Ms. Clothilde V. Hewlett
Commissioner, Department of Financial Protection and Innovation
2101 Arena Blvd.
Sacramento, CA 95834
Submitted electronically to regulations@dfpi.ca.gov

Re: PRO-05-21

Dear Commissioner Hewlett:

We appreciate the opportunity to provide additional comments on the Department's proposed rules enacting the Debt Collection Licensing Act. The undersigned organizations filed comments on October 5, 2021 regarding the same DCLA rulemaking at issue in this submission. In that October 2021 letter, this Coalition urged the Department to adopt the consumer-friendly approaches that we had urged in previous comments to the Department. *See* Oct. 2021 letter at 1-4; Appendix to Oct. 2021 letter (reproducing our June 2021 suggestions). Although we necessarily focus our comments today on the text of proposed regulations released on July 15, 2022, we continue to urge the Department to adopt the suggestions put forth in our October 2021 and June 2021 submissions. I

As a preliminary matter, we applaud the Department for adopting the Coalition s suggestion to require licensees to report the total number and dollar amount of California debtor accounts for which collection was attempted during the preceding calendar year. *See* section 1850.70(h). The rationale for this legal obligation appears on page 16 of our October 5, 2021 letter in this rulemaking. We appreciate the Department's adoption of this proposal.

Our suggested changes to the July 15, 2022 text of proposed regulations are as follows:

SUGGESTION 1: Amend section 1850(j) to avoid any suggestion that a person must be *profitable* to "engage in the business of debt collection"

Currently, the text of proposed regulations defines "engages in the business of debt collection" (which triggers coverage under the Act) as "(A) engages in debt collection for a profit or gain, and (B) the activity is of a regular, frequent, or continuous nature." Section 1850(j). The proposed regulations subsequently clarify that "[a]dvertising or otherwise offering the service of debt collection for remuneration constitutes engaging in the business of debt collection." Notwithstanding this clarification, the Department should amend the definition of "engages in the business of debt collection" to avoid any suggestion that "profit or gain" is required to be covered by the Act. An entity that engages in debt collection but is nonetheless not profitable is, of course, subject to the Act. At a minimum, the Department should substitute "for compensation" in the definition where "for a profit or gain" currently appears. This alternative would make it clear that *being paid* (as opposed to *being profitable*) is the relevant consideration. We see no reason, however, to include even the qualifier "for compensation," as we know of no entities engaged in regular yet pro bono debt collection (and even if such entities did exist, they still should be subject to the Act). Thus, we suggest amending the definition in section 1850(j) as follows (altered language **bolded**):

Section 1850

. . .

> (j) "Engage in the business of debt collection": A person engages in the business of debt collection and is required to be licensed pursuant to section 100001, subdivision (a) of the Financial Code if the person (A) **engages in debt collection**, and (B) the activity is of a regular, frequent, or continuous nature. Advertising or otherwise offering the service of debt collection for remuneration constitutes engaging in the business of debt collection.[1]

SUGGESTION 2: Strike the exemption to the licensing requirement for most original creditors (section 1850.1(c))

We oppose the proposal to exempt original creditors from the licensing requirement unless certain, narrow criteria are met. This proposed exemption is contrary to the text of the Act itself and is unjustified as a policy matter. Even if resource limitations prevent the inclusion of most original creditors in the present rulemaking, the Department can and should signal that it may revisit the issue in a future proceeding.

[1] If the Department adopts our suggestion here, we nonetheless recommend keeping the final sentence of this definition, which makes clear that *holding oneself out as* offering debt collection is sufficient to trigger coverage under the Act.

Currently, section 1850.1(c) of the text of proposed regulations provides that a "creditor seeking, in its own name, repayment of consumer debt arising from credit the creditor extended is not engaged in the business of debt collection" unless at least one of three narrow criteria (relating to the original creditor's amount of debt collection) are met.

