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March 8, 2021

Submitted via email to: regulations@dfpi.ca.gov

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

**Re: Invitation for Comments on Proposed Rulemaking Under the
California Consumer Financial Protection Law (PRO 01-21)**

Dear Mr. Carriere:

On behalf of Encore Capital Group, Inc. and its subsidiaries, including Midland Credit Management, Inc. (“MCM”) (collectively, “Encore” or the “Company”), we appreciate the opportunity to submit comments to the California Department of Financial Protection and Innovation (“DFPI”) on the above-referenced Invitation for Comments on Proposed Rulemaking Under the California Consumer Financial Protection Law (“CCFPL”).

Background on Encore and our Consumer-Centric Approach

Encore is a San Diego-based publicly traded company with nearly 70 years of experience helping consumers toward a better life. Our Company purchases portfolios of consumer receivables from major banks and retailers, and partners with individuals as they repay their obligations and work toward financial recovery. The accounts we purchase are mostly charged-off credit card receivables.

Over the past two decades, our Company has evolved from a small, West Coast-based debt purchaser to a publicly traded, global company. As one would expect from an industry leader, we have robust and well-staffed professional departments (including Compliance, Enterprise Risk Management, Quality Assurance, Information Technology, and Legal and Regulatory Affairs), as well as a Board of Directors that provides close oversight of the Company. These business functions and our Board are focused on ensuring compliance with laws, consumer protection, and an unwavering commitment to treating our consumers fairly and ethically.

Through our approximately 8,000 employees, we take a consumer-centric approach to helping consumers resolve their obligations. As part of this, per our Consumer Bill of Rights, we do not collect fees or pre-judgment interest, often offer consumers deep discounts and flexible payment options, cease collections on active-duty



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servicemembers, and forgive or suspend debt where consumers demonstrate a hardship.¹ In addition, through our Company’s Mission, Vision and Values, we seek to work with our consumers to create pathways to economic freedom. We strive to build a partnership with our consumers, based on trust and respect. Often, we work with our consumers over a span of several years to help them create and fulfill a workable repayment plan.

During the pandemic, consistent with our Consumer Bill of Rights and our Company’s Mission, Vision and Values, we have re-doubled our efforts to support our consumers who have been impacted by job loss, health crises, or other impacts. We provided collections forbearance for COVID-impacted consumers, and we offer our consumers a variety of flexible payment options. During the pandemic, we have also stopped all bank garnishments and have publicly supported restrictions on garnishing government stimulus funds. In 2020, we forgave over \$216 million in debt to consumers across the country, including through hardship forgiveness and discounts.

The Role of Our Industry in the Economic Ecosystem

The credit and collections industry is an important part of the overall credit economy. Professor Todd Zywicki of the Mercatus Center at George Mason University is one of the leading researchers on our industry, and he has noted that “[t]he ability to effectively and efficiently collect consumer debts is a crucial underpinning of the American economy. Without the ability to enforce contracts, consumer lending would be scarce and expensive. Everyone would be worse off.”²

In addition to noting the key role a robust credit and collections industry plays in maintaining a healthy consumer credit ecosystem, an abundance of academic research over the past several years has also revealed that legislation and regulation creating barriers to the valid collection of delinquent debt results in a restriction of the flow of affordable credit offered to consumers. As research by Professor Zywicki and others has consistently found, a reduced ability of creditors and collectors to make contact with consumers means less delinquent debt recovered. This, in turn, means that creditors will tighten the flow of credit, which in turn will result in less access to mainstream credit. With higher losses on delinquent debt that cannot be recovered through selling the debt, banks will be less willing to offer credit and will likely charge higher interest rates, especially to consumers with poor credit scores and low incomes. Those are the consumers who need access to affordable credit the most, often times in order to pay for basics such as food, clothing, child care and housing.

¹ Our Company’s Consumer Bill of Rights can be found at <https://www.midlandcredit.com/are-you-a-customer/consumer-bill-of-rights/>.

