CALIFORNIA LEGISLATIVE ACTION COMMITTEE
community ASSOCIATIONS INSTITUTE

Via Certified Mail, Return Receipt Requested, U.S. Mail & Electronic Mail: (regulations@dfpi.ca.gov)

October 1, 2021

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

RE: SB 908 | Proposed Regulations Under the Debt Collection Licensing Act
Response to Invitation for Comments on Proposed Second Rulemaking
PRO 05-21

To Whom It May Concern:

The Community Associations Institute's California Legislative Action Committee (CAI-CLAC), which serves the interests of over 13 million homeowners residing in more than 55,000 common interest developments—commonly known as homeowners associations, condominiums, and planned communities—throughout California, submits the comments below to the proposed regulations under the California Debt Collection Licensing Act (CDCLA).

It is CLAC's position the CDCLA does not apply to collection activities to recoup delinquent common interest development assessments from association members. Yet, there is confusion as to whether non-profit homeowners associations, association management agents, association attorneys, and/or assessment lien service companies must register as "debt collectors," nonetheless. Rules as to the scope of the DCLA must be adopted to reconcile this ambiguity and clarify whether any or all of these entities must register as debt collectors and, if so, under what circumstances. In that context, CLAC responds to the questions on the proposed topics for rulemaking set forth in your August 19, 2021, invitation for comments as follows.

I. Scope of the CDCLA

A. The CDCLA defines several terms in Financial Code section 100002, including "debt," "debt collection," and "debt buyer." Which of these definitions are unclear? Are the definitions of these terms the same as those in the Rosenthal Act and FDBPA?

The terms "debt" and "debt collection" are ambiguous as the CDCLA is limited to the regulation of "consumer debt." The CDCLA Rules should clarify that homeowners association assessment collection activities are not subject to licensing obligations.

Senate Bill 908's definition of "debt collection" mirrors the definitions contained in the Rosenthal Act at section 1788.2 of the California Civil Code:

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> The definitions as stated in Article III section 100002 state that "debt collection" means any act or practice in connection with the collection of consumer debt; "consumer debt" is defined as 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; a "consumer credit transaction" is defined as 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.

California Financial Code 100002(f) states:

> (f) "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. The term "consumer debt" includes a mortgage debt. The term "consumer debt" includes "charged-off consumer debt" as defined in Section 1788.50 of the Civil Code.

The term "debt collection" is defined as "any act or practice in connection with the collection of *consumer debt*." (*Cal. Fin. Code* § 100002(i) (emphasis added).) A "consumer credit transaction" is defined by subpart (e) of the same section:

> (e) "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.

Thus, "debt collection" to which Senate Bill 908 ("SB 908") applies relates to any act or practice in connection with the collection of money, property, or their equivalent due or owing by reason of a transaction in which property, services, or money is **acquired on credit** primarily for personal, family, or household purposes.

Common Interest Development assessments are not "Consumer Debt" governed by the Act. Similar to property taxes, common interest development assessments provide funding for municipal and community services critical to all residents. Property taxes have been found to be outside of the realm of consumer debt as defined by the Fair Debt Collection Practices Act (FDCPA). *Beggs v. Rossi*, 145 F3d 511 [2 Cir. 1998]. As such, common interest development assessments should be found to be outside of the realm of consumer debt as defined by the CDCLA.

The primary source of funding for common interest development operations is payment of assessments (usually monthly) by the homeowners. Many homeowners associations and condominiums directly deliver services once under the exclusive jurisdiction of local government, including trash pickup, neighborhood lighting, and snow removal. This transfer of services has become commonplace as the demand for housing has outpaced the ability of many local governments to provide services. Not only has the transfer of service relieved local municipal budgets, its proven to be economically efficient for homeowners, too.

In addition, common interest developments own the common elements; including, but not limited to, stairwells, hallways, roofs, windows, heating, cooling and water facilities, streets, sidewalks, parks, lighting, elevators, etc. The owners of the lots or units within the association pay assessments to the community for maintenance and upkeep of these common elements. When an owner does not pay assessments, the remaining homeowners must make up the shortfall in the association's operating budget.

For business purposes, the common interest development is organized as a nonprofit corporation and its financial model depends on the collection of assessments from homeowners to fund the services and maintain amenities based on the style of home within the community—condominium, cooperative, townhome, or single-family residence. Included in the financial model is the collection of reserve funds for capital expenditures such as roof replacement, stairwell repair, street paving, etc. Common interest developments do not generate revenue for a profit.

