



CALIFORNIA COMMUNITY  
BANKING NETWORK



April 12, 2024

The Honorable Dave Min  
Member, California State Senate  
1021 O Street, Suite 6710  
Sacramento, CA 95814

**RE: SB 1286 (Min): Rosenthal: Small Business Debts - OPPOSE**

Dear Senator Min,

The above noted organizations, representing original lenders doing business in California, respectfully submit our concerns related to Senate Bill 1286 as amended on March 18, 2024. Small businesses are engines of job creation and economic growth, and the banking industry has a long history of ensuring that small businesses have access to the capital and financial products that they need to survive and thrive. While we recognize that ensuring that small business borrowers are empowered to successfully manage their finances and repay loans is a laudable goal, we write to express the following preliminary concerns with SB 1286, as we believe that implementing new provisions intended for consumer debts on the collection of commercial debts may result in a chilling effect on small business lending due to litigation risk and unachievable compliance mandates that the measure currently presents.

**Consumer Debt & Commercial Debt is Not Apples to Apples**

The Fair Debt Collection Practices Act (FDCPA) govern how debt collectors may try to collect on consumer debts owed. Individual consumers in California are also protected by the Rosenthal Fair Debt Collection Practices Act (Rosenthal), which covers more types of collectors and offers additional protections to consumers.

The FDCPA is based on the "least sophisticated consumer standard," meaning a debtor must be considered uninformed, naive, or trusting. In its ruling in *Avila, et al. v. Riexinger & Associates, LLC*, the Second Circuit held that a debt collector cannot presume that a consumer understand the most elementary rules of debt collection. Similarly, Rosenthal is applied and enforced through the least sophisticated consumer standard.

As amended, SB 1286 proposes to incorporate business debts into Rosenthal, an act enforced through the least sophisticated consumer standard. By definition, a business is not a consumer. Because both the FDCPA and Rosenthal provide oversight over the collection of consumer debts and are applied at the least sophisticated consumer standard, it may be more appropriate to consider alternative methods to accomplish the goal of creating additional criteria for collection of commercial debts owed by a small business.

Consumer debt versus commercial debt is not an apples-to-apples comparison. Business owners are generally entrusted with a higher credit line than traditional consumers due to the rigorous requirements and sophistication needed to access a commercial purpose loan. Because Rosenthal provides oversight over the collection of consumer debts, many of the act's provisions impractical or are simply impossible in the context of the collection of commercial debts. Several examples of these conflicts are laid out below.

For example, Section 1788.12(a) of Rosenthal places restrictions around communications with a debtor's employer; in a small business context, the employer is likely the small business itself. In Section 1788.12(b), Rosenthal restricts a debt collector from communicating about the debt with family members. It is possible that a collector's communications with the business may include discussions with employees who are family members. Section 1788.12(c) restricts a debt collector from disclosing to any person the nature of the consumer debt by naming the debtor. It is appropriate in a consumer context not to name an individual debtor; however in commercial note sales, an entity may be listed and this is common practice. Would this also restrict those attempting to collect from sharing the business' name in question with the Better Business Bureau, a nonprofit organization that has a mission of advancing trust within the business marketplace?

Third party disclosure is further complicated by the fact that in a small business, there are many others who have the capacity to discuss the debt but are not necessarily the borrower or guarantor under the loan (e.g., bookkeeper). Restrictions on third party communications in a small business context would create cumbersome hurdles in reaching a resolution for all parties.

Section 1788.15(b) states that no collector shall attempt to collect a consumer debt, other than one reduced to a judgment, by means of judicial proceedings in a county other than the county in which the debtor has incurred the debt or the county in which they reside at the time of the proceedings or at the time the debt was incurred. In a consumer context, this provision has merit – a consumer would not have to go to a far-away court that they have no connection to. However, in a commercial context, actions are often required to be brought where the collateral is located – not where the borrower is located. Small businesses could have places of business in many different counties or even states. There are also scenarios where a business owner does not reside in the same judicial district where they operate the business, or obligors (e.g. different guarantors) may reside in

multiple places. Lastly, some businesses may have contractually agreed upon a specific venue to file claims which could create additional confusion and inefficiency.

Section 1788.13(j) states that no collector shall make false representations that a legal proceeding has been, is about to be, or will be instituted unless payment of a covered debt is made. In the commercial context, reservations of rights in contracts and in subsequent communications are common practice in business agreements. In a business context these are needed, in order to enforce these rights, but under SB 1286, this could be construed as a violation.

Section 1788.17 the FDCPA, which in its Congressional findings and declarations states that the act is specifically for consumer debts. The legislative history of the FDCPA does not contemplate nor include business/commercial purpose debts. Similarly, references to the Fair Credit Reporting Act (FCRA) may present confusion, as FCRA is generally limited to consumer purpose transactions but applies in some cases to commercial purpose transactions involving a consumer.

