August 29, 2022

VIA E-MAIL (REGULATIONS@DFPI.CA.GOV)

Department of Financial Protection and Innovation
Attention: Sandra Navaro
2101 Arena Blvd.
Sacramento, CA 95834

Re: ***Invitation for Comments on Draft Text for Proposed Second Rulemaking Under Debt Collection Licensing Act (PRO 05-21)***

Dear Ms. Navaro:

CTIA[1] respectfully submits these comments in response to the Department of Financial Protection and Innovation's (Department's) Invitation for Comments on Draft Text for Proposed Second Rulemaking Under the Debt Collection Licensing Act (DCLA), in the above-referenced docket.[2]

Background and Overview

Through the Draft Text, the Department seeks to implement the statutory mandate to require licensure of any entity that "engage[s] in the business of debt collection" in California while properly excluding the vast majority of businesses that are not "in the business of debt collection," but collect debts when their customers fail to pay for goods or services rendered under contract.[3] To that end, CTIA supports the adoption of a suitable

[1] CTIA – The Wireless Association ("CTIA") (www.ctia.org) represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st century connected life. The association's members include wireless carriers, device manufacturers, and suppliers as well as app and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment. The association also coordinates the industry's voluntary best practices, hosts educational events that promote the wireless industry and co-produces the industry's leading wireless tradeshow. CTIA was founded in 1984 and is based in Washington, D.C.

[2] *Invitation for Comments on Draft Text for Proposed Second Rulemaking Under the Debt Collection Licensing Act*, Pro 05-21 (rel. July 15, 2022) ("Invitation for Comments"), attaching Text of Proposed Regulations, Title 10, Chapter 3 ("Draft Text").

[3] *See generally* Cal. Fin. Code §§ 100001-100002.

definition of entities that "engage in the business of debt collection," and the exclusion from the licensing requirement of original creditors and entities that service debts not in default on behalf of original creditors.

While the proposals in the Draft Text on these topics take important steps in the right direction, the Department should refine the language in the Draft Text to ensure that the definition and exclusions capture the intended entities and do not create unnecessary administrative burdens for the Department or potential regulatees.

The Department Should Adopt Regulations That Appropriately Define Businesses That "Engage in the Business of Debt Collection."

The DCLA requires licensure by the Department of any entity that "engage[s] in the business of debt collection."[4] The statute makes clear, however, that not all "debt collectors" are "engaged in the business of debt collection." Specifically, although the DCLA defines several terms—including "debt collection" and "debt collector"—it does not define "engage in the business of debt collection."[5] As a result, under basic principles of statutory construction, the Department is correct to recognize that the Legislature must have intended "engage in the business of debt collection" to mean something different than "debt collector" since, had the Legislature wished to require licensure by all "debt collectors," it simply could have said so.[6]

Indeed, the DCLA subjects "debt collectors" to other obligations (e.g., restrictions on debt collection practices in section 1788.11), but does *not* require "debt collectors" to obtain licenses under section 100001(a). As such, the Department must define and give effect to the statutory term "engage in the business of debt collection" in a manner that appropriately differentiates it from defined terms such as "debt collectors."

The Draft Text proposes to define entities that "engage in the business of debt collection," and thus must obtain licenses, based on "engag[ing] in debt collection for a profit or gain" and doing so on a "regular, frequent, or continuous" basis.[7] This approach aligns with the

---

[4] Fin. Code § 100001(a).

[5] *Id.* § 100002(i)-(j).

[6] *See, e.g., Rashidi v. Moser,* 60 Cal. 4th 718, 725 (2014) ("where the Legislature uses a different word or phrase in one part of a statute than it does in other sections or in a similar statute concerning a related subject, it must be presumed that the Legislature intended a different meaning").

[7] Draft Text proposed § 1850(j).

statutory language showing the Legislature's intent to require licensure by entities that collect debts *as their business*, and *not* by all businesses that merely engage in "debt collection" (as broadly defined in the DCLA) whenever their customers fail to pay their bills.

While this basic approach is sound, the language in the Draft Text requires further clarification. The elements of the Draft Text's proposal—engaging in debt collection for profit or gain on a regular, frequent, or continuous basis—are generally appropriate, but would benefit from further definition of the terms used. For example, the Department should clarify that a business engages in debt collection "for profit or gain" only when it receives compensation or remuneration from another entity for engaging in debt collection. CTIA recognizes that the concept of "profit" or "gain" may play a legitimate role in this definition to capture debt collectors who are compensated by being allowed to retain payments from debtors to the extent that they exceed an amount that the debt collector pays to the original creditor. That said, the definition needs to make clear that entities "engage in the business of debt collection" only when they are compensated *for the act of collecting debts,* and that businesses do not "engage in the business of debt collection" when they recover money owed to them by their own delinquent customers. This must remain so even if, by collecting the money owed to them (including reasonable collection costs), they earn some portion of the ordinary "profit" or "gain" that any business receives for selling its goods or services.

The Draft Text also creates ambiguity because it is unclear how the "engage in the business" definition proposed to be added to section 1850(j) interrelates with the proposed exemption for "original creditors" proposed to be added as section 1850.1(c). Section 1850.1(c) would state that original creditors are "not *engaged in the business of debt collection* for purposes of licensure under the Debt Collection Licensing Act" except under certain criteria. Clearly the two sections closely relate to each other. For clarity, the Department should move the "original creditor" concept into the definition of "engage in the business of debt collection" in section 1850(j) so that the common phrase, "engage in the business of debt collection," will have a consistent meaning in each instance.

The Department Should Eliminate the Carve-Outs from the "Original Creditor" Exemption.

