REPLY TO FILE NO: PRO-05-21

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REPLY TO INVITATION FOR COMMENTS ON PROPOSED SECOND RULE MAKING UNDER THE DEBT COLLECTION LICENSING ACT

INTRODUCTION:

SB 908, titled the Debt Collection Licensing Act (DCLA) was passed and signed into law in 2020 and is set to take effect on January 1, 2022.

This measure is complemented by AB 1864, titled the California Consumers Financial Protection Law (CCFPL) which was also passed and signed into law in 2020 and took effect on January 1, 2021.

Both measures apparently capture all the findings and recommendations of the Federal Trade Commission (FTC) in its report dated July 2010 entitled "Repairing a Broken System Protecting Consumers in Debt Collection Litigation and Arbitration", which discusses comprehensively a myriad of consumer protection concerns, as follows:

On Litigation:

1. Filing suits based on insufficient evidence.
2. Failing to properly notify consumers of suits.
3. High prevalence of default judgments.
4. Improperly garnishing exempt fund from bank accounts.
5. Suing or threatening to sue on time-barred debts.

On Arbitration:

1. Binding consumers to resolve through arbitration without meaningful choice or awareness.
2. Bias or the appearance of bias in arbitration proceedings.
3. Procedural unfairness in arbitration proceedings.
4. Requiring consumers to pay substantially more to participate in arbitration proceedings than in comparable court proceedings.

The FTC's other principal findings, conclusions and recommendations with respect to debt collection litigation are:

States should consider adopting measures to make it more likely that consumers will defend in litigation. Very few consumers defend or otherwise participate in debt collection litigation, resulting in courts entering default judgment against them. States should take steps to ensure that: (1) consumers receive adequate notice when actions have been commenced; and (2) the costs to consumers of participating in such actions are not prohibitively high.

States should require collectors to include more information about the debt in their complaints. Complaints often do not contain sufficient information to allow consumers in their answers to admit or deny the allegations and assert affirmative defenses. To assist them in doing so, states should consider requiring that debt collection complaints include: (1) the name of the original creditor and the last four digits of the original account number; (2) the date of default or charge-off and the amount due at that time; (3) the name of the current owner of the debt; (4) the total amount currently owed on the debt; (5) the total amount owed broken down by principal, interest, and fees; and (6) the relevant terms of the underlying credit contract, if the contract itself is not attached to the complaint.

States should take steps to make it less likely that collectors will sue on time- barred debt and that consumers will unknowingly waive statute of limitations defenses available to them.

- In circumstances where it is difficult to determine the correct statute of limitations, it would be advantageous if states developed more clear and uniform statutes of limitations.

- Consumers do not understand that in many states a statute of limitations constitutes an affirmative defense which may preclude collectors from successfully suing to collect, so they rarely assert this affirmative defense. These states should assign to collectors the burden of proving that debts are not time-barred and require that they include the date of default and the statute of limitations in their complaints.

- Consumers are not aware that collectors cannot lawfully sue to recover on time- barred debt. To prevent deception, collectors who seek to collect debt they know or should know is time-barred should disclose that they cannot lawfully sue the consumers. Consumers likewise do not know that in many states making a partial payment on a time-barred debt revives the entire debt for a new statute of limitations period. Collectors in these states should disclose to consumers that making a payment will revive such debt.

Federal and state laws should be changed to prevent the freezing of a specified amount in a bank account into which a consumer has deposited funds that are exempt from garnishment. When banks freeze the accounts of consumers who receive government payments such as Social Security (which are exempt from garnishment), it may result in significant hardship for consumers, including many who are indigent. To alleviate such hardship, federal and state laws should be changed to limit the amount that banks can freeze in accounts receiving exempt funds.

The FTC's principal findings, conclusions, and recommendations relating to debt collection arbitration are:

Consumers should be given meaningful choice about arbitration. Consumers currently have little, if any, choice regarding mandatory pre-dispute arbitration provisions in contracts. Creditors should draft their consumer credit contracts in a way that ensures consumers are aware of their choice whether to arbitrate, and provides consumers with a reasonable method of exercising that choice. The public and private sectors should increase efforts to educate consumers, so that they have a basic understanding of arbitration and its consequences. They should evaluate whether, and under what conditions, options beyond the initial choice about arbitration must be offered in consumer credit contracts.

Arbitration forums and arbitrators should eliminate bias and the appearance of bias. Especially in the wake of serious concerns relating to the conduct of NAF, arbitration forums should take significant and concrete steps to prevent bias and the appearance of bias. Forums should develop, adopt, and vigorously enforce standards prohibiting bias and the appearance of bias for themselves and their arbitrators. Forums should diversify their rosters of arbitrators, rotate matters randomly among arbitrators, and limit the number of matters each arbitrator handles. Forums should make the process and procedures they use for selecting arbitrators as transparent as possible.

Arbitration forums should conduct proceedings in a manner which makes it more likely consumers will participate.

