July 6, 2022

Sent Via Email to [redacted]@dfpi.ca.gov

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

In response to the **Invitation for Comments on Proposed Rulemaking Under the California Consumer Financial Protection Law (PRO 03-21), California Creditors Bar Association** thanks you for providing stakeholders the valuable opportunity to provide input into this rulemaking. We welcome this occasion to submit our comments, and look forward to establishing an excellent working relationship with the DFPI in the years to come.

Introduction to California Creditor's Bar Association

The California Creditors Bar Association ("CCBA") is the only bar association in California dedicated to promoting and protecting creditors rights attorneys. The CCBA is a not-for-profit trade association of attorneys and law firms who, among other matters, engage in the practice of debt collection law. The members of the CCBA must meet their association's standards, which are designed to ensure professionalism and ethics. CCBA member law firms practice law in a manner consistent with their responsibilities as officers of the court and must adhere to applicable state and federal laws, rules of California civil procedure laws and rules of court, California State Bar rules of professional conduct and other State Bar requirements, like continuing legal education. Lawyers licensed in California, who manage and work at our member firms, are obligated under the California Rules of Professional Conduct to maintain the integrity of the legal profession, diligently advocate for their clients' interests, and maintain candor toward any tribunal. CCBA's values are: Professional, Ethical, Responsible.

Important facts about CCBA members firms are as follows:

- 95% of law firms are considered small businesses pursuant to the Small Business Administration;
- 27% are woman- and minority-owned law firms, nationally;

- CCBA member law firms devote over 20% of their overall operating budget to compliance costs on average; and
- CCBA member law firms are subject to an average of 24 audits per year by their clients and devote over 80 hours per month preparing for those audits.
- CCBA members employ California citizens and pay millions in taxes annually to the State. Members provide critical services to participants in the credit ecosystem in California, that allows creditors and other holders of consumer debt to pump money back into the economy.

Attorneys, like lenders and consumers, are a necessary part of the "credit economy." In enacting the Rosenthal FDCPA, the California Legislature recognized the importance of collections in the credit system:

> The banking and credit system and grantors of credit to consumers are dependent upon the collection of just and owing debts. U

(Civ. Code § 1788.1(a)(1).)

CCBA members represent small businesses including local retail establishments, small or regional banks, credit unions and small medical providers. These are long-term attorney-client relationships that have existed for years. These small business clients do not have vast legal departments or even in-house attorneys, and these small business clients rely on their local attorneys to ensure that outstanding receivables are paid so that their businesses can continue to operate. CCBA is comprised of small law firms whose attorneys serve the needs of their local community.

Attorneys who are members of CCBA law firms understand that they are officers of the court and work diligently to ensure that consumers, especially those that appear pro se in court, are treated fairly and with dignity and respect. Although our legal system is adversarial, CCBA attorneys make every effort to work with consumers throughout the legal process including efforts to help resolve their debts in a reasonable manner.

Over-Arching Themes and Important Considerations

CCBA applauds the Department of Financial Protection and Innovation ("DFPI") for taking the important step in providing a formal regulatory scheme regarding debt collection, which is governed by California's Rosenthal Fair Debt Collection Practices Act, ("Rosenthal FDCPA"), California Civil Code section 1788, *et seq.* The Rosenthal FDCPA, California Civil Code section 1788.17, incorporates most of the rights and obligations under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, *et seq.* CCBA strongly supports reasonable consumer protection measures. Its members pride themselves on balancing consumer rights and protections under federal and state law, with the requirements imposed on lawyers to zealously and ethically represent their clients' interests. CCBA generally supports the DFPI attempts to regulate debt collection activity, and not the practice of law, discussed below. The proposed regulations show deliberate and thoughtful consideration by the DFPI to ensure the Rosenthal FDCPA achieves its purpose. Such regulations should also take into consideration that the Rosenthal FDCPA must evolve and expand into the 21st Century.

The following reflects some of the common themes reflected in CCBA's comments and take-away considerations for the DFPI as it moves forward with final rules for debt collection:

- It is generally contemplated that the DFPI will make rules regarding various aspects of debt collection within its authority. Any regulation regarding debt collection should be consistent with the views and practices of the California Supreme Court and its appellate courts and the California State Bar regarding attorney debt collection, and guidance from the federal courts. CCBA also provides the above background in order to reiterate its position that a regulatory agency, like the DFPI, should not be looking to regulate attorney conduct when engaged in the practice of law. Such oversight of state licensed attorneys whether by enforcement or regulation violates the separation of powers doctrine embodied in the Constitution.

- The Proposed Regulations state that one of the DFPI's goals is to enable cost savings to covered persons. However, building an entirely new consumer complaint management program to comply with the very detailed and specific requirements outlined in the Proposed Regulations, will be very cost-prohibitive to our members. This is especially true when CCBA's members must already comply with their own consumer complaint management programs as developed in accordance with California civil procedure laws, CCBA members' client requirements, and the complaint management system developed by the Consumer Financial Protection Bureau ("CFPB").

- The Proposed Regulation, in the Economic Impact section, states that it will not eliminate jobs within California. CCBA disagrees with that finding. Implementation of the detailed consumer complaint management program and the inquiry response requirements created by the proposed regulations may have an adverse effect on the ability of some members to continue to operate and employ Californians, because the costs to implement and maintain such a program will be too high.

- Furthermore, the deadlines and requirements set forth in the Proposed Regulations should not conflict with civil procedure requirements and rules of court. Nor should it conflict with the deadlines set forth in the FDCPA.