As noted in the prior section, the proposed exemption for "original creditors" appropriately seeks to distinguish businesses that "engage in the business of debt collection" from businesses that are simply collecting their own debts in the ordinary course of business. As such, CTIA supports the inclusion of a provision in the Department's regulations making

clear that "original creditors" that collect their own debts (either directly or through an affiliate or subsidiary) are not "engaged in the business of debt collection."

It is unclear, however, why the Draft Text includes three carve-outs from the "original creditor" exemption:

- If five percent or more of the creditor's annual profits over the last 12 months constitute collection fees, late fees, or other charges added to the original consumer credit transaction;

- If an average of 10 percent or more of the creditor's inventory was repossessed at least once on the last 12 months by the creditor or a third party; or

- If the creditor has a monthly average of 25 percent or more of its gross accounts receivable 90 or more days past due over the last 12 months.[8]

CTIA proposes that these carve-outs be eliminated. The Invitation for Comment includes no explanation of any goals the carve-outs seek to satisfy, and their purpose is not apparent from the Draft Text itself. For the reasons discussed above, an entity that is pursuing repayment of consumer debt in its own name arising from credit that the entity itself extended—i.e., an "original creditor"—is not "engaging in the business of debt collection." It is simply a "debt collector" and as such is not subject to the licensing requirement regardless of the amount of the debt owed. As a result, it does not appear that the proposed carve-outs are "necessary" to the implementation of the DCLA and they should not be included.[9]

[8] Draft Text, proposed § 1850.1(c)(1)-(3).

[9] *See* Gov. Code § 11349.1(a)(1); Cal. Code of Regs. § 10(b) ("In order to meet the "necessity" standard of Government Code section 11349.1, the record of the rulemaking proceeding shall include: (1) a statement of the specific purpose of each adoption, amendment, or repeal; and (2) information explaining why each provision of the adopted regulation is required to carry out the described purpose of the provision. Such information shall include, but is not limited to, facts, studies, or expert opinion. When the explanation is based upon policies, conclusions, speculation, or conjecture, the rulemaking record must include, in addition, supporting facts, studies, expert opinion, or other information. An 'expert' within the meaning of this section is a person who possesses special skill or knowledge by reason of study or experience which is relevant to the regulation in question.").

The proposed carve-outs also lack the "clarity" required of agency regulations.[10] For example, it is unclear how a creditor's "annual profits" would be determined (for example, whether they would be computed before or after taxes, how depreciation is to be reflected, etc.). It is similarly unclear why the proposed five percent threshold is significant or appropriate—a problem exacerbated by the lack of a clear purpose for the carve-out. The inventory and past-due receivables carve-outs are problematic for similar reasons. For instance, it is unclear why these factors would be relevant as applied to an "original creditor," who is by definition not "in the business of debt collection." It is also unclear why the specific thresholds proposed (10 percent or more of inventory repossessed or 25 percent or more of gross receivables 90 days past due) were chosen. And there is no apparent connection between the carve-outs and their thresholds and any standard in the statute. The carve-outs are unnecessary under a clear interpretation of the statute, and the lack of rationale or support for the various thresholds proposed would make their adoption arbitrary and capricious.[11]

All of these reasons simply further militate for the Department to eliminate the carve-outs, and make clear that "original creditors" collecting their own debts (either directly or through affiliates or subsidiaries) should not be included in the definition of entities that "engage in the business of debt collection."

The Department's Regulations Should More Appropriately Capture the Realities of Retail Contract Transactions.

The Department's regulations also should reflect that the identity of the "original creditor" can be affected by the realities of standard retail transactions. For example, CTIA's members are generally in the business of selling wireless communications services and associated devices. In many cases, wireless providers sell directly to consumers (e.g., in retail stores or via their websites). However, in some cases wireless providers contract with, for example, major retailers such as Target or Walmart to serve as retail sales channels for their wireless devices and services. In such cases, the consumer contract may

---

[10] *See* Gov. Code § 11349.1(a)(3); Cal. Code of Regs. § 16(a) ("A regulation shall be presumed not to comply with the 'clarity' standard if any of the following conditions exists: (1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; or (2) the language of the regulation conflicts with the agency's description of the effect of the regulation; or (3) the regulation uses terms which do not have meanings generally familiar to those 'directly affected' by the regulation, and those terms are defined neither in the regulation nor in the governing statute….").

[11] *See, e.g., American Coating Ass'n v. So. Coast Air Qual. Mgmt. Dist.*, 54 Cal. 4th 446, 461 (2012).

be signed by the retailer, but only with the intention to shortly thereafter assign it to the wireless provider that actually will provide the service over the life of the contract.

The proposed exemption in section 1850.1(d) for entities "solely servicing debts not in default on behalf of an original creditor" appears to be aimed at addressing situations similar to this, and CTIA encourages the Department to adopt a regulation that encompasses this common type of retail sales contract transaction. However, the Department should modify the proposed regulation to make it clear that this exemption applies to an entity solely servicing a debt on behalf of the original creditor or any other person, as long as the debt is not in default at the time the servicer begins servicing it (even if the debt is subsequently defaulted upon). The Commission could also modify the definition of "original creditor" to include entities who purchase retail sales contracts that are not in default within a short period of their execution (e.g., 120 days).

*****

CTIA appreciates the opportunity to comment on the proposed rules in this proceeding and encourages the Department to reach out if it has any questions regarding the wireless industry.

Respectfully submitted,

[redacted]

Benjamin J. Aron
Assistant Vice President, State Regulatory Affairs

cc: Emily Gallagher (emily.gallagher@dfpi.ca.gov)