² Todd Zywicki. September 2015. *The Law and Economics of Consumer Debt Collection and Its Regulation*. Mercatus Center, George Mason University. Available at <http://mercatus.org/publication/law-and-economics-consumer-debt-collection-and-its-regulation>



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Research by the Philadelphia Federal Reserve Bank has also demonstrated that placing more restrictions on the collection of validly owed debt causes the availability of credit to decrease while increasing the cost of credit.³ That research found that each additional restriction on debt collection activity decreases credit card recovery rates by nine percent. This lower recovery rate, in turn, results in a reduction in new extensions of credit and more expensive credit products. Professor Zywicki’s research has demonstrated similar unintended consequences for consumers. Due to increased costs and decreased availability of credit, low income consumers will be forced to turn to alternative lending products – such as payday loans, title loans or short term installment loans – at a much higher cost.⁴ Similarly, a report from researchers at the Harvard Kennedy School of Government found that a 250% surge in credit-card related restrictions by regulators since 2007 contributed to a 50% drop in annual credit originations to lower-risk-score Americans.⁵ In addition, a New York Federal Reserve Bank Staff Report concluded, “We find consistent evidence that restricting collection activities leads to a decrease in access to credit and a deterioration in indicators of financial health...with effects concentrated primarily among borrowers with the lowest credit scores.”⁶

With this background in mind, we are pleased to have the opportunity to provide comments in response to the Invitation for Comments. We address three categories the DFPI has asked about, which relate to registration requirements, complaint handling and disclosures.

Registration Requirements

As a debt purchaser and debt collector, we are licensed throughout the nation, in every state and city as required. As the DFPI considers registration and licensing requirements for our industry, we would like to share our thoughts regarding several aspects.

First, we are pleased that for licensing our industry, the DFPI may use the national licensing framework of the Nationwide Multistate Licensing System & Registry (“NMLS”),⁷ as the DFPI uses for Mortgage Loan Originators. Under the law,

³ See Fedaseyeu, Viktor, Debt Collection Agencies and the Supply of Consumer Credit (Working Paper No. 13-38). Federal Reserve Bank of Philadelphia (May 2013).

⁴ Todd Zywicki. *The Law and Economics of Consumer Debt Collection and Its Regulation* (Sep. 2015), located at <https://www.mercatus.org/system/files/Zywicki-Debt-Collection-v2.pdf>.

⁵ Marshall Lux and Robert Green, *Out of Reach: Regressive Trends in Credit Card Access*, Harvard Kennedy School of Government (April 2016).

⁶ Julia Fonseca, Katherine Strair, and Basit Zafar, *Access to Credit and Financial Health: Evaluating the Impact of Debt Collection*, Federal Reserve Bank of New York Staff Reports, no. 814 (May 2017).

⁷ Debt Collection Licensing Act, Financial Code, Division 25, Section 100006.3.



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the DFPI may require a debt collection licensing application and any fees, fingerprints, financial statements, supporting documents, changes of address, and other information to be submitted through NMLS.⁸ Our experience licensing through NMLS in other states is that using NMLS allows for streamlined, consistent standards in licensing applications and coordination with other states. We would ask that we be enabled to apply for licensing in the state expeditiously under NMLS, to ensure that we are in full compliance with the law as we engage in debt collection in California.

Second, we support the requirements that “[a] license shall be obtained for the licensee’s principal place of business and shall not be transferred or assigned. A separate license is not required for each individual branch office.”⁹ As a company with multiple branch locations throughout the nation, these requirements help ensure that the licensing application process will be efficient.

Disclosures

The DFPI has asked for comments on whether it should prescribe rules to ensure that the features of a consumer financial product or service are fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service.

