Attorneys at Law

1901 Camino Vida Roble, Suite 100
Carlsbad, California 92008

74-900 Highway 111, Suite 222
Indian Wells, California 92210

(844) 4DELPHI ♦ Fax: (760) 820-2696 ♦ www.DelphiLLP.com

June 8, 2021

Via E-Mail: Peggy.Fairman@dfpi.ca.gov

Department of Financial Protection and Innovation
Attn: Senior Counsel Peggy Fairman
2101 Arena Boulevard
Sacramento, California 95834

Re: PRO 02/20 (Notice)

Dear Ms. Fairman:

Delphi Law Group, LLP ("Delphi") represents hundreds of common interest developments ("CID") throughout Southern California. Delphi practices almost exclusively in CID law and provides a full range of legal services, including, but not limited to, corporate counsel, civil litigation, regulatory compliance, governing document interpretation and enforcement, and assessment recovery. While not a large percentage of its business, Delphi does seek recovery of unpaid homeowner assessments on behalf of its CID clients. Delphi's assessment recovery services include non-judicial foreclosure actions, post-foreclosure services (such as unlawful detainer actions), personal lawsuits, and judgment enforcement (such as writs, wage garnishments and asset levies).

The adoption of the Debt Collection Licensing Act ("DCLA") has created much confusion within the CID community, as it is unclear if the licensing regulations apply to law firms and management companies that provide homeowner assessment recovery services. The DCLA is silent with respect to whether it applies to persons or entities attempting to collect homeowner assessments. The DCLA's definitions of "debt collector," "consumer debt," and "consumer credit transaction" make no reference to CIDs or homeowner assessments. As a result, we must look to the words of the DCLA statute and the Department of Financial Protection and Innovation's ("DFPI") proposed regulations to determine whether the collection of homeowner assessments falls within the statute's purview. Unfortunately, the DFPI's proposed regulations do not provide clear guidance.

The term "debt collection" is defined under the DCLA as "any act or practice in connection with the collection **of consumer debt**." Cal. Finance. Code § 10002(i) [Emphasis added.]. A "**debt collector**" is defined by California Finance Code § 10002(j) as follows:

> "Debt collector" means any person who, in the ordinary course of business, regularly, on the person's own behalf or on behalf of 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.

The prohibitions and enforcement provisions of the DCLA apply only to "consumer debt." "Consumer debt" is defined under the DCLA as follows:

> "Consumer debt" or "consumer credit" means money, property, or their equivalent, due or owing, or alleged to be due or owing, from a natural person **by reason of a consumer credit transaction**. [Emphasis added.]

A "consumer credit transaction" is defined in California Finance Code § 10002(e), which states:

> "Consumer credit transaction" means a transaction between a natural person and another person in which property, services, or money is acquired **on credit** by that natural person from the other person primarily for personal, family, or household purposes. [Emphasis added.]

If there is no "consumer credit transaction," there is no consumer debt and the DCLA does not apply. Cal. Finance Code § 10002(f). By extension, if there is no "consumer debt," then there is no "debt collection" and no "debt collector."

Thus, the question boils down to whether a homeowner's covenant to pay assessments is a transaction "in which property, services, or money is acquired **on credit**." Unfortunately, neither the DCLA nor the proposed regulations define the phrase "on credit." In addition, neither the language of the DCLA nor the legislative history provide guidance as to whether the term "consumer credit transaction" is intended to include homeowner association assessments.

While the DCLA and Rosenthal Fair Debt Collection Practices Act ("Rosenthal Act") share common definitions, they arise from completely different statutes. The DCLA and Rosenthal Act also have different stated purposes, as the Rosenthal Act regulates the activities of debt collectors, while the DCLA authorizes the Commissioner of the DFPI to enforce the licensing laws. In the absence of Legislative guidance for the DCLA, law firms and management companies have no other option but to look to case law to determine whether the term "consumer credit transaction" under the Rosenthal Act includes homeowner association assessments.

