July 2, 2024

Department of Financial Protection and Innovation
Legal Division
Attn: DeEtte Phelps, Regulations Coordinator
2101 Arena Blvd.
Sacramento, CA 95834

Re: PRO 01-23 — Proposed Regulations Under the Debt Collection Licensing Act (Modified Text)

Dear Ms. Phelps:

On behalf of the American Financial Services Association ("AFSA")[1] and California Financial Services Association ("CFSA"), I thank you for the opportunity to provide comments on the Department's June 17 modified text for the Proposed Scope Rulemaking Under the Debt Collection Licensing Act (PRO 01-23). We note the deadline for comments of July 3, 2024, which allows just over two weeks to feed-in to the rulemaking process. We do not believe that this is adequate (indeed, we believe it is unusually short) but in the spirit of cooperation we offer comments now, on the basis that new matters or detail that comes to light subsequently, will need to be addressed further down the line.

Our letter of January 15, 2024, regarding PRO 05-21, remains pertinent and we appreciate the Department's consideration of past comments. We also appreciate the steps DFPI has taken to clarify definitions and narrow the scope of the rules throughout this process. AFSA and CFSA represent financial institutions of all sizes across many of the industries DFPI oversees, including institutions that may be required to apply for licensure under the Debt Collection Licensing Act (DCLA) and institutions that hold other license types issued by DFPI. We believe clear rules benefit consumers and financial institutions alike.

Our first concern is the change to the definition of "net proceeds generated by California debtor accounts," which deletes the former "first party collector" definition and removes "third party collector" to leave a new definition of "all other debt collectors" alongside "debt buyer" and "purchaser of debt that has not been charged off and is not in default." Of these three categories it is far from clear which applies to AFSA and CFSA members, as assignees of Retail Installment Sales Contracts (RISCs). As we have commented previously, AFSA's and CFSA's automobile finance members are collecting their own debts as assigned by automobile dealers and, therefore, are neither debt buyers nor third party collectors or servicers. They are creditors collecting their

[1] Founded in 1916, the American Financial Services Association (AFSA), based in Washington, D.C., is the primary trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including direct and indirect vehicle financing, traditional installment loans, mortgages, payment cards, and retail sales finance. AFSA members do not provide payday or vehicle title loans.

own debts.[2] Accordingly, the deletion of subsection (4) creates confusion as to which of the remaining provisions apply. Should our members consider themselves debt buyers or debt purchasers, or do they belong in the catch-all "all other debt collectors" category? Clarification is needed so each type of debt collector can easily determine to which category they belong.

We are also concerned about modifications to the language around "net proceeds" which determines the "annual fee" a licensee must pay (Fin. Code Id. § 100020). The proposed reg reads as follows:

> *(2) For a purchaser of debt that has not been charged off or debt that is not in default, this is equal to the amount it collects on a debt minus the prorated amount it paid for that debt, before deducting costs and expenses.*

The proposed statute states, "amount it collects on a debt." It is not clear that this term excludes non-defaulted debt, implying that accounts that are not in default are subject to the DCLA. This is at odds with California Attorney General's opinion on the Rosenthal Fair Debt Collection Practices Act (RFDCPA), which excludes accounts that are current and not in default from the scope of that act. The DCLA enabling act uses identical language from the Rosenthal Act and is based on it. (Compare Fin. Code 100002(h) with Civil. Code 1788.2(d) – both have identical definitions of "debt"). For this reason we believe that accounts that are not in default should be outside the DCLA's calculations on which the Department can calculate "net proceeds," and this should be clarified in the proposed language, along with a clear statement as to when the Department believes a debt falls into default: after the 10-day grace period? After 30 days? After charge-off? Currently, this is unclear.

If it is the intent of the proposed changes to include non-defaulted debt, this would increase the figure that the Department applies as a charge to licensees and would essentially be an additional and punitive tax on the financing of products. The only recourse creditors would have would be to pass this enormous cost on to consumers, making financing of products more expensive and having a concomitant effect on the availability of credit in California.

In addition to this, we note that each category of collector includes language that states "before deducting costs and expenses." It is not clear what this is meant to cover. Are maintenance fees

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[2] *E.g. Wadlington v. Credit Acceptance Corp*., 76 F.3d 103, 107 (6th Cir. 1996) ("Once an installment sales contract has been assigned to Credit Acceptance, in our view, the debt it represents is owed to Credit Acceptance, not to Classic."); *Carrington v. Chrysler Fin*., No. 10-CV-1024 NGG VVP, 2010 WL 1371664, at *2 (E.D.N.Y. Apr. 6, 2010) ("Automobile finance companies like Chrysler Financial are primarily engaged in making installment loans to customers—that is, they are "creditors" within the meaning of the FDCPA—and therefore "do not have as their principal business purposes the collection of debts and ... do not generally collect debts due to others."1 *McGrady v. Nissan Motor Acceptance Corp.*, 40 F.Supp.2d 1323, 1335 (M.D.Ala.1998). Other courts have held that Chrysler Financial is not a "debt collector" and therefore not subject to the FDCPA. *See Brown v. Lanham Ford Inc.*, No. DKC 09–0753 (Chasanow, J.), 2010 U.S. Dist. LEXIS 4222, at *7, 2010 WL 313253 (D.Md. Jan. 20, 2010) (Chrsyler Financial not a debt collector under FDCPA); *Ghartey v. Chrysler Credit Corp.*, No. 92–cv–1782, 1992 U.S. Dist. LEXIS 18185, at *8–9, 1992 WL 373479 (E.D.N.Y. Nov. 23, 1992) (automobile finance company that preceded Chrysler Financial not a debt collector under FDCPA)").

included or do we allocate total overhead to each account? It would be helpful if costs and expenses were defined.

Thank you in advance for your consideration of our comments. If you have any questions or would like to discuss this further, please do not hesitate to contact us.

Sincerely,

Danielle Fagre
Senior Vice President
American Financial Services Association

Dave Knight
Executive Director
California Financial Services Association