- Consumers frequently do not appear in arbitration proceedings. While it is not clear to what extent notification problems cause low participation rates, arbitration forums should adopt measures to increase the likelihood they have valid addresses for consumers, track and document delivery of notices, and use envelopes which make it clear that their contents are important while not disclosing consumer debts to third parties. Arbitration forums and arbitrators also should conduct a closer assessment of consumers' assertions that they did not receive adequate notice.

- Arbitration forums should establish rules that limit the total cost to consumers of arbitrating a dispute to the cost that they would pay to defend against a similar proceeding in court.

Arbitration forums should require that awards contain more information about how the case was decided and how the award amount was calculated. Arbitrators rarely accompany awards with an opinion setting forth a statement of the law and an application of the law to the facts, which makes it difficult to understand the basis for the award. Arbitration forums should require that arbitrators issue reasoned opinions setting forth: (1) the law applied; (2) how the law was applied to the facts; and (3) how the amount of the award was calculated, including how the amount of principal, interest, and fees awarded was determined.

Arbitration forums should make their process and results more transparent. For the public to assess the costs and benefits of arbitration, and for consumers to decide whether to agree to

arbitration, the process used and the results reached must be more transparent. To promote such transparency, Congress should consider creating a nationwide system requiring arbitration forums to report and make public arbitration awards and decisions.

The Commission will continue to closely monitor debt collection arbitration, and evaluate whether creditors and arbitration forums provide consumers with meaningful choice and fair process. As appropriate, the Commission will report its views on new debt collection arbitration models to policymakers, industry, consumer groups, and the general public.

In a much later publication, the Human Right Watch in its Report dated January 2016, entitled "Rubber Stamp Justice, US Courts, Debt Buying Corporations, and the Poor, identified the following broad issues concerning debt collection lawsuits:

- Selling and buying of debts which are already written off as loss for pennies on the dollar but collecting the full face value of the debts plus interest rate up to 25%.
- Patterns of error and lack of compliance in filing the collection lawsuits.
- Many defendants are poor or living at the margins of poverty - the reason for falling into debt.
- US Courts which are called rubber stamp courts of debt buyers and collectors; becoming complicit in damaging the rights of poor people entitled to fair administration of justice and equitable proceedings
- Many debt buyers lawsuits rest on a foundation of highly questionable information and evidence.
- Debt buyers do not always receive meaningful evidence in support of their claims when they purchase a debt, sellers explicitly refuse to warrant that any of the information they passed on is accurate or even that the debs are legally enforceable.
- Enormous accumulations of interest—often in excess of 25 percent compounded over periods of several years—are added to many alleged debts based entirely on the debt buyers' own calculations.
- Debt buyers have sued the wrong people, sued debtors for the wrong amounts, or sued to collect debts that had already been paid. In other cases they have filed lawsuits that were barred by the applicable statutes of limitations or were otherwise legally deficient.
- New York's attorney general has publicly condemned debt buyers who "abuse" the power of the courts at the expense of "hardworking families." These are stirring words, but the problem with statements like these is that they cast the courts as a second set of victims when in reality they bear direct responsibility for allowing abuses to take root and proliferate.

- Fundamental problems with debt buyer lawsuits often come to light only after the companies have already won judgments they were never entitled to, in courts that never asked them to present any meaningful evidence in support of their claims.

- Courts across the US fail to stand up for the rights of disadvantaged defendants in debt buyer lawsuits, or put those defendants' sophisticated corporate adversaries to their burden of proof.

- Many courts routinely award default judgments to debt buyers in these cases without scrutinizing the claims at issue.

- Many individual courts issue thousands or even tens of thousands of no questions asked default judgments in favor of debt buyers every year.

- When defendants do attempt to defend themselves in court, they are badly outclassed by their opponents. The plaintiffs are often large corporations represented by top-tier collections attorneys. By contrast, hardly any of the defendants in debt buyer lawsuits have legal representation and many are largely unaware of their rights.

- Many courts—sometimes under political pressure to clear their dockets quickly rather than carefully—push defendants into unsupervised "discussions" with debt buyer attorneys in hopes that the parties will settle and obviate the need for a trial.

- Debt buyer attorneys pulled defendants out of court at the encouragement of judges, and then berated or misled them into foregoing a hearing and agreeing to pay the debt buyer everything it had asked for.

- Courts in several states have done far worse, creating "judgeless courtrooms" where alleged debtors are summoned to court for the sole purpose of forcing them to participate in unsupervised discussions with debt buyer and other creditor attorneys.

- Some courts—like the municipal court in Philadelphia—actually allow creditor attorneys to run these proceedings themselves, calling defendants one by one into hallways or back rooms where the large majority is persuaded to give up without ever going in front of a judge.

- Some judges recognize the importance of ensuring fairness in the proceedings they preside over, helping to guide pro se litigants through a hearing and taking proactive steps to confirm that a debt buyer's case has some indication of merit. Others, bound by overly rigid interpretations of judicial neutrality, refuse to push corporate plaintiffs to meet their burden of proof if the defendant lacks the legal sophistication to do it on their own.

