California's New Debt Collection Licensing Scheme and Mini-CFPB Legislation Create New Regulatory and Compliance Obligations for Collecting Consumer Debts in California

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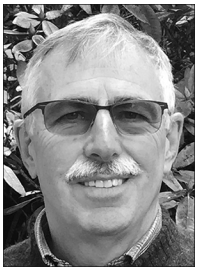

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I. Introduction

On September 25, 2020, California Governor Gavin Newsom signed a number of a bills designed to "protect consumers from financial predators and abusive business practices."[1] Two of these bills, Senate Bill 908, which includes the Debt Collection Licensing Act (DCLA) and Assembly Bill 1864, which includes the California Consumer Financial Protection Law (CFPL) are of particular importance for debt collectors and consumer finance companies doing business in California. These two bills are a regulatory "one-two punch" for such entities and provide significant new registration, oversight, rulemaking, and enforcement powers to the newly renamed California Department of Financial Protection and Innovation (DFPI) formerly known as the department of Business Oversight (DBO).

SB 908 requires debt collectors operating in California to be licensed under the supervision of the DFPI. While the federal Fair Debt Collection Practices Act (FDCPA) and California's Rosenthal Fair Debt Collection Practices Act (RFDCA) were passed in 1977 and regulated the conduct of debt collectors, neither required licensure of debt collectors. These laws, along with California's 2014 Fair Debt Buying Practices Act (FDBPA), relied on private enforcement of the debt collection laws to ensure compliance. The author of SB 908 and other proponents argued, however, individuals often lacked the time or resources to do so. The bill's author also argued California was one of handful of states that did not license debt collectors. Accordingly, the California Legislature passed SB 908 to address the perceived increase in consumer debt[2] and correlative perceived increase in unscrupulous debt collector practices.

The cornerstone of SB 908, the DCLA, will require debt collectors, broadly defined, to obtain a license with the DFPI starting on January 1, 2022. Otherwise, DFPI-regulated entities may be exempt from the new licensure requirement if they are already licensed or regulated under other certain enumerated licensure frameworks. The new DFPI licensure process will require a formal application, fees, and background checks, among other things, while licensees will be subject to annual fees and reports,

1. Press Release, Office of Governor Gavin Newsom, Governor Newsom Signs Legislation Establishing Nation's Strongest State Consumer Financial Protection Watchdog (Sept. 25, 2020).

2. *See*, *e.g.*, Reuters Staff, *U.S. Household Debt Falls amid COVID-19 Spending Cutbacks*, Reuters (Aug. 6, 2020), https://www.reuters.com/article/us-usa-fed-debt-idUSKCN252289 (stating since the COVID-19 pandemic began, it appears household debt has actually *decreased*).

along with being subject to the oversight and enforcement authority vested in the DFPI. While the DCLA purports to rely on the RFDCA and FDBPA as enabling acts, SB 908 confers in the DFPI additional regulatory and rulemaking authority and obligations related to the licensing and examination process.

In addition to SB 908, the California Legislature also passed AB 1864—the "mini-CFPB" law—to address a perceived retreat away from consumer protection by the federal Consumer Finance Protection Bureau (CFPB). Richard Cordray, President Barack Obama's first appointed director of the federal CFPB, played a key role in the formulation and passage of AB 1864.

AB 1864 renames the DBO as the DFPI. However, the cornerstone of AB 1864 is the CFPL, which primarily expands the coverage and authority of the DFPI to require registration of previously unlicensed persons and entities that provide consumer financial products or services to Californians. Banks, and other entities who hold California Finance Lenders licenses from the former-DBO are excluded from the coverage of the CFPL. For those newly covered entities, the DFPI is given authority over registration, rulemaking, oversight and enforcement. AB 1864, however, applies more broadly and not solely to previously unlicensed persons. AB 1864 gives the DFPI increased authority to bring civil actions under the federal Dodd-Frank Act or CFPB issued federal regulations. To support this expanded role, Governor Newsom's 2020–2021 budget was passed with increased funding for the DFPI (conditioned upon passage of the CFPL).

This article summarizes these two new bills that materially affect creditor debt servicing, debt collection, and debt collectors in California.

II. Senate Bill 908: The Debt Collection Licensing Act

A. What Prompted SB 908?

California State Senator Bob Wieckowski (D–Fremont) authored SB 908; according to Wieckowski, the perceived problem stemmed from California being one of only a handful of states that did not expressly license debt collectors.[3] According to Senator Wieckowski, between 1927 and 1992, debt

3. *See* Senate Rules Committee, Office of Senate Floor Analyses, SB 908, prepared on August 31, 2020, *available at* https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200SB908 ("This bill is sponsored by the author to ensure greater consumer protection through enhanced oversight over debt collectors and debt buyers operating in the state. In citing the need for this bill, the author's office observes that California is in the minority of states that currently fail to license debt collectors, along with Georgia, Kentucky, Mississippi, Missouri, Montana, New York, Oklahoma, South Carolina, Vermont, and Virginia. Most of the states that require licensing also have their own state-level fair debt collection laws with enforcement provisions; thus, other states impose licensing laws in addition to, not in lieu of fair debt collection laws.").

collectors in California were previously licensed under a law administered by the Bureau of Collection and Investigative Services, under the Department of Consumer Affairs.[4] While Senator Wieckowski also acknowledged California's passage of the Rosenthal Fair Debt Collection Practices Act (RFDCPA) in 1977 and California Civil Code section 1788 *et seq*., which governs debt collection practices, he argued its enforcement relied on individuals to sue the debt collection companies, and claimed consumers neither had the time nor the resources to take such action.[5] Senator Wieckowski also noted while "the California Attorney General (AG) can accept consumer complaints about debt collection and debt buying practices and does pursue major, widespread violations of the law, the AG cannot engage on every complaint filed or take enforcement action on every alleged violation."[6] Lastly, Senator Wieckowski argued consumer debt is at an all-time high, and the debt collection and debt buying industries are "notoriously unscrupulous in their practices," citing statistics that 70% of all collections action end in a default judgment and that the CFPB received over 400,000 debt collection complaints, representing nearly one-third of all complaints received.[7]

4. *See* Senate Banking And Financial Institutions Analysis, SB 908, prepared on May 15, 2020, *available at* https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200SB908 ("According to the author's office, California licensed the debt collection industry from 1927 to 1992 under a law administered by the Bureau of Collection and Investigative Services, under the Department of Consumer Affairs."); *see also* Senate Committee on the Judiciary, Background Information Request, SB 908 ("California also used to license the debt collection industry. California licensed debt collectors for 65 years, beginning in 1927 before the first stock market crash. The industry was overseen by the Bureau of Collection and Investigative Services. Problems arose in 1977 when a state audit found inadequate administration and poor funding weakened enforcement. The Legislature stepped up with emergency funding for the bureau in 1978, but the legislation had a sunset provision and was allowed to lapse in 1992.") (on file with the author).

5. *Id*.; Press Release, California Senator Bob Wieckowski, California Senate Passes Bill To License Debt Collectors, Senator Bob Wieckowski, (June 25, 2020), https://sd10.senate.ca.gov/news/2020-06-25-california-senate-passes-bill-license-debt-collectors.

6. Senate Banking And Financial Institutions Analysis, *supra* note 4.

7. *See* Senate Rules Committee, Office of Senate Floor Analyses, *supra* note 3 ("Finally, the author's office observes that the debt collection and debt buying industries are notoriously unscrupulous in their practices. Despite federal and state Fair Debt Collection Practices Acts, collection practices consistently remain a top consumer complaint. From July 2011 to March 2018, the federal Consumer Financial Protection Bureau received just over 400,000 debt collection complaints, representing nearly one-third of all complaints received. The most common concerns identified by consumers were attempts to collect a debt not owed (39%), written notification about debt (17%), and communication tactics (17%). The author notes that, while the California Attorney General (AG)

Bill supporters echoed these policy reasons during the legislative process in remarkably similar, and perhaps coordinated, support letters.[8]

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can accept consumer complaints about debt collection and debt buying practices and does pursue major, widespread violations of the law, the AG cannot engage on every complaint filed or take enforcement action on every alleged violation. It is also unreasonable to expect individual consumers to bring their own actions for violations of the Rosenthal Act or the FDBPA, because very few attorneys will take small-dollar cases, and most consumers do not know what protections the laws afford them."); *see also* Press Release, California Senator Bob Wieckowski, *supra* note 5 ("'Consumer debt is at an all-time high and without SB 908, more Californians will fall prey to the often abusive tactics of debt collectors,' said Senator Wieckowski, a member of the Judiciary Committee. 'We license all sorts of professions in California that do not have the power to do the financial harm to individuals that debt collectors can do by garnishing wages and seizing people's assets. It is a gaping loophole that needs to be closed to protect California consumers, especially when so many are struggling through this pandemic.'").

8. *See, e.g.*, Senate Banking And Financial Institutions Analysis, *supra* note 4 ("Support: (a) The California Low-Income Consumer Coalition, Consumers for Auto Reliability and Safety, Public Law Center, Bet Tzedek, Bay Area Legal Aid, and others write that the oversight and enforcement authority in SB 908 'is long overdue and badly needed. While California has had laws on the books requiring fair debt collection practices since 1977, our laws do little to stem the bad behavior they prohibit. This is because the law requires the consumer to sue the debt collection company .... Because the state has no oversight or licensing requirements, the industry can largely behave as it wishes. California has no idea how many debt collectors operate within the state, the sheer volume of debt they are collecting from Californians, or what qualifications these companies are requiring of their employees who manage thousands of accounts and thus impact the lives of thousands of Californians. SB 908 will add California to the list of the thirty-four other states that require a license in order to collect on a consumer debt.'"); *see also* Letter from Marisabel Torres, Director of California Policy, Center for Responsible Lending, to Senator Bob Wieckowski (May 13, 2020) (on file with author) ("Senate Bill 908 has long-been needed to regulate the industry. Before the onset of COVID-19 pandemic, US household debt was on the rise reaching over $14 trillion . . . The CFPB's 2018 report on third-party debt collection reveals that 1 in 4 consumers had a debt in collections on their credit report in 2018."); *see also* Letter from Bay Area Legal Aid, to Senator Bob Wieckowski (May 12, 2020) (on file with author) ("This oversight and enforcement authority is long overdue and badly needed. While California has had laws on the books requiring fair debt collection practices since 1977, our laws do little to stem the bad behavior they prohibit. This is because the law requires the consumer to sue the debt collection company."); *see also* Letter from Western Center on Law & Poverty, to Senator Steven Bradford (May 9, 2020) (on file with author) ("From July 2011 to March 2018, the Consumer Financial Protection Bureau (CFPB) received approximately 400,500 debt collection complaints, representing nearly one-third of the total complaints received."); *see also* Letter from Consumers for Auto Reliability and Safety, to

