Update on California's Debt Collection Licensing Act, Amnesty Legislation, and Proposed Regulations

Scott J. Hyman & Stephen D. Britt

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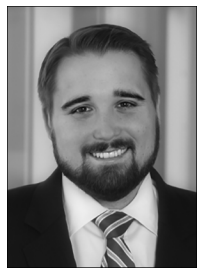

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I. Introduction

On September 25, 2020, California Governor Gavin Newsom signed Senate Bill 908, which included the Debt Collection Licensing Act ("DCLA"). The DCLA was introduced in response to the perceived problem that California is one of the few states that do not license debt collectors.[1] Most importantly, the DCLA required debt collectors operating in California—who are not already licensed under certain other licensing frameworks—to obtain a license from the Department of Financial Protection and Innovation ("DFPI"), beginning on January 1, 2022.[2] The DCLA also provided the DFPI with the authority to issue regulations interpreting its extremely vague statutory language, as well as enforce its provisions.[3]

On April 23, 2021, the DFPI filed a notice of proposed regulations, constituting the DFPI's "first rulemaking" proceeding related to the requirements for licensure under the DCLA.[4] Interpreting the January 1, 2022

1. *See SB 908 Unfinished Business*, S. Rules Comm., Off. of S. Floor Analyses (Aug. 31, 2020), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200SB908 (explaining existing laws and the proposed bill).

2. Cal. Fin. Code § 100000.5(c) (West 2022).

3. Cal. Fin. Code §§ 90006, 100001, 100004(a) (West 2021).

4. *DFPI Commences Rulemaking Process and Seeks Input on Implementation of the Debt Collection Licensing Act*, 27 Cal. Regul. L. Rep. 280 (2021), https://digital.sandiego.edu/cgi/viewcontent.cgi?article=3117&context=crlr ("The initial public comment period expired on June 8, 2021. After receiving public comment, the Department released modified text for public comment on June 23, 2021, and a second modified text on November 15. The public comment period on the second modified text expire[d] on December 2, 2021.").

deadline strictly, the DFPI opened the DCLA registration application as of September 1, 2021,[5] and set a hard deadline for prospective debt collectors to apply for their licenses through the Nationwide Multistate Licensing System ("NMLS") no later than December 31, 2021.[6] Debt collectors who submitted an application by this deadline were permitted to continue to operate while their application remained under review.[7] Perhaps predictably, the large influx of applicants at the end of 2021 led to a "temporary slowdown in obtaining a new Nationwide Multistate Licensing System or NMLS account."[8] In response, the DFPI "assure[d] [applicants] that DFPI [was] aware of this issue" and would "not take any action against a debt collector solely on the basis of the temporary slowdown with NMLS."[9]

This Article discusses recent 2022 legislation extending the time for entities who have applied for DCLs to conduct business in California through December 31, 2022. The Article also discusses the DFPI's proposed rulemaking on the scope of the DCLA and annotates the DFPI's proposed regulations by subject matter from the forty-three public comments filed on August 29, 2022—the so-called "Scope" regulations. The Article will then discuss the additional public comments received regarding its Notice(s) of Modification to the proposed so-called "Complaint" regulations first issued on December 22, 2022.[10] The annotations of the proposed "Scope" regulations and "Complaint" regulations reveal areas of common concern, areas of agreement, and the bases for public issue with the proposals.

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5. *See* Paul Soter et al., *An Overview of Developments Under California's Consumer Financial Protection Law and Debt Collection Licensing Act*, 75 Consumer Fin. L.Q. Rep. 39 (2021) [hereinafter Soter, *Overview*]; Paul Soter et al., *California's New Debt Collection Licensing Scheme and Mini-CFPB Legislation Create New Regulatory and Compliance Obligations for Collecting Consumer Debts in California*, 74 Consumer Fin. L.Q. Rep. 136 (2020) [hereinafter Soter, *Compliance Obligations*]. The opinions in these Articles and in the instant Article are the opinions of the author(s) and do not represent any opinion of or statement by the DFPI.

6. Innovation: Monthly Bull. (June 13, 2022), https://dfpi.ca.gov/2022/06/13/june-2022-monthly-bulletin/#1.

7. Fin. § 100000.5(c).

8. Keith Bishop & Allen Matkins, *NMLS Slowdown Frustrates Debt Collector License Applicants as Application Deadline Looms*, Cal. Corp. & Secs. Blog (Dec. 28, 2021), https://www.jdsupra.com/legalnews/nmls-slowdown-frustrates-debt-collector-6642077/ (quoting Cal. Dep't. of Fin. Prot. & Innovation: Monthly Bull. (Jan. 2022), https://dfpi.ca.gov/2022/01/18/january-2022-monthly-bulletin/).