- Some judges do a better job of navigating these problems than others, but there are limits to what individual judges can achieve in the context of unhelpful legal frameworks and court rules.

The Human Rights Watch enumerates the following recommendations to the courts, and to the state and federal policy makers, which it says that if implemented would help safeguard the

rights of alleged debtors sued by debt buying companies and protect the integrity of the courts at the same time:

1. Courts should not issue default judgments to debt buyers unless credible evidence is submitted in support of a claim. A few states—notably New York—have adopted rules to this effect. They should serve as a model for the many states that have so far done nothing.

2. Courts should take steps to help unrepresented litigants secure a meaningful day in court regardless of whether they can afford to hire an attorney.

As an obvious first step, courts and legislatures should ban rather than encourage the "hallway conferences" and "judgeless courtrooms" some debt buyer attorneys use to deceive and pressure defendants into giving up their right to a court hearing.

3. Courts and state legislatures should also support programs to provide widespread access to pro bono legal advice. Experience has shown that this approach can greatly improve unrepresented defendants' ability to defend themselves in court. Many of these recommendations would also serve to promote justice in other kinds of debt collection lawsuits filed by other creditors.

4. In many states, the courts themselves are also badly in need of further assistance and capacity. Too often, elected officials demand that courts clear unmanageably large dockets with impossible speed while at the same time failing to allocate the resources courts need to do that job honestly and fairly.

Although officials with some leading debt buying firms told Human Rights Watch said that they viewed reforms pursued in some state legislatures as unfair and prejudicial against the industry, they also indicated that they would not oppose many of the reforms suggested in this report. To the extent that this is true, it makes the failure of many states and court systems to act even more inexcusable—particularly given how many state law enforcement officials have publicly denounced the litigation practices of debt buyers.

5. Human Rights Watch takes no position on the policy arguments for or against the sale and purchase of delinquent consumer debt, but we believe Congress should pass legislation that sharply limits the rate at which interest can continue to accumulate on a debt after it is sold on to a third party.

Federal law can and should recognize that debt buyers are not in the same position as original creditors—they are seeking to appreciate an investment in bad debt, not to recoup money they have lent under agreed-upon contractual terms.

There is no compelling rationale for allowing debt buyers to accumulate interest at credit card rates after they purchase a debt. On the other hand, the fact that current law allows debt buyers to do just that places a huge, unfair burden on alleged debtors and is often the reason poor families struggle to pay these debts down over time. This can come at the expense of alleged debtors' ability to secure basic economic and social needs such as food, clothing, and medicine.

States, for their part, should revisit statutory rates of post- judgment interest that can also be punitively high.

CALIFORNIA'S ANSWER TO THE DEBT BUYERS AND COLLECTION LAWSUITS:

The State Legislature of California enacted the "The California Consumers Financial Protection Law" (CCFPL) (AB 1864), enumerating and prohibiting therein certain debt collection practices and abuses; and the "Debt Collection Licensing Act (DCLA). The DCLA provides for the licensure, regulation, and oversight of California debt collector by the Department of Financial Protection and Innovation. It authorizes the Commissioner of Financial Protection and Innovation ("Commissioner") to license, investigate, and examine debt collectors, and to enforce the Rosenthal Fair Debt Collection Practices Act ("Rosenthal Act") and the Fair Debt Buying Practices Act ("FDBPA").

From these legislative enactments, it is safe to conclude that the State Legislature identified the problem in the debt collection industry to be the abusive practices of debt buyers and collectors on account of its lack of regulation of the debt buying and collecting industry.

From the latest report of the Human Rights Watch entitled "Rubber Stamp Justice US Courts, Debt Buying Corporations, and the Poor", it identified the following players in the debt buying lawsuits problem as follows:

1. The debt buyers and collectors
2. The consumers who are majority poor
3. The Courts, the court system
4. The State policymakers
5. The Federal policymakers.

An interesting part on the Human Rights Report, which states that:

"Human Rights Watch takes no position on the policy arguments for or against the sale and purchase of delinquent consumer debt, but we believe Congress should pass legislation that sharply limits the rate at which interest can continue to accumulate on a debt after it is sold on to a third party."

Analyzing this statement very carefully, would lead us to the root cause of the problem and the most important player in the debt buyers and collectors lawsuit which should be really the focus of public policymaking and implementation.

The party that was left out in the report is the original creditor. These are the banks and other financial institution which extend credit to consumers. This is the important gap in the report of the Human Rights Watch.

There should be a study on the anatomy of credit. The study should include the following:

1. The players in the credit industry, the consumers, the lenders (banks, banking and other financial institutions).

2. Their roles in the social, political and economic aspects of the State, and the whole country as a whole.

3. The profile of the consumers; what type of credit accounts they borrow or avail of, whether revolving (credit cards), installment (auto or student loans), or mortgage/other.

