October 5, 2021

Department of Financial Protection and Innovation
ATTN: Sandra Sandoval
300 S. Spring Street, Suite 15513
Los Angeles, CA 90013

Re: PRO 05-21 — Proposed Regulations Under the Debt Collection Licensing Act

Dear Ms. Sandoval:

On behalf of the American Financial Services Association ("AFSA"),[1] thank you for the opportunity to provide comments on the Department's August 19 Invitation for Comments on Proposed Second Rulemaking Under the Debt Collection Licensing Act (PRO 05-21). AFSA represents financial institutions of all sizes across many of the industries DFPI oversees, including institutions that may be required to apply for licensure under the Debt Collection Licensing Act (DCLA) as well as institutions that hold other license types from DFPI. We believe clear rules that take into account existing laws benefit consumers and financial institutions alike, and we appreciate the Department's consideration of AFSA's previous comments related to the Debt Collection Licensing Act.

Scope of the DCLA

A. Definitions

The definitions referenced in the Invitation for Comments are the same or similar to the definitions of the Rosenthal Act. However, for purposes of the DCLA, the definitions of "debt" and "debt collection" require further clarification. The Rosenthal Act incorporates the Fair Debt Collection Practices Act's (FDCPA) exemptions for creditors and affiliates in certain instances. See California Civil Code § 1788.17. This means creditors, their affiliates, and other exempt entities under the FDCPA are not required to provide the Mini-Miranda warning (*i.e.*, the disclosure that "the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose"), or send the debt validation notice under § 1788.17. If the rules adopt the proposed definition of "debt collector," similar to the Rosenthal Act, then they should also recognize the exemptions provided within the Rosenthal Act for creditors and affiliates by exempting such entities from the definition of a "debt collector," or otherwise apply the same definition of "Debt Collector" as that found within the FDCPA itself.

[1] Founded in 1916, the American Financial Services Association (AFSA), based in Washington, D.C., is the primary trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including direct and indirect vehicle financing, traditional installment loans, mortgages, payment cards, and retail sales finance. AFSA members do not provide payday or vehicle title loans.

Clarity and fairness would be the result from such consistency with federal law. Customers with current accounts may be confused or concerned if they receive a statement from their creditor indicating that they are being contacted by a "debt collector." The proposed clarity in the definition would prevent this, as a creditor could be required to list a debt collector license number on correspondence, invoices, and other communications under the new § 1788.11(f), which requires a debt collector license number be displayed on any communications in connection with collections. The regulations should make clear that communications associated with typical servicing, such as invoices, deferral agreements, payment reminders, etc., do not require the debt collector license number.

Creditors generally pride themselves on excellent customer service, and if creditors are able to reach their customers before their accounts are 30 days past due, they may be able to help the customers avoid having their accounts reported to the credit bureaus as delinquent. Because of the significant new expense for creditors to add the debt collector license number to all collection communications and the concern that customers may feel insulted that they are receiving communications from a "debt collector," creditors may cease sending warning communications on accounts that are not 30 days past due. This will be a loss to the consumer who is not yet considered "in collections" and has simply forgotten to make the most recent payment. Not requiring the debt collector license number on communications will ensure creditors have numerous ways to provide consumers this warning. It is also not clear whether the debt collector license would need to be displayed on statutorily required notices, such as notices of negative credit reporting, notices of intention to dispose of a repossessed vehicle, cosigner notices, etc. Clarity that creditors are not debt collectors would prevent confusion in these areas.

B. Business of Debt Collection

Although the definition of "debt collection" in the DCLA is the same as or similar to the definition in the Rosenthal Act, it is not clear whether the DCLA is intended to cover all entities subject to the Rosenthal Act. "Engage in the business of debt collection" also requires clarification. Does "engage in the business of debt collection" mean that the primary purpose of the company is debt collection? This would cover traditional debt collectors and debt buyers because all they are doing is collecting debt. We believe DFPI should clarify that "engaging in the business of debt collection" is consistent with 15 U.S.C. § 1692a(6), and thereby requires the activity to stem from a person whose 1) principal purpose is collecting debts, or one who 2) regularly attempts to collect debts owed or due another. Persons/entities that do not fall within the statutory definition of "debt collector" under § 1692a(6) should not be found to be "engaged in the business of debt collection" under the DCLA.