Although Senator Wieckowski's rationale may have been subject to criticism or response, for the most part, parts of the debt collection industry realized SB 908 was likely to pass no matter the response and therefore took a seat at the table to try to tamper some of its most onerous provisions.[9]

Senator Bob Wieckowski (May 9, 2020) (on file with author) ("Especially now, during the economic downturn and soaring unemployment due to the Covid-19 pandemic, Californians are struggling to make ends meet . . . . This oversight and enforcement authority is long overdue and urgently needed"); *see also* Letter from Suzanne Martindale, Senior Policy Counsel & Western States Legislative Manager, Consumer Reports, to Senator Steven Bradford (May 6, 2020) (on file with author) ("For decades, California has lagged behind most other states by allowing debt collectors to operate without licensing or supervision."); *see also* Letter from Mike Godbe, Staff Attorney, California Indian Legal Services, to Senator Bob Wieckowski (May 14, 2020) (on file with author) ("Most consumers do not have the means to vindicate their rights under the law."); *see also* Letter from Prescott Cole, California Advocates for Nursing Home Reform, to Senator Bob Wieckowski (May 13, 2020) (on file with author) ("Given the deepening slide in our economy, it is almost certain that debt collecting practices will become more aggressive."); *see also* Letter from Eddie Kurtz, Courage California, to Senator Bob Wieckowski (May 11, 2020) (on file with author) ("This oversight and enforcement authority is long overdue and badly needed. While California has had laws on the books requiring fair debt collection practices since 197, our laws do little to stem the bad behavior they prohibit. This is because the law requires the consumer to sue the debt collection company."); *see also* Letter from Robert Herrell, California Federation of California, to Senator Steven Bradford (May 11, 2020) (on file with author) ("With the increased financial strain placed on families by the COVID-19 pandemic, it is more important than ever to ensure better consumer financial protections are in place."); *see also* Letter from Sharon Djemal, East Bay Community Law Center, to Senator Bob Wieckowski (May 14, 2020) (on file with author) ("Most consumers do not have the means to vindicate their rights under the law . . . . Because the state has no oversight or licensing requirements, the industry can largely behave as it wishes.").

9. *See California Legislature Approves Debt Collection Licensing Act*, ACA International (Sept. 1, 2020), https://www.acainternational.org/news/california-legislature-approves-debt-collection-licensing-act ("The California Association of Collectors (CAC) and Receivables Management Association International (RMAI) supported the bill before the August vote by the Assembly Banking and Finance Committee. Advocates with the CAC worked with the bill's authors to ensure the licensing system protects consumers and is workable for the accounts receivable management (ARM) industry. The CAC was heavily involved in the negotiations concerning this bill."); *see also* Receivables Management Association International (RMAI), Letter entitled "SUPPORT IF AMENDED" (May 12, 2020) (on file with author) ("Receivables Management Association International (RMAI) strongly supports the license of debt collectors. RMAI believes the licensing of debt collectors in the single most effective way to protect consumers from bad actors as it distinguishes highly compliant and ethical businesses from less compliant businesses . . . . The industry and

Some of the touted amendments include: "ensuring minor FDCPA violations would not result in the loss of a license, preempting local governments from licensing, eliminating consumer access to bonds, ensuring no requirements for branch licenses, allowing a family of companies to share a license and examination, eliminating a mandated state audit every two years, creating an advisory committee for rules and fees prior to publishing them for comment, and delaying the licensing date by one year."[10]

B. What Do the DCLA and SB 908 Do?

At a high-level, SB 908 includes the DCLA, which requires debt collectors operating in California and who are not already licensed under certain licensing frameworks, to obtain a license from the DFPI (formerly DBO) starting January 1, 2022. The licensing process will include background checks and investigation, along with annual fees, reports, potential examination by the DFPI, and other oversight and regulation.

1. *To whom does the DCLA apply?*

The cornerstone of SB 908, the DCLA, begins with broad coverage before including specific exemptions. The requirements for licensure state that: "[n]o person shall engage in the business of debt collection in this state without first obtaining a license pursuant to this division."[11] This includes persons regardless of whether they reside in California, so long as they are attempting to collect a debt from a debtor who resides in California.[12] The license is to be obtained for a licensee's principal place of business; there is no separate license for each branch office, and the license cannot be transferred or assigned.[13] The fact that multiple branches can all share a license appears to be a significant concession to the industry. In contrast, for example, a California finance lender must obtain a license for all locations and branches.[14]

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the author are close to resolving a handful of remaining issues involving affordability, confidentiality, and administrative interpretation of bill text. RMAI is confident that once the author and the industry have time to work through these issues, RMAI will be issuing a Memorandum of Support on SB 908."); *see also* Letter from Cliff Berg, Governmental Advocates, Inc., to Senator Steven Bradford (May 13, 2020) (on file with author) ("While significant progress has been made, CAC continues to work with Senator Wieckowski, his staff and this Committee's staff to establish a licensing system that provides consumer protection and state oversight and that is not overly burdensome or unreasonably costly for businesses, especially small businesses.").

10. *California Legislature Approves Debt Collection Licensing Act*, ACA International (Sept. 1, 2020), https://www.acainternational.org/news/california-legislature-approves-debt-collection-licensing-act.

11. Cal. Fin. Code § 100001(a) (West 2020).

12. *Id.*

13. *Id.*

14. *See*, *e.g.*, *Id.* § 22102.

The initial broad coverage continues through the defined term for "debt collection," which "means any act or practice in connection with the collection of consumer debt,"[15] the term "consumer debt[,]" which is "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,"[16] and the term "consumer credit transaction[,]" which is a transaction between a natural person and another person in which property, services, or money is acquired on credit by that natural person from the other person primarily for personal, family, or household purposes."[17] The DCLA's use of the RFDCPA's definition of "consumer credit transaction" could, however, limit the DFPI's jurisdiction in unpredictable ways, as all "consumer debts" are not "consumer credit transactions."[18]

15. *Id*. § 100002(i).
16. *Id*. § 100002(f).
17. *Id*. § 100002(e).
18. Debts that are not in default, but are merely being serviced, are not subject to the Rosenthal Act. Debts that do not arise from a "credit transaction" are not subject to regulation by the Rosenthal Act and, hence, should not be subject of licensure or disciplinary action by the DFPI. 85 Ops. Cal. Atty. Gen 215 (2002). *See* McMilion v. Rash Curtis & Assoc's, No. 16-cv-03396-YGR, 2018 WL 692105, at *11 (N.D. Cal. Feb. 2, 2018) (holding medical services were consumer credit transaction); *see also* Picazo v. Kimball, Tirey & St. John, LLP, No. 17cv1437 JM (BGS), 2018 WL 1583228, at *7 (S.D. Cal. Apr. 2, 2018) (finding payment of rent not a "consumer credit transaction"); *see also* Udo v. Kelkris Assoc's., Inc., No. 12-CV-2022-IEG (NLS), 2012 WL 5985663, at *2 (N.D. Cal. Nov. 29, 2012) (towing charges lack "credit transaction" requirement); *see also* Gouskos v. Aptos Vill. Garage, Inc., 94 Cal. App. 4th 754, 759 (2001) (stating an automobile repair transaction did not constitute a "consumer credit transaction."); *see also* Kohler v. Greystar Real Estate Partners, LLC, No. 15-cv-02195 JAH(KSC), 2017 WL 1198925, at *8 ("The Court is not aware of any cases holding that rent collection equates to 'debt collection' or that rent involves a 'consumer credit transaction' under the Rosenthal Act."); *see also* Bescos v. Bank of America, 105 Cal. App. 4th 378, 393 (2003) (asserting vehicle lease is not a "consumer credit transaction"). *But see* Koller v. West Bay Acquisitions, LLC, No. C 12-00117 CRB, 2012 WL 2862440, at *7 (N.D. Cal. July 11, 2012) (establishing rental video late fees and penalties are "credit transaction" under Rosenthal Act); *see also* Abels v. JBC Legal Grp., 428 F. Supp. 2d 1023, 1025–26 ("[T]he checks at issue do not fall under the California FDCPA's limited scope of 'credit transactions.'"); *see also* Edwards v Crosscheck, Inc., No. C-11-00187 EDL, 2011 WL 2836759, at *3 (N.D. Cal. July 13, 2011) ("Because the basis for Plaintiff's complaint is a bad check, the FDCPA does not apply"). In *Koller* however, the district court called these cases into question: "[T]here is conflicting authority as to whether dishonored checks constitute a 'consumer credit transaction.' *Koller*, 2012 WL 2862440, at *7. In a more recent Ninth Circuit bankruptcy case, the court held that other circuits have found that "a creditor's acceptance of what turns out to be a dishonored check transforms what would have been a contemporaneous exchange into a credit transaction, and the court explicitly joined those circuits".

The definition of "debt collector" is the same definition used in the RFDCPA[19] and includes a "debt buyer" as defined in California's Fair Debt Buying Practices Act ("FDBA"). Effective January 1, 2020, attorneys in California are no longer excluded from the definition of "debt collector" under the RFDCPA.[20] Thus, unlike the FDCPA, the RFDCPA—and, hence, the DCLA—applies to persons collecting on their own behalf,[21] in other words, creditors.[22]

The DCLA's mirroring of the RFDCPA's definition of "debt collector" creates particular problems with regulating attorneys engaged in debt collection. According to the legislative history of SB 908, the Legislature had the opportunity to exempt attorneys, but did not do so, on the belief that only "mill" collection firms "regularly" collect consumer debts.[23] Moreover,

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In re JWJ Contracting Co.,371 F.3d 1079, 1081 (9th Cir. 2004). *See generally*, Scott J. Hyman, *Fair Debt Collection Practices Act*, *in* Debt Collection in California, 2.20 (CEB 2019).

19. Cal. Civ. Code § 1788.2(c).

20. Stats. 2019, Ch. 545, § 2. (SB 187) Effective January 1, 2020.

21. *See* Weakley v. Redline Recovery Servs., LLC, 723 F. Supp. 2d 1341, 1346 (S.D. Cal. 2010) (finding debt collector's employees personally liable under federal and California Acts); *Gouskos*, 94 Cal. App. 4th at 754. *See also* Arikat v. JP Morgan Chase & Co., 430 F. Supp. 2d 1013,1028 (N.D. Cal. 2006) (holding a plaintiff must plead within statutory definition). *See generally*, Hyman, *supra* note 19 at 2A.14.