With regard to debt collection disclosures, we support providing consumers with robust disclosures about their rights and responsibilities. Our goal is for clear and transparent communications with our consumers. The existing federal and state consumer disclosures required for our industry are robust, and we believe that additional disclosure requirements would more likely serve to add confusion to already lengthy disclosures our consumers receive. Should the DFPI decide to issue additional disclosure requirements for our industry, we urge the DFPI to ensure that they do not conflict with existing disclosure requirements or create confusion for our consumers.

Below is an overview of the extensive federal and California disclosure requirements that exist for our industry.

Existing Disclosure Requirements

Under the Fair Debt Collection Practices Act (FDCPA),¹⁰ as well as the Fair Debt Buying Practices Act¹¹ and Rosenthal Fair Debt Collection Practices Act¹² under

⁸ *Id.*

⁹ Debt Collection Licensing Act, Financial Code, Division 25, Section 100001(a).

¹⁰ 15 U.S.C. § 1692 –1692p.



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California state law, there exist an extensive array of disclosure requirements. There are also applicable disclosure requirements under other laws not specific to our industry, including the Federal Gramm-Leach-Bliley Act (GLBA)¹³ and the California Consumer Privacy Act (CCPA),¹⁴ which we must comply with. With regard to the debt collection-specific disclosure requirements, they include, but are not limited to:

- Under the FDCPA, debt collectors must provide a validation notice to consumers within five days of the first communication with the consumer. The validation notice includes a host of account information, and notifies consumers on how they can dispute the debt or seek the name and address of the original creditor.¹⁵
- Under the FDCPA, debt collectors must disclose that they are attempting to collect a debt and that any information obtained will be used for that purpose (this is referred to as the “mini-Miranda” disclosure).¹⁶
- California law has a host of state-specific required disclosures for our industry, including disclosures regarding statutes of limitation and credit bureau reporting.¹⁷ Those disclosures require debt collectors to notify consumers whether the account is still within the statute of limitations and whether it is being credit reported. These disclosures are as follows:

(2) When collecting on a time-barred debt where the debt is not past the date for obsolescence provided for in Section 605(a) of the federal Fair Credit Reporting Act (15 U.S.C. Sec. 1681c):

“The law limits how long you can be sued on a debt. Because of the age of your debt, we will not sue you for it. If you do not pay the debt, [insert name of debt buyer] may [continue to] report it to the credit reporting agencies as unpaid for as long as the law permits this reporting.”

(3) When collecting on a time-barred debt where the debt is past the date for obsolescence provided for in Section 605(a) of the federal Fair Credit Reporting Act (15 U.S.C. Sec. 1681c):

¹¹ Cal. Civ. Code § 1788.50 *et seq.*

¹² Cal. Civ. Code §§ 1788 *et seq.*

¹³ 15 U.S. Code § 6801 *et seq.*

¹⁴ Cal. Civ. Code § 1798.100 *et seq.*

¹⁵ 15 U.S. Code § 1692g

¹⁶ 15 U.S. Code § 1692e.

¹⁷ Cal. Civ. Code § 1788.52.



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“The law limits how long you can be sued on a debt. Because of the age of your debt, we will not sue you for it, and we will not report it to any credit reporting agency.”

- California requires that, if we furnish negative information to a credit reporting agency, we must notify the consumer first.¹⁸ The notice shall be in writing and must be sent prior to or within 30 days after the transmission of the negative credit information. The notice is sufficient if it is in substantially the following form:

“As required by law, you are hereby notified that a negative credit report reflecting on your credit record may be submitted to a credit reporting agency if you fail to fulfill the terms of your credit obligations.”