9. *Id*.

10. Subsequent to the finalization of this Article for publication, the DFPI issued another set of modifications to the proposed Complaint Regulations on April 14, 2023. https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/04/PRO-03-21-Third-Notice-of-Proposed-Changes.pdf; https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/04/PRO-03-21-Third-Modified-Text.pdf Those modifications and the comments thereto are not addressed by this Article.

II. AB 156 Extends the DFPI's License Issuance Compliance Date and the Amnesty for Applicants to Continue to Conduct Business in California through December 31, 2022

On June 13, 2022, the DFPI issued a "Backlog Advisory," acknowledging that due to "unforeseen" delays, it would not be issuing required licenses in the foreseeable future. This advisory notified license applicants that:

> the issuance of licenses under the Debt Collection Licensing Act is unavoidably delayed at this time, because the Federal Bureau of Investigation has informed the Department that new changes are needed to state agency protocols for requesting federal background checks.[11]

This Advisory was confirmed on the DFPI's website.[12] As a result of these delays, the California Legislature passed AB 156 to recognize the administrative delay in license issuance; therefore, excepting the DCLA's strict requirements that applications be submitted by December 31, 2022. Specifically, AB 156 permits the DFPI to "allow any debt collector that submits an application before January 1, 2023, to operate pending the approval or denial of the application",[13] thus maintaining the amnesty that applicants whose applications have been submitted before January 1, 2023 can operate in California without formal issuance of the DCL by the DFPI. Applicants submitting applications on or after January 1, 2023, however, will not be permitted to operate in California until the DFPI issues a DCL.

Even before the expiration of the amnesty under AB 156, however, the DFPI had still filed enforcement actions against unlicensed debt collectors who had submitted no application all, utilizing its authority under the California Consumer Financial Protection Law (CFPL), Financial Code section 100004(a)(1).[14]

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11. *Backlog Advisory*, Cal. Dep't. of Fin. Prot. & Innovation: Monthly Bull. (June 13, 2022), https://dfpi.ca.gov/2022/06/13/june-2022-monthly-bulletin/#1.

12. *Frequently Asked Questions-Debt Collector Licensing Act (DCLA)*, Cal. Dep't of Fin. Prot. & Innovation, https://dfpi.ca.gov/debt-collection-licensee/#faq.

> 2. Can I continue doing business in California while my application is pending approval or denial? Yes. Licenses under the Debt Collection Licensing Act have been unavoidably delayed at this time, because the Federal Bureau of Investigation has informed the Department that new changes are needed to state agency protocols for requesting federal background checks. During this delay, applicants may continue to engage in business, and the Department will not take action for unlicensed activity against applicants who filed their applications after December 31, 2021.

13. A.B. 156, 2021–23 Legis. Sess. (Cal. 2021).

14. *See Summary of Actions and Orders-Listed by Month*, Cal. Dep't of Fin. Prot. & Innovation, https://dfpi.ca.gov/actions-and-orders-listed-by-month/; *see also* Soter *Overview*, *supra* note 5, at 46–48 (summarizing actions taken by DFPI).

III. DFPI Proposed Regulations on the Scope of the DCLA

A. Background of the Proposed Regulations.

On August 19, 2021, the DFPI opened its public comment period for its second round of rulemaking, asking commenters to identify unclear definitions within the DCLA, and seeking to reconcile some of these terms with the corresponding terms in California's Rosenthal Fair Debt Collection Practices Act (Rosenthal Act) and the Fair Debt Buying Practices Act (FDBPA).[15]

On July 15, 2022, the DFPI issued proposed regulations on the scope of debt collection licensure required by the DCLA (the "Scope Regulations"), before issuing two rounds of regulations relating to receipt of complaints from debtors (the "Complaint Regulations") in December 2022 and March 2023.[16] Public comments to the proposed Scope Regulations were due August 29, 2022, and the DFPI published the public comments on October 10, 2022.