22. Fin. § 100002(j).

23. *See* Senate Rules Committee, Office of Senate Floor Analyses, *supra* note 3 ("The California Creditors Bar Association writes, 'Members of the California Creditors Bar Association represent clients to collect a wide array of lawful obligations, including debts generated by defaults in contract obligations, consumer contracts, mortgage transactions, child support, and much more . . . . Regulations of the State Bar already expressly require compliance with California's Rosenthal Fair Debt Collection Practices Act, and violations by lawyers constitute grounds for disbarment . . . . There is no public policy justification for subjecting lawyers to duplicative licensing by the Department of Business Oversight . . . . A second license for precisely the same representation of clients is unnecessary, redundant, and will raise costs to clients.' The California Bankers Association and California Credit Union League, which are exempted from licensure under SB 908, but subject to enforcement authority of DBO for violations of the Rosenthal Act and FDBPA, argue that the bill 'creates a triplicate enforcement authority for our member institutions and does not take into account the robust and regulatory regimes that our member financial institutions already abide by.'"); *see also* Assembly Committee on Banking And Finance Analysis, SB 908, prepared on Aug. 11, 2020, *available at* https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200SB908 ("Two types of businesses licensed by other regulators have also raised concerns about the bill. Private investigators and attorneys who collect debts point out that they are required to be licensed by the Bureau of Security and Investigative Services and the State Bar, respectively. Neither regulator, however, has

some of the legislative history suggests these concerns could not be fully addressed because of the "compressed timeframe available" for policy committee hearings.[24] As a result, the DCLA's incorporation of the RFDCPA's definition of "debt collector" could drag in attorneys who do

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authority to provide a remedy to a consumer harmed by a violation of the Rosenthal Act, nor does either regulator routinely examine licensees for compliance with Rosenthal. Enforcement and examination authority are key tenets of this bill, and exempting attorneys or private investigators would create gaps in DBO's oversight of the debt collection industry."); *see also* Senate Banking And Financial Institutions Analysis, *supra* note 4 ("*Should Attorneys That Engage in Debt Collection Be Licensed?* As noted in the Opposition section below, the California Creditors Bar Association is seeking an exemption from the licensing requirements of this bill for lawyers that are licensed by the State Bar and are engaged in the representation of clients. In an ordinary year, that topic would have been the focus of discussion in the Senate Judiciary Committee. This year, because the compressed timeframe available for policy committee hearings, that subject is before the Senate Banking and Financial Institutions Committee. Input provided to this committee by Senate Judiciary Committee staff (see below) does not include suggested amendments to address the concerns of the California Creditors Bar Association. This bill's author has also declined to provide a debt collector licensing exemption for attorneys on the following grounds: "Law firms operate as debt collection mills. They send collection notices on law firm letterhead and send communications to consumers using the law firm name. There is only one reason for this overlap in professions: because it works. Consumers see a notice from a law firm alleging they owe a debt. They are intimidated and frightened that they're being sued or will be sued, even though most often that is not the case. To exempt attorneys from licensure would blow a huge hole through the licensure law."); *but see id.* ("The California Creditors Bar Association is seeking an exemption from the licensing requirements of the bill for lawyers that are property licensed by the State Bar and are engaged in the representation of clients. 'Members of the California Creditors Bar Association represent clients to collect a wide array of lawful obligations, including debts generated by defaults in contract obligations, consumer contracts, mortgage transactions, child support, and much more . . . Regulations of the State Bar already expressly require compliance with California's Rosenthal Fair Debt Collection Practices Act, and violations by lawyers constitute grounds for disbarment . . . . There is no public policy justification for subjecting lawyers to duplicative licensing by the Department of Business Oversight . . . . A second license for precisely the same representation of clients is unnecessary, redundant, and will raise costs to clients.'").

24. Senate Banking And Financial Institutions Analysis, *supra* note 4 ("In an ordinary year, that topic [Should Attorneys That Engage in Debt Collection Be Licensed] would have been the focus of discussion in the Senate Judiciary Committee. This year, because the compressed timeframe available for policy committee hearings, that subject is before the Senate Banking and Financial Institutions Committee. Input provided to this committee by Senate Judiciary Committee staff . . . does not include suggested amendments to address the concerns of the California Creditors Bar Association.").

not exclusively engage in consumer debt collection—the so-called "mill" collection firms—so long as the attorney *regularly* engages in consumer debt collection.[25]

The DCLA exempts, however, certain entities regulated under other laws, including exemptions for depository institutions, persons licensed under the California Finance Lenders Law, the California Residential Mortgage Lending Act, the California Real Estate Law, a person who is subject to the Karnette Rental-Purchase Act, and a trustee performing acts in connection with a nonjudicial foreclosure.[26] Additionally, the DCLA does not apply to debt collection under the California Student Loan Servicing Act.[27] However, it should be noted even entities exempt under the DCLA may be subject to the DFPI's power to bring actions for alleged "unfair," "deceptive," and "abusive" acts under AB 1864, discussed below,[28] and subject to the DFPI's power to bring an enforcement action for violations of the RFDCPA or FDBPA.[29]

In sum, debt collectors, creditors, and attorneys who fall within the extremely and purposely broad definitions that define debt collection in California and who are not covered under one of the specific exemptions will be required to obtain a license from the DFPI.

2. *Are there regulations coming?*

Under the DCLA, the primary rulemaking power for the DFPI will relate to the licensing and examination process. Starting January 1, 2021, the DFPI is set to begin making preparations to fully enforce the licensing and regulatory provisions of the DCLA starting January 1, 2022.[30] The DFPI is given powers to adopt rules and regulations and issue orders to administer the DCLA. Some of the powers include: to issue and refuse licenses; to adopt rules to allow affiliated companies to operate under one license; to revoke or suspend a license for violations of the DCLA, RFDPCA, and FDBA; to keep records of licenses; to investigate and consider complaints against licensees; to prescribe the form of applications for license and reports required of licensees; to subpoena witnesses, include testimony and

25. Fin. § 100001(a); *Id.* § 100002(j). The author of SB 908 repeatedly drove home the point during the legislative process that it was meant to apply to attorneys that *regularly* engage in debt collection. Senate Committee on the Judiciary, Background Information Request, SB 908 ("It is important to note that SB 908 uses the existing Civil Code definition of "debt collector." This bill applies only to a person who, *in the ordinary course of business, regularly*, on the person's own behalf or on behalf of others, engages in debt collection. This is not an attorney—or any other businessperson for that matter—trying to get paid money owed for services.") (on file with the author).
26. Fin. § 100001(b).
27. *Id*. § 100001(c).
28. *Id*. § 326(b) (as amended effective, January 1, 2021).
29. *Id*. § 100005(b).
30. *Id*. § 100000.5.

production of documents in connection with any inquiry required under the DCLA; to require information, as determined in the public interest, to ascertain the experience, background, honesty, truthfulness, integrity, and competency of an applicant; to enforce any order under the DLCA; and to levy fines and charges to cover the administration of the DCLA.[31]

The Senate bill analysis and commentary, which includes comments from Senator Wieckowski, summarizes the point that the DCLA uses two existing California laws, the FDPCA and FDBA, as its foundation, and merely adds a licensing and examination framework on top without imposing significant new requirements on debt collectors.[32]

3. *What is the registration process?*

While the DFPI is to develop much of the registration process starting January 1, 2021, some of the requirements are already set out in the DCLA. Applications must include: a completed application—in a form to be developed by the DFPI—and signed under penalty of perjury, including the location of the applicant's principal place of business and all branch office locations; an application and investigation fee—in an amount to be determined by the DFPI to cover the costs of administration; and a sample of the initial letter required under 15 U.S.C. § 1692g of the federal FDCPA that the applicant intends to send to California debtors.[33] The DFPI is also required to submit Department of Justice fingerprint images and related information required by the Department of Justice for every applicant for the purposes of obtaining information as to the existence and content of a record of state or federal convictions, and state or federal arrests.[34]

The DFPI may ultimately require some of the application, fees, or other filings to be submitted through the Nationwide Multistate Licensing System & Registry.[35]

The DFPI also has authority to investigate applicants—as well as licensees to ensure compliance with the DCLA or any other order by the DFPI—by obtaining books, accounts, records, files, documents, information, or evidence related to debt collection, including criminal, civil, and administrative history information; personal history and experience information,

31. *Id.* § 100003(a)–(b).
32. Senate Rules Committee, Office of Senate Floor Analyses, *supra* note 3 ("This bill uses the two existing state laws applicable to debt collectors and debt buyers as its foundation. With only minor exceptions, this bill does not add any new requirements on debt collectors or debt buyers; instead, it adds a layer of regulatory oversight over debt collectors and debt buyers already subject to state law, but not currently subject to licensure. The author's logic is that by layering a licensing and examination framework over existing state law requirements, the state will be better able to ensure that debt collectors and debt buyers comply with existing law.").
33. Fin. § 100007.
34. *Id.* § 100008.
35. *Id.* §§ 100006.3, 100015.

including credit reports; and any other documents, information, or evidence the commissioner deems relevant to the inquiry or investigation.[36] For corporate applications, depending on the nature of the entity, the DFPI has powers to investigate certain enumerated key personnel—for example, for partnerships, the general partners, and individuals owning more than 10%; for corporations, and LLCs, the principal officers, directors, trustee, managing members, and individuals owning more than 10%.[37]

Ultimately, if an application is complete and the DFPI does not find facts constituting reasons for denial, the commissioner shall issue and deliver a license to the applicant.[38] In contrast, the DFPI may deny the application with a written explanation after notice and opportunity for hearing.[39] Among the reasons for denial include: making a false statement of material fact in the application; if the applicant or certain enumerated key personnel have been convicted of a crime, violated the DCLA or any DFPI issued order, violated a similar regulatory scheme in another jurisdiction, were held liable by final judgment in a civil action under the RFDCPA or FDBA within the past seven years; or if the DFPI is unable to find the financial responsibility, criminal records, experience, character, and general fitness of the applicant support a finding the business will be operated honestly, fairly, efficiently, and in accordance with the requirements of the DCLA.[40]

4. *What kinds of enforcement powers are created?*

For the most part, the DFPI's enforcement powers under the DCLA are limited to administrative proceedings to enforce any violations of the DCLA itself.[41]

If the DFPI determines a person, who is required to be licensed under the DCLA, is engaged in debt collection without a license, or if the DFPI determines a licensee has violated the DCLA, or any order or ruling issued under it, the DFPI may order the person to cease and desist after notice and opportunity for a hearing.[42] The DFPI may also order ancillary relief, including refunds, restitution, disgorgement, and damages.[43]

36. *Id.* § 100004(a)(1).
37. *Id.* § 100009(a), (b).
38. *Id.* § 100011(a).
39. *Id.* § 100011(b).
40. *Id.* § 100012(b).
41. Senate Banking And Financial Institutions Analysis, *supra* note 4 ("Recognizing that the Rosenthal Act and the FDBPA already authorize private rights of action for violations of these acts, SB 908 contains a limited set of administrative remedies, including desist and refrain authority, the ability to order ancillary relief, and the ability to suspend and revoke licenses. Lack of civil and administrative penalty authority and citation and fine authority in SB 908 is intended to prevent situations where a licensee could be subject to both a lawsuit by a debtor and to an administrative or civil action brought by DBO for the same violation.").
42. Fin. § 100005(a)(1).
43. *Id.* § 100005(a)(2).