The DFPI Does Not Have Authority to Regulate Attorneys, Who Are Already Regulated Under the State Bar and the California Supreme Court.

The members of the CCBA have a strong interest in ensuring that the California Consumer Financial Protection Law (CCFPL) is interpreted and applied in a way that allows collection attorneys to execute their ethical duty to advance their clients' legitimate interests—within the bounds of existing law—without constantly exposing themselves to substantial personal liability.

Section 90002 of the California Financial Code states, in relevant part:

> (a) This division shall not apply to a licensee, or an employee of a licensee, of any state agency other than the Department of Financial Protection and Innovation to the extent that licensee or

> employee is acting under the authority of the other state agency's license.

The division in question is Division 24 of the Financial Code which is the CCFPL.

A listing of State Agencies is found on the State of California official website CA.gov. The State Bar of California is listed as a State Agency. When one clicks on the link on the list of state agencies, the following statement is found:

> State Bar of California (CALBAR)
> Founded in 1927 by the legislature, the State Bar of California is an administrative arm of the California Supreme Court. All lawyers practicing in California must be members of the State Bar.

By way of additional guidance, California Government Code Section 6252 states, in relevant portion:

> (f) (1) "State agency" means every state office, officer, department, division, bureau, board, and commission or other state body or agency, except those agencies provided for in Article IV (except Section 20 thereof) or Article VI of the California Constitution.
> (2) Notwithstanding paragraph (1) or any other law, "state agency" shall also mean the State Bar of California, as described in Section 6001 of the Business and Professions Code.

Attorneys who practice debt collection law are specifically subject to the provisions of California Business and Professions Code Section 6077.5 which states:

> An attorney and his or her employees who are employed primarily to assist in the collection of a consumer debt owed to another, as defined by Section 1788.2 of the Civil Code, shall comply with all of the following:
> (a) The obligations imposed on debt collectors pursuant to Article 2 (commencing with Section 1788.10) of Title 1.6C of Part 4 of Division 3 of the Civil Code.
> (b) Any employee of an attorney who is not a licensee of the State Bar of California, when communicating with a consumer debtor or with any person other than the debtor concerning a consumer debt, shall identify himself or herself, by whom he or she is employed, and his or her title or job capacity.
> (c) Without the prior consent of the debtor given directly to the attorney or his or her employee or the express permission of a court of competent jurisdiction, an attorney or his or her employee shall not communicate with a debtor in connection with the collection of any debt at any unusual time or place, or time or place known, or which should be known, to be inconvenient to the

debtor. In the absence of knowledge of circumstances to the contrary, an attorney or his or her employee shall assume that the convenient time for communicating with the debtor is after 8 a.m. and before 9 p.m., local time at the consumer's location.
(d) If a debtor notifies an attorney or his or her employee in writing that the debtor refuses to pay a debt or that the debtor wishes the attorney or his or her employee to cease further communications with the debtor, the attorney or his or her employee shall not communicate further with the debtor with respect to such debt, except as follows:
(1) To advise the debtor that the attorney or his or her employee's further efforts are being terminated.
(2) To notify the debtor that the attorney or his or her employee or creditor may invoke specific remedies which are ordinarily invoked by such attorney or creditor.
(3) Where applicable, to notify the debtor that the attorney or creditor intends to invoke his or her specific remedy.
(4) Where a suit has been filed or is about to be filed and the debtor is not represented by counsel or has appeared in the action on the debt in propria persona.
For the purpose of this section, “debtor” includes the debtor's spouse, parent, or guardian, if the debtor is a minor, executor, or administrator.
(e) An attorney or his or her employee shall not take or threaten to take any nonjudicial action to effect disposition or disablement of property if (1) there is no present right to possession of the property claimed as collateral through an enforceable security interest; (2) there is no present intention to take possession of the property; or (3) the property is exempt by law from that disposition or disablement.
(f) An attorney or his or her employee shall not cause charges to be made to any person for communications, by concealment of the true purposes of the communication. The charges include, but are not limited to, collect telephone calls and telegram fees.
(g) Within five days after the initial communication with a debtor in connection with the collection of any unsecured debt, an attorney or his or her employee shall, unless the following information is contained in the initial communication or the debtor has paid the debt, send the debtor a written notice containing the following:
(1) The amount of the debt.
(2) The name of the creditor to whom the debt is owed.
(3) A statement that unless the debtor, within 30 days receipt of the notice, disputes the validity of the debt or any portion thereof, the debt will be assumed to be valid by the attorney or his or her employee.

(4) A statement that if the debtor notifies the debt collector in writing within the 30-day period that the debt, or any portion thereof, is disputed, the attorney or his or her employee will obtain a writing, if any exists, evidencing the debt or a copy of the judgment against the debtor and a copy of such writing or judgment will be mailed to the debtor by the attorney or his or her employee.
(5) A statement that, upon the debtor's written request within the 30-day period, the attorney or his or her employee will provide the debtor the name and address of the original creditor, if different from the current creditor.
If the debtor notifies the attorney or his or her employee in writing within the 30-day period described in this section that the debt or any portion thereof is disputed, or that the debtor requests the name and address of the original creditor, the attorney and his or her employee shall cease collection of the debt or any disputed portion thereof, except for filing suit thereon, until the attorney obtains a writing, if any exists, evidencing the debt or a copy of a judgment or the name and address of the original creditor, and a copy of such writing or judgment or the name and address of the original creditor is mailed to the debtor by the attorney or his or her employee.
(h) If any debtor owes multiple debts and makes any single payment to any attorney or his or her employee with respect to the debts, the attorney may not apply such payment to any debt which is disputed by the debtor and, where applicable, shall apply such payment in accordance with the debtor's directions.
(i) A willful breach of this section constitutes cause for the imposition of discipline of the attorney in accordance with Section 6077.

