high school—primarily low-income people of color, immigrants, and troubled youth—are targeted by schools that offer predatory financial products to fund their education.

Moreover, the DFPI’s proposed definition appropriately covers all types of postsecondary education, whether the institutions are public, private nonprofit, or for-profit; whether they are accredited or unaccredited; whether or not they are eligible to receive federal financial aid; and whether or not they are required to be licensed to offer postsecondary education in California. Many institutions that offer or arrange education financing are not required to be licensed in California, including but not limited to public institutions, nonprofit institutions that are accredited by the Western Association of Schools and

[content/uploads/sites/337/2021/08/Meratas-Consent-Order.pdf](https://protectborrowers.org/wp-content/uploads/sites/337/2021/08/Meratas-Consent-Order.pdf) (“Historically, ISA issuers . . . have not treated ISAs as “loans” or “credit[.]”); Student Borrower Protection Center, *Inequitable Student Aid* (March 2021), https://protectborrowers.org/wp-content/uploads/2021/03/SBPC_Inequitable-Student-Aid.pdf.

²¹ See, e.g., Ben Kaufman, *A Predatory School is Dragging 290 Defrauded Students into Court in the Latest Example of the Exploitative State of the Income Share Agreement Market*, Student Borrower Protection Center (Feb. 28, 2022), <https://protectborrowers.org/a-predatory-school-is-dragging-290-defrauded-students-into-court-in-the-latest-example-of-the-exploitative-state-of-the-income-share-agreement-market/> (describing tech sales training bootcamp Prehired’s lawsuits against 290 former students who defaulted on the program’s income share agreements).

²² Proposed § 1003(f).

²³ Cal. Educ. Code §§ 94800 to 94950.

Colleges, and non-accredited out-of-state institutions that lack a physical presence in California.²⁴ All such institutions and the education financing products they offer or arrange must be subject to DFPI’s oversight.

Because this broad definition is essential to ensuring that all Californians who receive education financing are protected from abusive, deceptive, unfair and unlawful lending and debt collection practices, we support the DFPI’s decision to depart from the definition of “postsecondary education” found in the Education Code, as discussed in the DFPI’s Initial Statement of Reasons.²⁵

- **The definition of “education financing” should be expanded to include refinancing loans.** Although the definition of education financing is appropriately broad to cover the variety of ways that students finance their education, it does not include loans that companies offer to refinance their existing education debt (“refi loans”). As refi loans are not “extended for the purpose of funding postsecondary education” they are arguably not covered by the registry’s regulations. This is a missed opportunity for the DFPI and would result in an entire sector remaining effectively off the agency’s radar. We recommend that the definition of “education financing” be expanded to include these refi loans. We similarly recommend that reporting requirements for education financing providers, both those that register and those that are exempt from registration due to existing licensure, be revised to distinguish between information related to refi loans and other education financing. This is consistent with Regulation Z’s official interpretation of “private education loan,” which includes loans extended to consolidate pre-existing private education loans.²⁶
- **The definition of “education financing” should enumerate certain foreseeable miscellaneous personal expenses.** We support the proposed definition’s inclusion of funding for the “cost of attendance, including, but not limited to, tuition, fees, books and supplies, room and board, transportation, and miscellaneous personal expenses.” One common expense that is commonly funded by private education financing for a large population of non-traditional students, single parents, is childcare. It is unclear whether childcare would be considered a “miscellaneous personal expense.” To remove this ambiguity and ensure that education financing includes credit extended for the purpose of

²⁴ Cal. Educ. Code §§ 94801.5 (unaccredited out-of-state institutions that exclusively offer online programs and lack a physical presence in CA), 98874(c) (public institutions), 94874(I) (WASC exemption). See Cal. Educ. Code § 94874 for a list of all exemptions from the Cal. Bureau for Private Postsecondary Education’s oversight.

²⁵ Cal. Dep’t of Fin. Prot. & Innovation, *Initial Statement of Reasons for the Proposed Adoption of Regulations under the California Consumer Financial Protection Law and the California Financing Law, California Deferred Deposit Transaction Law, and California Student Loan Servicing Act, PRO 01-21 19* (March 2023), <https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/03/PRO-01-21-ISOR.pdf> (“Initial Statement of Reasons”).

²⁶ See, Consumer Financial Protection Bureau, *Official Interpretation of 12 C.F.R. § 1026.46(b)(5)*, <https://www.consumerfinance.gov/rules-policy/regulations/1026/46/#46-g-Interp-2>.

funding childcare (which can be very expensive), we suggest adding childcare to the list in the definition.

Section 1010: Persons Required to Register

The DFPI's registry will chart the course for how the nation ensures that financial products and services appear on regulators' radars. Critical to that goal, of course, is ensuring that the registry is defined to cover areas of high risk to consumers. To that end, we applaud the DFPI's decision to require education financing providers to register, and affirm the agency's explanation in its Initial Statement of Reasons for covering this sector.²⁷

However, we wish to offer comments on the registry's scope, both in support of the current proposal and to urge revisions. Specifically:

- **All schools that provide education financing should be required to register with the DFPI.** As drafted, the proposed regulations exempt California's public colleges and universities, as well as schools that are accredited by the Western Association of Schools and Colleges (WSAC) from the obligation to register with the DFPI for their provision of education financing for the purpose of obtaining a postsecondary education at those institutions.²⁸ Consequently, these institutions would not be required to provide information to the DFPI about their education financing. The DFPI's proffered justification for this exemption is that these institutions have not been identified as "sources of concern" and that therefore "requiring registration would not further consumer protection and may have unintended adverse consequences for these institutions."²⁹ We vigorously disagree with this justification and urge the DFPI to include school-based education financing providers in the registry.

The stated purpose of the CCFPL is "to strengthen consumer protections by expanding the ability of the [DFPI] to improve accountability and transparency in the California financial system"³⁰ The registry is an operative component of that goal. There is an education finance market within the California higher education system.³¹ DFPI cannot achieve transparency of that market if its participants are not required to register and provide data, without which it cannot know the true state of the market. Whether or not the DFPI has received complaints about lending from these schools is not dispositive as

²⁷ Initial Statement of Reasons at 22.