The Federal District Court for the Southern District of California has already considered and rejected such an interpretation in the case of *Durham v. Continental Central Credit* (S.D. Cal. October 20, 2009) 2009 U.S. Dist. LEXIS 96760, 17-19. In *Durham*, plaintiff failed to pay assessments to her homeowner association. *See Durham*, 2009 WL 3416114 at *1. The association referred her account to a collection agency, and plaintiff sued the association and the

agency under the Rosenthal Act. *Id*. at *2. The court granted summary judgment for defendants as to the Rosenthal Act claim. The court specifically reasoned that "the regular HOA assessments for ongoing maintenance and general services do not constitute a 'consumer credit transaction'" and that there was "no evidence that Plaintiff or the other homeowners acquired services on credit from the Association." *Id.* at *7; see also *Mlnarik v. Smith, Gardner, Slusky, Lazer, Pohren & Rodgers, LLP* (N.D. Cal. Jul. 28, 2014) 2014 WL 3728514 at **4-5 (following *Durham*; Rosenthal Act does not apply to HOA fees because no "consumer credit transaction" is present).

Further authority for the proposition that homeowner assessments are not "consumer credit transactions" is found in *Park Place Estates Homeowners Assn. v. Naber* (1994) 29 Cal. App. 4th 427. In an analysis of the statutes governing homeowner assessments, the Court stated:

> The Legislature has enacted very specific procedural rules governing condominium assessments. (See Civ. Code, § 1366, 1367.) Condominium homeowners associations must assess fees on the individual owners in order to maintain the complexes. (Civ. Code, § 1366, subd. (a).) **The assessment "shall be a debt of the owner . . . at the time the assessment [is] levied."** (Civ. Code, § 1367, subd. (a).) [Emphasis added.]

Park Place, 29 Cal. App. 4th 427, 431-432.

If the assessment is a debt of the owner at the time the assessment is levied, it is our opinion that it is not possible for it to be a "consumer credit transaction," as nothing is extended on credit. However, these cases were decided under the Rosenthal Act, not the DCLA. It remains to be seen whether the same logic will be applied to the DCLA.

As set forth in the DFPI Notice of Rule Making Action, the stated nonmonetary benefits to licensees from the proposed regulations include "clarifying the process and requirements" to apply for a license as a debt collector and "providing regulatory certainty when applying for a license to prevent licensees from inadvertently violating the Act." Unfortunately, the proposed regulations fell short in this regard. The proposed regulations could have provided clarity as to the application of the DCLA to debt collectors by simply defining the phrase "on credit" in Section 1850 of subchapter 11.3 of Title 10 of the California Code of Regulations. By failing to define this phrase, law firms and management companies who provide assessment recovery services for the more than 50,000 CIDs throughout California are left to guess whether a license is required to perform such work.

The DCLA requires that all debt collectors apply for a DFPI license by December 31, 2021. Law firms and management companies do not have the luxury of waiting for the courts to flesh out whether the term "consumer credit transaction" is intended to include homeowner association assessments. These entities will have no option but to incur the cost to comply with the proposed licensing requirements prior to the December 31, 2021, deadline, which includes an application fee, various investigation fees, costs related to statutorily required finger printing of key personnel

and to obtain credit reports for these individuals, and the costs to obtain a surety bond in the minimum amount of $25,000. These costs may be unnecessarily incurred if the Legislature did not intend for homeowner assessments to fall under the purview of the DCLA.

While the DCLA will not materially impact a CID's ability to recover delinquent assessments, it will certainly increase the costs associated with such efforts as greater state regulation tends to drive costs upward for all concerned. The costs incurred to comply with the DCLA will undoubtedly be passed on to the delinquent homeowners.

While there are a small number of potential exemptions to the application of the DCLA licensing requirement, law firms and management companies do not appear to be specifically exempted at this time. We urge the DFPI to clarify the reach of the DCLA by providing guidance as to what constitutes a "consumer credit transaction" and whether law firms and management companies that provide homeowner assessment recovery services to their CID clients are subject to the DCLA licensing requirement. If the Legislature intended the collection of homeowners assessments to be an activity triggering the need for a license, the regulations should say so. This can be accomplished by adding a definition of the phrase "on credit" and/or providing a specific exemption for law firms and management companies providing assessment recovery services to CIDs. We urge the DFPI to provide clarity in relation to the DCLA's scope prior to the deadline of December 31, 2021.

Very truly yours,

DELPHI LAW GROUP, LLP

Christina Baine DeJardin, Esq.
Kyle E. Lakin, Esq.
James R. McCormick, Jr., Esq.
Zachary R. Smith, Esq.