Section 6077 states:

§ 6077. Effect of rules; discipline for breach

The rules of professional conduct adopted by the board, when approved by the Supreme Court, are binding upon all licensees of the State Bar.

For a willful breach of any of these rules, the board has power to discipline licensees of the State Bar by reproval, public or private, or to recommend to the Supreme Court the suspension from practice for a period not exceeding three years of licensees of the State Bar.

§ 6078. Power to discipline and reinstate

> After a hearing for any of the causes set forth in the laws of the State of California warranting disbarment, suspension, or other discipline, the State Bar Court has the power to recommend to the Supreme Court the disbarment or suspension from practice of licensees or to discipline them by reproval, public or private, without such recommendation.
>
> The State Bar Court may pass upon all petitions for reinstatement.

The primary purposes of disciplinary proceedings conducted by the State Bar and of sanctions imposed are the **protection of the public**, the courts and the legal profession, the maintenance of high professional standards by attorneys and the preservation of public confidence in the legal profession; these concerns are at their zenith in the case of an attorney who has previously committed an offense serious enough to justify disbarment and is again found to have departed from the rules of professional conduct. (*In re Silverton* (2005) 36 Cal.4th 81 (emphasis added.).)

Under the State Bar Act the final orders made by the supreme court were the only ones which were intended to have the effect of working disbarment, suspension or discipline of any person who might be subjected to the powers and processes with which the board of bar governors were invested. (*Werner v. State Bar of Cal.* (1939) 13 Cal. 2d 666.)

As a result of the above, it is clear that attorneys engaged in debt collection are licensees, or employees of a licensee, of any state agency other than the Department of Financial Protection and Innovation to the extent that licensee or employee is acting under the authority of the other state agency's license from the time an account is placed with the attorney for collection through the time the account is closed.

This position is further supported by a resolution adopted by the Conference of Chief Justices in connection with their opposition of Federal Agency regulation of Lawyers's Litigation Activities. Although the resolution addresses Federal Agency regulation, the logic applies to State Agency regulation as well. The Resolution states:

> Resolution 1. In Support of Preserving the Courts' Authority to Regulate and Oversee Lawyers Engaged in Litigation and Opposing Federal Agency Regulation of Lawyers' Litigation Activities
>
> WHEREAS, the Conference of Chief Justices, in fulfilling its leadership role for state judicial systems, has traditionally taken

positions to defend against proposed policies that threaten principles of federalism or that seek to preempt proper state court authority; and

WHEREAS, the Conference has long committed itself to protect and strengthen independent state judicial authority and proceedings as a central part of the federal system of American government; and

WHEREAS, the Conference has also taken positions to defend against proposed policies that threaten to undermine separation of powers; and

WHEREAS, for centuries, lawyers engaged in the practice of law have been regulated and disciplined primarily by the highest court of the state in which a lawyer is licensed or admitted to practice, along with lawyer disciplinary agencies overseen by those courts, and other state and federal courts of competent jurisdiction; and

WHEREAS, the state courts have developed extensive and effective regulations governing all aspects of the practice of law, including admission requirements, rules of professional conduct, disciplinary rules, and procedural rules for litigation, while federal courts have adopted local rules governing the conduct of lawyers appearing before them; and

WHEREAS, as a result of these judicial rules and regulations, state and federal courts have extensive authority and tools to address lawyer misconduct that occurs during the course of litigation before them, including monetary sanctions, striking offending pleadings or other papers, or referring a matter to disciplinary authorities, which could lead to a reprimand, censure, license suspension, disbarment, or other available sanctions; and

WHEREAS, consistent with the longstanding principle of judicial regulation and oversight of lawyers and the legal profession, many

federal agencies have included broad practice-of-law exclusions in major rules, including the Federal Trade Commission's "Mortgage Assistance Relief Services" rule issued in November 2010 and the Department of Housing and Urban Development's "Secure and Fair Enforcement for Mortgage Licensing Act" rule issued in June 2011; and

WHEREAS, also consistent with this principle, Congress has incorporated broad practice-of-law exclusions into certain federal statutes, including Section 1027(e) of the "Consumer Financial Protection Act of 2010" that excludes most lawyers engaged in the practice of law from Consumer Financial Protection Bureau (CFPB) regulatory and enforcement authority, and language in the Fair Debt Collection Practices Act of 1977 (FDCPA) that completely exempted all lawyers engaged in the practice of law before the exemption was removed by Congress in 1986 based in part on its belief that the revised Act would only apply to lawyers' non-litigation activities; and

WHEREAS, the Conference of Chief Justices adopted Resolution 1 on January 26, 2011, which affirmed that primary regulation and oversight of lawyers and the legal profession should continue to be vested in the state courts, not federal agencies or Congress; expressed support for Congress and federal agencies' decisions to include broad practice of law exclusions in certain key federal statutes and agency rules; and opposed federal legislation or rules intended to establish or expand federal regulatory jurisdiction over lawyers engaged in the practice of law; and

WHEREAS, in recent years, certain federal agencies have undermined the courts' proper role by imposing special litigation rules and standards on certain types of lawyers that go beyond and often conflict with well-established court rules applicable to all litigation lawyers, including the special due diligence standards and procedural rules that the CFPB has sought to impose solely on creditor lawyers; and

WHEREAS, the President of the American Bar Association submitted detailed comments to the CFPB on September 18, 2019 urging it to withdraw that portion of its proposed Debt Collection

