January 13, 2024

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 regarding the scope of licensure and document retention requirements of the Debt Collection Licensing Act (DCLA). As a preliminary matter, we applaud the Department for identifying "COVID-19 rental debt," as defined in Code of Civil Procedure section 1179.02, as "consumer debt" within the meaning of the DCLA. The rationale for this suggestion is set forth in our coalition's August 29, 2022 comment letter filed in this rulemaking.[1] We commend the Department for its decision on this important issue.

Our suggested changes to the November 8, 2023 text of proposed regulations are as follows:

[1] Ltr. of CRL et al. in DFPI Rulemaking PRO 05/21 (Aug. 29, 2022), *available at* https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/10/PRO-05-21-Consumer-Federation-of-California-8.29.22_Redacted.pdf (hereinafter "CRL Letter").

SUGGESTION 1: Expressly clarify that an exemption from the DCLA does not exempt debt collectors from substantive state law obligations like the Rosenthal Act.

As this coalition has previously explained, we are opposed to the proposal in the draft text to exempt original creditors from DCLA licensing requirement unless certain, narrow criteria are met. *See* section 1850.1(c); CRL Letter at 2-5. While we continue to oppose any exemption for original creditors, we appreciate the DFPI's adoption of some of our backup suggestions on this issue. By amending the criteria to turn on the total amount of debt collection activity *in California* (rather than the *ratio* of such activity to other revenue streams), the Department's proposed test should more accurately require the original creditors that engage in the most debt collection activity to obtain DCLA licenses. While we continue to urge the Department to go further and strike completely the exemption for original creditors, the current draft text is an improvement over the prior version and we thank you for it.

If the Department declines to adopt our suggestion to strike this exemption, the Department should clarify that being exempt from DCLA licensure does not mean that an entity is exempt from the substantive obligations of the Rosenthal Fair Debt Collection Practices Act (Civil Code §§ 1788 *et seq.*). Such an amendment would, simply by expressly restating existing law in the regulations, limit the harm and possible confusion among regulated entities, consumers, enforcers, and courts, prompted by the exemptions proposed in section 1850.1. We recognize that the Department has tried carefully to phrase the exemptions in section 1850.1 (saying that these entities are not "engaged in the business of debt collection for purposes of licensure under the Debt Collection Licensing Act"). Nevertheless, confusion could still result from the near-verbatim similarities between key definitions in the DCLA and Rosenthal Act. *Compare, e.g.*, Civil Code section 1788.2(c), *with* Fin. Code section 100002(j) (definition of "debt collector" in Rosenthal Act and DCLA, respectively).

In sum, without our requested express statement of existing law, a regulated entity, a consumer, a public enforcer, or a court could wrongly believe that being exempt from licensure under the DCLA means that one is not a "debt collector" under that Act, and thus not also a "debt collector" under Rosenthal.

Indeed, in analogous circumstances the DFPI proposes a similar clarification in its ongoing California Consumer Financial Protection Law registration rulemaking (PRO 01/21). In a section of the proposed draft text wherein the DFPI states that an "advance of funds to be repaid in whole or in part by the receipt of a consumer's wages" is a loan under the California Financing Law, the DFPI proposed to clarify that:

> This section shall not be read to interpret what is considered a wage assignment under the Labor Code, consumer credit under the federal Truth in Lending Act (15 U.S.C. § 1601

et seq.), or a loan or forbearance of money under the California Constitution, article XV, section 1.[2]

Similar clarification is warranted here, especially given the very similar definitions in the DCLA and Rosenthal Acts. Thus, we suggest adding the following to the end of section 1850.1 **(new language bolded)**:

> **(n) This section addresses only the scope of the licensure requirement under the Debt Collection Licensing Act, and shall not be read to interpret the application of other state laws, including the Rosenthal Fair Debt Collection Practices Act, Civil Code § 1788 et seq., to entities exempt under this section.**

SUGGESTION 2: Limit the exemption for private nonprofit postsecondary institutions to those institutions collecting their own debts.

The current draft text proposes entirely to exempt from licensure "private nonprofit postsecondary institution[s]." Section 1850.1(*l*). And, in contrast to many other exemptions in section 1850.1, this exemption is not limited to instances where the institution collects its own debts (as, for example, with medical providers) or where it operates pursuant to another licensing scheme (as, for example, with public utilities or repossession agencies).

Respectfully, this categorical exemption is entirely unwarranted. As The Century Foundation explains, the line between for-profit and non-profit educational institutions is blurring and not for philanthropic reasons that benefit students:

> The public has gotten smarter as a result of the big scandals at for-profit schools: enrollment at for-profits has dropped substantially from its peak in 2010. But some for-profit executives are plotting a comeback. Their strategy? Claiming to be nonprofit, but without adopting nonprofit financial controls. Schools that take this deceptive approach are getting away with it in growing numbers largely because of dysfunction at the IRS, the agency that has traditionally policed the validity of nonprofit status for corporations.
>
> Because of their financial incentives, these "covert for-profits" are more likely to take unfair advantage of students. For evidence, look at the fraud complaints filed by student loan borrowers. Most public and nonprofit schools have few complaints levied against them, if any. Yet, of all schools claiming nonprofit status for at least five years, the three with the most fraud complaints are covert for-profits—conversions in which power never actual shifted away from owners who have an ongoing financial interest: Keiser University, Wright Career College (now closed), and Remington Colleges.[3]

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[2] Section 1461, *available at* https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/11/PRO-01-21-1st-Modified-Text.pdf.