We see no compelling policy justification for this carveout from the Act's application. To begin with, original creditors engage in a great deal of debt collection. According to a July 2022 study from the National Consumer Law Center, *nearly half* of all the debt collection lawsuits filed in 2021 in 16 California counties were filed by original creditors in their own names.[2] Original creditors filed 46% of all debt collection lawsuits, as compared to 30.2% for debt buyers. The landscape of debt collection activity in California counsels against a permanent situation in which original creditors are generally exempt from licensure.

Nor is the proposed distinction consistent with the language of the Act, which defines "debt collector" as "any person who, in the ordinary course of business, regularly, on the person's own behalf or on behalf of others, engages in debt collection." Fin. Code section 100002(j). Such language plainly includes original creditors seeking to collect debt in their own names, at least those who do so regularly.

To be sure, the Debt Collectors Licensing Act does not apply to several categories of entities, many of which include original creditors that seek to collect their own debts. *See* Fin. Code section 100001(b) (excluding from the Act, *inter alia*, depository institutions, mortgage lenders, and entities licensed under the CFL). Those exclusions, however, do not justify excluding *other* original creditors that would otherwise be subject to the Act. Notably, bail bonds companies are original creditors that frequently collect debts in their own name. As this Coalition explained in a previous letter to the DFPI, bail bonds companies are "debt collectors" within the meaning of the DCLA and for strong policy reasons should be covered by the Act, given their demonstrated history of unscrupulous debt collection practices. *See* Ltr. of April 1, 2021 from LCCRSF et al. at 3-5 (attached as Appendix A). Under current DCLA regulations, bail bonds companies are required to obtain a license from the DFPI, but we are concerned this requirement may be jeopardized by the current proposed text.

Given that the Act plainly applies to original creditors that are not exempt institutions under Financial Code section 100001(b), it is unclear what textual basis there is for the lines that the proposed rule draws between different original creditors. In section 1850.1(c) of the text of proposed regulations, the Department proposes three criteria that are each, alone, sufficient to trigger coverage under the Act:

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[2] *See Pandemic Lawsuits in California: Credit Card Issuers and Debt Buyers Top Litigants in 2021*, available at https://www.nclc.org/images/pdf/debt_collection/IB_CA_2021_collection_lawsuits.pdf. The cohort of counties studied includes many populous counties from across the state, including Los Angeles, Orange, San Diego, Alameda, and Santa Clara counties.

(1) Five percent or more of the creditor's annual profits over the last twelve months, whether contracted for or received, constitute collection fees, late fees, or any other charges added to the original consumer credit transaction that created the debt.

(2) Within the last 12 months, an average of ten percent or more of the creditor's inventory was repossessed at least once, either by the creditor directly or through a third-party.

(3) The creditor has a monthly average over the last 12 months of twenty-five percent or more of the gross amount of its accounts receivables ninety or more days past due.

All three definitions are based upon a comparison between the entity's debt collection practices and non-debt collection practices. But the textual and policy bases for such a distinction are elusive. A massive original creditor with many different business lines could engage in extensive debt collection in California and be exempt under these definitions, while a smaller original creditor that engages in far less debt collection activity (but that has fewer significant other business lines) would be covered. The approach makes even less sense given that these three criteria appear not to distinguish between in-state and out-of-state activity. It is not clear how the purpose and text of the Act would be effectuated by exempting a multi-state creditor that happens to do a lot of non-debt-collection-related business out of state. With respect to bail bonds companies in particular, it is not clear whether any such companies would be deemed subject to the DCLA under the Department's proposed test, even though those entities have a demonstrated history of problematic debt collection behavior. *See* Appendix A at 3-5.

