

The Banking Law Journal

Established 1889

An A.S. Pratt™ PUBLICATION

FEBRUARY 2021

EDITOR'S NOTE: BANK MERGER GUIDELINES

Steven A. Meyerowitz

REVISING THE BANK MERGER GUIDELINES – PART II

David S. Neill, Damian G. Didden, and Christina C. Ma

THE CALIFORNIA CONSUMER FINANCIAL PROTECTION LAW BRINGS MORE PROVIDERS OF CONSUMER FINANCIAL PRODUCTS AND SERVICES INTO THE REGULATORY TENT

Nancy R. Thomas and Joseph Gabai

SECOND CIRCUIT REJECTS EVASION-OF-SECONDARY-SANCTIONS THEORY; UPHOLDS DOJ'S USE OF BANK FRAUD STATUTE IN SANCTIONS PROSECUTION

Roberto J. Gonzalez, Rachel Fiorill, Anand Sithian, and Apeksha S. Vora

FinCEN ISSUES FIRST-EVER ENFORCEMENT GUIDELINES AND FEDERAL BANKING AGENCIES UPDATE ENFORCEMENT GUIDANCE

Betty Santangelo, Gary Stein, Joseph P. Vitale, Melissa G.R. Goldstein, Hannah M. Thibideau, and Nicholas A. Wilson

CAN THE SUSTAINABILITY LINKED LOAN DELIVER LASTING CHANGE?

Henrietta Worthington and Victoria Judd

THE NEGOTIATING BANK IN A DOCUMENTARY CREDIT

Sang Man Kim



THE BANKING LAW JOURNAL

VOLUME 138

NUMBER 2

February 2021

Editor's Note: Bank Merger Guidelines Steven A. Meyerowitz	63
Revising the Bank Merger Guidelines—Part II David S. Neill, Damian G. Didden, and Christina C. Ma	66
The California Consumer Financial Protection Law Brings More Providers of Consumer Financial Products and Services Into the Regulatory Tent Nancy R. Thomas and Joseph Gabai	82
Second Circuit Rejects Evasion-of-Secondary-Sanctions Theory; Upholds DOJ's Use of Bank Fraud Statute in Sanctions Prosecution Roberto J. Gonzalez, Rachel Fiorill, Anand Sithian, and Apeksha S. Vora	89
FinCEN Issues First-Ever Enforcement Guidelines and Federal Banking Agencies Update Enforcement Guidance Betty Santangelo, Gary Stein, Joseph P. Vitale, Melissa G.R. Goldstein, Hannah M. Thibideau, and Nicholas A. Wilson	96
Can the Sustainability Linked Loan Deliver Lasting Change? Henrietta Worthington and Victoria Judd	103
The Negotiating Bank in a Documentary Credit Sang Man Kim	108

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call:

Matthew T. Burke at (800) 252-9257
Email: matthew.t.burke@lexisnexis.com
Outside the United States and Canada, please call (973) 820-2000

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at (800) 833-9844
Outside the United States and Canada, please call (518) 487-3385
Fax Number (800) 828-8341
Customer Service Website <http://www.lexisnexis.com/custserv/>

For information on other Matthew Bender publications, please call

Your account manager or (800) 223-1940
Outside the United States and Canada, please call (937) 247-0293

ISBN: 978-0-7698-7878-2 (print)

ISSN: 0005-5506 (Print)

Cite this publication as:

The Banking Law Journal (LexisNexis A.S. Pratt)

Because the section you are citing may be revised in a later release, you may wish to photocopy or print out the section for convenient future reference.

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Inc. Matthew Bender, the Matthew Bender Flame Design, and A.S. Pratt are registered trademarks of Matthew Bender Properties Inc.

Copyright © 2021 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved.

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

MATTHEW  BENDER

Editor-in-Chief, Editor & Board of Editors

EDITOR-IN-CHIEF

STEVEN A. MEYEROWITZ

President, Meyerowitz Communications Inc.