4. What are the reasons why consumers become delinquent first and then default in paying their debts.

5. What should be the appropriate remedy for the lenders to recover the money they extended to consumers as credit, should it be a mandatory arbitration clause that should be incorporated in the contract of loan.

6. The propriety in selling the debts of defaulted consumers given the remedy of write-off of debt on the part of the lenders.

7. The propriety of allowing lenders to sell written-off debts for a penny on the dollars despite the write-off.

8. The propriety of allowing debt buyers and collectors to collect the total face value of the debt plus interest of up to 25%.

9. How much would a debt buyer/debt collector collect on the debt they purchase.

10. What should be the most expeditious and less costly method of collecting debts, arbitration or litigation.

REPLY ON THE INVITATION FOR COMMENTS ON THE PROPOSED SECOND RULEMAKING UNDER THE DEBT COLLECTION LICENSING ACT:

Senate Bill No. 908 Chapter 163 expressly mentions that it is "An Act to amend Sections 1788.11 and 1788.52 of the Civil Code, and to add Divisions 25 (commencing with Section 100000 to the Financial Code, relating to debt collectors.

A.

Article 3. Section 100002 defines the following:

- "Debt" means money, property, or their equivalent that is due or owing or alleged to be due or owing from a natural person to another.

- "Person" means a natural person, partnership, corporation, limited liability company, trust, estate, cooperative, association, or other similar entity.

- "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.

- "Debt collection" means any act or practice in connection with the collection of consumer debt.

- "Debt buyer" is not defined under S.B. No. 908 but adopts the definition under Section 1788.50 of the Civil Code, (Fair Debt Buying Practices Act) as follows:

1788.50. (a) As used in this title: (1) "Debt buyer" means a person or entity that is regularly engaged in the business of purchasing charged-off consumer debt for collection purposes, whether it collects the debt itself, hires a third party for collection, or hires an attorney-at-law for collection litigation. "Debt buyer" does not mean a person or entity that acquires a charged-off consumer debt incidental to the purchase of a portfolio predominantly consisting of consumer debt the has not been charged-off.

The Rosenthal Fair Debt Collection Practices Act defines the following as:

- "Debt" means money, property, or their equivalent that is due or owing or alleged to be due or owing from a natural person to another person.

- "Debt collection" means any act or practice in connection with the collection of consumer debts.

- "Person" means a natural person, partnership, corporation, limited liability company, trust, estate, cooperative, association, or other similar entity.

- "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.

- "Debt collector" means 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.

The Rosenthal Fair Debt Collection Practices Act does not have a definition for debt buyer.

The Fair Debt Buying Practices Act has no definitions for debt, debt collection, person, consumer credit transaction, and debt collector.

It provides definition only for the term debt buyer as:

- "Debt buyer" means a person or entity that is regularly engaged in the business of purchasing charged-off consumer debt for collection purposes, whether it collects the debt itself, hires a third party for collection, or hires an attorney-at-law for collection litigation. "Debt buyer" does not mean a person or entity that acquires a charged-off consumer debt incidental to the

purchase of a portfolio predominantly consisting of consumer debt that has not been charged off.

The addition of Article 3 Definitions, Section 100002 in the Financial Code makes the wordings for the definition of debt, debt collection, person, consumer credit transaction, debt collector and debt collection the same or harmonized as in the Rosenthal Act and the FDBPA. Hence, it seems that they are clear.

B. Are regulations needed to clarify the term "engage in the business of debt collection"?

The application for license should be made clear as to the frequency. Is it one time or renewable after a certain period?

The wording in the provision is future, "No person shall engage in the business if debt collection" It means that the granting of the license is a condition precedent for the engagement in the business of debt collection of a person.

C. The DCLA 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"?

In order that the engagement in the debt collection to be considered within the ordinary course of business, a transaction must adhere to the practices and customs that are considered normal for an industry.

The question that has to be determined therefore is "Does the debt collection industry have the practices and customs, which are acknowledged by the players in the debt collection industry?

Another issue is the case of Henson v. Santander Consumer USA Inc., 137 S.CT. 1718 (2017), that complicates the definition of debt collectors, which restricts its meaning and application and does not apply to creditors collecting debts they originated.

This decision needs to be harmonized with the meaning(s) of debt collector on account of the term collection of debt in the ordinary course of business or regularly. If there is a need for lenders, the banks and other financial institution to be required to create their own collection unit should be considered such that the original creditors should be considered to be debt collectors themselves.

Another need for the issuance of regulations should focus on the clear enumeration of the debt collection industry practices and customs acceptable to all the players.

D. Financial Code section 100001, subdivisions (b)(1) and (c) provide exemptions from the DCLA. Is further clarification needed regarding which entities or transactions are exempt?

As enumerated in the DCLA, those persons not required to obtain a license under the DCLA are the following:

1. Under the Banking Law:

Depository Institution as defined in Section 1420:

(a) “Depository institution” means any of the following:

(1) Any insured bank as defined in Section 3 of the Federal Deposit Insurance Act (12 U.S.C. Sec. 1811 et seq.) or any bank which is eligible to make application to become an insured bank under Section 5 of the act.