> Practices Rule that would effectively codify the flawed "meaningful attorney involvement" concept that imposes special due diligence standards and procedural rules solely on creditor litigation lawyers, and also urging the CFPB to recognize the courts' authority to regulate, oversee, and sanction all lawyers engaged in litigation, regardless of the lawyer's legal specialty or the type of case filed with the court; and
>
> WHEREAS, these recent actions by federal agencies have undermined the courts' primary and inherent authority to regulate and oversee lawyers engaged in the practice of law by creating multiple conflicting sets of litigation rules and standards for lawyers, resulting in unfair lawsuits against lawyers pursing valid legal claims for clients in court, increased lawyer malpractice insurance rates, difficulty in obtaining legal representation, reduced access to justice, and interference with core aspects of the confidential attorney-client relationship including the attorney-client privilege;
>
> NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices supports legislation that would clarify that (1) lawyers engaged in litigation should be regulated and disciplined exclusively by state supreme courts, their lawyer disciplinary agencies, and other state and federal courts of competent jurisdiction; (2) federal agencies shall have no regulatory authority over litigation activities of lawyers or law firms; and (3) no party in a legal action shall have a federal private right of action against the opposing lawyer for the lawyer's litigation activities.

ADOPTION OF REGULATIONS/DEFINITIONS CONSISTENT WITH CFPB GUIDELINES

For all these reasons, CCBA believes it should be exempt from these proposed regulations.

Rules Must be Clear in Order to Prevent Frivolous Lawsuits Against Debt Collectors

CCBA's comments reflect the historical experiences of members who for forty (40) plus years have been subject to inconsistent interpretations of the FDCPA and its counterpart, California's Rosenthal FDCPA. Guidance around standard practice and procedure under the Rosenthal FDCPA has been left to the courts, resulting in a patchwork of inconsistent opinions which has resulted in a constant state of flux and uncertainty in compliance expectations for industry members. The FDCPA expressly recognizes that abusive debt collection practices competitively disadvantage those in the debt collection field that follow the rules and are not abusive. (15 U.S.C. § 1692(e).)

The California Rosenthal FDCPA was enacted to:

> ensure that debt collectors and debtors exercise their responsibilities to one another with fairness, honesty and due regard for the rights of the other

However, this mission of the California Rosenthal FDCPA has been lost. Rather than protecting consumers from the egregious conduct of unscrupulous debt collectors, the Rosenthal FDCPA has become nothing more than a breeding ground for a cottage industry of attorneys looking to benefit themselves rather than the consumers whose interests they are supposedly representing.

Therefore, CCBA urges the DFPI to consider that any final rule be abundantly clear and not conspicuously vague. Non-compliant behavior by any debt collector should be evident to a consumer as well as other debt collectors. Debt collectors who fail to implement compliance programs and who disregard the rights of consumers must be harshly punished. However, debt collectors who follow the rules ought not be sued because an attorney who knows that it will be too costly for the debt collector to fight the claim, even if they win, will still pursue frivolous cases against debt collectors in order to extract a "quick" settlement. The final debt collection rules must focus on compliance and not this sort of litigation extortion.

The Definitions in the Proposed Regulation, Section 1071, Require Additional Clarification.

The Proposed Regulation defines "complaint" as an expression of dissatisfaction regarding a financial product or service. (Regulation 1071(a).) This definition is not clear enough, leaving questions about what constitutes a complaint. Does a letter stating that the consumer does not recognize the debt and will not pay the debt constitute a complaint? Does a letter requesting verification of the debt constitute a complaint? Is a letter stating that the debt is not owed and is the subject of identity theft a complaint? Is a dunning letter returned with profanity written on it constitute a complaint? Does a hand drawn picture of a vulgar hand gesture constitute a complaint? Does a letter explaining that the consumer is a grandmother on a fixed income and cannot pay her medical bills and questioning (or complaining) why the covered party is attempting to collect the debt fall within the definition of a complaint? And the definition of "complaint," should exclude documents filed by the Court and discovery requests and responses. For instance, an answer could be considered a complaint under the proposed definition. The definition should exclude litigation documents. The definition should allow both consumers and covered entities to understand whether a complaint has been submitted.

The Proposed Regulation defines "complainant" as a consumer who submits a complaint, including parties who have authority to act on behalf of a consumer. (Regulation 1071(b).) How will CCBA's members determine who has authority to act on behalf of a complainant? If the complainant is represented by counsel, identifying who has authority is easy. But so often, CCBA members get letters who are allegedly signed by the consumer, but whose signature does not match the consumer. Additionally, these communications are often sent from a state or town that is hundreds of miles from a consumer. And if a party claims to have authority to represent a consumer, how does the covered party know that for certain?

Additionally, are complainants California residents who make a complaint, even if the covered party is out of state? Are complainants non-California residents who make a complaint? Can a

consumer file a complaint under the Proposed Regulations only if the consumer's residential address is in California? What if the consumer's representative is located in California, but the consumer resides in another State? Can a consumer residing in a State other than California, file a complaint in California under the Proposed Regulations about conduct between the consumer and the covered person that occurs entirely in another State? Does the "complaint" address only those licensed as a debt collector? The Proposed Regulations should make explicitly clear the answers to these questions. These questions also demonstrate a need to define "covered persons."

The definition of "inquiry" in the Proposed Regulations (Regulation 1071(e)) is much too broad, creating an assumption that there is an issue or problem connected to the inquiry. It covers ANY request for information about an "issue or problem" with a "financial product or service." That language creates the impression that an inquiry is more like a complaint. It is important that "inquiry" and "complaint" are distinctly defined, as they are very different and require different responses.