²⁸ Proposed § 1010(b)(2).

²⁹ Initial Statement of Reasons at 25.

³⁰ Fin. Code § 90000(a)(4).

³¹ See, e.g., Josh Moody, *Stanford Law Introduces Income-Share Agreements*, Inside Higher Ed (Sept. 18, 2022), <https://www.insidehighered.com/quicktakes/2022/09/19/stanford-law-introduces-income-share-agreements>; *Student Account Information*, Pomona College, <https://www.pomona.edu/administration/finance-office/student-accounts> (describing payment plan options) (last visited May 8, 2023).

to whether such lending requires consumer protection. Nor is oversight by education regulators a sufficient substitute for consumer protection oversight.

In fact, there is at least one recent instance of a WASC-accredited California school engaging in predatory lending to Californians. Dominican University of California, a private nonprofit, WASC-accredited, degree-granting institution entered an arrangement with Make School, a San Francisco-based, for-profit, non-degree granting bootcamp, whereby the Dominican University students could access computer science courses from the Make School and Make School students would earn a bachelor's degree from Dominican.³² This arrangement arose after Make School received a citation for operating as an unlicensed educational institution, and this partnership was approved by WASC.³³ Make School engaged in education financing, and when the school abruptly closed, students were left with their debt but no chance at pursuing the education that had been offered to them. Former students who took on debts to attend the school have sued Make School for its deceptive practices.³⁴ The fact that Dominican University was WASC-accredited and that the arrangement was WASC-approved did nothing to ensure that the school's financing practices were appropriate, at the least, or, as it turned out, to ensure that the school wasn't ripping off students. This example shows how non-degree granting educational programs that offer education financing could embed themselves in registry-exempt schools, thereby evading the DFPI's oversight.

Additionally, the exemption for in-state schools raises serious dormant commerce clause concerns, as the registration requirement could be viewed as discrimination against out-of-state schools that engage in education financing for Californians. This would apply to out-of-state schools that offer online courses and education financing to individuals within California, as well as to out-of-state schools that offer in-person courses and education financing to Californians who go out of state for schools but who are nonetheless still considered "residents" of the state.³⁵ This potential vulnerability can be avoided by requiring registration by all schools that offer education financing. This solution is also the better policy outcome.

³² Olivia Sanchez, *When Universities Slap Their Names on For-Profit Coding Bootcamps*, Hechinger Report (March 20, 2023), <https://hechingerreport.org/when-universities-slap-their-names-on-for-profit-coding-boot-camps/>.

³³ *Id.*

³⁴ See Student Borrower Protection Center, *New Investigation Exposes Years-Long Scheme by Private College and Failed Coding Bootcamp to Dupe Regulators and Push Predatory Loans on Low-Income Students* (March 20, 2023), <https://protectborrowers.org/new-investigation-exposes-years-long-scheme-by-private-college-and-failed-coding-bootcamp-to-dupe-regulators-and-push-predatory-loans-on-low-income-students/>; *Accreditation*, Dominican University of California, <https://www.dominican.edu/directory/academic-affairs/accreditation> (last visited April 30, 2023) (Disclosing Dominican University of California as accredited by WSAC).

³⁵ See proposed § 1010(a) (Requiring registration for any person who offers a subject product to a California resident).

Further, while speaking recently at U.C. Irvine Law School, Consumer Financial Protection Bureau (CFPB) Director Rohit Chopra highlighted the harm that occurs when school-based financial aid advisors push students into unaffordable loans.³⁶ As Director Chopra noted, we generally think of these school employees as “trusted advisors,” but unfortunately we’ve seen what happens when that trust is abused.

To the extent these schools are not providing education financing, they will not have to register, so there is no burden for them. If they are providing education financing, there is no reason that they should be exempt from registration. WASC is an accreditation agency and does not in any way examine its institutions’ education finance products or practices. The public schools are not overseen by any agency or accreditor that would examine their education finance products or practices. Requiring these schools to register in the event they decide to offer education financing at some point in the future ensures that the DFPI is able to stay abreast of new trends and lending practices, rather than having to pass new regulations to cover new entities after they have started offering education financing products. For public institutions, the DFPI could also clarify that any education financing offered by public institutions is exempt to the extent that the financing comes from the state itself.

In light of these considerations, and given the lack of concrete data suggesting that no oversight is needed for this segment, the cost and administrative burden of registering is far outweighed by the transparency and accountability that such compliance will provide. Further, as a general matter, supervision of school-based lending is not an outlandish concept. Just last year the CFPB began examining schools for their in-house private student loan origination and debt collection activities.³⁷ By requiring all schools to register their education financing programs, the DFPI would be able to better ensure that Californians are protected from abusive practices while making data-informed decisions about which schools require more scrutiny and how to allocate resources.

- **The exemption for California Financing Law licensees and supplemental reporting requirement is appropriate.** The DFPI’s proposal that education financing providers that are already licensed under the California Financing Law (CFL) for their education financing activities be exempt from registration is appropriate. The purpose of the registry is to identify market participants and to gather data about their market conduct. The DFPI proposes exempting existing CFL licensees only if they meet the requirements

³⁶ Consumer Financial Protection Bureau, Director Rohit Chopra’s Prepared Remarks at the University of California Irvine Law School (Apr. 3, 2023), <https://www.consumerfinance.gov/about-us/newsroom/director-chopra-remarks-at-the-university-of-california-irvine-law-school/>.