(2) A mutual savings bank as defined in Section 3 of the Federal Deposit Insurance Act (12 U.S.C. Sec. 1811 et seq.) or any bank which is eligible to make application to become an insured bank under Section 5 of the act.

(3) A savings bank as defined in Section 3 of the Federal Deposit Insurance Act (12 U.S.C. Sec. 1811 et seq.) or any bank which is eligible to make application to become an insured bank under Section 5 of the act.

(4) An insured credit union as defined in Section 101 of the Federal Credit Union Act (12 U.S.C. Sec. 1751 et seq.) or any credit union which is eligible to make application to become an insured credit union pursuant to Section 201 of that act.

(5) Any member as defined in Section 2 of the Federal Home Loan Bank Act (12 U. S.C. Sec. 1421 et seq.).

(6) Any insured institution as defined in Section 401 of the National Housing Act (12 U.S.C. Sec. 1701 et seq.) or any institution which is eligible to make application to become an insured institution under Section 403 of that act.

2. Under the California Financing Law:

A person licensed pursuant to Section Division 9 (commencing with Section 22000, who is:

(a) “Licensee” means any finance lender, broker, or program administrator who receives a license in accordance with this division.

- “Finance lender” includes any person who is engaged in the business of making consumer loans or making commercial loans. The business of making consumer loans or commercial loans may include lending money and taking, in the name of the lender, or in any other name, in whole or in part, as security for a loan, any contract or obligation involving the forfeiture of rights in or to personal property, the use and possession of which property is retained by other than the mortgagee or lender, or any lien on, assignment of, or power of attorney relative to wages, salary, earnings, income, or commission.

- “Broker” includes any person who is engaged in the business of negotiating or performing any act as broker in connection with loans made by a finance lender.

- "Program administrator" means a person administering a PACE program on behalf of, and with the written consent of, a public agency. "Program administrator" does not include a public agency.
    - "Program administrator" does not include a person who meets both of the following conditions:
        - (1) The person does not administer a PACE program that provides financing for the installation of efficiency improvements on residential property with four or fewer units.
        - (2) The person does not administer a PACE program that provides financing for the installation of efficiency improvements on real property with a market value of less than one million dollars ($1,000,000).
- "Finance lender," "broker," and "program administrator" do not include employees regularly employed at the location specified in the license of the finance lender, broker, or program administrator, except that an employee, when acting within the scope of his or her employment, shall be exempt from any other law from which his or her employer is exempt.
- "Mortgage loan originator" means an individual who, for compensation or gain, or in the expectation of compensation or gain, takes a residential mortgage loan application or offers or negotiates terms of a residential mortgage loan.

3. Under the California Residential Mortgage Lending Act:

A person licensed pursuant to Division 20 (commencing with Section 50000):

(c) The following persons are exempt from subdivision (a):

(1) Any bank, trust company, insurance company, or industrial loan company doing business under the authority of, or in accordance with, a license, certificate, or charter issued by the United States or any state, district, territory, or commonwealth of the United States that is authorized to transact business in this state.
(2) A federally chartered savings and loan association, federal savings bank, or federal credit union that is authorized to transact business in this state.
(3) A savings and loan association, savings bank, or credit union organized under the laws of this or any other state that is authorized to transact business in this state.
(4) A person engaged solely in business, commercial, or agricultural mortgage lending.
(5) A wholly owned service corporation of a savings and loan association or savings bank organized under the laws of this state or the wholly owned service corporation of a federally chartered savings and loan association or savings bank that is authorized to transact business in this state.

(6) An agency or other instrumentality of the federal government, or state or municipal government.
(7) An employee or employer pension plan making residential mortgage loans only to its participants, or a person making those loans only to its employees or the employees of a holding company, or an owner who controls that person, affiliate, or subsidiary of that person.
(8) A person acting in a fiduciary capacity conferred by the authority of a court.
(9) A real estate broker licensed under California law, when making, arranging, selling, or servicing a residential loan.
(10) A California finance lender or broker licensed under Division 9 (commencing with Section 22000), when acting under the authority of that license.
(11) A trustee under a deed of trust pursuant to the Civil Code, when collecting delinquent loan payments, interest, or other loan amounts, or performing other acts in a judicial or nonjudicial foreclosure proceeding.
(12) A mortgage loan originator who has obtained a license under Chapter 3.5 (commencing with Section 50140), provided that the mortgage loan originator is employed by a residential mortgage lender or servicer.
(13) A registered mortgage loan originator described in subdivision (e).

(d) An individual, unless specifically exempted under subdivision (e), shall not engage in the business of a mortgage loan originator with respect to any dwelling located in this state without first obtaining and maintaining annually a license in accordance with the requirements of Chapter 3.5 (commencing with Section 50140) and any rules promulgated by the commissioner under that chapter. Each licensed mortgage loan originator shall register with and maintain a valid unique identifier issued by the Nationwide Mortgage Licensing System and Registry.