- California also requires that, if a language other than English is principally used by the debt buyer in the initial oral contact with the consumer, a validation notice shall be provided in that language within five working days.¹⁹
- In addition, California requires that a debt buyer shall include with its first written communication with the debtor (*i.e.*, the validation notice) in no smaller than 12-point type, a separate prominent notice that provides:

“You may request records showing the following: (1) that [insert name of debt buyer] has the right to seek collection of the debt; (2) the debt balance, including an explanation of any interest charges and additional fees; (3) the date of default or the date of the last payment; (4) the name of the charge-off creditor and the account number associated with the debt; (5) the name and last known address of the debtor as it appeared in the charge-off creditor's or debt buyer's records prior to the sale of the debt, as appropriate; and (6) the names of all persons or entities that have purchased the debt. You may also request from us a copy of the contract or other document evidencing your agreement to the debt.

“A request for these records may be addressed to: [insert debt buyer's active mailing address and email address, if applicable].”

- Under the state's Rosenthal Act, debt collectors must provide consumers with a notice of their rights:

¹⁸ Cal. Civ. Code § 1785.26 (b) – (c).

¹⁹ *Id.*



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“The state Rosenthal Fair Debt Collection Practices Act and the federal Fair Debt Collection Practices Act require that, except under unusual circumstances, collectors may not contact you before 8 a.m. or after 9 p.m. They may not harass you by using threats of violence or arrest or by using obscene language. Collectors may not use false or misleading statements or call you at work if they know or have reason to know that you may not receive personal calls at work. For the most part, collectors may not tell another person, other than your attorney or spouse, about your debt. Collectors may contact another person to confirm your location or enforce a judgment. For more information about debt collection activities, you may contact the Federal Trade Commission at 1-877-FTC-HELP or www.ftc.gov.”

(b) The notice shall be included with the first written notice initially addressed to a California address of a debtor in connection with collecting the debt by the third-party debt collector.

(c) If a language other than English is principally used by the third-party debt collector in the initial oral contact with the debtor, a notice shall be provided to the debtor in that language within five working days.

While not a complete list, the snapshot of various requirements above demonstrates the breadth of disclosure requirements that currently exist for our industry under both federal and state law. When determining whether there is a need to issue additional disclosure requirements, we respectfully request that the DFPI consider the existing requirements in place to determine whether more disclosures, in addition to the already lengthy disclosures given, would provide incremental benefits to consumers. Should the DFPI propose any additional disclosure requirements, we urge the DFPI to ensure that they are not duplicative or contradictory to the existing requirements, which could create substantial confusion for our consumers.

Additional Federal Disclosure Requirements Will Take Effect in November 2021

In addition to the existing disclosure framework under federal and state law, more federal disclosure requirements will take effect in November 2021. The Federal Consumer Financial Protection Bureau (“CFPB” or “the Bureau”) recently completed a seven-year long rulemaking for our industry. With comprehensive debt collection rules issued in October 2020 and December 2020, effective November 30, 2021,²⁰ our industry

²⁰ The final October 2020 CFPB debt collection rules can be found here: https://files.consumerfinance.gov/f/documents/cfpb_debt-collection_final-rule_2020-10.pdf. The final



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will now have specific standards with which to comply, where previously there had been no uniform rules, including those related to disclosures. We view this development as a significant and positive step in the evolution of the regulation of the debt collection industry.

The CFPB's debt collection rules will require a host of disclosures in the validation notice, including:

- **Debt collector communication disclosure:** A statement that indicates the communication is from a debt collector.
- **Name and mailing information:** The debt collector's name and mailing address, the name and mailing address of the consumer who owes the debt, and the name of the creditor to whom the debt is currently owed. Also, if the validation information is provided in connection with a debt related to a consumer financial product or service (*e.g.*, credit card debt, mortgage-related debt), the name of the creditor as of the itemization date.
- **Account number:** The account number (full or truncated) associated with the debt.
- **Itemization-related information:** An itemization of the current amount of the debt reflecting interest, fees, payments, and credits since the itemization date. The "itemization date" reflects an event in the debt's history that provides a reference point that consumers may recognize. The debt collector may select one of five reference dates as the itemization date: 1) the last statement date; 2) the charge-off date; 3) the last payment date; 4) the transaction date; or 5) the judgment date. The debt collector may disclose the itemized information as of that itemization date on a separate page provided in the same communication with the validation notice if the debt collector includes on the validation notice, where the itemization would have appeared, a statement referring to that separate page.
- **Current amount of the debt:** The amount of the debt as of when the validation information is provided.
- **Information about consumer protections:** Statements about the consumer's right to dispute the debt and request original-creditor information, and rights that apply if the consumer completes those actions. The statements must include the date the validation period (*i.e.*, the 30-day period, during which the consumer's submission of disputes and requests for original-creditor information about the debt obligates the debt collector to respond before resuming collection of the debt) will end. Additionally, for consumer financial product or service debts, a