Notably, entities otherwise exempt from licensure under the DCLA based on the enumerated exemptions—with the exception of trustees conducting non-judicial foreclosures—may also be subject to the same administrative process outline above if the DFPI determines the entity violated the RFDCPA, FDBA, or both.[44] An important and potentially unanswered question is to what extent persons challenging the application of the DCLA in the first place may be subject to the administrative process or if they can instead simply challenge the administrative process in court.

5. *What kinds of examination powers are created?*

Once an applicant is licensed under the DCLA, the DFPI maintains powers to investigate licensees. Specifically, the DFPI can investigate a licensee in the same broad way it can investigate an application to determine if the licensee is complying with the DCLA.[45] In response to a complaint about the licensee or potential violation of the DCLA, the DFPI can also subpoena documents or testimony of any person whose testimony may be required about the consumer debt or account of the debtor.[46]

In addition to investigatory powers, the DFPI has authority to examine the affairs of each licensee for compliance with the DCLA as often as the commissioner deems necessary.[47] This examination process may involve investigating the licensees records; examining officers, directors, employees, or agents under oath regarding the licensee's debt collection operations; or both.[48] These examinations can be done remotely unless an onsite examination is deemed necessary.[49] Moreover, the licensee is to bear the costs of examination.[50]

There is, of course, a framework for the DFPI to suspend or revoke a license after notice and opportunity for hearing for certain enumerated findings, including if the licensee violates the DCLA, if licensee does not cooperate with an investigation or examination, if the licensee violates the RFDCPA or FDBA (the DFPI is to develop regulations concerning the criteria it will consider for such action), or if the licensee becomes insolvent.[51]

Lastly, aside from the examination and investigatory process, licensees have certain affirmative obligations they must comply with proactively. A licensee is required to update the DFPI within 30 days if the information in their application is now inaccurate, or any material change—such as change in principal place of business.[52] A licensee is also required to develop policies and procedures to ensure compliance with the DCLA, file

44. *Id.* § 100005(b).
45. *Id.* § 100004(a)(1).
46. *Id.* § 100004(b).
47. *Id.* § 100023(a).
48. *Id.*
49. *Id.* § 100023(c).
50. *Id.* § 100023(e).
51. *Id.* § 100003.3(b).
52. *Id.* § 100018(a), (b).

reports with DFPI as required, submit to periodic examination, maintain $25,000 surety bond—but it can be higher depending on number of affiliates and dollar amount being collected.[53] The DFPI will also determine an annual fee for each licensee to pay, which will be calculated based on the costs of administering the DCLA.[54] The annual report each licensee will need to submit must include detailed information such as the total number of accounts, total dollar amount of accounts, the face value of the debt collector's portfolio in the preceding year, the total amounts collected in the preceding year, whether or not the licensee is a debt collector, a debt buyer, or both, and the case number of any lawsuit in which licensee was held liable under RFDCPA or the FDBA.[55] The DFPI is to develop the form of the annual report, which will also be made available to the public.[56] The DFPI can also require licensees to submit other special reports as needed.[57]

6. *What else is in SB 908?*

The DCLA also provides for a Debt Collection Advisory Committee within the DFPI.[58] The purpose of the Committee is described as follows: "[t]he Debt Collection Advisory Committee shall advise the commissioner on matters relating to debt collection or the debt collection business, including proposed fee schedules and the mechanics and feasibility of implementing requirements proposed in regulations."[59] Its membership will consist of seven members, appointed by the DFPI commissioner, one member will represent consumers, and the terms are voluntary and for two-years.[60] The Committee is to meet at least twice a year.[61]

Outside of the DCLA, SB 908 makes a few amendments to the RFDPA. Specifically, it prohibits debt collectors from sending a written or digital communication to the debtor "that does not display the California license number of the collector in at least 12-point type."[62] Similarly, a debt buyer must include their California license number in their written communication to debtors.[63] During a telephone call, a debt collector is required to provide the customer their California license number upon the customer's request.[64]

53. *Id.* § 100019(a)–(e).
54. *Id.* § 100020.
55. *Id.* § 100021(a).
56. *Id.* § 100021(b), (c).
57. *Id.* § 100021(d).
58. *Id.* § 100025(a)–(e).
59. *Id.* § 100025(b).
60. *Id.* § 100025(c).
61. *Id.* § 100025(d).
62. Civ. § 1788.11 (f) (as amended effective, January 1, 2021).
63. *Id.* § 1788.52(a)(7).
64. *Id.* § 1788.11(b).

C. What Kinds of Criticism and Comments Have Been Raised in Response?

As discussed, for the most part, the debt collection industry realized that SB 908 was likely to pass no matter the response and therefore tried to negotiate its final form, even resulting in key amendments touted by the industry.[65]

One notable issue raised but unresolved during the legislative process was the fact the DCLA did not include any exception for licensed attorneys. For example, a written opposition by the California Creditors Bar Association was quoted as a key opposition argument to SB 908:

> Members of the California Creditors Bar Association represent clients to collect a wide array of lawful obligations, including debts generated by defaults in contract obligations, consumer contracts, mortgage transactions, child support, and much more . . . Regulations of the State Bar already expressly require compliance with California's Rosenthal Fair Debt Collection Practices Act, and violations by lawyers constitute grounds for disbarment . . . . There is no public policy justification for subjecting lawyers to duplicative licensing by the Department of Business Oversight . . . . A second license for precisely the same representation of clients is unnecessary, redundant, and will raise costs to clients.[66]

Any belief that the inclusion of attorneys in the licensure process was an unintended oversight is erased by comments from the bill author, Senator Wieckowski, who wrote (as part of an earlier bill summary):

> Law firms operate as debt collection mills. They send collection notices on law firm letterhead and send communications to consumers using the law firm name. There is only one reason for this overlap in professions: because it works. Consumers see a notice from a law firm alleging they owe a debt. They are intimidated and frightened that they're being sued or will be sued, even though most often that is not the case. To exempt attorneys from licensure would blow a huge hole through the licensure law.[67]

Nevertheless, the California Legislature offers no answer to the criticism of the unprecedented duplication of jurisdiction the DFPI and the Califor-

65. *California Legislature Approves Debt Collection Licensing Act*, ACA International News (Sept. 1, 2020), https://www.acainternational.org/news/california-legislature-approves-debt-collection-licensing-act.

66. Senate Rules Committee, Office of Senate Floor Analyses, *supra* note 3. *See* Letter from California Advocates, Inc., to Senator Steven Bradford (Apr. 19, 2020) (on file with author) ("The law now is quite clear: lawyers are debt collectors for the purposes of the Rosenthal Act, and compliance with the Rosenthal Act is subject to license enforcement by the State Bar.").

67. Senate Committee On Banking And Financial Institutions, Bill Summary, SB 908, prepared on May 15, 2020, *available at* https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200SB908.

nia State Bar would have over attorneys.[68] Similar criticism came from the California Association of Licensed Investigators (CALI) who also argued they would be subject to two licensing schemes.[69]

Other criticism about SB 908 came from the California Bankers Association and California Credit Union League, who noted their members would be exempt from licensure but subject to the DFPI enforcement authority for violations of the RFDCPA and FDBA, but argued SB 908 "creates a triplicate enforcement authority for our member institutions and does not take into account the robust and regulatory regimes that our member financial institutions already abide by."[70] In at least one opposition letter, the California Bankers Association and California Credit Union League also raised a potential federal preemption argument based on a June 17, 2020 bulletin by the Office of the Comptroller of the Currency (OCC).[71] During

68. Genni Burkhart, *California Looks to License Debt Collection Practices*, ABC Legal (Sept. 8, 2020), https://www.abclegal.com/blog/california-sb908-debt-collection-legislation-news ("Another area of concern for lawyers and law firms is the duplicate licensing by the State Bar and the Department of Business Oversight for precisely the same function in SB 908. As this is not a situation the State Bar would regulate, some aspects would fall under the Rosenthal Act, and some the Department of Business Oversight. Therefore, this bill creates overlapping jurisdiction. Currently, there is no precedent in state law where an occupational group must obtain multiple licenses for the same function.").

69. Letter from Francie Koehler, California Association of Licensed Investigators, Inc., to Senator Bob Wiecknowski (Aug. 14, 2020) (on file with author) ("The California Association of Licensed Investigators (CALI) regrets to inform you that we continue to have a position in opposition to SB 908 unless the bill is amended to resolve the ambiguity that could result in licensed private investigators having to be licensed twice due to the overreach of the proposed definition of 'debt collection' that could be interpreted to include an investigation.").

70. Senate Rules Committee, Office of Senate Floor Analyses, *supra* note 3; Letter from California Bankers Association, California Credit Union League, to Senator Bob Wieckowski (June 5, 2020) (on file with author) ("In other words, despite an exemption from licensing under this act, SB 908 empowers the DBO Commissioner with broach enforcement authority specific to Rosenthal over our member financial institutions, which are licensed and regulated in their own right and are already subject to the Rosenthal Act and enforcement thereof. In addition to the California state law described above, it is worth underscoring that our member financial institutions are also subject to the federal Fair Debt Collection Practices Act, which similarly prohibits abusive, unfair, or deceptive debt collection practices.").

71. Letter from California Bankers Association, *supra* note 70 ("Empowering a state agency with this type of oversight calls into question issues surrounding federal preemption. This was recently reasserted by the Office of the Comptroller of the Currency (OCC) in a June 17, 2020 bulletin, wherein the OCC reminds stakeholders that banks are governed primarily by uniform federal standards and generally are not subject to state law limitations. Federal pre-

later Assembly committee meetings, the bill analysis responded to this point by arguing state laws related to debt collection were not preempted by federal law.[72] Ultimately, as noted above, the Legislature kept in the provision that allows the DFPI to bring enforcement actions against non-licensed persons under the RFDCPA and FDBA.