³⁷ Press Release, Consumer Financial Protection Bureau, *Consumer Financial Protection Bureau to Examine Colleges’ In-House Lending Practices* (Jan. 20, 2022), <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-to-examine-colleges-in-house-lending-practices/>.

of proposed section 1430.1, which would require the licensees to submit a supplemental report to their general CFL reporting obligation that focuses on their education financing activities.³⁸ In this way, the DFPI can accomplish the registry’s purpose without requiring duplicative actions by an existing licensee. Please note, however, that if CFL licensees are to be exempt, the supplemental reporting must capture all of the data points that registrants are required to submit. Below we provide comments to the section on supplemental reporting to ensure that consistency.³⁹

- **The DFPI should clarify the instances in which a licensed student loan servicer is exempt from registration and require registration except in those specified instances.** The DFPI proposed exempting a licensee under the Student Loan Servicing Act from registering when “offering or providing” education financing if the licensee complies with proposed section 2044.1.⁴⁰ The rationale for this exemption is that the DFPI has an alternative basis of authority, the Student Loan Servicing Act (SLSA), from which to obtain information about these actors’ education financing activities. Proposed section 2044.1, however, further specifies that the exemption only applies “to the extent the licensee offers or provides education financing . . . to California residents *to be serviced by the licensee after origination*[.]”⁴¹ Although the exemption provision in section 1010(b)(5) does not include this additional caveat that the licensee must both originate and service the education financing, it is critical. The SLSA does not provide an alternative basis of authority related to these education financing products if those products are not, in fact, serviced by servicers licensed under the SLSA. The DFPI should therefore clarify in section 1010(b)(5) that SLSA licensees are only exempt to the extent they continue to service the education financing that they offer or provide, mirroring proposed section 2044.1, and that any education financing products that will not be serviced by the licensee require registration.
- **Persons engaged in the business of “arranging” subject products, in addition to “offering or providing” subject products, should be required to register.** As proposed, regulations require any person, who is not otherwise exempt, that is engaged in the business of offering or providing education financing to register.⁴² This creates a loophole, however, for persons that arrange, but do not actually offer or provide, education financing, and who would not have to register. This market exists. For example, certain ISA companies partner with schools to help them create ISA programs

³⁸ Proposed § 1010(b)(3).

³⁹ See *infra* page 16, comment on *Section 1430.1: CCFPL Registration Exemption - Reporting*.

⁴⁰ Proposed § 1010(b)(5).

⁴¹ Proposed § 1010(b)(2) (emphasis added).

⁴² Proposed § 1010(a).

wherein the school is the lender.⁴³ In such arrangements, the ISA company, which is certainly in the business of education financing, is arguably neither offering nor providing the financing. However they are certainly engaged in arranging education financing, and their omission from the registry would result in a lingering blind spot on the overall market. The DFPI can prevent this by amending section 1010(a) to include those persons engaged in the business of arranging subject products. The role of a credit arranger is critical to the overall operations of credit markets, and certainly falls within the intended scope of the CCFPL, in addition to the law's text. The CCFPL provides that service providers to covered persons can be, themselves, covered persons.⁴⁴ Credit arrangers, especially those that provide turnkey ISA programs to schools, certainly meet the CCFPL's definition of service provider.⁴⁵ It is therefore within the DFPI's legal authority and legislative mandate to require persons who arrange credit in the registry, including companies that assist schools in establishing in-house lending programs.

Section 1021: Registration Application

The DFPI's proposed regulations for the registration application process appropriately require registrants to submit a variety of information about their corporate governance structure and business models. Although these requirements mainly pertain to information that the DFPI will use to administer the registry, it also includes powerful opportunities for consumer protection. We therefore offer the following comments:

- **The Description of Business requirement should include information about any targeted marketing that registrants use.** Proposed section 1021(a)(15) requires registrants to submit information related to the products and services they offer, associated charges, a description of how the registrants market their products and services to Californians, and whether the registrant offers or provides products or services through a mobile application. In particular, proposed section 1021(a)(15)(C) requires description of marketing activities, including “identifying any websites, social media accounts, and third-party brokers or lead generators that the applicant uses to acquire potential California consumers[.]”⁴⁶ These are powerful data points in understanding registrants market conduct in California. They are especially important given the fair lending concerns that already permeate the student loan market.⁴⁷ To maximize the registration

⁴³ See, e.g., *We're Leif*, Leif, <https://www.leif.org/company> (describing ISA services provided for schools) (last visited May 8, 2023).

⁴⁴ Cal. Fin. Code § 90005(f)(3).

⁴⁵ Cal. Fin. Code § 90005(n)(1)(A).

⁴⁶ Proposed § 1021(a)(15)(C).

⁴⁷ See Student Borrower Protection Center, *Inequitable Student Aid* (March 2021), https://protectborrowers.org/wp-content/uploads/2021/03/SBPC_Inequitable-Student-Aid.pdf; Stephen Hayes and Alexa Milton, *Innovation or Discrimination?*, Student Borrower Protection Center (July 28, 2020), <https://protectborrowers.org/solving-student-debt-or-compounding-the-crisis-income-share-agreements-and-fair-lending-risks/>; Press Release, NAACP Legal Defense and Educational Fund & Student Borrower Protection Center, *Agreement Marks New Standard for Fair*

application's utility, the DFPI should revise proposed section 1021(a)(15)(C) to include the submission of any targeted advertising and search terms, and similar metrics that suggest registrants are marketing to specific protected classes. This information would facilitate the DFPI's examinations for fair lending protection violations.

- **The DFPI should require annual renewal of certain application materials.** As proposed, the registrants must submit application materials one time, and must only provide an update to the DFPI if there are changes to the submitted materials.⁴⁸ However, the application provisions, as written, allow for a high level of generality, which would practically allow registrants to adjust their practices within a broadly described practice without having to report a change. For these reasons, we are advocating for more detailed application descriptions in this letter. Additionally, although registrants are required to submit annual reports,⁴⁹ those reports do not necessarily capture all of the information required with the application. This is particularly true for the Description of Business in proposed section 1021(a)(15). The discrete marketing tactics that registrants use may vary year to year, and those variations could have profound effects on how Californians are targeted for financial products and services, but would not appear in the annual reports. Whether as an annual requirement to update application materials, which should include more detailed information, or as an additional requirement in the annual report, we therefore urge the DFPI to require registrants to annually update their application materials, in particular those related to Description of Business.