In addition, we ask for clarification that an inquiry does not include a request for validation, which consumers may request from debt collectors under the FDCPA, 15 U.S.C. § 1692g. Federal law governs debt collectors' responses to consumers' requests for validation and provides the specific information that must be provided in response.

We also seek clarification that the hundreds of consumer form letters we receive allegedly from consumers – even though the signatures do not match and the letters are mailed from states and town hundreds of miles from a consumer's address, and the letters are often received in bulk with many letters in the same envelope, as referenced above. We do not believe that these letters should constitute an "inquiry" from consumers. Such form letters include not just requests for validation, but also requests to cease communications, notice of attorney representation, and statements that the consumer does not accept responsibility for the debt. CCBA members have policies and procedures in place to respond to such letters. CCBA requests clarification that such letters do not constitute an "inquiry."

Additionally, consumers contact creditors rights law firms on a broad range of topics including, making offers to pay or negotiating a payment plan and asking questions about the legal process. It does not appear that these types of contact are the types of contacts that the DFPI intended to constitute inquiries.

The Proposed Regulations essentially would require CCBA member law firms to create detailed records, apart from their current systems of record for tracking matters to which clients have requested representation, to document each and every consumer interaction for purposes of preparing and providing the required annual report to the DFPI. This is an extremely onerous and cost-prohibitive requirement. Such a process and procedure would negatively impact the financial status of small business law firms, potentially requiring a reduction in staff to curb expenses, or an increase in fees to the small business clients CCBA member attorneys represent, which could financially impact these small business clients. This seems counter to the the DFPI's desire to support California's economy.

Indeed, it appears from the definition that inquiries are not really addressed toward debt collectors. If that is the case, CCBA recommends the definition be amended to exclude debt collection from the scope of "financial product or service" to which the inquiry provisions apply. For example, revise the definition as follows to address the references that make the definition appear to be directed toward complaints, and exclude debt collection.:

> "Inquiry" means a question or request for information, interpretation, or clarification submitted by an inquirer regarding a specific financial product or service, other than debt collection.

CCBA members already have in place, internal policies and procedures to intake, investigate, resolve, track, and report on consumer complaints. These policies and procedures are required by federal law and guidance, to which all CCBA members already are subject. Specifically, the Consumer Financial Protection Bureau (CFPB), in its examination guidance for debt collectors, already requires that CCBA members have a robust program to track and resolve consumer complaints. (*See, e.g.*, CFPB Examination Procedures: Debt Collection, March 2022).

The Proposed Regulations seem to imply that creditors' rights law firms operating in California do not already have robust consumer complaint programs in place, and that those law firms are building these programs from scratch. This is not an accurate assumption. CCBA members strongly urge the DFPI to modify the Proposed Regulations to allow our members to build on the consumer complaint management programs that our members already have, which provide information to the CFPB, instead of requiring them to build entirely new programs that will be expensive to build and maintain.

The DFPI Should Consider Using the Same Dispute System and Requirements Dictated by the CFPB.

The Proposed Regulations, Section 1072, contain extremely detailed requirements about how a covered person must establish and maintain its complaint management systems, including specific requirements for collecting complaints, providing a written acknowledgement of receipt, requiring the designation of a specific officer to be accountable for complaint management, tracking complaints specifically for and in the format required by the DFPI, and providing public reporting on complaints. In essence, the Proposed Regulations require each and every covered entity in California to create, in-house, a more robust consumer complaint management system than the consumer complaint system currently housed by the CFPB. The CFPB has spent millions of dollars to build and maintain that system over the 11 years of its existence. The DFPI is now asking each covered person to build its own similar system in-house. This is cost-prohibitive, particularly for small companies operating in the industry. The DFPI should mirror the requirements of the CFPB complaint system. The DFPI proposed regulations do not reference gathering any information that the CFPB does not gather that would be relevant to identifying and responding to a complaint.

CCBA suggests that the DFPI build its own consumer complaint portal, similar to the CFPB's. CCBA members would be happy to interact and support such a system, just as we do currently with the CFPB's consumer complaint portal. Through such a system, California consumers would file their complaints directly with their California regulator, and the covered entities

would file their responses directly with the regulator, and both the complaint and the response would be public, just like with the CFPB's complaint system.

If the Regulation Applies to Attorneys, the DFPI Should Exempt Litigation Documents from the Requirements for Litigation Related Documents.

The proposed regulations include a host of requirements for written communications. For example, under Section 1072(a)(3), all written communications, except for several listed exceptions (iMessage, SMS and MMS), would need to be in at least 12-point font disclosing procedures for filing oral and written complaints. We support clear and transparent communications with consumers about the complaint process and consumers' rights and responsibilities. We also assume that the proposed requirements do not apply to lawsuit-related correspondence, discovery and documents filed with the Court, which is governed by California civil procedure laws and rules. To address this, we ask that "written communications" be defined, to clarify that the term does not include court pleadings, motions, discovery, or other lawsuit-related documents.

The DFPI Should State Plainly What Obligations Exist if the Consumer Fails to Provide the Minimum Information Required to Submit a Complaint, Including a California Consumer Requirement.

Section 1072(a)(1) sets for the minimum elements of information that a covered person must include on the complaint form, which are all necessary to properly identify the complainant in the covered entity's records and properly identify the issue or problem. What is a covered person to do, if the consumer declines to provide one or more of the required information elements in the complaint form? The CCBA requests clarification on this issue.