(e) A registered mortgage loan originator is exempt from licensure under subdivisions (a) and (d), when he or she is employed by a depository institution, a subsidiary of a depository institution that is owned and controlled by a depository institution and regulated by a federal banking agency, or an institution regulated by the Farm Credit Administration.

(f) A loan processor or underwriter who is an independent contractor employed by a residential mortgage lender or servicer may not perform the activities of a loan processor or underwriter under this division unless the independent contractor loan processor or underwriter obtains and maintains a license under Section 50120.

4. Under the Real Estate Law:

A person licensed pursuant to Part 1 (commencing with Section 10000) of Division 4 of the Business and Professions Code:

- “Licensee,” when used without modification, means a person, whether broker or salesperson, licensed under any of the provisions of this part.

- “Broker,” when used without modification, means a person licensed as a broker under any of the provisions of this part.
- “Salesperson,” when used without modification, means a person licensed as a salesperson under any of the provisions of this part. Whenever the word salesman is used in this division, or in the rules and regulations of the commissioner, it means salesperson. Notwithstanding any other law, a licensee may elect to refer to his or her licensed status as real estate salesman, real estate saleswoman, or real estate salesperson.
- “Real estate licensee” means a person, whether broker or salesperson, licensed under Chapter 3 of this part.
- “Real estate broker” means a person licensed as a broker under Chapter 3 of this part.
- “Responsible broker” means the real estate broker responsible for the exercise of control and supervision of real estate salespersons under Section 10159.2, or a licensee subject to discipline under subdivision (h) of Section 10177 for failure to supervise activity requiring a real estate license. The supervision of a salesperson required under this part or any other law is limited to regulatory compliance and consumer protection.
- “Manager” means a real estate licensee authorized to perform supervisorial services for a responsible broker.
- “Broker associate” means a broker retained by a responsible broker who has authority to provide services requiring a real estate license on behalf of the responsible broker.
- “Responsible broker’s identity” means the name under which the responsible broker is currently licensed by the department and conducts business in general or is a substantial division of the real estate firm, or both the name and the associated license identification number. “Responsible broker’s identity” does not include a fictitious business name obtained pursuant to paragraph (2) of subdivision (a) of Section 10159.5 or the use of a team name pursuant to Section 10159.6.
- “Professional identity” includes “responsible broker’s identity” and the identity under which the licensee is authorized to do business.
- “Real estate salesperson” means a natural person licensed as a salesperson under Chapter 3 of this part and who, for a compensation or in expectation of a compensation, is retained by a real estate broker to do one or more of the acts set forth in Sections 10131, 10131.1, 10131.2, 10131.3, 10131.4, and 10131.6.
- “Retained” means the relationship between a broker and a licensee who is either an independent contractor affiliated with, or an employee of, a broker to perform activities that require a license and are performed under a broker’s supervision.
- “Seller” means a transferor in a real property transaction, and includes an owner who lists real property with a licensee, whether or not a transfer results, or who receives an offer to purchase real property of which he or she is the owner from a licensee on behalf of another. “Seller” includes both a vendor and lessor of real property.
- “Listing agent” means a licensee who provides services requiring a real estate license for or on behalf of a seller pursuant to a listing agreement. Listing agent includes a seller’s agent.
- “Seller’s agent” means a licensee who provides services requiring a real estate license for or on behalf of a seller. A seller’s agent may or may not be a listing agent.

- "Buyer" means a transferee in a real property transaction, and includes a person who executes an offer to purchase real property from a seller through a licensee, whether or not a transfer results, or who seeks the services of a licensee in more than a casual, transitory, or preliminary manner, with the object of entering into a real property transaction. "Buyer" includes a purchaser, vendee, or lessee of real property.
- "Buyer's agent" means a licensee who provides services requiring a real estate license for or on behalf of a buyer.
- "Dual agent" means an agent acting, either directly or through a salesperson or broker associate, as agent for both the seller and the buyer in a real property transaction.
- "Appraiser" means a person licensed or certified under Part 3 (commencing with Section 11300).

5. Under the Karnette Rental - Purchase Act:

A person who is subject to the Karnette Rental - Purchase Act (Title 2.96, commencing with Section 1812.620, Part 4 of Division 3 of the Civil Code):

- (c) "Lessor" means any person or entity that provides or offers to provide personal property for use by consumers pursuant to a rental-purchase agreement.

6. Under Chapter 2 - Mortgage, Civil Code:

A trustee performing acts in connection with a nonjudicial foreclosure pursuant to Article 1 (commencing with Section 2920) of Chapter 2 of Title 14 of Part 4 of Division 3 of the Civil Code.

The enumeration of exempt entities or transactions is extensive enough to even require further clarification. If there are areas to be identified that seems to have remain concerns despite the enactment of legislative measures to solve them, what needs to be thresh out is whether existing policies on debt collection and the underlying debt collection lawsuit proliferation are inadequate, need policy change, or the concerns consist in the implementation of existing rules ad regulations.