Section 1025: Supplemental Information - Education Financing

The supplemental information required for education financing registrants includes information that cannot be submitted through the Nationwide Multistate Licensing System & Registry process, but that is nonetheless important for industry oversight. We applaud the DFPI's inclusion of active contracts and a description of funding sources. We urge the DFPI to incorporate the following comments to ensure comprehensive information is submitted with registration:

- **The DFPI should require registrants to provide contracts providing for the sale of education financing from any postsecondary school that offers or provides education financing to third parties.** In the past, large postsecondary institutions, including ITT Technical Institute and Corinthian Colleges, Inc., entered into agreements with private third-party lenders under which the institutions made the loans and immediately sold them to the private third-party lenders or arranged the loans for third-party lenders. These types of arrangements encouraged illegal and unfair debt collection

Lending Oversight in Financial Technology(Dec. 2, 2020), <https://protectborrowers.org/naacpldf-sbpc-upstart-agreement/>.

⁴⁸ See proposed § 1034.

⁴⁹ See proposed § 1041.

practices that were the subject of CFPB actions and also involved predatory lending to a majority of students that the institutions knew were unlikely to be able to repay the loans. Although section 1025(a)(2) addresses education financing to be provided by a third party for a school, it does not capture business arrangements in which third parties agree to purchase schools' education financing. The ability to offload these debts is a critical part of any education financing providers' business model, and so should be covered by the registry.

- **The DFPI should require submission of any active agreements or contracts related to the Description of Business activities in the main application.** The supplemental materials include agreements in effect between registrants and third-party servicers of the education financing.⁵⁰ The DFPI should require registrants to submit active agreements for any third-party service provider, not just servicers, involved in the origination, marketing, or administration of registrants' education financing. This could include lead generators and third-party brokers who may be paid in a way that encourages illegal or deceptive practices, such as through revenue sharing, commissions based on student numbers, or kickbacks. This can be accomplished by amending proposed section 1025(a)(3) to cover third party service providers engaged in any of the activities identified in proposed section 1021(a)(15). Such an amendment would also help the DFPI to obtain a better understanding of the various stakeholders in the education financing market and their respective roles. If a contract with a registrant reveals that the third-party service provider is, in fact, the true lender, the DFPI can require that service provider to directly register. As noted above, this information should be updated annually.
- **The DFPI should require registrants to include images reflecting their marketing activities.** In its proposed section for general supplemental information, the DFPI requires registrants to provide images documenting the enrollment or application process for any subject product.⁵¹ This is a helpful way for regulators to understand the consumer experience and identify potentially misleading or unlawful actions. For this reason, the DFPI should also require the submission of images documenting registrants' marketing materials or materials used by third-party servicers with whom the registrant has contracted for marketing services. Although we know that financing companies regularly target certain demographic groups,⁵² which is prohibited by state and federal law, the current application materials do not include information that would help regulators readily identify these unlawful practices. Requiring imagery is also important because, currently, the application merely requires a "description" of these materials. Applicants could revise their marketing materials to be substantially different from a consumer

⁵⁰ Proposed § 1025(a)(3).

⁵¹ See proposed § 1022(b).

⁵² See *supra* n.47.

perspective but to still meet a vague description that had been previously filed, and evade meaningful scrutiny. Requiring actual images would ensure the DFPI can provide meaningful oversight of these marketing practices. This is a simple but powerful change that we urge the DFPI to make. As noted above, this information should be updated annually.

Sections 1030, 1041(d), 1430.1(c): Confidentiality of Application and Annual Report Materials

The DFPI currently proposes to make registrants' application materials not subject to disclosure pursuant to requests made under the California Public Records Act.⁵³ While the DFPI must comply with Government Code section 7929.000, it should not itself legislate an exemption beyond what has been provided in that section by the legislature. This provision, and others like it throughout the proposed regulations, could inadvertently exempt records from public disclosure that are not exempt under section 7929.000. In this case, the DFPI would be exceeding its statutory authority.

To avoid this problem, we recommend removing this and all other proposals regarding the exemptions of DFPI records under Government Code section 7929.000. The DFPI states that this provision is necessary "to protect registration applications from disclosure". This makes no sense. As a state government agency, the DFPI is already required to comply with Government Code section 7929.000 and must assert this exemption in response to Public Records Act requests whenever appropriate, regardless of whether or not provided for by regulation.

In addition, to the extent that the legislature amends Government Code section 7929.000 in a way that would require the DFPI to disclose any applications or other records, this regulation would then be in conflict with the Government Code. Thus, at a minimum the proposed regulation should be revised as follows:

The Commissioner shall treat applications submitted pursuant to Section 1021 as confidential to the extent they are exempt from disclosure under Government Code section 7929.000, subdivisions (a) and (d).

Proposed sections 1041(d), 1430.1(c), 2044.1(a) should be similarly removed or amended. Additionally, to the extent that the DFPI chooses not to disclose application or report information, it should require the submission of information relevant to the education financing market and for which public review is important through some other mechanism, i.e., not application or annual report, and publish that information.

⁵³ See proposed § 1030.

Section 34: Notice of Changes

As discussed above, we urge the DFPI to require annual resubmission of certain application materials. This would ensure the agency has up-to-date and relevant information related to important registrant interactions with California consumers.

Section 1041: Annual Reporting - General

We applaud the DFPI's proposed annual reporting, which captures the legislative intent behind the CCFPL and its registration authorities and which will result in meaningful data and analysis of the market for consumer financial products and services in California. Our comments on the reporting requirement are found below, with regard to the specific reporting requirements for education finance registrants, however as a general point we urge the DFPI not make these reports available to the public, both in response to requests pursuant to the California Public Records Act and by affirmatively posting the reports on the DFPI website, as discussed in greater detail above.