"[T]here is a consumer credit transaction when the consumer acquires something without paying for it." (*Gouskos v. Aptos Vill. Garage* (2001) 94 Cal. App. 4th 754, 759 (analyzing the term consumer credit transaction under the Rosenthal Fair Debt Collection Practices Act); *see also Davidson v. Seterus, Inc.* (2018) 21 Cal. App. 5th 283, 296-97 (construing "consumer

credit transaction" as "a transaction between a natural person and another person in which property, services or money is acquired without immediate payment and with the promise to pay in the future….").) A homeowner's assessment obligation is not the result of a consumer credit transaction.

Every California common interest development (i.e., a homeowners association) has an obligation to "levy regular and special assessments sufficient to perform its obligations under the governing documents and [the Davis-Stirling Common Interest Development Act]." (*Cal. Civ. Code* § 5600.) Consequently, every owner within a common interest development has a corresponding duty to pay such assessments "when the assessment is levied by the…association." (*Diamond Heights Vill. Assn. v. Financial Freedom Sr. Funding Corp.* (2011) 196 Cal. App. 4th 290, 300.) That is, the obligation to pay assessments becomes due when it is levied by the association. Thus, owners are not acquiring services from the association on the promise of future payment. Therefore, assessments do not meet the definition of "consumer debt."

In light of the foregoing, it is our position the CDCLA does not apply to persons and businesses that engage in the collection of delinquent common interest development assessments, and the regulations should be clarified to reflect this fact. To that end, the following language should be added to Article 1, Section 1850(h)'s definition of "debt collector," "The term "debt collector" does not include a common interest development, community association manager, management company, community association attorney, or business collecting assessments for a common interest development, as defined by Civil Code Section 4100."

B. The CDCLA states that "[n]o person shall engage in the business of debt collection in this state without first obtaining a license pursuant to this division." Are Regulations needed to clarify the term "engaged in the business of debt collection"?

Yes, regulations are needed to clarify term "engaged in the business of debt collection." In order to determine whether a license is required, it is important to determine what is included within the definition of "debt collection." A "debt collector" subject to the licensing requirements of SB 908 is a person or entity who "**in the ordinary course of business, regularly,** on the person's own behalf or on behalf of others, **engages in consumer debt collection.**" (Proposed Regs. Art. 1, § 1850(h); emphasis added.) As discussed below, the CDCLA does not define what constitutes the phrases "in the ordinary course of business" or "regularly" as used in this context.

C. The CDCLA defines a debt collector as "any person who, in the ordinary course of business, regularly, on behalf of that person or others, engages in debt collection." Are regulations needed to clarify the term in the ordinary course of business" or "regularly"?

Yes. A common interest development does not "regularly . . . engage[] in consumer debt collection." A common interest development is not engaged in "business" in the conventional sense. It does not seek to generate profits. Rather, a common interest development is a "**non-profit corporation or unincorporated association created for the purpose of managing a common interest development.**" (*Cal. Civ. Code* § 4080; emphasis added.) The common interest development's primary function is to maintain infrastructure and enforce deed restrictions governing the community, including property owned in common with the other members. (*See, Cal. Civ. Code* §§ 4775 & 5975.) Thus, everything the common interest development does is for the benefit of the very people making the assessment payments, i.e., protecting the members' property interests. Likewise, the cost to comply with necessary licensing requirements must be paid by the presumed "consumers," i.e., the association members.

It strains the bounds of credulity to suggest, for example, a four-unit homeowners association "in the ordinary course of business, regularly ... engages consumer debt collection" when it collects homeowners assessments. Moreover, a homeowners association's managing agent and its attorneys help the Association discharge a bevy of obligations imposed by the governing documents, the Civil Code, and the Corporations Code unrelated to collection of assessments, e.g., maintenance of infrastructure, compliance with use restrictions, payment of vendors, negotiating contracts with vendors, obtaining insurance, maintaining and protecting operating and reserve funds, conducting elections, maintaining and producing Association documents, interpreting and amending the governing documents, and prosecuting and defending legal obligations. Assuming *arguendo* that assessment collection is subject to the CDCLA, how much and how often must a managing agent, attorney, or other vendor be involved in this process so as to be subject to the licensing requirements?

Does sending one invoice to a homeowner for an obligation imposed by the governing documents constitute "regularly" engaging in debt collection in the "ordinary course of business" so as to trigger the licensing obligations? Is an onsite manager of a homeowners association "in the ordinary course of business, regularly," for merely communicating on behalf of the homeowners association?

The licensing obligations should be clarified to avoid confusion and uncertainty as to who must obtain a license. The term "in the ordinary course of business" as used in Section 1850(h) should be defined in a manner to clarify that common interest development boards, community association attorneys, community association managers, and management companies are not engaged in the collection of a "consumer debt" in their "ordinary course of business."

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We thank you for your time and consideration. Please do not hesitate to contact us at JBeaumont@HOAattorneys.com or lbrown@kscsacramento.com if you have any questions or need additional information.

Sincerely,

Jeffrey A. Beaumont
Chair, CAI-CLAC