EDITOR

VICTORIA PRUSSEN SPEARS

Senior Vice President, Meyerowitz Communications Inc.

BOARD OF EDITORS

BARKLEY CLARK

Partner, Stinson Leonard Street LLP

CARLETON GOSS

Counsel, Hunton Andrews Kurth LLP

MICHAEL J. HELLER

Partner, Rivkin Radler LLP

SATISH M. KINI

Partner, Debevoise & Plimpton LLP

DOUGLAS LANDY

Partner, Milbank, Tweed, Hadley & McCloy LLP

PAUL L. LEE

Of Counsel, Debevoise & Plimpton LLP

TIMOTHY D. NAEGELE

Partner, Timothy D. Naegele & Associates

STEPHEN J. NEWMAN

Partner, Stroock & Stroock & Lavan LLP

THE BANKING LAW JOURNAL (ISBN 978-0-76987-878-2) (USPS 003-160) is published ten times a year by Matthew Bender & Company, Inc. Periodicals Postage Paid at Washington, D.C., and at additional mailing offices. Copyright 2021 Reed Elsevier Properties SA., used under license by Matthew Bender & Company, Inc. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For customer support, please contact LexisNexis Matthew Bender, 1275 Broadway, Albany, NY 12204 or e-mail Customer.Support@lexisnexis.com. Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway, #18R, Floral Park, NY 11005, smeyerowitz@meyerowitzcommunications.com, 646.539.8300. Material for publication is welcomed—articles, decisions, or other items of interest to bankers, officers of financial institutions, and their attorneys. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to THE BANKING LAW JOURNAL LexisNexis Matthew Bender, 230 Park Ave, 7th Floor, New York, NY 10169.

POSTMASTER: Send address changes to THE BANKING LAW JOURNAL, A.S. Pratt & Sons, 805 Fifteenth Street, NW., Third Floor, Washington, DC 20005-2207.

The California Consumer Financial Protection Law Brings More Providers of Consumer Financial Products and Services Into the Regulatory Tent

*Nancy R. Thomas and Joseph Gabai**

This article highlights the key provisions of the California Consumer Financial Protection Law.

The California legislature passed, and Governor Newsom signed into law, the California Consumer Financial Protection Law¹ (“CCFPL”). It became effective on January 1, 2021. The law reflects Governor Newsom’s vision of a much more powerful banking agency with new registration authority, Unfair, Deceptive, or Abusive Acts or Practices (“UDAAP”) authority mirroring the authority of the Consumer Financial Protection Bureau (“CFPB”), and expanded enforcement authority. But important amendments adopted by the legislature will exempt many regulated entities from the scope of the law and will impose limits on the new Department of Financial Protection and Innovation’s (“DFPI”) exercise of its authority.

This article highlights the key provisions of the CCFPL.

FOCUS ON CONSUMER PROTECTION

Although most of the CCFPL comes directly from Dodd-Frank Act Title X, the statutory purpose differs from the purpose and objectives of Dodd-Frank. The legislative findings assert that “lack of [a dedicated financial services regulator with broad authority over providers of financial products and services] has left consumers vulnerable to abuse and forced California businesses to

* Nancy R. Thomas is a consumer class action and regulatory enforcement partner at Morrison & Foerster LLP representing clients in high-stakes litigation in state and federal courts, as well as in arbitration and administrative proceedings. Joseph Gabai is senior counsel at the firm focusing his practice on the representation of banks, savings associations, mortgage banking companies, finance companies, and their holding companies and affiliates. Resident in the firm’s Los Angeles office, the authors may be reached at nthomas@mof.com and jgabai@mof.com, respectively.