If the Department believes it necessary to carve out original creditors that engage in a *de minimis* amount of debt collection activity, then it would seem more in line with the text and purpose of the statute to base that carve-out on the creditor's *absolute* amount of debt collection activity rather than a comparison between its debt collection and non-debt collection activity. Rather than inject this uncertainty into the scope of the Act, however, it might be more appropriate simply to omit any exclusion for original creditors per se. Such entities are plainly covered by the Act unless they are also exempt entities under Financial Code 100001(b). Alternatively, the Department could promulgate a general rule that original creditors are covered so long as the original creditor is not an exempt entity under Financial Code 100001(b), as follows (altered language bolded):

Section 1850.1

. . .

(c) A creditor seeking, in its own name, repayment of consumer debt arising from credit the creditor extended is **not required to obtain a debt collector license if the creditor is exempt from coverage of the Debt Collection Licensing Act under Financial Code section 100001(b).**

We note that such clarification is, strictly speaking, unnecessary given the clear statutory exclusion set forth in Financial Code section 100001(b). But we believe it may be helpful.

If, for reasons of resource limitations or other prudential concerns, the Department determines not to require licensure of all non-exempt original creditors at this time, we suggest that – in addition to drawing the lines differently as described above – the Department indicate that it may revisit and expand licensure requirements for original creditors in the future.

SUGGESTION 3: Amend section 1850.2 to clarify that the DCLA covers the collection of COVID-19 back rent debt.

We believe that it is inappropriate to exempt "residential rental debt" from the definition of consumer debt under Section 100002 of the Financial Code. That broad an exemption risks unintended consequences. For example, under current law, the question whether rental debt is covered by the similar definition in the Rosenthal Fair Debt Collection Practices Act (Civ. Code sec. 1788) is unresolved. *See* California Senate Judiciary Committee Analysis of SB 1324 (2022) (concluding the issue is unclear).[3] If the Department decides not to require most landlords to obtain licenses as debt collectors, it could directly state that entities that collect their own residential rental debt do not need to obtain a license (rather than, as the current proposed draft text states, that residential rental debt is not consumer debt). Adopting such an approach would reduce unintended consequences outside of the DCLA context. We note that whatever the argument may be for exempting landlords themselves from licensure, there is little if any textual or policy basis for exempting third-party collectors who collect rental debt.

Further, the proposed rule's exemption of rental debt from covered debt runs counter to recent changes in California statute making clear that rent that went unpaid because of the COVID-19 pandemic is consumer debt for purposes of the Department's enforcement authority. Given those changes, it makes even less sense for the proposed draft to state categorically that "[r]esidential rental debt" is "not consumer debt within the meaning of section 100002, subdivision (f) of the Financial Code." As we wrote in our October 5, 2021 comment letter:

> This is the result of AB 3088 (Chiu), enacted as an urgency measure. In that measure, the Legislature converted unpaid COVID-19 rent into "consumer debt." This does not have to be inferred. The Legislative history is plain. Consider the Senate Judiciary Committee s analysis of AB 3088 which repeatedly states that the bill would by operation of law transform unpaid rents into "consumer debt". With highlights and emphases supplied, it states:
>
> This bill:

[3] *Available at* https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202120220SB1324

10) Establishes a legal framework to address circumstances where a tenant has fallen behind on rent or other payment obligations under the lease due to financial hardship caused by the COVID-19 pandemic as follows:

a) provided the tenant follows specified procedures, including providing specified documentation of the hardship if the tenant is a high-income tenant, as defined, then:

i) unpaid rent and other payment obligations under the lease accrued between March 1, 2020 and August 31, 2020 **are converted to consumer debts** and cannot form the basis for an eviction ever;

ii) unpaid rent and other payment obligations under the lease accrued between September 1, 2020 and January 31, 2021 cannot form the basis for an eviction until after January 31, 2021.