The release of the Scope Regulations by the DFPI was frequently commented on by observers, reported on, but with little analysis. Some commentators correctly noted that the Regulations were a step in the right direction limiting uncertain[17] and overbroad scope[18] or resulting in unintended consequences.[19]

15. Cal. Regul. L. Rep, *supra* note 4, at 280–81.

16. Lisa Lanham, *California DFPI Issues Draft Text for Second Rulemaking Under Debt Collection Licensing Act*, Consumer Fin. Monitor (July 20, 2022), https://www.consumerfinancemonitor.com/2022/07/20/california-dfpi-issues-draft-text-for-second-rulemaking-under-debt-collection-licensing-act/.

17. Vaishali S. Rao & Sarah E. King, *Proposed California Debt Collection Licensing Regulations Raise Scope Concerns*, Consumer Crossroads (May 24, 2021), https://www.jdsupra.com/legalnews/california-dfpi-issues-proposed-2908558/.

> However, the DFPI's proposed regulations also appear to implicitly address the scope of the license requirement, potentially expanding the category of licensees beyond what the statutory text contemplates. . . . The distinction between "engag[ing] in the business of debt collection" and acting in the capacity of a debt collector could be meaningful. The DCLA's definition of "debt collector" is very broad. If the California Legislature intended to require all debt collectors to be licensed under the DCLA, and not just those who engage in the business of debt collection, it could have easily provided that all debt collectors must be licensed. For example, there are other California laws that prohibit both engaging in certain businesses *and* acting in a certain capacity. California's contractor law prohibits either engaging in the business of a contractor *or* acting in the capacity of a contractor when not licensed. Cal. Bus. & Prof. Code § 7028. And, California's Real Estate Law prohibits a person from, without a license, engaging in the business of a real estate broker or sales person, *or* acting in the capacity of a real estate broker or sales person. Cal. Bus. & Prof. Code § 10130. The plain language of the DCLA only prohibits engaging in the business of debt collection without a license.

B. Annotation of the DFPI's Proposed Scope Regulations.

1. *Definitions.*

The Proposed Scope Regulations seek to amend the definition sections contained in section 1850.

§ 1850. Definitions.

(i) "Employee" means an individual whose manner and means of performance of work are subject to the right of control of, or are controlled

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This would mean there may be instances where a party is a debt collector for purposes of the Rosenthal Fair Debt Collection Practices Act's (RFDCPA) substantive provisions, but not engaging in the business of debt collection for purposes of the DCLA's licensing provisions. Notwithstanding the DCLA's exemptions for certain licensed lenders and other parties, there will be individuals who regularly—in the conduct of their business—collect debts owed to themselves, but in a manner that is ancillary or tertiary to their primary business. For example, merchants who extend credit to their customers under retail installment contracts or entities that acquire certain types of current obligations and only seek to collect delinquent amounts owed themselves, might not be engaging in the business of debt collection. These entities may very well be subject to the RFDCPA's substantive provisions as well as the new California Consumer Financial Protection Law, but without further guidance from the DFPI, it is not clear they are engaging in the business of debt collection.

18. Alexandra Megaris et al., *California DFPI Issues Proposed Rulemaking on the Debt Collection Licensing Act*, JDSupra (July 28, 2022), https://www.jdsupra.com/legalnews/california-dfpi-issues-proposed-2908558/.

The text of the DCLA gave many the impression that the statute's scope would mirror that of the Rosenthal Act, which, among others, covers both third-party debt collectors and creditors collecting their own debts. If that were to be the case, then the DCLA's licensing requirement would apply to activities that may only be covered by licensing in a small number of other jurisdictions.

19. Charles E. Washburn et al., *California Regulator Proposes Debt Collector Licensing Rules,* Manatt (July 18, 2022), https://www.manatt.com/insights/newsletters/client-alert/california-regulator-proposes-debt-co ("Some of the terms used in the DCLA suggested that its scope may be similar to that of the Rosenthal Fair Debt Collection Practices Act (RFDCPA). The RFDCPA applies to third-party debt collectors, but also applies to a creditor collecting its own debts. Accordingly, retailers and others contacting their customers regarding late payments were uncertain as to whether they now needed to obtain licenses under the DCLA in order to engage in this everyday activity."); *California DFPI Extends Comments on Debt Collection Licensing*, ACA Int'l, (July 18, 2022) ("In the draft text, the DFPI expands on the scope of the licensing requirement for employees of debt collectors and criteria that would qualify original creditors as engaging in the business of debt collection.").

by, a person and whose compensation for federal income tax purposes is reported, or required to be reported, on a W-2 form[20] or international equivalent, issued by the controlling person.