C. Ordinary Course of Business

This definition is also not clear and warrants clarity that "in the ordinary course of business" means that debt collection is the primary business of the entity and does not include creditors or their affiliates. In *Henson v. Santander Consumer USA, Inc.*, 137 S. Ct. 1718 (2017), the U.S. Supreme Court held that the defendant consumer finance company was not a "debt collector" within the meaning of the "regularly collects" prong of the FDCPA, § 1692a(6), because the consumer finance company was collecting debts that it purchased and owned, not collecting

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debts owed to another. Accordingly, we believe that collecting debts "in the ordinary course of business" and "regularly" do not need further definition based on the frequency of the activity, but rather, the DFPI should clarify that the aforementioned terms "in the ordinary course of business" and "regularly" do not apply to creditors or their affiliates, as recognized by the FDCPA.

D. Exemptions

Given the extensive requirements under state and federal law with which existing licensees and other federally chartered financial institutions already comply, additional requirements under the DCLA would be duplicative and unnecessarily create a significant compliance burden with limited consumer benefit. The legislature recognized this reality, as evidenced by the Act's list of exempt entities in Part 100001(b). Accordingly, the rulemaking should reinforce that any entities falling under an exemption are not subject to the DCLA. Further, the rules should also recognize the exemptions provided within the Rosenthal Act for original creditors and affiliates from the requirements of FDCPA Sections 1692e(11) and 1692g, per § 1788.17 of the Civil Code and clarify that all such exemptions will be interpreted as broadly applicable to all of these entities.

Exempt entities' affiliates that regularly interact with consumers and are engaging in collections activities relevant to their existing licenses should also be clearly exempt under the rules. DFPI examinations for such entities would be duplicative and will only serve to distract the DFPI from the main target of the law and licensing requirements—California debt collectors with no existing state or federal oversight.

Additional clarification is particularly critical with regard to affiliates of depository institutions. Section 10001(b)(1) of the Act exempts depository institutions from the licensing requirements, as defined in Section 1420 California's Financial Code. Section 1420(a) defines a "depository institution" as any FDIC- insured bank. Accordingly, it is not clear whether the licensing requirement excludes affiliates and subsidiaries of FDIC-insured banks. If affiliates and subsidiaries need to be licensed, they would be subject to DFPI oversight, including investigations, audits, periodic reporting requirements, examinations, and fines and penalties for violations. A bank's structure should not be the factor that ultimately determines whether its activities subject it to state debt collector licensing. Under the rule as written, a FDIC-insured bank does not need to be licensed as a debt collector. But, if the bank has certain servicing activities performed by an affiliate or subsidiary, it must be licensed as a debt collector.

These affiliates and subsidiaries are also regulated by the Office of the Comptroller of the Currency (OCC), Consumer Financial Protection Bureau (CFPB), and others, just like the parent bank, and are subject to federal examinations and oversight. DFPI oversight would be duplicative. The OCC, for example, supervises and examines national banks by conducting on-site reviews, providing ongoing supervision of the bank's operations, and regularly meets with

bank management and board of directors.[2] The OCC also takes enforcement action against banks that engage in risky practices or do not comply with their rules and regulations.