In addition, if the tenant pays at least 25 percent of any amount that the landlord demands after it comes due, the remaining unpaid balance **is converted to consumer debt** and cannot form the basis for an eviction ever;[4] …

At its most basic, this bill provides a pathway for tenants enduring financial hardship due to the COVID-19 pandemic to remain in their homes through the end of January 2021. However, the bill does not "forgive" or "cancel" any payment obligations that a tenant has under the lease. Instead, depending on the circumstances, **some or all of any unpaid amount essentially turns into consumer debt, meaning that the landlord can sue the tenant for failing to pay the money and can use any of the standard legal methods (bank levy, wage garnishment, etc.) to collect it**, but the unpaid amount **cannot serve as a basis for throwing the tenant out of the home**.[5]

If the tenant returns the signed declaration of COVID-19 related financial hardship to the landlord within the fifteen days given, then the tenant receives protection against eviction. How long that protection lasts depends on when the unpaid rent accrued. For unpaid rent and other charges that accrued between March 1, 2020 and August 31, 2020, returning a signed declaration of COVID-19 related financial hardship permanently protects the tenant against eviction. **The tenant still owes that money to the landlord, but it becomes consumer debt: something the landlord can sue the tenant for if the tenant does not pay it back voluntarily, but not the basis for an eviction.** For unpaid rent and other

[4] 2019-2020 Regular Session AB 3088 (Chiu) Version: August 28, 2020 Hearing Date: August 29, 2020, at p. 4. Emphasis and highlight supplied.

[5] *Ibid.,* at p. 7.

> charges that accrue between September 1, 2020 and January 31, 2021, returning a signed declaration of COVID-19 related financial hardship only protects the tenant against eviction until February 1, 2021. However, if the tenant returns the signed declaration of COVID-19 related financial hardship and also manages, before February 1, 2021, to pay the landlord at least 25 percent of the rent still due for September 1, 2020 to January 31, 2021 period, then the tenant is permanently protected against eviction for failure to pay the balance. **That balance is not forgiven or cancelled, though. It, too, becomes consumer debt that the tenant can be sued for if the tenant does not eventually pay it voluntarily.**

The Senate Appropriations Committee analysis (August 30, page 3) and the Senate Floor analysis (August 31, 2020, pages 4, 6, and 8) say the same thing, and no amendments were made to the bill after these analyses were written.

The equation of unpaid rent to "consumer debt" is not just true by operation of law. It is also true as a matter of fact and common sense. The hallmark of a "consumer credit transaction" is the notion of "credit": a person obtaining and being able to use for personal use a monetary benefit now, with an obligation to pay it back later. That is precisely how COVID-19 rental debt is treated as a result of AB 3088, SB 91, and AB 832.

Finally, any regulatory interpretation of these statutes that does not acknowledge the legal treatment of unpaid rent as consumer debt would undermine the purpose of those laws. If the rent owed were not "consumer debt," then it would still be unpaid rent subjecting tenants to eviction. That is the opposite of the purpose of this trio of laws, which was to prevent epic, unprecedented, and socially destabilizing evictions. For this reason, treating unpaid rent as consumer debt is an essential feature of the laws, which is why the Senate Judiciary Committee analysis of AB 3088 is so explicit on that point. Avoiding mass evictions, while at the same time not erasing COVID-19 back rent debt but treating it like consumer debt, was a top-shelf priority for the legislature. That priority needs to be reflected in the DCLA rule as well.

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As noted, we recognize that because of resource limitations or other prudential concerns the Department may not believe it appropriate at this time to license landlords who collect rental debt, including from the COVID-19 period. But any such concerns do not justify exempting *third-party* debt collectors from being licensed when collecting such rental debt. Indeed, given the Legislature's determination that COVID-19 rental debt is consumer debt, there is no reason to treat such debt any differently when being collected by entities that would otherwise be subject to the DCLA. Thus, at a minimum, we strongly encourage the Department not to exclude from licensure third-party debt collectors who are collecting COVID-19 rental debt.

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We thank the Department for considering our suggestions. If any further information would be useful, please contact Andrew Kushner at [redacted] or Lucia Mattox at [redacted].

Very truly yours,

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