### **Definition of Small Business**

Section 1788.2(n) of the measure sets forth qualifying factors to define a small business; the factors are vague and it is unclear what would serve as a way to verify the accuracy of the qualifying factors in this definition. For example, the definition states that the entity is “independently owned and operated” and “not dominant in its field of operation.” These terms are ambiguous and subjective, and it is unclear how a creditor or collector would have access to this information. The section states that all officers of the business are domiciled in California and that the business has 100 or fewer employees. A creditor is unlikely to have this level of information, which is also subject to change at any given time.

The measure’s definition of “small business” also includes annual gross receipts calculations over a three-year period of \$15 million, which seems high for a “small business” and may not be suited for a variety of industries. Again, a creditor may not have access to gross receipts to verify this qualifying factor. By incorporating small businesses into Rosenthal, SB 1286 seems to suggest that the financial sophistication of a small business is akin to the “least sophisticated consumer” standard, but a business managing \$15 million in gross receipts and 100 employees seems to indicate an entirely different level of acumen and engagement. For comparison, California’s dollar limit on limited civil cases is \$35,000. This increase began in January 2024 and was enacted by way of Senate Bill 71 (Umberg, 2023, Chapter 861), which increased the jurisdictional limit on small claim cases to \$12,500 and mid-level cases to \$35,000. If the intent of the measure is indeed to protect truly small California businesses, the thresholds should be adjusted accordingly.

### **Scope of Collectors**

The fact sheet specifically cites practices of debt collection agencies, suggesting a narrow scope of debt collecting entities that would be impacted by the provisions of SB 1286.

However it is vital to note that the Rosenthal Fair Debt Collection Practices Act defines a debt collector in Section 1788.2(c) as “any person who, in the ordinary course of business, regularly, on behalf of that person or others, engages in debt collection. The term includes any person who composes and sells, or offers to compose and sell, forms, letters, and other collection media used or intended to be used for debt collection.” While this definition does indeed include debt collection agencies, current law also includes original lenders.

By scoping commercial transactions into the act, one may also interpret that SB 1286 proposes that all companies that sell or extend credit to a small business and that have an accounts receivable department would be considered debt collectors and would be subject to the many laws and regulations that debt collectors abide by, including licensing with the Department of Financial Protection and Innovation. This would likely require subsequent legislation to amend the licensing statute, as new entities that do not currently have a debt collection license would not be able to collect on commercial debt until they obtain a debt collection license from the Department of Financial Protection and Innovation (DFPI).

### **Types of Debt**

As written, it is unclear the types of loans and lines of credit that SB 1286 intends to impact. Aside from a traditional loan, small businesses also access capital through credit cards, home equity lines of credit (HELOC), etc. One solution may be to clarify that the measure applies to personal guarantees of commercial debt. Without necessary guardrails, the possible impacts of this measure will be exponentially greater and is likely to inadvertently result in small businesses facing restricted access to financial products and services that would help them grow and thrive.

### **Effective Date**

One may interpret SB 1286 as an attempt to retroactively impact existing obligations. As written, it is unclear whether this will be applied to small business debt originated on or after the effective date. Applying the measure’s provisions to existing debt will create severe operational issues for creditors to even determine whether a business qualifies. Compliance will be challenging if not impossible for debt collecting entities. At a minimum, the measure should apply to debts originated after July 2025 to also allow for compliance systems to operationalize.

### **Timing Considerations**

This measure represents a massive change to decades' old law which was the result of lengthy negotiations and necessary careful consideration; and this measure deserves similar adequate time to be vetted by relevant stakeholders. One may question whether the subject matter would be more deserving of reintroduction during the first year of a two-year session, which would allow for more thorough and thoughtful analysis and negotiation by all impacted parties. As illustrated, adding commercial debts owed by a small business into the Rosenthal framework is not a simple and direct addition, and in

fact, represents a substantial change to existing law that may ultimately harm those that SB 1286 attempts to help. If the goal of the measure is to prevent fraudulent behavior in the collection of commercial debts owed by a small business, we would look forward to participation in stakeholder meetings that contemplate alternative approaches that do not present this level of conflict and impracticality.

For these reasons, we must oppose SB 1286.

Respectfully,

California Bankers Association – Melanie Cuevas, VP of Government Relations  
American Financial Services Association – Scott Govenar, Contract Lobbyist  
California Community Banking Network – Lindsay Gullahorn, Contract Lobbyist  
California Creditors Bar Association – Harvey Moore, Contract Lobbyist  
California Credit Union League – Emily Udell, Policy Advocate  
California Financial Services Association – Scott Govenar, Contract Lobbyist  
California Mortgage Bankers Association – Indira McDonald, Contract Lobbyist

cc: All Members, Senate Banking and Financial Institutions  
Michael Burdick, Consultant, Senate Banking and Financial Institutions  
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