III. Assembly Bill 1864: The Consumer Financial Protection Law

A. What Prompted AB 1864?

The idea that ultimately became AB 1864 appears to have originated in Spring 2019, when Richard Cordray, who was President Barack Obama's first appointed director of the federal CFPB, and Assemblywoman Monique Limón (D–Santa Barbara), along with others, discussed the idea of state-wide CFPB—a so-called "mini-CFPB"—at an Informational Hearing of the Assembly Committee on Banking and Finance to combat a perceived pull-back at the federal level by the CFPB.[73] Cordray also provided input

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emption derives from the Supremacy Clause of the U.S. Constitution. It permits banks, many of which operate across state lines, to achieve efficiencies associated with operating under a uniform set of rules. In addition, 'as provided by statute, set forth in OCC regulations, and recently reiterated in OCC Bulletin 2020-43, the OCC has exclusive visitorial authority with respect to banks. Requirements to report to state and local officials generally run afoul of this exclusive authority.'").

72. Assembly Committee on Banking and Finance, *supra* note 23 ("The California Bankers Association raises a federal preemption argument citing a recent bulletin from the Office of the Comptroller of the Currency (OCC) that contains contestable claims related to the reach of federal preemption; however, state laws related to "rights to collect debts" are explicitly not preempted by federal law as recognized by the very same OCC as promulgated in its own regulations (see 12 C.F.R. § 7.4008 (e)).").

73. *See* The Consumer Financial Protection Bureau: An Examination of the CFPB under the Current Federal Administration and Options for California to Better Protect its Consumers, Informational Hearing of the Assembly Committee on Banking and Finance (2020) (statement of Richard Cordray) ("My testimony concerns how California can take the initiative to protect consumers in the financial marketplace at a time when the Federal government is retreating from this area"); *see also* Katie Grzechnik Neill, *California Assemblywoman Explores Creation of State-Level CFPB in Press Conference with Cordray*, insideARM (Apr. 15, 2019), https://www.insidearm.com/news/00044939-press-conference-cordray-california-assem/ ("On March 27, 2019, California Assemblywoman Monique Limón (D–Santa Barbara) stated that she plans to introduce legislation that would create a state-level version of the Consumer Financial Protection Bureau (CFPB). In a press conference, Limón argues that the goal of strengthening consumer protection can be achieved by creating a new state agency—which is being dubbed the 'mini CFPB'—or by increasing the budget for California's Department of Business Oversight. Limón stated, 'We are working to

when the idea of a "mini-CFPB" was first proposed as part of California Governor Gavin Newsom's 2020 to 2021 budget.[74] After Governor Newsom

really rethink what a state CFPB would do . . . . We see the presence of predatory lending products in auto loans, payday loans, cash advance and small business loans.' The federal CFPB's former Director, Richard Cordray, was also in attendance. Cordray commented: 'If, at the federal level, they are pulling back, a large and important state like California can make an important difference here. If the system is not preventing massive problems and exploitation, even the people that are most careful can be hurt.'"); *see also* Assembly Floor Analysis, AB 1864, prepared Aug. 25, 2020, *available at* https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200AB1864 ("According to the Author: Last year, I introduced AB 1048 to start the important conversation of strengthening our consumer financial protection capabilities at the state level. In March 2019, the Assembly Banking Committee held an informational hearing to examine gaps in our existing regulatory approach. Subsequent to that hearing, I worked with a coalition of former CFPB officials and consumer law experts to shape a vague concept into a specific proposal for the Legislature to consider. The Governor's inclusion of the proposal in his January budget provided a pathway for our state regulator to receive the necessary resources and authority to carry out a renewed vision of putting consumers first. AB 1864 will provide the renamed Department of Financial Protection and Innovation with the appropriate authority to oversee unregulated areas of the financial marketplace, creating a best-in-class state regulatory agency that will protect California consumers from unfair, deceptive, and abusive practices by financial services companies."); Allyson Baker et al., *Mini-CFPBs—What Increased Regulation, Enforcement, and Supervision by State Agencies Mean for the Financial Services Industry*, Venable 1, 2 (2020), https://www.venable.com/-/media/files/events/2020/04/mini-cfpb-webinar-slides.pdf ("The CFPB's deregulatory agenda has states worried about consumer financial protection. States are filling the void by: Empowering and focusing existent agencies and law enforcers [and] Creating wholly new agencies with broad jurisdiction and authority"); Jonathan B. Engel et al., *California's New State "Mini-CFPB" Is Not Very "Mini," but Very "CFPB"*, Davis Wright Tremaine (Oct. 7, 2020) https://www.dwt.com/blogs/financial-services-law-advisor/2020/10/ca-department-financial-protection-innovation ("Since President Trump's inauguration, in response to perceived lax federal consumer protection, consumer protection advocates pushed for more powerful state-level consumer protection regulators. Joining this chorus, California's DBO concluded that the state 'lacks a singular body to oversee the state's providers of financial products and services, which leaves consumers vulnerable to abusive financial products and practices,' and advocated for "modern, effective financial protection.").

74. *See* David Lazarus, *Column: Trump Hated Him as a Watchdog. Now He's Helping Protect California Consumers*, L.A. Times (Jan. 17, 2020), https://www.latimes.com/business/story/2020-01-17/california-consumer-agency ("Cordray said he offered input as Newsom put together his plan for a "mini-CFPB." He advised the governor to make sure the agency has the authority and resources to be an effective overseer. Cordray said he was particularly encour-

introduced the mini-CFPB in his January 2020 budget proposal (as a trailer-bill), Governor Newsom and other advocates continued to argue the mini-CFPB was necessary because the federal CFPB, particularly under the Trump administration, had retreated from consumer financial protection and because California played an important role in the protection of consumers as the world's fifth biggest economy.[75]

As California's 2020–2021 budget was held up by the world-wide COVID-19 pandemic, the mini-CFPB proposal was seemingly dropped.[76] Then, suddenly, the mini-CFPB proposal was included in the budget as an

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aged by Newsom's proposal for California to implement regulations for debt collectors—an industry the state previously left to federal officials to monitor. 'It was astonishing to me that California wasn't in the business of regulating debt collectors,' he said.").

75. *See* David Lazarus, *Column: Trump Slashed Consumer Protections. So California is Stepping Up*, L.A. Times (Jan. 9, 2020), https://www.latimes.com/business/story/2020-01-09/column-california-consumer-bureau ("Gov. Gavin Newsom will unveil a California Consumer Financial Protection Law as part of his proposed 2020–21 state budget, to be introduced Friday. 'As the Trump administration undermines and weakens the rules that protect consumers from predatory businesses, California is filling the void and stepping up to protect families and consumers,' he told me via email. Details at this point are scant. But it appears what California is trying to do is create a state version of the Consumer Financial Protection Bureau. That's the federal agency created by the Dodd-Frank Wall Street Reform and Consumer Protection Act signed into law by President Obama in 2010. Since President Trump took office, he has chipped away at the bureau's oversight of financial firms, making the CFPB, to a great extent, a consumer-protection watchdog in name only."); *see also* Lydia Beyoud, *California Seeks New Fintech Regulation in Agency Overhaul*, Bloomberg Law (Jan. 13, 2020), https://news.bloomberglaw.com/banking-law/calif-governor-seeks-new-fintech-regulation-in-agency-overhaul ("During a news conference, Newsom (D) criticized the Trump administration and the Consumer Financial Protection Bureau in particular for reducing its enforcement activity of the financial sector. 'They're getting out of the financial protection business. We're getting into it,' Newsom said. 'We're going to protect consumers from unfair and deceptive practices better than we have,' he added.").

76. One potential reason was that it submitted through the budget process rather than the normal legislative process. For example, the Legislative Analyst's Office (LAO) recommended that the DFPI proposal be considered through legislative policy process rather than as part of the budget. "We recommend that the Legislature consider the Governor's proposed statutory changes through the legislative policy process. This would allow the changes to be vetted by the policy committees that have expertise on the specific issues that are raised. In addition, this would better position the Legislature to determine which policies should be established in statute and which could be left to the regulatory process." *The 2020–21 Budget: Reinventing the Department of Business Oversight*, Legislative Analyst Office 1 (2020).

increased funding set-aside for the DBO contingent on the Legislature passing the CFPL before the end of the legislative session.[77]

Consequently, there were far fewer support or opposition letters generated in response to AB 864 than SB 908. Consumer groups mainly argued the COVID-19 pandemic and the threat of increased activity against consumers justified the need for AB 1864.[78] While others relied upon the original rational Governor Newsom and the bill's authors gave—the perceived federal retreat.[79] Meanwhile, the industry's response was mostly neutral because the final version of AB 1864 included exemptions for already licensed entities.[80]

77. *California State 2020–21 Budget*, Dept. of Finance 1, 113 (2020), http://www.ebudget.ca.gov/FullBudgetSummary.pdf ("The Budget includes $10.2 million in 2020–21, growing to $19.3 million ongoing in 2022–23, in a set-aside item for these purposes. However, expenditure of these funds is contingent upon enactment of statutory changes that authorize the California Consumer Financial Protection Law program. The Administration and Legislature will work together over the next several weeks to finalize the statutory framework needed to implement the program and other changes that aim to improve consumer protection for all Californians.").

78. Letter from Beneficial State Foundation, et al., to Assemblywoman Monique Limón (Aug. 27, 2020) (on file with author) ("This matter is urgent. The COVID-19 crisis has thrown huge numbers Californians out of work—more than 7 million of us have filed unemployment claims since March. While the pandemic continues, Californians are piling on debt, all too often from high-interest lenders who target their loans specifically to low-income communities and communities of color. In some counties, aggressive debt collectors have used the pandemic as an opportunity to increase the number of lawsuits they file, against Californians who have lost their source of income. Both consumers and small businesses are being victimized.").

79. *See* Letter from Michael N. Feur, Los Angeles City Attorney, to Senator Toni Atkins, et al. (Aug. 28,2020) (on file with author) ("Retrenchment at the federal level has created a gap in enforcement that state and local agencies must fill, particularly as unscrupulous businesses target vulnerable members of our community in these unprecedented times.").