Section 1044: Annual Reporting - Education Financing

We applaud the DFPI's proposal to require reporting specific to education financing, and to further require separate reporting for contracts with income-based repayment provisions and those without income-based payment provisions. As stated above, gathering more information about the ISA market, as a subcomponent of the education financing sector, will greatly benefit the agency's and the public's understanding of these types of student loans. To ensure the DFPI has the information it needs to faithfully implement the CCFPL's oversight authority and its consumer protections, we propose the following comments to the annual reporting requirements for education financing registrants:

- **The annual report should cover more than just contracts entered into during the prior calendar year.** As proposed, the annual report for education financing registrants would only require them to report on contracts "entered into" during the prior calendar year.⁵⁴ This will result in underreporting on education financing activities and a limited set of data on outstanding education finance contracts owed by California residents. Although capturing data about recent origination volume and activities is helpful and should be included in the reporting, it should not constitute the entirety of the reporting. We therefore urge the DFPI to revise this proposed requirement to include reporting by registrants of both their activity during the prior calendar year, as currently provided, and their overall portfolios of outstanding education financing contracts.
- **The annual report should include more granular data about registrants' outstanding education financing contracts and the Californians who owe them.** As initially proposed to the DFPI and discussed below, to accomplish the CCFPL's mandate

⁵⁴ See proposed § 1044(a)-(c).

to protect consumers and sunlight financial services industries, the agency must capture more granular information. This includes more details about the education financing contracts themselves at the loan level. For example, their terms, whether they include a cosigner, what school the contracts were taken out to attend, and their status or outcomes. This also includes more information about the Californians who take out these contracts, such as their gender, race, zip code, and age. These data points are critical to empowering the DFPI to screen for predatory practices, including violations of fair lending laws. Although the DFPI could access much of this information through its Student Loan Servicing Act licensure, these data would have to be sorted by lender and paired with registrants, which is unnecessarily cumbersome and may lead to an imperfect snapshot of registrants' activities.

- **The DFPI should clarify the distinction between amount advanced and amount owed.** With respect to education finance contracts without income-based repayment provisions, the proposed regulation requires registrants to submit the total amount advanced and the total amount owed under those contracts.⁵⁵ It is not clear whether “total amount owed” is meant to capture outstanding principal at the time of reporting or the amount that the registrant expects to collect over the course of the contract term. This is especially confusing as drafted given that the current proposal only requires reporting on contracts entered into during the prior year, which presumably have not yet accrued significant interest in addition to the principal amount. Additional clarity about the DFPI’s intent with this reporting item would be useful.
- **The method for calculating the cash price for school-based education financing with income-based repayment provisions should be revised.** In its proposed regulation, the DFPI includes specific reporting on education financing contracts with income-based repayment provisions.⁵⁶ This will be critical for capturing more information about ISAs in California. It further provides a method for calculating the amount advanced by registrants under these contracts where the registrant is also the education provider, including where the education program is provided remotely.⁵⁷ In this latter instance, the DFPI instructs registrants to calculate the amount owed using the lowest available cash price for the remote program by the registrant in any United State jurisdiction, regardless of the cash price available in California. The regulation should be revised to require registrants to also report the actual cash price offered to Californians. This is a simple addition, but would be extremely valuable in understanding how registrants operate in the California market versus in the rest of the country. There also appears to be a stray comma on the 4th line of proposed section 1044(c)(1).

⁵⁵ See proposed § 1044(b).

⁵⁶ See proposed § 1044(c).

⁵⁷ Proposed § 1044(c)(1).

Section 1430.1: CCFPL Registration Exemption - Reporting

The proposed regulations exempt from registration an existing CFL licensee that is engaged in the offering or providing of education financing within the scope of its CFL license. We agree with this decision, as requiring licensees to register for activities that are already covered by their licensure results in unnecessary additional work. It requires, however, that such exempt licensees annually submit a special report that includes the same information that registered education financing providers submit pursuant to proposed sections 1041 and 1044.⁵⁸ We support this requirement, as it will help the DFPI create a full picture of education financing activity in the state across both registered and licensed entities. The DFPI further proposes that those special reports would not be subject to disclosure in response to requests made pursuant to the California Public Records Act.⁵⁹ As discussed in greater detail above, we urge the DFPI to make these special reports available to the public.

Section 1461: Advances Under the California Financing Law

The DFPI's proposed regulation states that advances of funds to be repaid in whole or in part by receipt of a consumer's wages is a sale or assignment of wages and a loan subject to the CFL.⁶⁰ It further provides that a consumer who receives such an advance of funds is a borrower, and a provider of such funds is a lender, as those terms are used in the CFL.⁶¹ The DFPI offers a detailed analysis in support of these regulations in its Initial Statement of Purpose,⁶² in which it states unequivocally that under this analysis ISAs are, "for all practical purposes, an assignment of a portion of the consumer's wages or earnings."⁶³ We agree with this analysis. Although the subsequent proposed sections make clear that education financing contracts with income-based repayment provisions—i.e., ISAs—are "advances" under proposed section 1461, the text of the section does not provide an equivalent level of clarity. This uncertainty is in part due to the fact that one of the other subject products covered by the register is "income-based advances" and the use of the term "advance" in this section could be misinterpreted to apply to only those subject products. We urge the DFPI to include in proposed section 1461 itself that ISAs are considered advances covered by the CFL.

Section 1462.5: Licensure of Advance Providers - Education Financing

The DFPI proposes that providers of education financing with income-based repayment provisions, as those terms are defined in proposed subparagraphs 1003(b) and 1003(d), do not need to obtain a license under the CFL for that education financing activity if the provider is either registered under the CCFPL or covered by the registry's SLSA licensee exemption, and

⁵⁸ Proposed § 1430.1(b).

⁵⁹ Proposed § 1430.1(c).

⁶⁰ Proposed § 1461(a).

⁶¹ Proposed § 1461(b).

⁶² Initial Statement of Reasons at 53.