¹ http://leginfo.legislature.ca.gov/faces/billVersionsCompareClient.xhtml?bill_id=201920200AB1864.

compete with unscrupulous providers.”² They refer to UDAAP and to discriminatory practices multiple times. They also refer to technological innovation that “offers great promise,” but also “poses risks to consumer and challenges to law enforcement.”³

In contrast, the objectives of Dodd-Frank Title X are much more balanced, referring to protecting consumers from UDAAP and discrimination, but also:

- The need for consumers to have timely and understandable information to make responsible decisions;
- The need to reduce unwarranted regulatory burdens;
- Consistent enforcement of federal consumer financial law to promote fair competition and transparency; and
- Efficient operation of markets for consumer financial products and services.⁴

EXPANDED JURISDICTION BOUNDED BY SIGNIFICANT EXEMPTIONS

Since the proposed legislation was introduced, the Department of Business Oversight (“DBO”) has consistently explained its view that the CCFPL would not change the regulatory landscape for state-chartered and state-licensed entities. This position is reflected in the version of the CCFPL passed by the legislature, which exempts national banks, banks chartered by California or any other state, and existing DBO licensees other than payday lenders and student loan servicers, from the CCFPL.⁵ The CCFPL also exempts licensees and their employees of any California state agency other than the DFPI where the licensee or employee is acting under the authority of the other state agency’s license. For example, this should exempt real estate licensees under the Real Estate Law and their employees acting under those licenses.

² Cal. Fin. Code § 90000. The CCFPL adds Division 24, commencing with Section 90000 to the Financial Code.

³ Cal. Fin. Code § 90000(a).

⁴ 12 U.S.C. § 5511(b).

⁵ Cal. Fin. Code § 90002. The exemptions include licensees such as lenders, brokers, mortgage loan originators and program administrators under the California Financing Law, mortgage lenders, mortgage servicers, and mortgage loan originators under the California Residential Mortgage Lending Act, and money transmitters under the California Money Transmission Act.

The broad jurisdiction in the statute, then, applies almost exclusively to entities that previously were not licensed by the DBO.⁶ These entities must be “covered persons,” which are persons engaging in offering or providing consumer financial products or services, affiliates that act as service providers, and any service provider that engages in the offering or provision of its own consumer financial product or service.⁷ As in Title X, a “service provider” is any person that provides a material service to a covered person in connection with the covered person’s offering or providing of a consumer financial product or service.⁸

Whether an entity is a “covered person” depends on whether it offers or provides a “consumer financial product or service.” The definition of “financial product or service” mirrors the broad definition in Title X, with the addition of brokering the offer or sale of a franchise in the state on behalf of another.⁹ As in Dodd-Frank, the CCFPL authorizes the DFPI to issue regulations defining any other financial product or service based on specified criteria.¹⁰

UDAAP AUTHORITY

The CCFPL gives the DFPI the same UDAAP authority that Dodd-Frank Title X gives the CFPB: The DFPI can take enforcement action against covered persons for UDAAP violations and can issue regulations regarding UDAAP.¹¹

The CCFPL also allows the DFPI to bring proceedings pursuant to the Dodd-Frank Title X provisions authorizing state regulators to enforce Title X and any regulations promulgated by the CFPB pursuant to Title X.¹² The DFPI can bring these proceedings against both covered persons under the CCFPL as well as existing DBO licensees, including California-licensed banks, savings and loans and credit unions, California Financing Law licensees, and California Residential Lending Act licensees.

⁶ Although supporters of the CCFPL repeatedly identified debt collectors as previously unlicensed entities that warranted the expanded authority provided by the proposed legislation, the legislature passed a separate law (SB 908 https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=201920200SB908&showamends=false) that requires licensing of debt collectors and grants the DFPI licensing, examination, investigatory, and enforcement authority over debt collectors.

⁷ Cal. Fin. Code § 90005(f).

⁸ Cal. Fin. Code § 90005(n); 12 U.S.C. § 5481(26)(A).

⁹ Cal. Fin. Code § 90005(k); 12 U.S.C. § 5481(15)(A), (B)(i).

¹⁰ Cal. Fin. Code § 90005(k)(12).

