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October 5, 2021

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Via email at regulations@dfpi.ca.gov

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

Re: File No. PRO 05-21 – Invitation for Comments on Proposed Second Rulemaking under the Debt Collection Licensing Act

Dear Ms. Sandoval:

We appreciate the opportunity to comment on the second rulemaking that the Department of Financial Protection and Innovation ("**DFPI**") is considering making to adopt regulations under the Debt Collection Licensing Act ("**DCLA**").

Background

We represent various retailer clients that operate online and in hundreds of storefronts across California and the nation. The enactment of the DCLA and the promulgation of its implementing regulations has raised concerns for our retailer clients that they could be subject to the licensing requirements under the DCLA in connection with various activities that (i) these retailers engage in that are ancillary to the retailers' primary business; (ii) fall outside of the scope of the federal Fair Debt Collection Practices Act ("**FDCPA**"); and (iii) we believe should not be subject to the licensing requirements under the DCLA.

We understand that many of the definitions in the DCLA are similar to those under the Rosenthal Fair Debt Collection Practices Act ("**Rosenthal Act**"). However, the DCLA and the Rosenthal Act accomplish very different purposes. The Rosenthal Act is a law that regulates the acts and practices that are permissible for entities engaged in the collection of consumer debt, whereas the DCLA is a licensing law that gives the DFPI oversight over covered entities through the licensing process. Our retailer clients understand and support the broad application of consumer protection requirements under the Rosenthal Act to retailers and others, but we believe that applying the DCLA licensing requirements broadly to retailers whose debt collection activity is incidental to the retailer's business or does not

constitute a considerable portion of the retailer's overall business is inconsistent with the purpose of the DCLA and would create unnecessary burdens on retailers.

In particular, we are concerned that the DCLA could be interpreted to require a retailer to obtain a debt collection license in connection with a retailer's activities under a private label or co-brand credit card program. As background, some of our retailer clients have partnered with federally regulated credit card issuing banks to offer the retailer's customers private label and co-brand credit cards that are branded with the retailer's marks. These traditional private label and co-brand credit card programs are common in the market, and are intended to drive sales to the retailer's business. Under these private label and co-brand credit card programs, the bank is the issuer and creditor of the credit card and has total oversight and control over the co-brand credit card program. The retailer's control is generally limited to use of its brand in marketing materials and marketing channels. The retailer may also act as a service provider to the bank to provide related services to the bank in connection with the private label or co-brand credit card program, including accepting credit card applications, accepting credit card payments at the retailer's stores, preparing and mailing credit card account statements, sending payment reminders, and operating customer service call centers that handle customer requests related to the private label or co-brand credit card.[1] Retailers that provide these additional services to the bank generally do so not to generate revenue, but rather to protect their brand and customer relationship and to ensure that their customers receive the high levels of customer service that the retailer typically provides.[2]

In addition to activities in connection with private label and/or co-brand credit card programs, our retailer clients may also make sales to their customers on credit in the form of a retail installment contract. If the retailer retains ownership of the retail installment contracts, the retailer will typically engage in various servicing and debt collection activity related to the amount owed to the retailer, such as sending payment reminders, receiving payments, and providing customer support related to amounts owed to the retailer. Under California law, a retailer typically does not require a license to extend credit under a retail

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[1] We note that our retailer clients generally identify the bank in all communications with the cardholder as the credit card issuer, owner of the account, and the entity to which the cardholders are sending payments.

[2] These banks also are required to oversee, supervise and monitor these retailers' activities consistent with federal regulatory expectations, *e.g.*, the Office of the Comptroller of the Currency's guidance, OCC Bulletin 2013-29 "Third-Party Relationships: Risk Management Guidance" (Oct. 30, 2013) and OCC Bulletin 2020-10 "Third-Party Relationships: Frequently Asked Questions to Supplement OCC Bulletin 2013-29" (Mar. 5, 2020), and the Federal Deposit Insurance Corporation's guidance, FIL-44-2008, "Guidance for Managing Third-Party Risk" (June 6, 2008). See also "Proposed Interagency Guidance on Third-Party Relationships: Risk Management," 86 Fed. Reg. 38182 (July 19, 2021). The banks themselves are subject to significant regulatory oversight and scrutiny, and maintain the account relationship with the cardholder.

installment contract, but it appears that under the DCLA a retailer would need a license to service or collect payments owed to the retailer under the retail installment contract.

Summary of Comments

We strongly encourage the DFPI to promulgate regulations that clarify the scope of the DCLA so that a retailer whose debt collection activity is incidental to the retailer's business or does not constitute a considerable portion of the retailer's overall business (including a retailer who engages in servicing or debt collection activity in connection with a private label and/or co-brand credit card program) is not inadvertently required to obtain a license.

The DFPI should clarify the scope of the DCLA by:

1. Defining what it means to "engage in the business" of debt collection to clarify that a license is only required for "debt collectors"; and

2. Defining "ordinary course of business" and "regularly" to include only persons for whom a considerable portion of the person's business is debt collection and for whom debt collection is not incidental to the person's business.

Detailed Comments and Recommendations

More specifically, we urge the DFPI to promulgate regulations that clarify the scope of the DCLA as it would be applied to retailers whose primary business is not debt collection and whose debt collection activity is incidental to the retailer's business or does not constitute a considerable portion of the retailer's overall business.