(j) "Engage in the business of debt collection"[21]: A person[22] engages in the business[23] of debt collection and is required to be licensed pursuant

20. Letter from Bonnie Dye, Hinshaw & Culbertson, LLP, to Commissioner Christopher Schultz, Cal. Dep't of Fin. Prot. and Innovation (Aug. 26, 2022), https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/10/PRO-05-21-Hinshaw-Culbertson-LLP-8.29.22_Redacted.pdf?emrc=e78ab9 ("[W]e respectfully ask that definition of employee in the proposed second rulemaking under the DCLA be removed or revised to resemble other state definitions of "employee" to mean a natural person working for a salary or wages."); Letter from Matthew Kownacki & Dave Knight, to Cal. Dep't of Fin. Prot. and Innovation (Aug. 29, 2022). https://afsaonline.org/wp-content/uploads/2022/08/AFSA-comment-letter-CA-DFPI-2022-DCLA.pdf ("[W]e believe additional clarification is necessary to protect the ability of debt collectors to utilize the services of non-W2 workers, including 1099 workers, temporary help from a staffing agency, or a collection agency employee, who works for a creditor to collect in the creditor's name at the creditor's office under the creditor's supervision. Such workers would be covered by the de facto employee exemption of the FDCPA, but would not meet the W2 employee definition of the proposed rules.").

21. Keith Paul Bishop, *Confusion Abounds Over Scope of Debt Collection Licensing Act*, Cal. Corp. & Sec. L. (Jan. 5, 2022), https://www.calcorporatelaw.com/confusion-abounds-over-scope-of-debt-collection-licensing-act

> Section 100001(a) provides that "no person shall engage in the business of debt collection in this state without first obtaining a license . . . ." Section 100005 authorizes the Commissioner of Financial Protection & Innovation to take specified enforcement actions if in her opinion "a person who is required to be licensed under this division is engaged in business as a debt collector without a license . . . ." Note that these two statutes use different terms—"debt collection" and "debt collector." Both are defined in the DCLA but the definitions are not consistent. Section 10000(2)(i) defines "debt collection" as "any act or practice in connection with the collection of consumer debt" while Section 100002(j) defines "debt collector" as "any person who, in the ordinary course of business, regularly, on the person's own behalf or on behalf of others, engages in debt collection." Thus, the definition of "debt collector" requires more than simply "debt collection." The determining the scope of the DCLA is further complicated by the use of nested definitions. The definition of "debt collection" refers to collection of "consumer debt" which is defined in Section 100002(f) as "money, property, or their equivalent, due or owing, or alleged to be due or owing, from a natural person by reason of a consumer credit transaction." It also includes mortgage debt and "charged-off consumer debt" as defined in Section 1788.50 of the Civil Code. Section 100002(e) term "consumer credit transaction" as "a transaction between a natural person and another person in which property,

to section 100001, subdivision (a) of the Financial Code if the person (A)

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services, or money is acquired on credit by that natural person from the other person primarily for personal, family, or household purposes."

22. Letter from Matthew Kownacki, *supra* note 20

> [W]e remain concerned that neither the DFPI nor the definition in the proposed regulations gives any guidance for attorneys or law firms retained by AFSA and CFSA members to defend them in litigation initiated by consumers who are, themselves, represented by counsel. Because of the lack of guidance from the DFPI in the proposed regulations or otherwise, AFSA and CFSA members who retain defense counsel to defend litigation initiated by consumers must also retain a separate set of DCLA-licensed attorneys to prosecute compulsory counter-claims on the debt or affirmative defenses of "offset" in the context of defending litigation. This dual-licensing regime prohibiting defense counsel from prosecuting counter-claims on the debt or affirmative defenses of offset conflicts with AFSA's and CFSA's members' right to select counsel of their choice, as well as with the California's State Bar Act and the federal Rules of Civil Procedure and Local Rules that permit AFSA's and CFSA's members' defense counsel to represent AFSA and CFSA members in any Court in which they are admitted. . . . We request that the rules provide clarity on this issue such that the DFPI follow 9th Circuit precedent and state with respect to section 1850(j)(B) that communications or activity between counsel is not licensable activity and is exempt from the calculus of determining whether activity is regular, frequent, or continuous in nature. *E.g., Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926, 935–39 (9th Cir. 2007) ("While no purpose of the Act is furthered by the unwarranted extension of its prohibitions to communications targeted exclusively at a debtor's attorney, the facts of this case illustrate well how a contrary rule would actively frustrate some of these objectives [of the FDCPA].").