80. *See* Senate Floor Alert from California Bankers Association, California Community Banking Network, California Credit Union League, California Escrow Association, California Financial Services Association, California Mortgage Association, California Mortgage Bankers Association, August 31, 2020 ("The trade associations identified above are pleased to inform you that we are **neutral** on Assembly Bill 1864, a measure that reorganizes the Department of Business Oversight into the Department of Financial Protection and Innovation."); *see also* Letter from The Responsible Business Lending Coalition, et al., to Assemblyman Philip Ting & Assemblyman Jim Cooper (Aug. 28, 2020) (on file with author) ("Small businesses are facing unprecedented challenges. As we emerge from shelter-at-home, Californians will come face-to-face with shuttered storefronts in our neighborhoods, and with our friends and family who have lost their jobs. The best social service program is a job, and small businesses account for half of California employment. California cannot afford to

Even though the Legislature passed the final bill on the last-day of session, it includes significant exemptions for already licensed entities. Governor Newsom, and other legislators, continue to characterize the mini-CFPB as having lofty goals, which broadly regulate the entire consumer finance industry. At the virtual signing ceremony, Governor Newsom commented

> [w]hile the federal government is getting out of the financial protection business, California is leaning into it. It's at this moment especially—when so many Californians are strapped for cash and struggling to pay their bills—that families are likely to fall victim to predatory and abusive financial products. These bills ensure that financial predators are subjected to alert oversight and agile enforcement.[81]

B. What do the CFPL and AB 1864 Do?

At a high-level, AB 1864 re-brands the DBO as the DFPI. The bill includes the CFPL, which creates a registration requirement for certain previously unlicensed entities providing consumer financial products to California residents, and provides additional oversight and rule-making powers to the DFPI over these entities—and to some degree over already licensed entities.

1. *To whom does the CFPL apply?*

Like SB 908 and the DCLA, the applicability of AB 1864 and CFPL begins broadly, before including some notable exemptions for entities that are already licensed.

The CFPL applies to covered persons, who are defined as—to the extent not preempted by federal law:

> (1) Any person that engages in offering or providing a consumer financial product or service to a resident of this state; (2) Any affiliate of a person described in this subdivision if the affiliate acts as a service provider to the person; (3) Any service provider to the extent that the person engages in the offering or provision of its own consumer financial product or service.[82]

The definition of "financial product or service" is similarly broad, including for example, extending credit and servicing extensions of credit, certain leases of personal or real property, providing real estate settlement services,

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lose more small businesses. We are a coalition of nonprofit community development and advocacy organizations, and for-profit fintech and small business lending companies that have come together in support of the Governor's effort to provide small businesses with the protections they so critically need from the proposed Department of Financial Protection and Innovation (DFPI). Above all, these small business protections must not be removed from the trailer bill. Additionally, we are concerned that without a few simple clarifications, this mandate to protect small businesses will not function as intended.").

81. Press Release, Office of Governor Gavin Newsom, *supra* note 1.

82. Cal Fin. Code, § 90005(f) (West 2020).

engaging in deposit-taking activities, transmitting and exchanging funds, acting as a custodian of funds, selling or providing certain stored value or payment instruments, providing check cashing, check collection, or check guaranty services, providing certain payments or other financial data processing products or services to a consumer through technological means, providing certain financial advisory services, collecting, analyzing, maintaining, or providing certain consumer report information or other account information, "collecting debt related to any consumer financial product or service."[83] Insurance is not included, as are certain electronic data transmissions.[84] And of course, many of these broad categories are subject to exceptions.

After starting out extremely broadly with its coverage, the CFPL includes exemptions for entities already licensed and acting under a licensed issued by any state agency other than DFPI, and for the certain entities already licensed by the DFPI: escrow agents, persons who are licensed under the California Finance Lenders Law, broker-dealers and investment advisors licensed under the Corporate Securities Law of 1968, residential mortgage lender, a mortgage servicer, or a mortgage loan originator licensed under the California Residential Mortgage Lending Act, persons licensed as a check seller, bill payer, or prorater under the Check Sellers, Bill Payers and Proraters Law, person licensed as a capital access company under Financial Code section 28000, any person with a license, charter, or certificate issued under the Financial Institutions Law, and any bank, bank holding company, trust company, savings and loan association, savings and loan holding company, credit union, or an organization subject to oversight of the Farm Credit Administration—when such entities are licensed under another state or federal law.[85]

Merchants, retailers, and other sellers of nonfinancial goods and services are also excluded from the DFPI's authority under the CFPL under certain conditions: if there is a "bona fide extension of credit" to a consumer for the acquisition of a nonfinancial good or service, "the credit extended does not significantly exceed the fair market value of the nonfinancial good or service provided," the merchant does not sell or otherwise assign the debt, except for delinquent debt for collection, and the merchant does not regularly extend credit, as defined under the federal Truth in Lending Act (15 U.S.C. § 1601 *et seq*.).[86] One area of criticism is that all retail installment sales contracts, previously subject to the Unruh Act and the Rees-Levering Act, and historically enforced by private plaintiffs or the Attorney General's Office, are now subjected to DFPI regulation and enforcement unless these conditions exist, which practically are nonexistent in most retail installment sales contracts. As discussed below in section III(C), this criticism

83. *Id*. § 90005(k)(1)–(12).
84. *Id*. § 90005(k)(13)
85. *Id*. § 90001(a)–(c).
86. *Id*. § 90006(e).

was raised by car dealers who rely on indirect financing typically assigned after purchase, thus this exemption would seemingly not apply, meaning dealers would be covered under the CFPL.

For those entities that are exempt, at least according to AB 1864, the entirety of the CFPL does not apply.[87] These exempt entities remain subject to the DFPI's authority under the previously existing frameworks, but the new powers in the CFPL do not apply.

In a few notable areas, the new powers afforded to the DFPI under AB 1864 and the CFPL still apply to persons or entities that are exempt from the definition of covered person. In other words, there are new powers afforded to the DFPI in AB 1864 that are outside the CFPL. In particular, the DFPI has the authority to bring a civil action to enforce the provisions of the federal Consumer Financial Protection Act of 2010 (12 U.S.C. § 5481 *et seq*.) (also known as the Dodd-Frank Act) or regulations issued by the federal CFPB with respect to any entity that is licensed, registered, or subject to oversight by the DFPI.[88]

Thus, for the most part, the CFPL includes under its coverage entities that provide a financial service or production to California residents—defined broadly—but not entities or persons already licensed under existing frameworks. However, the regulatory oversight of the DFPI will also likely be subject to further clarification in the near future, such as the recent clarification that the Department of Real Estate will maintain authority over reverse mortgages, discussed below in section III(C).

2. *Are there regulations coming?*

Under the CFPL, the DFPI has authority to develop rules and regulations on topics that are specific and discreet, such as registration, and a consumer complaint process, but also broad and open-ended, such as the oversight of covered persons, and identifying unlawful, unfair, deceptive, or abusive acts in connection with any transaction with a consumer for a consumer financial product or service.

Starting with the more specific, the DFPI has authority to develop rules for the registration of covered persons, including a filing made under oath, filing fees, and a requirement that registration occur through the Nationwide Multistate Licensing System and Registry.[89] The DFPI also has the authority to develop rules and regulations for a consumer complaint process, which in general terms allows a consumer to submit a complaint about a covered person, requires the covered person to timely respond in writing to the DFPI including steps taken in response, and a follow-up plan.[90] If requested by the consumer, the covered person is required to

87. *See id.* ("This division [the California Consumer Financial Protection Law] shall not apply to . . . .").
88. *Id.* § 326(b), (c) (as amended effective, January 1, 2021).
89. *Id.* § 90009(a).
90. *Id.* § 90008(a)–(b).

provide certain documents about the consumer financial product or service.[91]

Moving onto the more broad topics of regulation, the DFPI has the authority to develop rules to "facilitate oversight of covered persons and assessment and detection of risks to consumers."[92] As part of this rule-making authority, the DFPI may require covered persons to generate, provide, or retain records, and may develop rules to ensure covered persons are legitimate entities and able to perform their obligation to consumers, which might include background checks for principals, officers, directors, or key personnel and bonding or other financial requirements.[93] To clarify the applicability of state credit cost limitations to the offering and provision of consumer financial products and services by covered persons, the DFPI also has authority to interpret and implement all California credit cost provisions as to their applicability to consumer financial products and services—but not to establish a usury limit.[94]

Still even more general, the DFPI has authority to prescribe rules applicable to covered persons "identifying as unlawful, unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service."[95] "Unfair" and "deceptive" is to be interpreted consistent with Section 17200 of the Business and Professions Code, while "abusive" is to meant to be interpreted consistent with the federal Dodd-Frank Act.[96] This term has been and remains the subject of much controversy.[97] The DFPI also has authority to prescribe

91. *Id*. § 90008(d).
92. *Id*. § 90009(b)(1).
93. *Id*. § 90009(b)(2)–(3).
94. *Id*. § 90009(f)(3).
95. *Id*. § 90009(c).
96. *Id*. § 90009(c)(1), (3); Senate Committee on Budget and Fiscal Review, AB 1864, Aug. 7, 2020, *available at* https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200AB1864 ("Defin[ing] 'abusive' acts and practices as acts and practices that materially interfere with the ability of a consumer to understand the terms and conditions of a financial product or service and/or that take unreasonable advantage of the lack of understanding of the consumer and/or the ability of the consumer to protect their interests in selecting or using a consumer financial product or service. This definition is consistent with the provisions of the federal Consumer Financial Protection Act of 2010"). It's just not, though. The CFPB defines "abusive in supervising or challenging conduct as abusive in enforcement if the Bureau concludes that the harms to consumers from the conduct outweighs its benefits to consumers." CFPB Policy Statement, January 24, 2020, pp. 10. *See also The CFPB's Policy Statement Concerning the Meaning of "Abusiveness"*, Jones Day Insight (Feb. 2020), https://www.jonesday.com/en/insights/2020/02/the-cfpbs-policy-statement-concerning-the-meaning.
97. *See*, *e.g.*, Christopher L. Peterson, *Consumer Financial Protection Bureau Law Enforcement: An Empirical Review*, 90 Tulane L. Rev. 1057, 1070 (2016) ("The abusiveness standard has alternatively been the subject of much hand wringing in the financial services industry and excitement amongst consumer advo-

rules to "ensure that the features of any consumer financial product or service, both initially and over the term of the product or service, are fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service, in light of the facts and circumstances."[98]

In an area where the CDPL goes beyond even the federal CFPB, the DFPI is given authority to define unfair, deceptive, and abusive acts and practices in connection with the offering or provision of commercial financing to small business recipients, nonprofits, and family farms.[99]

3. *What conduct is prohibited?*

The CFPL declares as unlawful for a covered person to:

(1) Engage, have engaged, or propose to engage in any unlawful, unfair, deceptive, or abusive act or practice with respect to consumer financial products or services.
(2) Offer or provide to a consumer any financial product or service not in conformity with any consumer financial law or otherwise commit any act or omission in violation of a consumer financial law.
(3) Fail or refuse, as required by a consumer financial law or any rule or order issued by the department thereunder, to do any of the following:
    (A) Permit the department access to or copying of records.
    (B) Establish or maintain records.
    (C) Make reports or provide information to the department.[100]

Persons that knowingly or recklessly provide substantial assistance are also liable.[101]

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cates."); *CFPB Announces Policy Regarding Prohibition on Abusive Acts or Practices*, CFPB (Jan. 24, 2020), https://www.consumerfinance.gov/about-us/newsroom/cfpb-announces-policy-regarding-prohibition-abusive-acts-practices/ ("However, nearly a decade after the Act became law, uncertainty remains as to the scope and meaning of abusiveness. This uncertainty creates challenges for covered persons in complying with the law and may impede or deter the provision of otherwise lawful financial products or services that could be beneficial to consumers . . . . In the policy statement, the Bureau leaves open the possibility of engaging in a future rulemaking to further define the abusiveness standard."); *The CFPB's Policy Statement Concerning the Meaning of "Abusiveness," supra* note 96 ("A number of questions remain, however, concerning how the CFPB will apply its new cost-benefit analysis with respect to conduct that may be challenged as 'abusive.' Finally, this policy statement is nonbinding, making it easier for future CFPB leadership to revisit these issues, although the CFPB has left open the possibility of engaging in a future rulemaking to provide further definition. For all of these reasons, only time will tell the extent of any impact of the CFPB's new framework.").