As noted before, the proposed regulations do not clearly state that they apply to California residents. CCBA requests clarification in the Proposed Regulation that the availability of the complaint form can be restricted solely to consumers who reside in the State of California.

The DFPI Should Clarify and Expand the Methods by Which a Consumer Can Submit a Complaint.

In Section 1072(a)(4), the regulations discuss a website link to the Complaint Form. As raised above, the CCBA requests clarification that the link to the complaint form can be restricted solely to consumers who reside in the State of California. The proposed regulation requires each CCBA member to build an internet portal through which a complaint can be uploaded/submitted online. This requirement is extremely costly and does not serve any real purpose if the consumer is permitted to submit the completed for and its attachments by email. CCBA requests clarification that it would be allowable for the consumer to submit the completed complaint form and any attachments, to an email address.

Under Proposed Section 1072(a)(4), the main page of the covered person's website shall prominently display instructions on how complainants may submit their oral and written complaints, including the e-mail address, telephone number, mailing address, and website for filing a complaint. With regard to accepting complaints via an e-mail address, we are concerned that the designated e-mail inbox would be flooded with a host of disputes, comments and

inquiries, in addition to any complaints. This would be very difficult to manage. As an alternative to, an email inbox, we strongly prefer that complainants submit their complaints via a web portal. Many of our members already provide consumers with a web portal option to submit disputes to our Chief Compliance Officer which works well. In addition to providing a fillable version of the complaint form on our website, our members could provide a PDF of the complaint form if a complainant prefers to print, fill out and mail the form to us.

The 24-Hour Response to an Oral Dispute or Inquiry Voicemail Message Pursuant to Section 1072(a)(5) Is Unworkable and Needs Clarification.

The Proposed Regulations require a return call if a message is left by a consumer regarding a complaint (or inquiry). The s, without regard to weekends or holidays. However, this 24-hour requirement could conflict with CFPB requirements regarding the frequency of call attempts. Both the CFPB and the FDCPA prohibit calls during unusual times (15 C.F.R. § 1006.6; 15 U.S.C. § 1692c(a)), and courts might find calls on weekend or holidays to be unusual times for a call, creating liability. A 24-hour turnaround is not possible when that time limit falls on a weekend or a holiday. Furthermore, especially in the context of law firms whose time is controlled by the Court setting deadlines, or the scheduling or depositions or hearings, this 24-hour turnaround requirement is outside normal business requirements for a return call. We suggest that the language be changed to:

> If a live representative is unavailable to take the call, the covered person shall provide complainants with the option to leave a voicemail message with their telephone number for a callback from a live representative either at a time and date requested by the complainant, or within 3 business days, whichever is sooner.

In the experience of CCBA members, consumers often do not pick up incoming calls placed by our members. Furthermore, consumers also often have not enabled on their phone lines, the ability to receive a voicemail message. And there are times when a missed call does not register on a phone. For these reasons, CCBA feels it is important to clarify that the return call requirement is satisfied, even if the consumer does not answer the call or the covered entity cannot leave a message. The Proposed Regulations as currently drafted do not require more than one attempt to return the consumer's call. And as noted above, placing calls to a consumer may run afoul of the call frequency limitations imposed on debt collectors under CFPB's Regulation F (15 C.F.R. § 1006.14((b)).

Section 1072(a)(7)'s Time Limit for Making a Complaint to a Covered Entity Should Be Reduced

CCBA strongly objects to the proposed 4-year time limit on making complaints against our members. The complaints our members will face arise from debt collection. CCBA request that the DFPI align this time frame with federal and state laws that govern debt collection. Under the federal FDCPA, an action "may be brought in ... within one year from the date on which the violation occurs." (15 U.S.C. § 1692k(d); Rotkiske v Klemm, 139 S. Ct. 1614 (2019) (statute of limitations under the FDCPA runs from the date of the wrongful conduct, not the date of discovery). Our members are also subject to the California Rosenthal FDCPA, which also provides for a one-year statute of limitations. (Civ. Code § 1788.30(f).) The DFPI has no

authority to extend, through this rulemaking activity, those statutes of limitations on actions against or complaints to debt collectors. Setting a longer four-year period for complaints only confuses the issue, and gives greater opportunity for the passage of time to erode evidence, thereby making responses to complaints (or inquiries) impossible. It is unclear why the DFPI chose a four-year time frame. We ask that the DFPI align more closely with these laws and set the time frame for complaints within one-year of the conduct of which the consumer complains.

The DFPI Should Provide Examples of What Would Be Considered Incomplete Complaint Information Pursuant to Section 1072(a)(8)

Section 1072(a)(8) states that a complaint may not be treated as incomplete if the complainant is reasonable identifiable from the information provided and the information available to the covered entity from its records. CCBA requests more specificity in the Proposed Regulation by way of illustrative examples about what kinds of missing information would lead to the conclusion that the complainant was not "readily ascertainable." For example, what if the consumer declined to include their name or address in their complaint, and just included a phone number and an email address, and let's assume that in our member's system of record, that phone number is associated with multiple accounts with different creditors, and the email address is not in our member's system of record at all. In that example, our member cannot readily ascertain exactly which account to which the consumer's complaint refers.

Section 1072(b) of the Proposed Regulation Sets Forth Unnecessary Requirements as a Precursor to Addressing a Complaint (or Inquiry).