E. The DCLA defines a "debtor" as "a natural person from whom a debt collector seeks to collect a consumer debt that is due or owing or alleged to be due or owing from the person."[3] Is the term "due or owing" clear?

On account of the decision of the US Supreme Court in the case of Henson Et Al. v. Santander Consumer USA Inc., there is a need to clarify the term "due or owing" to include debt buyers, which would include the likes of Santander even though it is not engaged in regularly collecting consumer debts.

SUGGESTED LANGUAGE:

"Debtor" means a natural person from whom a debt collector seeks to collect a consumer debt that he acquired through sale or that is due or owing or alleged to be due or owing from the person.

F. The DCLA grants the Department authority to enforce the Rosenthal Act and the FDBPA against persons required to be licensed under the DCLA and persons expressly exempt from licensure, including certain federally- regulated entities. Is further clarification needed regarding against whom the Department can enforce the Rosenthal Act and the FDBPA?

First of all the DCLA mentions the Department of Business Oversight headed by the Commissioner of Business Oversight under Article 3 Definitions, Section 100002:

(d) Commissioner means the Commission of Business Oversight, and
(l) Department means the Department of Oversight.

It has no mention of the Department of Financial Protection and Innovation (DFPI) which is the former Department of Business Oversight renamed and revamped under the California Consumer Financial Protection Law (CCFPL).

A clarification could be made by making express reference to the CCFPL specifically Division 24, Chapter 1, Section 90000 in connection with debt buying and collection.

II. Annual Reports

A. What terms in Financial Code section 100021 need clarification and how should those terms be defined?

In order to ensure full consumer financial protection to the most vulnerable sector of the consumer community, measures should be included at the time of the contracting of the debt with the creditor.

- There should be a full disclosure in the contract for the loan of a debt.
- This would include among others, the interest due to the debt, the effect of failure to pay within 30-day period, what are the additional charges and how much would be the additional charges for the balance of the debt, whether to require lenders to have their own collection unit to take charge of the debt which is 30-day past due, or to send the debt concerned to a collection agency. Whether the collection of the debt is decided to be done by an in-house debt collection unit by the original creditor or given to a collection agency, the consumer should be given a formal report stating therein the following, the balance of the debt, amount due failed to be paid and the amount of charges or interest for the 30-day delay.
- When the debt payment is not done and is at 60-day past due. Creditor should give the debtor formal report containing the following: the balance of the debt including the agreed fees and

charges for the 60-day delay payment (stating that it is a compounded interest as provided for under the original contract of loan), that the creditor has already undertaken the action of reporting the delinquent account which has already become defaulted.

- When the debt reached the charged-off status. Lender should be required to have a uniformed practice on when a debt should be charged off. Once the uniformed period, which is generally within the 90 - 180 day period, is agreed upon a validation notice should be sent to the creditor. This would afford the consumers the much ballyhooed consumer financial protection policy of the State a concrete tool to determine whether the debt or account is really that of the consumer, whether the debt or account is really paid, and whether the debts is already time-barred.
- When the debt is validated and the real cause of the default is established to be genuine and beyond the control of the creditor, (i.e. economic crises resulting in loss of employment) the State should decide whether to institute remedial measures to alleviate the economic crises to bail out the defaulting consumers.
- The next stage would be Arbitration or Litigation. Arbitration should be institutionalize in debt collection to help lessen court cases involving debt collection.

B. Is there additional information the Department should require from licensees in their annual reports?

The specific provision which enumerates the information required to be contained in an annual report states:

"100021. (a) A licensee shall file an annual report with the commissioner, on or before March 15, that contains all relevant information that the commissioner reasonably requires concerning the business and operations conducted by the licensee in the state during the preceding calendar year, including information regarding collection activity. The report shall, at minimum, require disclosure of all of the following information:

(1) The total number of California debtor accounts purchased or collected on in the preceding year.

(2) The total dollar amount of California debtor accounts purchased in the preceding year.

(3) The face value dollar amount of California debtor accounts in the licensee's portfolio in the preceding year.

(4) The total dollar amount of California debtor accounts collected in the preceding year, and the total dollar amount of outstanding debt that remains uncollected.

(5) The total dollar amount of net proceeds generated by California debtor accounts in the preceding year.

(6) Whether or not the licensee is acting as a debt collector, debt buyer, or both.

(7) The case number of any action in which the licensee was held liable by final judgment under Title 1.6C (commencing with Section 1788) or Title 1.6C.5 (commencing with Section 1788.50) of Part 4 of Division 3 of the Civil Code.

(b) x.x.x

(c) x.x.x
(d) A licensee shall make other special reports that may be required by the commissioner."

The information enumerated were those identified in the studies of the FTC that would prevent the filing of debt collection cases that lack the necessary information in order for the defendant consumers to know that they are haled in for alleged non-payment of their consumer debts.

To solve this debt collection cases resulting in the defendant being declared in default and the resulting default judgment, it was recommended that the appropriate information should be incorporated in the complaint.