⁶³ Initial Statement of Reasons at 55.

the provider does not collect charges in excess of what would be permitted under the CFL.⁶⁴ In effect, this means that ISA providers that are not already licensed under the CFL will not be required to be licensed if they register their ISA activity with the DFPI. Importantly, this provision expires when the registry sunsets after four years.⁶⁵ We support this approach to oversight over ISA providers. Although the DFPI has been clear that ISAs are loans in the context of California law,⁶⁶ this proposal is a prudent way for the agency to gather more information about the ISA industry without having to engage with individual unlicensed ISA providers and make fact-specific determinations, as the registry unequivocally covers ISAs. The information that the DFPI receives will further inform their analysis of the applicability of the CFL and other California laws to the ISA industry. The CCFPL includes consumer protections that will apply to any registrant, and the proposed exemption still requires compliance with applicable CFL rate caps, which means that California consumers have the same levels of protection under this proposal as if all ISA providers were required to be licensed. When the registry and this licensing exemption expire, the DFPI and the legislature can decide if it is necessary to enact additional legislation to cover ISA activity for if existing CFL licensure is sufficient.

Section 1466: Loans with Income-Based Repayment Options - Education Financing

The DFPI proposes regulations to address loan contracts' compliance with the CFL when the contracts have income-based repayment provisions. Specifically, it focuses on the requirement that all monthly payments be paid in substantially equal installments and that payment commence within one month and fifteen days from when the loan is made. First, the proposed regulations provide that such contracts can comply with the equal installments provision if, in addition to their income-based repayment options, they provide an option of making equal installment payments. Second, it provides that when these contracts have grace periods before borrowers have to commence payments, those grace periods can comply with the "month and fifteen days" requirement if they do not accrue charges during the grace period. We offer the following comments about these proposals:

- **We applaud the application of these important consumer protections to education financing contracts with income-based repayment provisions.** In enacting the CFL, the legislature determined that these provisions were necessary to protect borrowers in

⁶⁴ Proposed § 1462.5.

⁶⁵ See proposed § 1462.5(b); Initial Statement of Reasons at 56.

⁶⁶ See Press Release, Cal. Dep't of Fin. Prot. & Innovation, *California DFPI Enters Groundbreaking Consent Order with NY-Based Income Share Agreements Servicer* (Aug. 5, 2021), <https://dfpi.ca.gov/2021/08/05/california-dfpi-enters-groundbreaking-consent-order-with-ny-based-income-share-agreements-servicer/> (finding that ISAs are student loans for purpose of Student Loan Servicing Act); see also Press Release, Cal. Dep't of Fin. Prot. & Innovation, *Lambda School Reaches Settlement with DFPI, Agreeing to End Deceptive Educational Financing Practices* (Apr. 26, 2021), <https://dfpi.ca.gov/2021/04/26/lambda-school-reaches-settlement-with-dfpi-agreeing-to-end-deceptive-educational-financing-practices/> (settlement related to misrepresentations by Lambda Inc. about its ISAs).

California. As the DFPI’s proposed regulations make clear, education financing contracts, including ISAs, are covered by the CFL. This is consistent with the DFPI’s recent treatment of ISAs.⁶⁷ Taking the step of applying these CFL protections to ISA through these regulations provides clarity to both providers and consumers. The availability of a standard installment repayment option for ISA borrowers will provide California ISA borrowers the transparency and options that the legislature intended when enacting Fin. Code section 22307.

- **The DFPI should clarify whether this provision applies to education financing providers that are exempt from CFL licensure pursuant to proposed section 1462.5.** The DFPI’s application of the CFL in proposed section 1466 applies to the same financial contracts for which the providers are exempt from CFL licensure if they register with the DFPI and comply with the DFPI’s registration regulations. The proposed 1466 analysis, however, rests on CFL language found at Fin. Code section 22307(b). Fin. Code section 22307(a) applies to “loans made under this division” It is not clear, therefore, whether loans made by registrants that are not licensed under the CFL are considered to have been made under that division of the CFL, such that the analysis in section 22307(b) applies to them. The DFPI should clarify that the above analysis is applicable to all education financing contracts with income-based repayment provisions, regardless of whether the provider is a CFL licensee or a CCFPL registrant.
- **The proposed regulations make clear that California law requires ISA providers to provide a total amount due and substantially equal periodic payments under their financing contracts.** At various times, ISA providers have claimed that their contracts do not have a principal amount due and that the value of the contract is dependent on the borrower’s future income, and that for this reason they cannot compute an interest rate or APR.⁶⁸ Additionally, they have claimed that future payments may fluctuate and be difficult to pre-determine. The DFPI’s analysis makes clear that California law requires these providers to have a predetermined total amount due for the purpose of offering substantially equal payments on an installment plan. To the extent that there are ISAs outstanding in California that do not provide such a plan and that are identified through the registration process, the DFPI should use its enforcement authority to rescind or reform these contracts.⁶⁹

⁶⁷ See *supra* n.63.

⁶⁸ See, e.g., San Diego Workforce Partnership, *Sample Income Share Agreement (ISA) Contract 1* (Oct. 2020), <https://workforce.org/wp-content/uploads/2020/10/Digital-Marketing-ISA-Sample-Contract.pdf> (“Your Income Share is a fixed percentage of your future earned income you will owe in return for the ISA Amount credited to your account. It is not an interest rate or annual percentage rate. . . . An ISA is different from a loan (which has principal and interest payment) or a conventional tuition payment plan[.]”).

⁶⁹ See Cal. Fin. Code § 90012(b)(1).

Section 2044.1: CCFPL Registration Exemption - Notice - Reporting

The DFPI proposes exempting from registration any education financing providers that are also SLSA licensees, and that service the education financing contracts that it provides. As discussed above, we support this in concept, but have provided comments meant to ensure this exception is applied only in the narrow instances that the DFPI envisions and that exemption does not result in less transparency for those providers' activities.⁷⁰ We offer the following comments with those goals in mind:

- **Exempt SLSA licensees should have to report the same information as education financing registrants.** The DFPI proposes having registry-exempt SLSA licensees submit special annual reports about its education financing activities. These reports essentially mirror what registrants must file with the DFPI. However, one area that SLSA licensees would not currently be required to report on are the marketing activities for registrants covered by proposed section 1021(a)(15). We therefore urge the DFPI to include this information in the SLSA licensees' special reports, inclusive of the recommendations that we have made above with respect to section 1021(a)(15).
- **The DFPI must ensure the SLSA licensees' special reports are available to the public.** Although special reports are protected from public review under the SLSA,⁷¹ the DFPI proposes making reports submitted pursuant to this section protected from disclosure in response to requests under the California Public Records Act. As discussed in greater detail above, the DFPI should strive to publish as much data as possible, and should not unnecessarily or preemptively determine that certain material is protected from disclosure.