Section 1072(b) requires that a covered entity provide written acknowledgement of receipt of a complaint (or inquiry). The CCBA objects to the requirement to provide the complainant a written acknowledgement of receipt, which is a costly an unnecessary step that takes time away from responding to the complaint (or inquiry). The costs to the covered entities to create and maintain this notice function, appear to outweigh the benefits to the consumer to receive notice that their complaint is being worked on. The California Consumer Privacy Act and other California statutory schemes provides for written confirmation of receipt and providing notice of need for additional time if the covered entity cannot respond in the required time limit. The DFPI should incorporate this requirement rather than confirming receipt of each and every complaint (or inquiry).

The CCBA strongly objects to the requirement that the covered person must assign "a unique tracking number" to the complaint. This imposes an unnecessary and costly procedural requirement on the covered person, some of which are small businesses for whom this would be unduly burdensome. Our members already have systems in place internally to intake and track all consumer complaints received. As long as the covered person can track the complaint internally, that should be sufficient to accomplish the purposes of the Proposed Regulations.

Section 1072(b)(3) further requires the representative talking to the consumer live on the telephone to generate the unique tracking number while on the telephone and give it to the consumer. This would require "real-time" generation of a complaint number. This would require building new computer systems or processes internally to do so. This is an overly burdensome administrative requirement imposed on CCBA members and of limited utility to the

consumer. If the consumer receives a written response to the complaint (or inquiry) within the time frame allowed or a written confirmation if the response to the complaint (or inquiry) will take longer, this is sufficient notice to the consumer.

Time Frames for Providing Written Acknowledgment of Receipt of Complaint According to Section 1072(b) Are Too Short.

CCBA members appreciate the need to respond to complaints (and inquiries) in a timely fashion. CCBA members will work diligently to comply with the DFPI's new regulations in this regard. However, the proposal to mandate that covered persons respond to complaints submitted via email or internet within one calendar day, and complaints via postal mail and telephone in seven calendar days, is unduly burdensome, provides little added benefit to complainants, and is unreasonable. Our hard-working employees work Monday through Friday, and should we receive a complaint on a Saturday, we would have to hire significant additional staff and/or pay significant amounts of overtime to current employees to ensure a response by Sunday. Should there be a long weekend (e.g., Memorial Day or Labor Day three-day weekends), we would fail to be in compliance with the one-calendar day requirement. Holidays in which our offices are closed for longer periods – such as Thanksgiving and Christmas – would also result in noncompliance and potential legal exposure as a result. We urge the DFPI to switch to a business day standard, rather than a calendar day standard. It is too burdensome on covered persons with little, if any, added benefit to consumers.

More broadly, we believe that extremely short response times take away covered persons' resources from conducting a robust investigation with remediation, as appropriate. Rather than spending significant resources to provide an acknowledgement in an extremely short timeframe, covered persons should be given more leeway to devote the bulk of their resources on investigating the complaint, addressing any issues found, and providing a final, timely response to the complainant. We therefore urge the DFPI to modify the extremely burdensome acknowledgment timeframes being proposed, as suggested above.

Section 1072(b)(3) requires that for complaints received via telephone call, the covered person must provide written acknowledgement of receipt of the complaint, to the consumer via USPS mail. The Proposed Regulation should clarify that if the consumer declines to provide or verify the consumer's current mailing address as part of the consumer's complaint, the covered person will comply with this rule by mailing the written acknowledgement to the consumer's last known address.

Section 1072(c)(1), Providing for Initial Processing of Complaint, Should Regulate the Expected Output and Not How the Law Firm and Who in the Law Firm Addresses the Complaint.

The Proposed Regulations state exactly who inside the covered person's company must review the consumer's complaint. CCBA members strongly object to being told exactly how to engage in its internal processes for investigating and resolving consumer complaints. Each covered person should be allowed to determine how best to do so, given its size, business structure, compliance program characteristics, and employee skills and abilities. For example, one company many chose to have a complaint handling representative embedded in each operational

function in the company to handle complaints concerning that operational function, whereas another company may require all complaints to be funneled into one office (like the compliance department) for handling. Either option should be acceptable, so long as the desired outcome – a properly investigated complaint – is achieved.

The Proposed Regulation instead should describe the expected output of the consumer complaint, not how that output should be achieved. CCBA suggests this revision:

> The covered person must ensure that its response to each complaint, including the allegations in the complaint form and all supporting materials submitted by the complainant, are reviewed by staff of the covered person who are knowledgeable about the services and operations which are the subject of the complaint, as determined by the covered person.

The Requirement to Track Complaints Set Forth in Section 1072(d)(2) Needs Further Clarification Regarding Tracking Methodology.

The Proposed Regulation states that covered persons must provide information about complaint tracking "in any electronic format requested by the department." As noted above, The DFPI should develop a complaint management system similar to the one developed by the CFPB, rather than each covered entity create their own system. Furthermore, CCBA objects to this open-ended requirement, without any specificity as to the criteria or data points the DFPI will want, and the specific electronic format in which the DFPI will want it. CCBA suggests that either the DFPI build the complaint management system itself, with which our members will interact, or provide specific requirements. If we must build our own systems, we need to understand the data the DFPI wants, up front, so those requirements can be built into our new IT systems.

The DFPI Should Shorten the Records Retention Period Set Forth in Section 1072(f):

CCBA strongly objects to the proposed 5-year records retention period set forth in Section 1072(f). As noted above, a more relevant retention period might be one year (or even two years), given the statute of limitations for claims. CCBA suggests the following change to the Proposed Regulation:

> The complaint process shall require a covered person to maintain a written record of each complaint for one year, starting on the date the statute of limitations would run on any claim arising from the conduct identified in the complaint.

Section 1072 Sets Forth Quarterly Reporting on Complaints and More Clarification Is Necessary.