To strengthen further the Rosenthal Act and the FDBPA, the DCLA institutionalizes the prohibition of debt collectors from engaging in unfair or deceptive acts or practices in the collection of consumer debts, add the placing of a telephone call without disclosing the caller's identity, as specified, and sending digital or written communications that do not display the license number of the debt collector in at least 12-point type as prohibited debt collection practices.

The information listed, I would say would be adequate to attain the purpose of enacting the DCLA as well as the California Consumer Financial Protection Law (CCFPL), which has a wider objective of enhancing the California consumer financial protection.

If ever the enumeration needs additional information that would be later identified during the implementation of the law, which is already covered under the catch all provision in
Section 1000021(d).

III. Higher Bond Amounts

A. Should the Department require higher bond amounts pursuant to Financial Code section 100019, subdivision (e)(2)?

B. If the Department should require higher bond amounts, what amounts are appropriate and how should they relate to the number of affiliates under the license and the dollar amount of consumer debt collected by the licensee? Specifically:

1. At what point should the bond amounts begin to increase?

2. What formula is appropriate for calculating the higher bond amount?

3. Should the amounts be set based on tiers? If so, what should be the boundaries between the tiers?

The provisions of the DCLA that mentions "surety bond" are:

1. Section 100006 (b)(1)(C) which states:

"(b) For purposes of this section, the following terms have the following meanings:

(1) "Electronic record" means an initial license application, or material modification of that license application, and any other record created, generated, sent, communicated, received, or stored by electronic means. "Electronic record" also includes, but is not limited to, all of the following electronic documents:

(A) x.x.x.
(B) x.x.x.
(C) A surety bond, rider, or endorsement thereto."

2. Section 100019**.** A licensee shall do all of the following:
(a) x.x.x.
(b) x.x.x.
(c) x.x.x.
(d) x.x.x.
(e) Maintain a surety bond in accordance with this section in a minimum amount of twenty-five thousand dollars ($25,000). The bond shall be payable to the commissioner and issued by an insurer authorized to do business in this state. The surety bond, including any and all riders and endorsements executed subsequent to the effective date of the bond, shall be filed with the commissioner within 10 days of execution. The bond shall be used for the recovery of expenses, fines, and fees levied by the commissioner in accordance with this division. The commissioner may require licensees to submit bonds, riders, and endorsements electronically through the Nationwide Multistate Licensing System & Registry's electronic surety bond function.
(1) When an action is commenced on a licensee's bond, the commissioner may require the filing of a new bond. Immediately upon recovery of any action on the bond, the licensee shall file a new bond. Failure to file a new bond within 10 days of the recovery on a bond, or within 10 days after notification by the commissioner that a new bond is required, constitutes sufficient grounds for the suspension or revocation of the license. A licensee may provide the commissioner a refundable deposit in the amount of twenty-five thousand dollars ($25,000) in lieu of the bond while the licensee pursues a new bond.
(2) The commissioner may require a higher bond amount for a licensee based on the number of affiliates under the license and the dollar amount of collecting consumer debt by that licensee."

It is observed that the "surety bond" is not a requirement for the application of a license, which is provided for under Article 2, Application for Licensure. Under Section 100007, the requirement for the application for license are:

(a) A completed application for a license in a form prescribed by the commissioner and signed under penalty of perjury. Every application shall include the location of the applicant's principal place of business and all branch office locations.

(b) An application fee and investigation fee, the amount of which shall be determined by the department, to cover any costs incurred in processing an application, including a fingerprint processing and criminal history record check under Section 100009. The investigation fee, including the amount for the criminal history record check, and the application fee are not refundable if an application is denied or withdrawn.

Instead of clearly expressing the "surety bond" as a requirement for the application for license, it becomes only one of the duties of a licensee under Chapter 3, Section 100019 (e). There is a need to transpose the maintaining of "surety bond" from a duty to a requirement for application for licensure.

From the language of the law, "surety bond" is expressly made a duty for the purpose of:

"The bond shall be used for the recovery of expenses, fines, and fees levied by the commissioner in accordance with this division."

Going now to the query, "Should the Department require higher bond amounts pursuant to Financial Code section 100019, subdivision (e)(2)?", which provides:

(2) The commissioner may require a higher bond amount for a licensee based on the number of affiliates under the license and the dollar amount of collecting consumer debt by that licensee."

There seems to a an expansion of the licensee duty of maintaining surety bond that includes now the number of affiliates and the dollar amount involved in the collection that the licensee had, and also expanding the purpose of the surety bond from being used for the recovery of expenses, fines and fees, to the number of affiliates and the dollar amount.

The query could be best answered if the schedules of expenses, fines and fees would be clarified first such that the amount of $25,000 could easily be calculated if sufficient or not for the intended expenses, fines, and fees that the commissioner may levy in accordance with the division.

A concrete answer as to the amount in letter B would also be based on the quantification of the expenses, fines, and fees that the commissioner may levy pursuant to the division in issue.

Thank you very much.

Ramon B Reblora