23. *See* Letter from Maria Garcia, Fresenius Med. Care N. Am., to Cal. Dep't of Fin. Prot. and Innovation (Aug. 29, 2022), https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/10/PRO-05-21-Fresenius-Medical-Care-North-America-8.29.22_Redacted.pdf

> There is a large conceptual distinction between entities that perform collections as a small or incidental part of a larger suite of services, e.g., a company that manages a healthcare clinic or residential property, versus a traditional debt collection agency that focuses on performing debt collection services for aged accounts transferred over by a creditor. FMCNA proposes that this definition be revised [to include] as follows: ". . .(j) . . . , *and (C) debt collection is the primary purpose of the person's business or is a primary source revenue. A person who performs collection services as an incidental part of the services rendered by a person to another person shall not be deemed to be engaging in the business of debt collection for the purposes of this section*."

see also CTIA—The Wireless Ass'n, Comment Letter on Proposed Regulations on the Scope of Debt Collection Licensure Required by the Debt Collection

engages in debt collection for a profit or gain,[24] and (B) the activity is of a regular, frequent, or continuous nature. Advertising or otherwise offering the service of debt collection for remuneration constitutes engaging in the business of debt collection.

(o) For purposes of subdivision (a) of Financial Code section 100020, "net proceeds generated by California[25] debtor accounts"[26] shall mean the rev-

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Licensing Act (Aug. 29, 2022)

> That said, the definition needs to make clear that entities "engage in the business of debt collection" only when they are compensated for the act of collecting debts, and that businesses do not "engage in the business of debt collection" when they recover money owed to them by their own delinquent customers. This must remain so even if, by collecting the money owed to them (including reasonable collection costs), they earn some portion of the ordinary "profit" or "gain" that any business receives for selling its goods or services. . . . For clarity, the Department should move the "original creditor" concept into the definition of "engage in the business of debt collection" in section 1850(j) so that the common phrase, "engage in the business of debt collection," will have a consistent meaning in each instance.

see also Letter from Matthew Kownacki, *supra* note 20 ("[W]e recommend [revisions to] § 1850 (j) to focus the definition on entities whose businesses are solely debt collection from consumers rather than creditors collecting on existing obligations: . . . . (A) engages in debt collection for a profit or gain *that is earned solely from the act of collecting past due amounts*, and . . . .").

24. Letter from Ctr. for Responsible Lending, et al., to Cal. Dep't of Fin. Prot. and Innovation (Aug. 29, 2022), https://dfpi.ca.gov/wp-content/uploads/sites/337/2021/03/3-15-21-Kiran-Sidhu-Center-for-Responsible-Lending-Comments-to-the-DFPI_ISA_3.15.21_FINAL.pdf

> An entity that engages in debt collection but is nonetheless not profitable is, of course, subject to the Act. At a minimum, the Department should substitute "for compensation" in the definition where "for a profit or gain" currently appears. This alternative would make it clear that being paid (as opposed to being profitable) is the relevant consideration. We see no reason, however, to include even the qualifier "for compensation," as we know of no entities engaged in regular yet pro bono debt collection (and even if such entities did exist, they still should be subject to the Act).

25. Letter from Summer Volkner & Sophia C. Kim, Arent Fox, LLP, to Cal. Dep't of Fin. Prot. and Innovation (Aug. 29, 2022), https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/10/PRO-05-21-ArentFox-Schiff-LLP-8.29.22_Redacted.pdf

> [T]he DCLA should be clarified to enable out-of-state universities to understand and calculate the meaning of "California debtor accounts". . . . To clarify this issue, we suggest that the DFPI should consider the terms "reside in California" and "California debtor accounts" to exclude students who live outside of California in the academic term when the ac-

enues less cost of goods sold or "gross income" generated by California debtor accounts.

(1) For purposes of this section, revenues generated by California debtor accounts means any income generated from collection activity for California debtor accounts, including but not limited to fees for services related to the collection of California debt accounts, income received from the payment of debt by a debtor, and income[27] received from buying and selling California debtor accounts.

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count goes to collections, and include only students who physically are living in California then.