98. Fin. § 90009(d).
99. *Id.* § 90009(e).
100. *Id.* § 90003(a).
101. *Id* § 90003(b).

Covered entities are also prohibited from retaliating (terminating or discriminating) against employees of covered persons that either file a proceeding under a consumer protection law or refuse to participate in conduct the employee believes violates law, or any rule that is the subject of the DFPI's jurisdiction.[102]

4. *What kinds of enforcement powers are created?*

As discussed, the DFPI's enforcements powers include the power to bring actions under the federal Dodd-Frank Act or federal regulations issued by the CFPB with respect to any entity that is licensed, registered, or subject to oversight by the DFPI.[103] Importantly, this power was included outside the CFPL—but still part of AB 1864—and so it applies to all entities subject to the DFPI's powers, not just the entities newly regulated under the CFPL.[104]

Under the CFPL, the DFPI has broad authority take "any action authorized by this law against a covered person or service provider who engages, has engaged, or proposes to engage in unfair, deceptive, or abusive practices with respect to consumer financial products or services."[105] The relief the DFPI may seek under its civil or administrative action authority includes, but is not limited to:

(1) Rescission or reformation of contracts.
(2) Refund of moneys or return of real property.
(3) Restitution.
(4) Disgorgement or compensation for unjust enrichment, with any disgorged amounts returned to the affected consumers, to the extent practicable.
(5) Payment of damages or other monetary relief.
(6) Public notification regarding the violation, including the costs of notification.
(7) Limits on the activities or functions of the person.
(8) Monetary penalties . . . .[106]

Monetary penalties for any civil or administrative action taken by the DFPI are determined based on whether the violation was simply a violation (up to $5,000 per day for each day the violation or failure to pay continues or $2,500 for each act or omission in violation), reckless (up to $25,000 per day for each day the violation or failure to pay continues or $10,000 for each act or omission in violation), or knowing (up to the lesser of 1% of the covered persons assets or $1,000,000 per day for each day the violation or failure to pay continues or $25,000 for each act or omission in violation).[107] However, the DFPI has discretion to determine the penalty based

102. *Id.* § 90004(a).
103. *Id.* § 326(b) (as amended effective, January 1, 2021).
104. *Id.*
105. *Id.* § 90012(a).
106. *Id.* § 90012(b).
107. *Id.* § 90012(c)(1)(A).

on mitigating factors, including the amount of financial resources of the person charged, the good faith of the person charged, the gravity of violation, the severity of the risks to or losses of the consumer, and the history of previous violations.[108]

As far as civil enforcement authority, the DFPI can bring a civil action if "a person violates any provision of this division, rule or final order, or condition imposed in writing by the [DFPI]" to "enjoin the acts or practices or to enforce compliance with this law or any rule or order herein under."[109] In addition to injunctive relief, the DFPI can seek a receiver or other fiduciary appointed for the defendant or their assets, as well as ancillary relief in the public's interest, including the relief and/or penalties discussed above.[110]

As far as administrative authority, the DFPI can conduct hearings and adjudicate proceedings to ensure or enforce compliance with: the CFPL, and any rule, final order, or condition imposed by the DFPI under the CFPL; or any other law the DFPI is authorized to enforce and any regulations or order prescribed thereunder[111]—unless that law specifically limits the department from conducting a hearing or adjudication proceeding and only to the extent of that limitation.[112] These administrative hearings are to be conducted under the procedures set forth in the California Administrative Procedure Act.[113] After notice and opportunity for a hearing, the DFPI can assess the monetary penalties discussed above.[114] Under the administrative hearing framework, the DFPI can order the person to cease and desist conduct if the DFPI determines it is prohibited conducted under the CFPL or any other law, rule, order, or any condition imposed in writing on the person by the DFPI.[115] Like under the DFPI's civil action authority, the

108. *Id.* § 90012(c)(1)(B).
109. *Id.* § 90013(a).
110. *Id.* § 90013(a)–(b).
111. *Id.* § 90015(a).
112. A breakdown of the DFPI's enforcement powers to bring an administrative action versus a civil action will likely follow this framework:

	Existing Licensee	Newly Covered Person: New DFPI Regulations Issued	Newly Covered Person: No DFPI Regulations Issued
DFPI Can Initiate Administrative Enforcement Action	Yes	Yes	No
DFPI Can Initiate Civil Suit	Yes	Yes	Yes

113. FIN. § 90015(b).
114. *Id.* § 90015(c).
115. *Id.* § 90015(d).

DFPI also has discretion to seek ancillary relief, including the relief discussed above.[116] The DFPI also has authority to suspend or revoke a license after notice and opportunity for hearing.[117]

After exhaustion of the DFPI's administrative proceeding authority, the DFPI is empowered to apply to relief to the appropriate superior court for an order compelling the cited licensee or person to comply with the DFPI's orders.[118] Similarly, under the California Administrative Procedure Act, a covered person or other respondent who has been subjected to an administrative proceeding may bring an action in the appropriate superior court to challenge the administrative decision.[119]

While the DFPI cannot outsource or delegate enforcements powers to a private attorney, it may enter cooperation agreements with the Attorney General's office or other agencies.[120]

5. *What kinds of oversight powers are created?*

As part of the DFPI's broad power to monitor, regulate, and assess, the DFPI may gather information on the activities of covered persons and service providers.[121] This includes requiring covered persons to file under oath or otherwise, annual or special reports, or answers in writing to specific questions.[122]

Elsewhere in the CFPL, the DFPI is given oversight authority over certain covered persons—and their service providers—that offer origination, brokerage, or servicing of loans secured by real estate, or loan modification or foreclosure relief services, or is a statutorily required registrant of the DFPI, or the DFPI is offering or providing financial products or services.[123] For these covered persons, which is likely all covered persons, the DFPI may require reports and conduct examinations on a periodic basis for the purposes of:

(1) Assessing compliance with the requirements of consumer financial laws.
(2) Obtaining information about the activities and compliance systems or procedures of that person.
(3) Detecting and assessing risks to consumers, small business, and to markets for consumer financial products and services.[124]

Covered persons are required to pay the costs of these examinations.[125] The DFPI also has broad investigatory and subpoena powers, which in-

116. *Id.* § 90015(e).
117. *Id.* § 90015(f).
118. *Id.* § 90015(g).
119. *See, e.g.*, Cal. Gov't Code, § 11523 (West 2020).
120. Fin. §§ 90016, 90017.
121. *Id.* § 90009(f)(1).
122. *Id.* § 90009(f)(2).
123. *Id.* § 90010(a).
124. *Id.* § 90010(b).
125. *Id.* § 90007(b)(1).

cludes the right to ask any person to produce documents or respond to written questions.[126]

6. *What else is in AB 1864?*

Along with the registration, oversight, rulemaking, and enforcement powers, CFPL also establishes the Financial Technology Innovation Office.[127] One of the key aims of the CFPL is to "cultivate financial innovation, and allow the department to track and regulate emerging financial products"[128] and it's likely the Office will serve this purpose. The DFPI is also given authority to investigate, research, analyze, and report on markets for consumer financial products or services, develop outreach and education programs to underserved consumers and communities, and develop and implement initiatives to promote innovation, competition, and consumer access within financial services.[129]

Under AB 1864 and the CFPL, the DFPI's authority is not totally unchecked. The DFPI is to also publish an annual report, available to the public, regarding its rulemaking, enforcement, oversight, and other activities.[130] The DFPI is also required to report to the Legislature at least once a year to review its activities in the prior year and its planned activities in the upcoming year, as well as certain other topics.[131] Further, the regulation by the DFPI requiring a covered person to register shall be inoperable on January 1 of the calendar year that is four years after the initial year of operation, unless the Legislature takes action to extend the registration.[132] The Legislature is to hold public hearings and the DFPI is to submit a report of its activities related to covered persons that are required to register.[133]

C. What Kinds of Criticism and Comments Have Been Raised in Response?

Some of the comments in response to AB 1864 and the CFPL focused on the fact that established industries lobbied to get exempt from most of the coverage of the CFPL.[134] This has led to some in the consumer financial

126. *Id.* § 90011(a)–(b).
127. *Id.* § 90006(d)(1).
128. *California Consumer Financial Protection Law*, California Dep't of Fin. Protection and Innovation (Dec. 3, 2020), https://dfpi.ca.gov/california-consumer-financial-protection-law/.
129. Fin. § 90006(d)(2)–(4).
130. *Id.* § 90018(a)–(b).
131. *Id.* § 90009.5(d).
132. *Id.* § 90009.5(b).
133. *Id.* § 90009.5(b)–(c).
134. Matthew Adams, *California's Proposed Mini-CFPB Is Cronyist and Ill-Conceived*, Competitive Enterprise Institute (Sept. 29, 2020), https://cei.org/blog/california%E2%80%99s-proposed-mini-cfpb-cronyist-and-ill-conceived; *See* Senate Floor Alert from California Bankers Association, California Community Banking Network, California Credit Union League, California Escrow

services industry to even publicly remark they were not worried about the CFPL or "neutral" on AB 1864.[135]

Related to the issue of the CFPL's coverage, car dealers raised one strain of criticism during the legislative enactment of AB 1864, they argued California's mini-CFPB goes further than the federal CFPB because it included within its scope auto dealers that assigned debt after credit was extended to customers.[136] The dealers' opposition to AB 1864 was cited in the legislative history summary but ultimately brushed aside because it was claimed the dealers did not acknowledge the exemption for entities licensed by other state agencies: "[t]he California New Care [sic] Dealers Association argues that new car dealers should be exempted from the bill, but their letter does not acknowledge the existing exemption in the bill related to licensees of other state departments or describe how that exemption is insufficient for car dealers."[137]

Association, California Financial Services Association, California Mortgage Association, California Mortgage Bankers Association, Aug 31, 2020 ("The trade associations identified above are pleased to inform you that we are neutral on Assembly Bill 1864, a measure that reorganizes the Department of Business Oversight into the Department of Financial Protection and Innovation.").

