January 15, 2023

Department of Financial Protection and Innovation
Legal Division
Attn: DeEtte Phelps, Regulations Coordinator
2101 Arena Boulevard
Sacramento, California 95834

Re: PRO 05-21 on the Second Draft Text for Proposed Scope Rulemaking Under the Debt Collection Licensing Act

Dear Ms. Phelps,

On behalf of The American Fintech Council (AFC)[1], I am submitting this comment letter in response to the request for comment by the California Department of Financial Protection and Innovation (DFPI or Department) the Second Draft Text for Proposed Scope Rulemaking Under the Debt Collection Licensing Act (Proposed Rulemaking). We thank the California DFPI for the opportunity to provide comments on the draft regulation.

AFC is the premier trade association representing the largest financial technology (Fintech) companies and the innovative banks that power them. Our mission is to promote a transparent, inclusive, and customer-centric financial system by supporting responsible innovation in financial services and encouraging sound public policy. AFC members foster competition in consumer finance and pioneer products to better serve underserved consumer segments and geographies. Our members are lowering the cost of financial transactions, allowing them to help meet demand for high-quality, affordable products.

AFC believes in developing pragmatic policy that properly protects consumers while not creating requirements that stymie innovative banks and fintech companies from offering responsible products and services. AFC has publicly advocated for a unified regulatory approach that does not create duplicative or diverging requirements on innovative financial institutions or their fintech partners in an unnecessary manner. Also, AFC has advocated for a regulatory environment that avoids duplicative or diverging requirements and accurately reflects the nuances of the innovative services being offered. AFC supports a fair financial services system where products are designed in compliance with regulation and where predatory conduct has no place.

[1] AFC's membership spans technology platforms, non-bank lenders, banks, payments providers, loan servicers, credit bureaus, and personal financial management companies.

AFC appreciates the continued focus of the California DFPI on the appropriate scope of its rulemaking on debt collection licensing (DCL). Importantly, we wholeheartedly support the California DFPI's objectives to protect consumers from predatory actors and to hold debt collectors accountable for their conduct, given the potential for abusive or deceptive consumer practices. However, we have specific concerns regarding the stated scope of the proposed regulations, because it creates a licensing requirement that is incongruous with the Fair Debt Collection Practices Act (FDCPA) and other state debt collection laws for those entities who obtain and service debts prior to default of the loans.[2]

I. AFC Recommends that California DFPI Similar Limited Exemptions Loan Servicers under § 1850.1 as Exist in Federal and Other State Debt Collection Laws

While the California DFPI's second draft text of proposed regulations makes some improvements, it continues to take an overly broad approach by scoping in those entities servicing debt from the time of origination if they service a loan in default.[3] Loan servicers for the original creditor receive a loan immediately after it is originated by the original creditor, often a bank, and work with the consumer throughout the term of the loan. The loan is not in default when acquired for servicing and the servicer follows the terms of the loan as originated if there is no payment. Servicers help manage the loan through completion, including communicating with the consumer to address any concerns and helping the consumer to stay current. In fact, servicers may also work in other ways with the original creditor by performing marketing services or processing applications. The vast majority of these loans perform and do not go into default, and therefore the DCL requirements will not have any relevance or material impact for the types of consumers, with whom these servicers are typically engaged.

Importantly, servicers for the original creditor have the goal to keep accounts performing, which is distinct from those market participants that are in the business of profiting from debt collection when loans go into default. Such servicers are not purchasing debtor accounts for collection purposes, and as such, are not in the business of profiting from "debt collection." The servicer model is in stark contrast to the business model that is the main target of the California DFPI's DCL proposal - which is for debt collectors who have as their primary purpose the collection of debts in default or may buy past-due debts for the sole purpose of trying to profit from the collection on them.

As noted, the provision under the Proposed Rulemaking's 1850.1 is unique to the DCL regime in California and incongruous with the scope of the FDCPA and other state laws. According to the FDCPA, it is these parties for which there is "abundant evidence"[4] of abusive, deceptive and unfair debt collection practices, and which should be the main target of the California DFPI's DCL proposal. Servicers to the original creditor were intentionally scoped out of the FDCPA because it was recognized that these servicers are not in the business of debt collection and

[2] Section 803 of FDCPA explicitly exempts entities that collect a debt "which was not in default at the time it was obtained by such person". See, FDCPA § 803.6(F)(iii). Also, Florida, New Mexico, New York, and North Carolina state laws exempt entities that service any debt that was not in default prior to the entity's servicing of the debt from requiring a debt collection license. See, F.S.A. 559-55(7)(f); 23 NYCRR 1; NMSA 1978 §61-18A-1 et seq; and N.C. Gen. Stat. 58-70-15.

[3] Under the DCL proposed rulemaking "default" is considered more than 90 days past due.

[4] Section 802 of FDCPA describes congressional intent in regulating debt collectors.

therefore do not pose the same risk to consumers as debt collectors. Drafters of the FDCPA recognized the limited benefit to consumers of that was garnered by including servicers who obtained the debt before default. Further, they recognized the high cost and burden associated with complying for a new licensing regime, and potential for unintended outcomes. For these important reasons, the FDCPA does not include these servicers as "debt collectors."

Additionally, Regulatory requirements are not costless endeavors for entities providing financial services. While cost alone should not be a reason to amend a regulation, it should be taken into consideration as part of a regulatory cost-benefit analysis. The Proposed Rulemaking, as written, would create significant compliance burdens to servicers that are servicing the debt for the original creditor and are not subject to FDCPA or other states' debt collection laws. Such burdens do not comport with the minimal cost estimates[5] for compliance put forth by the California DFPI in issuing this rulemaking. To the extent that the California DFPI does not exclude servicers to the original creditor from the proposal, the California DFPI should develop a new cost estimate that accurately reflects the resource spend required to stand up a new compliance program.

In an effort to ensure a unified regulatory approach that does not create duplicative or diverging requirements, we recommend that the DFPI adopt a requirement similar to the FDCPA and other state law servicer exceptions, whereby if the servicer obtains the debt before it is in default, the servicer is not considered a "debt collector".

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AFC appreciates the opportunity to comment on the California DFPI's Second Draft Text for Proposed Scope Rulemaking Under the Debt Collection Licensing Act. We thank you for your consideration of our comments on this important piece of consumer protection-focused regulation.

Sincerely,

Ian P. Moloney
SVP, Head of Policy and Regulatory Affairs
American Fintech Council

[5] This is especially critical if the California DFPI envisions that the cost estimates it set forth remain unchanged. California DFPI has estimated that the cost to comply with the proposed licensing requirements will be an estimated $1,000.