December 2020 CFPB debt collection rules can be found here:

https://files.consumerfinance.gov/f/documents/cfpb_debt-collection_final-rule_2020-12.pdf.



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statement directing the consumer to a page on the Bureau’s website with more information regarding consumer protections in debt collection.

- **Consumer-response information:** Prepared statements and prompts that the consumer may use to take certain actions, such as disputing the debt. On the model notice, the consumer-response information is formatted as a tear-off that the consumer may detach and return to the debt collector, if the consumer chooses. If the validation notice is provided electronically, the consumer-response information must include a statement explaining how the consumer can take these actions electronically.

The contents above must be “clear and conspicuous,” which is defined in the CFPB’s rule to mean readily understandable. If the validation notice is provided in writing or electronically, the location and type size also must be readily noticeable and legible to consumers.

In addition to the required content, the debt collector may also include certain optional content in the validation notice, provided that the optional content is no more prominent than the required content. Optional content includes: 1) the debt collector’s telephone contact information, 2) a reference code the debt collector uses to identify the consumer or the particular debt, 3) certain payment disclosures, 4) certain electronic communication information, such the debt collector’s website or email address, 5) certain Spanish-language disclosures regarding how a consumer may request a Spanish-language validation notice, 6) the merchant brand, affinity brand, or facility name associated with the debt, and 7) disclosures specifically required under (or that provide safe harbor under) other applicable law.

If the validation information is provided electronically, the CFPB’s rule allows the debt collector the option to vary the format or content of the notice in certain places to accommodate the electronic delivery, such as by including hyperlinks or formatting consumer response prompts into fillable fields.

In addition to the new validation notice requirements, the CFPB’s rule requires debt collectors to notify consumers before they furnish collection information about a debt to a credit reporting agency (CRA). Under the disclosure, before a debt collector furnishes information to a CRA the debt collector must do one of the following: 1) Speak with the consumer in person about the debt; 2) Speak with the consumer by telephone about the debt; 3) Mail the consumer a letter about the debt and wait a reasonable period of time to receive a notice of undeliverability; or 4) Send the consumer a message about the debt by electronic communication and wait a reasonable period of time to receive a notice of undeliverability.

The CFPB’s new rule also restates and updates other FDCPA-required oral and written disclosures. The rule generally restates the FDCPA’s requirement that a debt



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collector must disclose in their initial, and in each subsequent communication with the consumer, that the communication is from a debt collector (*i.e.*, the “mini-Miranda” disclosure). The rule requires a debt collector to make these disclosures in the same language, or languages, used for the rest of the communication in which the disclosures are conveyed. The rule clarifies that all required disclosures must be sent in a manner that is reasonably expected to provide actual notice and required written disclosures must be sent in a form that the consumer may keep and access later. To meet the general standard when sending required written disclosures electronically, a debt collector must send the disclosures in accordance with the Electronic Signatures in Global and National Commerce Act (E-SIGN Act)’s consumer-consent requirements.

The CFPB’s debt collection rules are comprehensive and lengthy – they are over 1,000 pages in total between the rules issued in October 2020 and December 2020 – and, as stated above, they were the result of over seven years of intensive industry research by the CFPB and feedback from consumer groups, small businesses, academics and other experts on the credit and collections industry. With an effective date of November 2021, the new rules cover a broad array of disclosures, and are intended to create even greater transparency for our consumers as well as clear standards for the collections industry.