Comments about the DFPI's responses to prior feedback from stakeholders.

Included in the DFPI's Initial Statement of Reasons are responses to feedback that the agency previously received from stakeholders about its proposed registry. This includes feedback provided by several of the undersigned. We offer the following comments to some of the DFPI's responses:

- The DFPI rejected a suggestion to collect contract performance metrics from registrants because it could gather those metrics from its SLSA licensees.⁷² We disagree with this assessment. Although it is true that the DFPI can request these metrics from its licensed student loan servicers, those data are not disaggregated by originator. The data would need to be disaggregated and then matched with the corresponding registrant. This would involve unnecessary steps and burdens for the DFPI, given that the registrants themselves have access to their portfolio metrics and could easily include it in their annual reports,

⁷⁰ See *supra* page 10, comment on SLSA licensee exemption.

⁷¹ See Initial Statement of Reasons at 64 (discussing SLSA reports status as public records).

⁷² Initial Statement of Reasons at 9.

alongside the other relevant data that is already required. **We urge the DFPI to cut out these unnecessary interim steps and to request registrants provide their own portfolio metrics.** This comment is a complement to the suggestion above to include reporting on the registrants' entire portfolios, not just on their prior year's activities.⁷³

- The DFPI rejected the suggestion to include the reporting of marketing strategies to assess whether protected classes of borrowers are being targeted by education financing providers. The DFPI's rationale was that it can review for fair lending violations during its examination process.⁷⁴ It is not clear from the proposed regulations, however, that registrants will be examined by the DFPI on any routine basis. Even if registrants are routinely examined, one of the DFPI's stated purposes for the registry is to gather information that can inform its examination priorities.⁷⁵ **To ensure the most effective and efficient fair lending reviews during exams, the DFPI should therefore collect fair lending-related information from its registrants.** It is also worth noting that when violations of any kind are found during exams, it can be difficult to make consumers whole. By requiring reporting of fair lending-related data during the registration and annually, however, the DFPI would be able to more readily identify ongoing harms and address them in real time. We have suggested including the reporting of certain marketing activities to proposed section 1021(a)(15) that would help identify whether protected classes are being targeted.
- The DFPI rejected the suggestion that contracts entered into when an education financing provider was out of compliance should be deemed void and unenforceable. The DFPI's justification was that it has extensive enforcement powers to make consumers whole, including through rescission.⁷⁶ It is true that the CCFPL provides the DFPI with extensive enforcement powers, including rescission.⁷⁷ However, the DFPI will not know of every violation nor have the resources to address every violation in a state the size of California. The DFPI should therefore aspire to make any borrower relief as self-executing as possible. **It should incorporate into its regulations that non-compliant actors or contracts result in those contracts being void,** and reduce the number of steps that an individual California consumer or the DFPI would need to take to deliver that relief.
- The DFPI rejected a suggestion to make public the applications and annual reports that the agency receives from registrants and registry-exempt licensees. It cited its analysis of

⁷³ See *supra* page 15 (“The annual report should cover more than just contracts entered into during the prior calendar year”).

⁷⁴ Initial Statement of Reasons at 9.

⁷⁵ Initial Statement of Reasons at 2.

⁷⁶ Initial Statement of Reasons at 10.

⁷⁷ See Cal. Fin. Code § 90012(b)(1).

a provision of the Government Code related to operating or condition reports as justification for keeping this information confidential, noting that the legislature could choose to make future reports public if it extends the registry after it sunsets.⁷⁸ **It is critical that the public benefit from the information about the education financing market in California that the DFPI will obtain through the registry.** This information will inform policy analysis and consumer choice, as well as likely identify outlier bad actors. To the extent that the DFPI does not feel that it is authorized to disclose the reported information, it should compile annual summaries and make those publicly available.

We urge the DFPI to review these topics and to reconsider its initial responses. This registry is an opportunity for the state to sunlit the entirety of the education financing market, and the DFPI should maximize the information and tools that could be available to it in executing the CCFPL's market monitoring and consumer protection mandates.

Comments on the DFPI's proposed regulations for student debt relief services.

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

To strengthen the registry's provisions on student debt relief services, and the related provisions on debt settlement, we offer the following comments:

Section 1010: Persons Required to Register

We support the DFPI's inclusion of student debt relief service providers in its registry. Although it is important to closely monitor this market, we urge the DFPI to ensure that bona fide nonprofit service providers are not inadvertently required to register. Compliance could be unduly burdensome for these organizations, which generally provide services to the same low-income communities on which scammers prey. Specifically:

- **The DFPI must revise regulations to ensure that appropriate nonprofit organizations are exempt from both the debt settlement services and student debt relief services registration requirements.** Nonprofit organizations that provide student loan services free of charge should not be required to register and submit annual reports

⁷⁸ Initial Statement of Reasons at 43.

because such requirements would create unnecessary administrative burden and risk further diminishing options for free assistance. Nonprofit legal aid organizations that represent and assist low-income student loan borrowers often do all the following, which would generally bring them under the proposed definition of student debt relief services provider: (1) assess suitability for providing advice; (2) prepare documents to be submitted on the borrower's behalf, such as income-driven repayment plan applications, borrower defense discharge applications, closed school discharge applications, Direct Consolidation Loan applications, etc.; and (3) act as an intermediary between a borrower and a student loan servicer, creditor, or debt collector.⁷⁹ Similarly, nonprofit legal aid organizations provide advice and act as intermediaries for the purpose of negotiating student loan payments, negotiating settlements, and addressing other legal issues with loan servicers and private education financing. These actions bring them under the proposed definition of debt settlement services provider.⁸⁰

Legal aid organizations, as well as other nonprofit organizations that offer student loan counseling,⁸¹ have limited resources to provide desperately needed student loan assistance. They should not have the additional burdens of having to register as debt settlement or relief services providers and provide annual reports. It is for-profit debt relief companies, not nonprofit organizations like legal aids, that deceive borrowers into making payments for debt forgiveness then either do nothing or simply consolidate their student loans.