135. Kate Berry, *Banks, Consumer Groups Both Got What They Wanted in 'mini-CFPB' Bill*, American Banker (Aug. 31, 2020), https://www.americanbanker.com/news/banks-consumer-groups-both-got-what-they-wanted-in-mini-cfpb-bill ("But the California Bankers Association said last week that it was 'neutral' on the identical bills in the state Senate and Assembly after successfully lobbying with other trade groups to exempt banks and auto lenders from the most dramatic reforms in the legislation, including the new agency's ability to bring "administrative actions" against financial firms outside of court. 'The changes we were advocating for—that the intent of the legislation be to cover current entities that are unregulated and that there be no new enforcement authority over existing licensees—are now affirmed in these recent amendments . . . allowing us to be neutral on the bill,' said Beth Mills, a spokeswoman for the California Bankers Association.").

136. David Dayen, *A New Agency to Fight Financial Predators in California*, Prospect (Sept. 8, 2020), https://prospect.org/power/new-agency-to-fight-financial-predators-in-california/ ("But Cordray still thinks that the agency can be meaningful, because it can apply rules that are more stringent than the federal floor. 'California can often be a leader for the nation,' he says. "If you're a national company, you do not want to do business differently in one place than another. If California sets a higher standard, you'd be inclined to meet those and apply them across the country." This is likely true in at least one area. According to several sources, while auto dealers operating under their normal DMV license would be exempted, those that engage in certain forms of lending are likely to be covered under the new agency, which would go further than the federal CFPB, which gave auto dealers a full carve-out. This is subject to implementation and interpretation, and dealers could still find a way out. But if that stays intact, it would be a foothold for auto dealer oversight that isn't contemplated in federal law.").

137. Assembly Floor Analysis, AB 1864, prepared Aug. 31, 2020, *available at*

Similarly, a "coalition of payday lenders and other high-cost lenders" argued that "all existing licensees of DBO should be exempt from the proposed California Consumer Financial Protection Law" and argued certain definitions and terms were unclear.[138]

Based on this inevitable jostling over the CFPL's coverage, it can be expected that in the near future, as the DFPI ramps up its new authority and rule-making powers, members of the consumer financial services industry will seek further clarification about the scope of the DFPI's new authority. One notable example of this already happening was the recent announcement that the DFPI and the California Department of Real Estate both clarified, in response to an inquiry, that the DRE will maintain oversight of reverse mortgages and the CFPL does not give the DFPI new regulatory authority over the reverse mortgage industry.[139]

Similar to questions over what entities the CFPL cover, another open question will be to what extent the DFPI will embrace the broad and lofty mantle touted by legislators involved with crafting the CFPL—even though many entities are seemingly exempt from the final version of the CFPL. For example, in a press release issued by the DFPI after the passage AB 1864, the DFPI acknowledged its new authority extended to financial services not currently subject to the department's regulatory oversight, but much of the comments continued to suggest its new authority was extremely broad, signifying the DFPI viewed its mandated under the CFPL as simply to protect California consumers.[140] One potential avenue for broad enforcement actions under the AB 1864, which applies irrespective of whether entities are covered under the CFPL or previous existing frameworks, is the DFPI's authority to bring enforcement actions under the Dodd-Frank Act.[141] Some commentators have suggested the broad UDAAP powers given to the DFPI may allow it to engage in rule-making by enforcement, particularly under the sometimes vague "abusive" standard.[142]

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https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200AB1864.

138. *Id.*

139. Craig Marolf, *New California CFPB-style Agency Will Not Have Authority Over Reverse Mortgage Industry*, Reverse Mortgage Daily (Oct. 8, 2020), https://reversemortgagedaily.com/2020/10/08/new-california-cfpb-style-agency-will-not-have-authority-over-reverse-mortgage-industry/.

140. Stronger Financial Protections on the way for California Consumers, California Dep't of Fin. Protection and Innovation (Sept. 25, 2020), https://dfpi.ca.gov/2020/09/25/stronger-financial-protections-on-the-way-for-california-consumers/.

141. Cal. Fin. Code § 326(b)–(c) (as amended effective, January 1, 2021).

142. *See, e.g.*, Isabelle Ord et al., *California enacts consumer financial protection legislation and establishes the Department of Financial Protection and Innovation*, DLA Piper (Oct 5, 2020), https://www.dlapiper.com/en/us/insights/publications/2020/10/california-enacts-consumer-financial-protection-legislation/; Julia B. Strickland et al., *California's Mini-CFPB: Its Powers and Enforcement Implications*, Stroock (Sept. 9, 2020), https://www.stroock.com/news-and-

IV. How Will These Two Bills Act Together to Affect Debt Collectors?

Although AB 1864 and SB 908 no doubt initially sought to broadly regulate the entire consumer finance industry, due to industry participation during the legislative process, a number of entities and industries within this umbrella were ultimately exempt from the new provisions. The entities that are not exempt will either need to be licensed by the DFPI under the DCLA, which is generally considered a higher level of oversight,[143] or register with the DFPI under the CFPL.

Creditors and other financial institutions not already licensed under one of the enumerated exempt frameworks may decide to re-align operations and submit to licensure under an existing and exempt framework to avoid the potentially more onerous CFPL, DCLA, or both. However, most debt collectors that are "purely" debt collectors and operationally do not function in a way that allows them to qualify as an exempt entity will need to be licensed under the DCLA.[144] However, being licensed under the DCLA may not be enough to escape the CFPL, as there is no exemption for being licensed under the DLCA, and "collecting debt related to any consumer financial product or service" is included in the defined term of "financial product or service."[145] While at least some of the commentary related to SB

insights/californias-mini-cfpb-national-impact-and-enforcement-threat; *California's New 'Mini-CFPB' and What It Means For Compliance*, PerformLine (Sept. 3, 2020), https://blog.performline.com/california-department-of-financial-protection-and-innovation-compliance.

143. As part of the Legislative Analyst's Office (LAO) summary of the budget proposal that later became AB 1864, the LAO noted, in discussing whether the DFPI should be given power to determine what entities will need to register, that "the Legislature is currently considering a bill—SB 908 (Wieckowski)—that would require debt collectors to be licensed, which is generally considered to be a higher level of oversight than registration." The 2020–21 Budget: Reinventing the Department of Business Oversight, Legislative Analyst Office (LAO), at p. 7, February 26, 2020 (emphasis added).

144. According to the legislative history of SB 908, the DBO estimated that 7,000 of the 9,000 "newly covered persons" under the budget proposal that later became AB 1864 were debt collectors. Senate Banking And Financial Institutions Analysis, *supra* note 4 ("The trailer bill accompanying the BCP proposed to give DBO additional authority over its existing licensees and new oversight authority over entities which are not currently required to be licensed in California, but which offer or provide financial products or services in California. This second group (unlicensed entities that offer or provide financial products or services in California) are called 'new covered persons (NCPs)' in the Governor's proposal. DBO estimated that debt collectors represented approximately 7,000 of the 9,000 NCPs over which the department would gain new authority.").

145. Fin. § 90005(k)(10).

908 noted this overlap between the two pending laws and suggested what would later become AB 1864 would need to be adjusted, this was not done.[146]

Aside from questions over coverage under one or both new laws, there remains open questions about the rulemaking, oversight, and enforcement role of the new DFPI. While the DCLA and the CFPL both have limitations—for the DCLA it is described as a regulatory layer on top of existing law, and for the CFPL, most of the new authority extends only to unlicensed consumer financial institutions—the DFPI has increased funding and a broad mandate as a mini-CFPB to take the place of the federal CFPB, which has retreated from consumer protection. It remains to be seen how the DFPI will develop the more specific framework under the DCLA and CFPL and how the DFPI use its new powers to fulfill its broad mandate.[147] Debt collectors and other consumer financial providers operating in California may need to ramp up their government relations efforts to engage with the DFPI proactively to try to shape regulations and educate DFPI staff on industry specific issues.[148]

Another potential question is to what extent other states will follow in California's footsteps and step up to create their own mini-CFPB or increase scrutiny of unlicensed or minimally regulated parts of the con-

146. Senate Banking And Financial Institutions Analysis, *supra* note 4 ("If SB 908 is enacted, the scope of the Governor's CDCFPI Budget Proposal will likely need to change, to reflect licensure of debt collectors and a resulting decrease in the number of NCPs over which the department will gain oversight.").

147. While the process for the registration of debt collectors and the registration of newly covered persons under the CFPL is still in the works, the DFPI has already begun to use some of its new powers. In a press release issued on January 19, 2021, the DFPI announced it issued a dozen subpoenas to third party debt collectors who the DFPI claimed were "potentially engaged in unlawful, unfair, deceptive, or abusive debt collection practices in California based on consumer complaints." According to the DFPI, this represents the first major action under the CFPL. Earlier, in the DFPI's January 2021 bulletin, the DFPI announced it planned to immediately exercise its new powers: "[b]eginning immediately, the DFPI will review and investigate consumer complaints against previously unregulated financial products and services, including debt collectors, credit repair and consumer credit reporting agencies, debt relief companies, rent to own contractors, private school financing, and more." In a January 4 press release, the DFPI also indicated that to "focus on these new activities and expanded charge, the DFPI will hire 90 additional employees over the next three years." These 90 additional employees represent a 13% increase.

148. The DFPI issued a first invitation for comments for CCFPL rulemaking on February 4, 2021, open through March 8, 2021, on a variety of potential rulemaking topics. *California Consumer Financial Protection Law: Regulations, Legislation, Opinions, and Releases*, California Dep't of Fin. Protection and Innovation (as of February 24, 2021), https://dfpi.ca.gov/california-consumer-financial-protection-law/california-consumer-financial-protection-law-regulations-legislation-opinions-and-releases/.

sumer financial services industry. The risk, of course, is this will result in a patchwork of inconsistent and difficult to follow rules in different states and locales.

V. Conclusion

In the end, debt collectors and consumer financial providers operating in California will need to look closely at SB 908 and AB 1864 to determine to what extent they will be required to be licensed or register with the DFPI. They will also need to keep a close eye on rules developed by the DFPI and enforcements actions brought by the DFPI to avoid further scrutiny.