¹¹ Cal. Fin. Code §§ 90012(a); 90009(c); 12 U.S.C. § 5531(a), (b).

¹² Sec. 4 of the CCFPL, amending Cal. Fin. Code § 326(b).

The DFPI will have to give advance notice to the CFPB if it relies on this authority to bring actions against existing licensees. There is no similar requirement in the CCFPL for actions brought against covered persons that are not exempted.

The CCFPL authorizes the DFPI to prescribe rules defining UDAAP, which will apply to covered persons. The DFPI must interpret “unfair” and “deceptive” in accordance with Business & Professions Code Section 17200 and cases interpreting that provision. The CCFPL defines “abusive” in the same way that it is defined under Dodd-Frank, and requires the DFPI to interpret the term consistently with Title X. Any inconsistency, though, is to be resolved in favor of greater protections and more expansive coverage.¹³

In the only provision in the law that does not concern consumers, the CCFPL authorizes the DFPI to define UDAAP in connection with the offering of commercial financing or other financial products and services to small businesses, nonprofits, and family farms.¹⁴

REGISTRATION AND REPORTING REQUIREMENTS FOR COVERED PERSONS

The DFPI can issue rules for registration of covered persons engaged in the business of offering or providing a consumer financial product or service, including requiring payment of registration fees.¹⁵ Registered covered persons, as well as those determined to be covered persons that are offering or providing financial products and services, are subject to reporting and examination.¹⁶

The DFPI, like the CFPB, may require a covered person to “generate, provide, or retain records” and to respond to written questions to facilitate supervision.¹⁷ The CCFPL also gives the DFPI the same authority as the CFPB to collect information from covered persons and service providers in conducting monitoring, regulatory, and assessment activity.¹⁸

¹³ Cal. Fin. Code § 90005(p).

¹⁴ Cal. Fin. Code § 90009(e). Thus, the California Legislature continues to expand consumer protections to certain providers of smaller commercial loans. *See, e.g.*, Cal. Fin. Code § 22800, which governs commercial financing disclosures.

¹⁵ Cal. Fin. Code § 90009(a).

¹⁶ Cal. Fin. Code § 90010.

¹⁷ Cal. Fin. Code § 90009(b); 12 U.S.C. § 5514(b)(7)(B).

¹⁸ Cal. Fin. Code § 90009(f); 12 U.S.C. § 5512(c)(4).

ENFORCEMENT AUTHORITY

In addition to UDAAP, the CCFPL gives the DFPI authority to enforce consumer financial laws and recordkeeping and reporting violations with respect to covered persons, service providers, and aiders and abettors.¹⁹ This authority applies only to acts or practices engaged in after the operative date of the law.²⁰

The CCFPL grants the DFPI investigatory and subpoena power. It authorizes the DFPI to bring a civil action or an administrative proceeding for violation of the CCFPL, rule or final order, or condition imposed in writing by the DFPI.²¹ The DFPI also has the option to issue desist and refrain orders for these violations, which are deemed final if the respondent does not request a hearing within 30 days.²²

The DFPI also has the right to seek to revoke the license or registration of a covered person or service provider for violation of any law, rule, order, or any condition imposed by the DFPI. The DFPI also can file suit to enforce its orders.²³

The DFPI may not outsource or delegate its enforcement authority to private attorneys.²⁴

Statute of Limitations

The DFPI cannot bring a civil action under the CCFPL more than four years after discovering the violation. Historically, the DBO has taken the position that it is not bound by any statute of limitations, so the CCFPL provides some helpful guardrails. That said, the CCFPL provides one year more than Dodd-Frank Title X.²⁵ Claims brought under a consumer financial law are covered by the applicable statute of limitations for that law.²⁶

¹⁹ Cal. Fin. Code §§ 90003, 90012(a); 12 U.S.C. § 5536. Note that the original version of the CCFPL would have given the DFPI jurisdiction to enforce a list of over 50 state and 20 federal “enumerated consumer financial laws.” This lengthy list and the express grant of jurisdiction were deleted by amendment and are not included in the final version.

