

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 2433 (Grayson)
Version: March 11, 2022
Hearing Date: June 21, 2022
Fiscal: Yes
Urgency: No
AWM

SUBJECT

Department of Financial Protection and Innovation: unlawful practices

DIGEST

This bill clarifies that the Department of Financial Protection and Innovation (DFPI) may bring an order to discontinue violations against a licensee or person regulated by the DFPI for a violation that has already occurred.

EXECUTIVE SUMMARY

The DFPI, headed by the commissioner of the DFPI, regulates a broad range of financial services, businesses, products, and persons in the state. The DFPI is empowered to enforce the relevant laws and regulations through a number of administrative tools, including orders to cease violations of the law, the denial, suspension, or revocation of licensure, and prohibiting violators from participating in regulated activities. The DFPI's administrative actions are reviewable by an independent Administrative Law Judge (ALJ). The DFPI is also tasked with providing transparency to the public, which it does by maintaining a public record of the licensees who have been sanctioned.

According to the authors and supporters of the bill, there is currently a disagreement among ALJs as to whether the DFPI's authority in certain contexts extends to issuing orders against violations that are no longer ongoing, such as a failure to provide proper notices that the licensee subsequently began to provide. Under this interpretation, if a licensee corrects its behavior prior to a hearing on the order before an ALJ, the order must be vacated even if there is no question that the licensee had previously been in violation of applicable laws. The authors and supporters argue that this is an unnecessarily narrow interpretation of the DFPI's authority that prevents it from taking action against, and notifying the public of, licensees who failed to comply with the law.

This bill is intended to clarify that the DFPI can issue enforcement orders against licensees for conduct that is no longer ongoing. To do so, the bill updates a number of

sections in the Corporations Code and Financial Code to specify that the DFPI can take action against past behavior. Other provisions relating to the DFPI's enforcement authority already clearly allow the DFPI to issue orders against past conduct, so this bill makes the DFPI's authority consistent across regulatory regimes.

This bill is sponsored by the author and is supported by the California Association for Micro Enterprise Opportunity and the California Low-Income Consumer Coalition. There is no known opposition. This bill passed out of the Senate Banking and Financial Institutions Committee with a 9-0 vote.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Establishes the DFPI to regulate the offering and provision of consumer financial products and services under California consumer financial laws and to exercise oversight and enforcement authority under those laws, to the extent such authority is consistent with federal consumer financial laws. (Fin. Code, div. 24, §§ 90000 et seq.)
- 2) Requires the DFPI to conduct oversight and enforcement of specific laws, including through enforcement orders imposed by the commissioner of the DFPI that may be appealed to an ALJ, as follows:
 - a) Ordering a licensed broker-dealers and specified licensed investment advisors to desist and refrain from engaging in violations of specified laws or rules, or for conducting business in an unsafe or injurious manner. (Corp. Code, §§ 25249-25251.)
 - b) Ordering any person the commissioner determines to be engaging in prohibited commodities selling or purchasing activities to desist and refrain from the conduct. (Corp. Code, § 29542.)
 - c) Ordering a person engaging in violations of the Franchise Investment Law (Corp. Code, tit. 4, div. 5, §§ 30000 et seq.) or rules promulgated thereunder to desist and refrain from that conduct. (Corp. Code, §§ 31406-31407.)
 - d) Ordering a licensee licensed to transmit money in the state that is violating or failing to comply with any law to direct the licensee to comply with the law or, if the commissioner determines that the licensee is conducting its business in an unsafe or injurious manner, to discontinue the unsafe or injurious practice. (Fin. Code, § 2148.)
 - e) Ordering a person or entity licensed under the Check Sellers, Bill Payers and Proraters Law (Fin. Code, div. 3, §§ 12000 et seq.) that is insolvent or conducting its business in an unsafe or injurious manner to discontinue the disbursement of funds and the further conduct of business. (Fin. Code, § 12307.2.)

- f) Ordering, when the commissioner determines that a person is engaging in specified conduct that violates the Escrow Law (Fin. Code, div. 1, §§ 17000 et seq.), has become insolvent or otherwise allowed their net worth to fall below the required level, is conducting business in an unsafe or injurious manner, the person to discontinue the disbursement of funds, as well as specified steps to be taken by persons having their property in escrow with the violator. (Fin. Code, §§ 17415, 17602-17604.)
- g) Issuing a citation and assessing a fine against a person in violation of specified provisions of the California Financing Law (Fin. Code, div. 9, §§ 22000 et seq.), which governs entities making and brokering consumer and commercial loans; and if, after investigation, the commissioner has reasonable grounds to believe that a person is conducting business in an unsafe or injurious manner, ordering that the person discontinue the unsafe or injurious practices. (Fin. Code, §§ 22690, 22707.5, 22712.)
- h) Ordering a licensee licensed under the Student Loan Servicing Act (Fin. Code, div. 12.5, §§ 28000 et seq.) who has conducted business in an unsafe or injurious manner to discontinue the unsafe or injurious business practices. (Fin. Code, §§ 28158, 28164.)
- i) Ordering a licensee licensed under the California Residential Mortgage Lending Act (Fin. Code, div. 20, §§ 50000 et seq.) that is violating any law, rule, or provision in its articles of incorporation, or that is conducting business in an unsafe or injurious manner, to cease and desist the violating or unsafe or injurious conduct. (Fin. Code, §§ 50321-50323.)