1. Define what it means to "engage in the business" of debt collection to clarify that a license is only required for "debt collectors."

We encourage the DFPI to promulgate regulations that are consistent with respect to the licensing requirement.

We note that, under the DCLA, the provisions related to the licensing requirement are not entirely consistent. In particular, Cal. Fin. Code § 100001(a) states that a license is required to "engage in the business *of debt collection*," but Cal. Fin. Code § 100005 refers to "a person who is required to be licensed under this division [that] is engaged in business *as a debt collector*" (emphasis added). However, the definitions of "debt collection" and "debt collector" are not identical and the differences may be material. In particular, although the definition of a "debt collector" includes the requirement that the person be engaged in debt

collection "in the ordinary course of business, regularly," the definition of "debt collection" does not tie into that concept in any way.[3]

The inconsistent references to a license being required for engaging in the business of "debt collection" and engaging in the business "as a debt collector" could be resolved by promulgating regulations that clarify that a person is "engage[d] in the business of debt collection" if the person is a "debt collector" as defined under Cal. Fin. Code § 100002(j).

We encourage the DFPI to adopt the following definition of "engage in the business of debt collection":

> The term "engage in the business of debt collection" means engaging in business as a debt collector.

2. Define "ordinary course of business" and "regularly" to include only persons for whom a considerable portion of the person's business is debt collection and for whom debt collection is not incidental to the business.

The DCLA defines a "debt collector" 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 term "debt collector" includes "debt buyer" as defined in Section 1788.50 of the Civil Code.

The DFPI should promulgate regulations that further define what constitutes "ordinary course of business" and "regularly" as used in the definition of "debt collector." These terms should be defined in a way that focuses on the principal purpose of the entity and not on the frequency of debt collection activity alone.

As an example of the unintended consequences that would arise if the DFPI does not further define what constitutes "ordinary course of business" and "regularly", each as used in the definition of "debt collector", many of our retailer clients still accept checks for purchases made in-store. If a customer's check is returned due to insufficient funds or otherwise, the retailer may need to contact the customer via telephone, letter or otherwise to notify the customer that his or her check was returned and request payment for the purchase of the retailer's goods and services, including any additional fees owed to the retailer. For our retailer clients with hundreds of locations across California, the retailer is continuously

[3] See Cal. Fin. Code § 100002(i), (j).

collecting on returned checks as part of the retailer's core business. This remains true even though the number of returned checks the retailer collects on represents only a small portion of the total volume of transactions the retailer engages in as a retailer. Without clarification, such activities would render the retailer a "debt collector" as currently defined under the DCLA, and subject the retailer to licensing. As such, the DFPI should promulgate regulations that clarify that such a retailer would not be a debt collector under the DCLA because the returned check collection activity would not constitute a considerable portion of the retailer's business.

We encourage the DFPI to adopt the following definitions:

- A person is engaged in debt collection "in the ordinary course of business" if a considerable portion of the person's business is debt collection. When determining whether a considerable portion of a person's business is debt collection, the person's debt collection activity shall be compared to the total business activity performed by such person.

- A person is not "regularly" engaged in debt collection if the person's debt collection activity is incidental to the person's business.

These suggested clarifications to the meaning of "ordinary course of business" and "regularly" are consistent with the legislature's intent when promulgating the DCLA. Specifically, a Committee Report on the DCLA includes the following Senate Judiciary Committee staff analysis of the DCLA:

> The bill adopts the same salient definitions relating to debt collection currently in effect in the Rosenthal Fair Debt Collection Practices Act, so the licensing requirement is limited only to persons or businesses which "in the ordinary course of business, regularly" engage in debt collection of consumer debt—i.e., debt owed by a natural person on a credit transaction conducted "primarily for personal, family, or household purposes." In other words, ***only persons and businesses who spend a considerable portion of their business collecting on credit debt held by natural persons will have to be licensed***; the bill will ***exclude*** from licensure, e.g., persons who attempt to collect on debts owed between businesses and persons ***who only incidentally engage in debt collection activities***.[4]

We strongly urge the DFPI to adopt our proposed definitions of "ordinary course of business" and "regularly" so that retailers whose collection activities are not a considerable

[4] Senate Committee on Banking and Financial Institutions, "Debt collectors: licensing and regulation: Debt Collection Licensing Act," May 15, 2020 (*emphasis added*).

portion of their business activities or whose collection activities are only incidental to their business are not inadvertently subject to licensure under the DCLA.

In the alternative, the DFPI should consider a specific exemption to the definition of "debt collector" for purposes of the licensing requirement for retailers engaged in servicing and debt collection (i) on behalf of a bank in connection with the retailer's own private label and/or co-brand credit card programs, and (ii) in connection with the retailer's returned check collection activities. Without such a limitation, the definition and the licensing requirement would be counter to the legislative intent of the DCLA, which was not intended to apply to persons whose collection activities are not a considerable portion of their business or are incidental to their business.

* * *

We appreciate the opportunity to comment on the DFPI's proposal to undertake a second rulemaking regarding the DCLA, and we encourage the DFPI to move forward with a second rulemaking. If we can be of any assistance or provide clarification regarding these issues please contact me at [redacted].

Sincerely,

[redacted]

Crystal N. Kaldjob
Partner

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