With the existing comprehensive framework of federal and state disclosure rules, and new rules to take effect this year, additional rules by the DFPI have the potential to create confusion for consumers and uncertainty as to what the standards are for our industry. We ask that should the DFPI propose new debt collection disclosure rules, they do not duplicate or contradict the existing or new CFPB requirements.

Complaint Handling

As demonstrated in the previous sections, our industry is heavily regulated on the federal and state level. As with disclosures, there is an existing robust framework of regulation relating to how debt collectors must investigate and respond to complaints and disputes from consumers.

The Federal Fair Credit Reporting Act (“FCRA”)²¹ and the FDCPA both set forth requirements for handling consumer disputes and complaints (collectively referred to as “disputes”). Under the FDCPA, consumers may dispute a debt verbally or in writing. If a consumer only disputes a debt verbally the debt collector is not obligated to provide the consumer verification of the debt. Encore does, however, provide verification of the debt to consumers who submit disputes verbally.

²¹ 15 U.S.C. § 1681.



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When a debt is disputed, under federal law, the debt must be marked as disputed in a debt collector's records, and if the debt is subsequently reported to a CRA, the report must reflect the dispute. If a consumer disputes a debt in writing and within thirty days of receiving the validation notice, a debt collector must send verification of the debt to the consumer before continuing collection activity. If a debt collector furnishes information to CRAs, the debt collector also has important compliance obligations under the FCRA if a consumer disputes a debt.

The FCRA permits a consumer to dispute information with a CRA or directly with the furnisher. Much like the FDCPA, if a consumer disputes a debt (verbally or in writing), the FCRA requires that the reported item must be marked as disputed. In many instances a dispute will also require a furnisher to conduct a "reasonable investigation" of the disputed information. Exactly how and when the furnisher needs to respond to the dispute will depend on whether the consumer initiated the dispute with the furnisher or the CRA.

Under California law, there also exist specific requirements for our industry regarding the handling of consumer complaints and disputes. Under the Fair Debt Buying Practices Act, when a consumer requests information regarding the debt or proof of the debt, the debt buyer must provide a robust amount of information and documents to the consumer within 15 calendar days. The documents and information includes proof that the debt buyer is the sole owner of the debt at issue, the debt balance at charge-off and an explanation of all post-charge-off interest and fees, the date of default or date of last payment, the name and address of the charge-off credit, the names and addresses of all owners of the debt after charge-off, the California license number of the debt buyer, and other information.²²

As noted above, the CFPB has also created robust new standards for the debt collection industry – a result of seven years of industry research and collaboration with stakeholders. The new CFPB rule, which takes effect in November 2021, creates new standards for collectors respond to consumer disputes and complaints.²³ The new rule addresses various items relating to dispute handling, including:

- As in the FDCPA currently, the new rule requires debt collection be ceased in the validation period upon a consumer's written request.
- Establishes a framework for obtaining E-SIGN consent to respond to consumers electronically to requests for validation.
- The rules address how to handle a duplicative dispute, which is a dispute made again within the validation period that does not include new or material

²² Cal. Civ. Code § 1788.52.

²³ See *supra* note 20.



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information to support the dispute, such as documentation showing account was paid.

If a consumer disputes an account or requests validation, we respond under both the federal and state requirements. This is a complex framework and, as the DFPI explores the possibility of creating additional rules for handling disputes and complaints, we urge the DFPI to ensure that any new standards are not duplicative or conflicting with the existing federal and state requirements.

* * *

Thank you for your efforts to solicit feedback on these important issues under the CCFPL. Should you have any questions about our comments, please don't hesitate to contact us at tamar.yudenfrend@mcmcg.com.

Respectfully submitted,

/s/ Sheryl A. Wright

/s/ Tamar Yudenfrend

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