This bill:

- 1) Clarifies that the commissioner of the DFPI may bring an enforcement order against a licensee or person, as provided in 2) of the “Existing law” section, for violating the law, engaging in activity in violation of the law, or conducting business in an unsafe or injurious manner regardless of whether the prohibited action is ongoing at the time of the order.

COMMENTS

1. Author's comment

According to the author:

AB 2433 clarifies that when the DFPI brings an order to discontinue violations against a licensee, the order can be upheld even in cases where the licensee stops violating the law in advance of the hearing. This proposal will hold bad actors accountable and assure greater transparency for consumers.

2. This bill clarifies that the DFPI can take administrative action against conduct that violates the law or is unsafe or injurious even where the conduct has ceased

The DFPI is tasked with overseeing a wide range of financial services, products, and professionals in the state with the goal of protecting consumers and businesses engaged in financial transactions. As part of the DFPI's regulatory authority across statutory regimes, the DFPI is empowered to take administrative action in the form of desist orders, which order a violator to cease conduct that violates the law or that constitutes a safe or injurious business practice. A desist order is also reported publicly, so as to inform the public of the bad actor's conduct. The subject of such an order can appeal the issuance of the order to an administrative law judge (ALJ).

Several of these enforcement statutes describe the violating conduct exclusively in the present tense or past tense—e.g., “conduct that *is* in violation of the law.” According to the author, this has led certain ALJs to question whether the DFPI can issue a desist order after the violation has ceased, or, in the case of a past tense violation, an order can be issued while conduct is ongoing. There does not appear to be any clear Legislative intent to have limited the DFPI’s authority in that manner. This interpretation, however, gives rise to a concern that a bad actor could avoid a desist order, and any negative publicity of said order, by ceasing a violation when the DFPI learns of it, and potentially restarting it once the DFPI’s attention has shifted elsewhere.

Several existing statutes authorize the DFPI to issue a desist order for both ongoing and since-terminated conduct.¹ This bill simply brings the remaining statutes into conformity, making clear that, where the DFPI is authorized to issue a desist order, that authority extends to conduct that has been ceased as well as to conduct that is ongoing.

3. Arguments in support

According to the California Low-Income Consumer Coalition, writing in support:

AB 2433 will make sure that DFPI has the ability to stop wrongdoers from violating the law. When the Department determines that financial industry players like investment advisors or debt collectors have engaged in unlawful activity, a key tool in DFPI’s toolbox is an “order to discontinue violations.” That type of order provides public documentation that a licensee has violated the law and tells the licensee to cease engaging in that unlawful conduct now and not to engage in it in the future.

Unfortunately, ambiguity in the law has undermined DFPI’s ability to use this enforcement tool effectively. In 2020, DFPI issued orders to discontinue violations in two cases that were not upheld by Administrative Law Judges (ALJs). In these

¹ See, e.g., Fin. Code, §§ 14304(a), 30606(b), 50321.

cases, the licensees had stopped violating the law just prior to the hearing, and the ALJs found that current law did not clearly provide that a forward-looking order can be upheld in this situation. As a result, there may be future situations where those bad actors – and others – are not held accountable.

AB 2433 would fix the problem. The bill would clarify that a forward-looking injunctive order can be upheld if the licensee has previously, or is currently, engaged in unlawful conduct. This change will allow DFPI to keep the same unlawful conduct from recurring and will also create a public record of violations that the public can see.

SUPPORT

California Association for Micro Enterprise Opportunity (CAMEO)
California Low-Income Consumer Coalition (CLICC)

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

AB 1136 (Luz Rivas, 2021) would have expanded the commissioner of the DFPI's enforcement authority under the California Financing Law with respect to individuals operating under the Property Assessed Clean Energy (PACE) program. AB 1136 died in the Assembly Appropriations Committee.

AB 1864 (Limón, Ch. 157, Stats. 2020) renamed the "Department of Business Oversight" as the DFPI and put the DFPI in charge of various additional laws relating to the provision of financial products and services in the state.

AB 1446 (Dababneh, Ch. 310, Stats. 2015) clarified that the commissioner of the DFPI's predecessor entity is authorized to issue a desist and refrain order under the California Financing Law's predecessor act.

PRIOR VOTES:

Senate Banking and Financial Institutions Committee (Ayes 9, Noes 0)

Assembly Floor (Ayes 68, Noes 0)

Assembly Appropriations Committee (Ayes 13, Noes 0)

Assembly Banking and Finance Committee (Ayes 10, Noes 0)