Section 1072(h) sets forth various information to include in quarterly reports. The requirement to identify any "partial refund" or "full refund" does not appear to apply to collection attorneys. As collection attorneys, CCBA members could not imagine a situation in which the attorney would provide a "partial refund." CCBA members typically do not issue a "partial refund or account adjustment" or a "full refund" to consumers on an account in collections. This section of

the reporting requirement appears to relate more to holders of debt, so debt collectors should be exempted.

Moreover, most of the "complaint types" that the Proposed Regulation requires be reported to the DFPI, appear to relate more to current or original creditors. To ensure that all are aware, debt collectors and debt collection attorneys should be exempted from reporting on the following complaint categories: subparagraphs (D), (I), (J), (K), and (N).

The DFPI's proposal includes public reporting of all complaints and inquiries. Information about whether a company responded and responded on time should be included. It is also critical to ensure that complaints and inquiries are listed separately and differentiated, as looking at the total number of complaints and inquiries would be highly misleading. Overall, it is important that publicly available complaint and inquiry data is differentiated to reflect which are complaints, which are inquiries, whether a company responded, and whether the response was timely

The DFPI Must Add More Clarity to What Constitutes an Inquiry.

Regulation 1073(e) defines "inquiry" as follows:

> "Inquiry" means a question or request for information, interpretation, or clarification submitted by an inquirer regarding a specific issue or problem with a financial product or service.

Many if not all of the comments regarding complaints apply to inquiries as well. For instance, as discussed above, this definition is problematic, including problematic from an attorney perspective. As attorneys, we are limited in giving legal advice, and the definition and rules regarding inquiries do not reflect this issue. Attorneys cannot give legal advice to its client's adversary and responding with legal advice would create an attorney-client relationship for purposes of ethical conflicts. It is certainly imaginable to envision a consumer asking for legal advice about how to respond to a notice of debtor's examination or a request for default. And one would assume that any call that might contain legal advice inquiries would need to be forwarded to an attorney, which may involve leaving a message for a return call.

Additionally, if contacted directly by a consumer who is represented by counsel, these regulations would require that the law firm/attorney talk with the represented party/consumer. As a legal representative of our clients, CCBA attorney members are prohibited under the California Rules of Professional Conduct from talking directly to a represented party (Rule 4.2) or providing any legal advice to a consumer (Rule 4.3). The definition of inquiry (and complaint for that matter) must address this issue.

The definition is also vague, appearing to encompass complaints. To address the above and provide more clarification, the definition should be changed as follows:

> "Inquiry" means a question or request for information, submitted by an inquirer regarding a specific account or financial product or service prior to litigation.

DFPI Should Modify Response Time and Information.

Moreover, these regulations do not contemplate the short timelines that may come into play when litigation is involved. And the necessity to call consumers rather than mail consumers.

Responses to inquiries must be responded to in the same method that the inquiry was made, such as by mail. (Regulation 1073(c)(1) (allowing for 15 day response for inquiries).) When a court deadline prompts a consumer to mail an inquiry, responding by mail may not be in the consumer's best interest delaying information that may be necessary prior to the court deadline.

CCBA law firms are dedicated to responding to inquiries in a timely fashion. These law firms have policies and procedures to respond to all inquiries and complaints. Nonetheless, we are concerned with the requirement to have a dedicated inquiry phone line. (Regulation 1073(a).) First, it is unclear whether one such line could be used for complaints and inquiries.

Second, once a matter is in litigation, inquiries are sometimes better referred to the attorney rather than the inquiry phone line, especially if court-imposed deadlines are approaching. For instance, the defendant consumer is to meet and confer with the attorney representing the creditor to discuss how each party sees their case and possible stipulations as required by Rule of Court 3.724. Such a phone call could be viewed as an inquiry as to the creditor's positions, falling within Regulation 1073. Such discussion cannot be handled by the person assigned to the inquiry phone line. Since there are persons responsible for a case in litigation, sending those calls to a dedicated line only to have a message taken or the call referred elsewhere would only irritate consumers and delay responses to their questions.

Furthermore, the return call after a message is left on the dedicated line must occur within 24 hours according to Regulation 1073(a). As noted above, this time frame is too short. Additionally, when responses need verification with a client, a 24-hour return call is not feasible. First, the regulation does not clarify if that 24 hour period means weekend and holiday return calls. Second, there are often times that a covered party would want to confirm the response with the client prior to providing the response to the consumer. Under such circumstances, 15 days would be appropriate for a response deadline, especially since CCBA's members most certainly would have to consult with their creditor clients and review documents.

The categories of inquiries in Section 1073 do not make sense for CCBA's collection attorney members. They are inquiries law firms would not be able to address, such as "cost of the product or service; fees and surcharges; funds access, etc." These are inquiries that seek information from a creditor, not a law firm. The Regulation should clarify that not all inquiries may be addressed by collection attorneys.

Attorney Client Communication Privilege and Attorney Work Product Should be Included in the List of Confidential Information in Section 1075.

The definition of "nonpublic or confidential information" set forth in Regulation Section 1075(a) must also include attorney client communications and attorney work product in the list of excluded privileged information.

Thank you again for inviting and considering stakeholder input during the rulemaking process. We look forward to providing input on future DFPI rulemakings as well.

If you have any questions, please contact me by telephone at [redacted] or by email at [redacted]@messerstrickler.com.

Sincerely,

[redacted]

June Coleman
Secretary and Committee Chair to Provide Comments on Proposed Regulations by the DFPI
California Creditors Bar Association