[3] https://tcf.org/content/commentary/colleges-say-theyre-nonprofit/

As another industry watchdog bluntly observes:

> About a dozen years ago, owners of some of the biggest, worst-acting for-profit colleges began concocting, with their eager, high-paid lawyers, schemes to convert their schools into non-profits. The apparent aims were to evade the heightened government regulations applied uniquely to for-profit schools in order to guard against waste, fraud, and abuse — and to escape the growing stigma that the industry's predatory behavior had placed on for-profits.[4]

Moreover, these predatory institutions aggressively target veterans because of their access to GI benefits[5] and "low-income students and students of color."[6]

Not only would the categorical exemption for debt collection unwittingly serve the predatory ends of the worst actors in an already scandal-drenched sector, the representative of the legitimate non-profits has not itself asked for such a blanket exemption. The August 2022 letter from the Association of Independent California Colleges and Universities (ACCIC) addressing this issue asked only for an exemption "if the debt it collects is on its own behalf and is payment for educational, housing, or other services it provided."[7] We agree with the measured request of ACCIC and implore the Department not to offer those who cynically convert from for-profits a lane to escape regulation of debt collection targeted at the young and by definition inexperienced and vulnerable.

For all these reasons, we respectfully suggest amending section 1850.1(*l*) as follows (new language bolded):

> A private nonprofit postsecondary institution is exempt from debt collection licensure **if the debt it collects is on its own behalf and is payment for educational, housing, or other services it provided**.

Potential financial impact of the regulations.

Finally, DFPI has asked commenters to address the potential financial impact of the proposed regulations. At the outset, we note that it seems likely that the draft rulemaking package will, on the whole, actually *save* debt collectors from incurring financial costs. This is so

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[4] https://www.republicreport.org/2024/predatory-colleges-converted-to-non-profit-are-failing/

[5] *See* http://californiawatch.org/dailyreport/company-markets-profit-colleges-veterans-under-fire-16430; http://www.foxnews.com/us/2012/06/27/vet-targeted-website-to-be-turned-over-to-feds/; http://money.cnn.com/2012/06/26/news/economy/veterans-schools/index.htm; http://www.cbsnews.com/8301-250_162-57423226/obama-for-profit-colleges-swindle-veterans/

[6] The Education Trust, *Subprime Opportunity: The Unfulfilled Promise of For-Profit Colleges and Universities*, http://www.edtrust.org/sites/edtrust.org/files/publications/files/Subprime_report_1.pdf, p. 2

[7] Ltr. of AICCU in DFPI Rulemaking PRO 05/21 (Aug. 29, 2022), *available at* https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/10/PRO-05-21-Association-of-Independent-California-Colleges-and-Universities-8.29.22_Redacted.pdf.

because the central components of the rulemaking are section 1850.1's long list of exemptions from DCLA licensure and section 1850.2's list of exemptions from the definition of "consumer debt." In the DCLA, the legislature commanded that "[n]o person shall engage in the business of debt collection in this state without first obtaining a license pursuant to this division." Fin. Code § 100001(a). It also categorically defined "consumer debt" as "money, property, or their equivalent, due or owing, or alleged to be due or owing, from a natural person by reason of a consumer credit transaction." *Id*. § 100002(f). Measured against those statutory commands, which must be the baseline for any administrative law financial impact analysis, this rulemaking package actually significantly *lessens* the aggregate regulatory burden for debt collectors. It exempts whole classes of entities from a licensure regime that would otherwise apply to them, and exempts from the definition of "consumer debt" types of debt that would otherwise satisfy the definition. This is true even for the classes of entities that the regulatory package subjects to licensure in certain instances (like original creditors and attorneys). Absent the rulemaking, those entities would be subject to licensure in *all* instances. Thus, there should be no difficulty justifying the overall financial impact of this regulatory package.

Even if section 1857.1 does impose non-statutory recordkeeping requirements on entities subject to the DCLA, the financial burden of complying with those obligations are minimal. The obligations in section 1857.1(a) overlap to some degree with the federal Fair Debt Collection Practices Act record retention requirements for attempts to contact a debtor (*see* 12 C.F.R. § 1006.100), so many debt collectors already maintain records subject to section 1857.1.

Finally, any financial burden of complying with section 1857.1 is easily justified by the benefits of that provision. The Legislature enacted the DCLA in part to ensure that the DFPI could enforce the Rosenthal Act. *See* Fin. Code § 100001(a). The records subject to section 1857.1 is crucial to effectuating that purpose. The simple requirement of retaining records bearing on compliance or non-compliance with the Rosenthal Act should itself encourage compliance with the law, and records of attempts to contact debtors are the best evidence of compliance or non-compliance with that Act. Both the DFPI and debtors should thus benefit.

In fact, there should be offsetting financial benefits to companies required to be licensed under the DCLA. Because the DCLA will encourage compliance with substantive debt collector obligations, entities that are licensed should face less competition from unscrupulous entities that do not follow the law and are potentially able to undercut law-abiding debt collectors. In this way, all of society – including regulated entities – benefit from a well-run licensing regime like that enacted in the DCLA.

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We thank the Department for considering our suggestions discussed above. If any further information would be useful, please contact Andrew Kushner at andrew.kushner@responsiblelending.org, 510.379.5513.

Very truly yours,

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