Unlike other debt collectors, national banks have examiners that are assigned and solely dedicated to the examination of their operations, and even may reside on site in pre-pandemic environments. A credentialed national bank examiner has the following responsibilities:

- maintains an up-to-date understanding of the condition and risk profile of the bank;
- identifies risks and responds in an appropriate and timely manner;
- considers the risks posed by significant activities or affiliates, including affiliates or lines of business subject to the primary supervision of another regulator, in determining the bank's ratings and risk assessment;
- maintains responsibility for ongoing supervision of the bank and oversees the execution of examination plans;
- updates the OCC's supervisory information systems to reflect the bank's current risk profile and condition;
- maintains ongoing and effective communication with bank management and the board;
- keeps the supervisory office informed about the status of each assigned bank;
- establishes and maintains points of contact with domestic and foreign banking supervisors and other regulatory agencies, as appropriate;
- implements OCC and supervisory office directives;
- takes actions to require banks to address deficiencies, or recommends such actions to the supervisory office;
- follows up on bank management's actions to address deficiencies and outstanding enforcement actions.

DFPI's proposed rule would also require the sharing of significant personal information of licensee principal officers and others, including their social security numbers and fingerprints. National banks already follow an in-depth application process to be chartered as an OCC-supervised bank, that includes character requirements as well as comprehensive background checks of the bank's organizers, senior executive officers, senior officers, directors, principal bank shareholders, and general managers of federal branches or agencies.[3] In this application, the OCC must consider experience, competence, and integrity, and may also consider a person's character, financial ability, or willingness to direct or lead a bank's business in a safe, sound, and legal manner. The OCC also closely examines the backgrounds of filers whose previous experience contributed to a failed or "troubled" financial institution or when other facts may raise questions about competence, character, or personal or fiduciary integrity. These background checks include information from:

- Credit Bureaus;
- Federal Bureau of Investigation;

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[2] Comptroller's Handbook Examination Process, Bank Supervision Process, Version 1.0, June 2018 https://www.occ.gov/publications-and-resources/publications/comptrollers-handbook/files/bank-supervision-process/pub-ch-bank-supervision-process.pdf

[3] Comptroller's Licensing Manual: Background Investigations, https://www.occ.gov/publications-and-resources/publications/comptrollers-licensing-manual/files/background-investigations-licensing-manual.pdf

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- Federal and state regulators of banks and other entities;
- IRS;
- Publicly-available online resources, including the "Interagency Biographical and Financial Report";
- FinCEN;
- Enforcement Action Report System, an OCC database of historical criminal referral information.

The OCC may also perform additional background checks when deemed appropriate, including making a request for background information from:

- U.S. Commodity Futures Trading Commission;
- State and local law enforcement agencies;
- Federal Trade Commission;
- Local courts;
- National Association of Securities Dealers;
- U.S. Securities and Exchange Commission.

Most investigations also include fingerprint checks and "IRS Tax Check Waiver" forms. Indeed, changes in directors and senior officers of a national bank or federal savings association require notice that includes fingerprinting of any individual that hasn't been fingerprinted within the prior three years.[4] For all of these reasons, the final regulations should clearly state that the depository institution exemption referenced in Section 10001(b)(1) of the Debt Collection Licensing Act also applies to subsidiaries and affiliates of depository institutions.

E. Due or Owing

Similar to the problems described above with the definition of "debt," the definition of "debtor" is also too broad. "Due and owing" could be construed to include current debt and apply the requirements of the DCLA to accounts that merely one day delinquent as opposed to being in a state of default. As written, the requirements could apply to all phases of customer service, including invoices and payment reminders. We do not believe the DCLA's intent is to prevent creditors from communicating with their customers who are delinquent but not defaulted with the goal of helping such customers remediate their accounts. Clarity that a "debt" that is "due and owing" applies only to amounts that are in true default, as opposed to merely delinquent, will allow creditors to engage in normal servicing of an account without treating a customer as a "debtor."

Accordingly, we request that the regulations clarify that "debt" and "due and owing" is limited to accounts that are in default. Because of the importance of the delinquent versus default distinction, the DFPI should seek additional input in the form of future opportunities for comments, as this question was not specifically asked of interested stakeholders in the current request.

[4] 12 CFR § 5.51

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Thank you in advance for your consideration of our comments. If you have any questions or would like to discuss this further, please do not hesitate to contact me at 202-469-3181 or mkownacki@afsamail.org.

Sincerely,

Matthew Kownacki
Director, State Research and Policy
American Financial Services Association