²⁰ CCFPL Section 9.

²¹ Cal. Fin. Code §§ 90011(a), 90012, 90013.

²² Cal. Fin. Code § 90015(d).

²³ Cal. Fin. Code § 90015(f), (g).

²⁴ Cal. Fin. Code § 90016.

²⁵ Compare Cal. Fin. Code § 90014(a) and 12 U.S.C. § 5564(g)(1).

²⁶ Cal. Fin. Code § 90014.

Remedies

Like the CFPB, the DFPI may seek broad relief for violation of UDAAP, including rescission or reformation of contracts, refunds, restitution, disgorgement or compensation for unjust enrichment, payment of damages, public notification of the violation, including the costs of notice, injunctive relief, and civil money penalties. Authorized relief does not include exemplary or punitive damages.²⁷

The CCFPL authorizes very significant penalties for violation of its provisions and lists factors that the DFPI must take into account when determining the amount of any penalty.²⁸

NEW COMPLAINT RESPONSE OBLIGATIONS

In provisions that mirror those in Dodd-Frank Title X, the CCFPL requires the DFPI to establish procedures for covered persons to provide a timely response to consumer complaints and specifies information covered persons must include in the response.²⁹ This section does not apply to consumer reporting agencies, and the DFPI must promulgate regulations implementing the complaint response process before it can bring enforcement actions for failing to comply with the complaint response requirements.³⁰

TRANSPARENCY AND LIMITS ON AUTHORITY

The CCFPL requires the DFPI to prepare and post on its website an annual report discussing actions taken pursuant to the law, including rulemaking, enforcement, oversight, complaints, education, and research. The report also must discuss the activities of the Financial Technology Innovation Office. The commissioner must appear and report annually to the appropriate legislative committees regarding all activities pursuant to the CCFPL in the prior year.³¹

The CCFPL also includes several provisions that seem aimed at curbing the DBO's preference for regulating by enforcement and questions³² raised by the Legislative Analyst Office and others regarding the broad delegation of registration authority to the DFPI. The CCFPL requires the DFPI to issue

²⁷ Cal. Fin. Code §§ 90012(b), 90013(d).

²⁸ Cal. Fin. Code § 90012(c)(1).

²⁹ Cal. Fin. Code § 90008; 12 U.S.C. § 5534.

³⁰ Cal. Fin. Code §§ 90008(c), (d)(3), (e).

³¹ Cal. Fin. Code §§ 90018, 90009.5(d).

³² <https://lao.ca.gov/reports/2020/4181/DBO-022620.pdf>.

regulations before it can bring enforcement proceedings regarding compliance with the complaint response procedures, the registration requirements, the recordkeeping requirements, and disclosures of the features of consumer financial products and services.³³ The DFPI must promulgate rules regarding registration requirements no later than three years after initiating the second enforcement action to enforce a violation of the CCFPL by a person providing substantially similar consumer financial products or services. Those regulations in turn must be ratified by the legislature.³⁴

TAKEAWAYS

Providers of financial products and services to California consumers should buckle their seatbelts. Through the reorganization, the DFPI will have increased funding to expand supervision and enforcement for California state-chartered banks and existing licensees. The CCFPL will expand the DFPI's jurisdiction to cover previously unlicensed entities. Although banks and most other current DBO licensees are exempt from the CCFPL, the DFPI may be influenced by the broad UDAAP and enforcement provisions of the CCFPL to adopt a more aggressive posture to these exempt institutions as well.

The dual focus on consumer protection and innovation will draw the DFPI's focus to FinTechs and bank partnerships. The DFPI will have the opportunity to create clear rules that will allow FinTechs and established financial institutions to compete on a level playing field, to partner in providing new products, and to expand access to credit.

³³ Cal. Fin. Code §§ 90008(e); 90009(d).

³⁴ Cal. Fin. Code § 90009.5.