The proposed registration regulation, however, does not include any nonprofit exemption for student debt relief services providers.⁸² It only includes a debt settlement service registration exemption for a limited group of persons that provided an audit report under Fin. Code § 12104(i) within the previous 12 months and are providing debt settlement services solely in accordance with the requirements of that section.⁸³ This references a subdivision of the Financial Code that exempts nonprofit community service organizations that meet certain criteria from requirements imposed on proraters.

Under these proposed regulations, all nonprofit organizations that assist borrowers with student debt for free and who already struggle to fund student loan assistance will be required to register, and many, if not most, would have to register for debt settlement work. Nonprofit legal aid organizations, for example, do not qualify as prorate community based organizations as defined by Cal. Fin. Code § 12104, as their principal

⁷⁹ Proposed § 1002(c)(2).

⁸⁰ Proposed § 1001(b)(1).

⁸¹ The City of Los Angeles is working with nonprofits throughout the city to create a student loan counseling program; the City and County of San Francisco and the City of Stockton may be doing the same.

⁸² See Proposed § 1010.

⁸³ Proposed § 1010(b)(1).

function is not to arrange or administer debt management or settlement plans.⁸⁴ Rather, their principal function is to provide free civil legal services to low-income people, including legal services related to immigration, housing, public benefits, re-entry, family law, and consumer law.

If covered, many nonprofit organizations that provide student loan services, including legal aid organizations, are likely to pull out of providing such assistance altogether. This would be counterproductive, as these are the only organizations that provide an alternative to the scam debt relief companies by providing free expert student loan services to borrowers who desperately need them. We therefore urge the DFPI to create a broad exemption for nonprofits engaged in student debt relief services, and to simplify and broaden the existing exemption for debt settlement services. As discussed below, the DFPI can structure this exemption to include those entities that are eligible to participate in its Student Loan Empowerment Project.

- **The DFPI should ensure the registry’s exemptions, including for student debt relief services, cover the pool of applicants that it anticipates for its Student Loan Empowerment Project.** The DFPI received over \$7 million in funds to administer a grant program for community-based nonprofit organizations to offer student loan counseling.⁸⁵ The program, the Student Loan Empowerment Project, contemplates services that fall under the proposed definition of student debt relief services. Unless the DFPI ensures that the nonprofit organizations that are eligible to participate in the Student Loan Empowerment Project are exempt from registration as student debt relief service providers, the DFPI is likely to unduly burden these entities that are already resource-strapped, which may deter participation in the program. The program and its eligibility requirements should serve as a model for the types of nonprofits that do not require registration.⁸⁶

⁸⁴ Cal. Fin. Code § 12104(c).

⁸⁵ See Press Release, Cal. Dep’t of Fin. Prot. & Innovation, *Budget Proposal Would Allocate \$10 Million to Department of Financial Protection and Innovation to Help Student Loan Borrowers ahead of Repayment and Public Service Loan Forgiveness Waiver Deadlines* (Feb. 22, 2022), <https://dfpi.ca.gov/2022/02/22/budget-proposal-would-allocate-10-million-to-department-of-financial-protection-and-innovation-to-help-student-loan-borrowers-ahead-of-repayment-and-public-service-loan-forgiveness-waiver-deadlines/> (discussing proposal that developed into Student Loan Empowerment Project).

⁸⁶ See S.B. 154 (2022) at 1701-102-0001(1)(b) (providing that participants in the grant program must be exempt from federal income taxes under the Internal Revenue Code and that no part of the net earnings of the organization shall inure to the benefit of a private shareholder or individual).

Section 1043: Annual Reporting - Student Debt Relief Services

We affirm the DFPI's decision to require supplemental annual reporting by subject product. We offer the following comments to the proposed reporting:

- **The reporting requirements should be expanded to include services rendered without a written contract.** As proposed, the reporting for student debt relief focuses on the number of existing written contracts. The most predatory student debt relief companies are likely to operate without a written contract, and may evade reporting on their activities. The DFPI should revise the reporting requirement to capture all student debt relief services, regardless of whether those services are subject to a written contract.
- **The terms “federal” and “private” student debt should be defined.** The reporting requirement includes references to “federal student debt” and “private student debt” throughout the proposed provisions but does not define either term. We recommend defining “federal student debt” as “education financing” that is made or guaranteed pursuant to the federal student aid provisions of the Higher Education Act and defining “private student debt” as any “education financing” that is not “federal student debt,” including debts that may be owed to the State.

Additionally, as with education financing, any outstanding contracts with California residents by debt settlement or student debt relief service providers that are not registered and are not exempt from registration should be deemed void and unenforceable. It is important that this be a self-enforcing mechanism, as the California market is too vast and there are too many actors for the DFPI to be able to monitor, police, and deliver relief in every instance of unauthorized conduct.

Conclusion

The DFPI has proposed regulations for a registry that will shed much-needed light on the student debt industries operating in California. We applaud the agency's commitment to transparency and accountability, and believe that, once implemented, this registry will set the standard nationwide for how regulators can equip themselves with the information needed to ensure consumers have access to fair and affordable credit to finance their education. We urge the DFPI to consider the comments we have provided in this letter, as we believe that incorporating them into the proposed regulations would result in the best possible execution of the authorities granted to the agency by the CCFPL.

Thank you for considering these recommendations. Please contact Winston Berkman-Breen, Policy Counsel and Deputy Director of Advocacy at the Student Borrower Protection Center, at winston@protectborrowers.org if you have any questions or would like to discuss this comment.

Sincerely,

Student Borrower Protection Center
California Low-Income Consumer Coalition
Center for Responsible Lending
Consumer Federation of California
Consumer Reports
Legal Aid Foundation of Los Angeles
National Consumer Law Center
NextGen California
Public Counsel
Student Debt Crisis Center
The Institute for College Access and Success (TICAS)
Young Invincibles