26. *See* Letter from Susan D. Appel, Unifund, to Cal. Dep't of Fin. Prot. and Innovation (Aug. 29, 2022), https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/10/PRO-05-21-Unifund-8.29.22_Redacted_remediated-10-05.pdf ("For debt collectors, 'cost of goods sold' is not a meaningful term. We suggest that 'net proceeds' should be based upon net income of the licensee attributable to California debtor accounts."); Letter from Toyer, to Commissioner Schultz (Aug. 30, 2022), https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/10/PRO-05-21-Toyer69021-8.30.22_remediated-10-05.pdf

> However, your definition discriminates against law firms and collection agencies in the business of debt collection because their entire overhead is directly related to the income generated by working California debtor accounts. . . . A far more fair and appropriate approach would be to have one regulation for first party debt collectors, such as the one you have suggested and have a different definition for third party collectors that would allow third party debt collectors to determine the percentage of their gross receipts are directly related to working in California debtor accounts, and then using that percentage determine how much of their net profits are from working on California debtor accounts.

see also Letter from Tamar Yudenfreund, Encore Cap. Grp., to Cal. Dep't of Fin. Prot. and Innovation (Aug. 29, 2022) https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/10/PRO-05-21-Midland-Credit-Management-8.29.22_Redacted.pdf ("'[C]ost of goods sold' is not a term of art in our industry. We ask for clarification that 'net proceeds' means net income, or revenue minus expenses. That is a figure we include in our balance sheet, in accordance with GAAP."); Letter from Cindy Yaklin, Legislative Co-Chair, Cal. Ass'n of Collectors, (undated), https://dfpi.ca.gov/wp-content/uploads/sites/337/2021/06/California-Association-of-Collectors.pdf

> This section should state clearly that the amounts remitted by a licensee to its client or assigning creditor shall not be included in the determination of the licensee's "net proceeds generated by California accounts." Additionally, the amount to be remitted should not be included in the 'gross income' of the licensee since it is not the licensee's income.

27. Letter from Law Offices of Keith Levey, to Cal. Dep't of Fin. Prot. and Innovation (July 19, 2022), see https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/10/PRO-05-21-Law-Offices-of-Keith-Levey-7.19.22-Remediated.pdf

> Section 1850(o)(1) with regards to a collection attorney who only accepts cases for litigation on an hourly or fixed fee basis, but does not otherwise

> (2) For purposes of this section, cost of goods sold for the collection of California debtor accounts includes expenses directly attributable to the debt being collected, including[28] the cost of the debt. The cost of goods sold does not include operational costs that are not directly attributable to the expenses for the collection of California debtor accounts.

2. *Scope of licensing requirement*.

The proposed regulations seek to adopt a section 1850.1, that would define and limit the scope of the licensing requirement under the DCLA.

> § 1850.1 Scope[29] of Licensing requirement.
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> (a) Employees of debt collectors are not required to be licensed under the Debt Collection Licensing Act when acting within the scope of their employment with a debt collector licensed[30] pursuant to Division 25 of the Financial Code, commencing with Section 100000.

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provide debt collection services to the creditor /collection agency and does not receive any collection percentage, it is unclear whether "collection activity" also means litigation. It is also unclear whether "related to the collection" means fees paid by the creditor for the litigation of the account, especially where all payments are made directly to or remitted to the creditor.

28. Letter from Missy Meggison, Consumer Rels. Consortium, to Cal. Dep't of Fin. Prot. and Innovation (Aug. 29, 2022), https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/10/PRO-05-21-California-Nevada-Credit-Union-Leagues-8.29.22_Redacted.pdf (recommending adding the clause "including *the cost of services rendered, and* the cost of the debt . . . ." and arguing that "CRC believes that the proposed definition of 'net proceeds generated by California Debt Accounts' should factor in the costs of the licensee's services rendered, not just 'goods provided'").

29. Letter from Francie Koehler, CALI Gov't Affs. Comm., to Cal. Dep't of Fin. Prot. and Innovation (Aug. 29, 2022), https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/10/PRO-05-21-Desmond-Desmond-LLC-8.29.22_Redacted.pdf

> The California Association of Licensed Investigators [CALI] urges the Department of Financial Protection and Innovation to revise the proposed amendments to the regulations implementing the Debt Collection Licensure Act to include provisions ensuring that the regulations do not require licensure for conduct and activity covered under the Private Investigator Act [Chapter 11.3 of Division 3 of the Business and Professions Code, commencing with Section 7512].

Letter from Allegheny Cas. Co., Comments on Proposed Regulations on the Scope of Debt Collection Licensure Required by the Debt Collection Licensing Act (Aug. 29, 2022) ("Based on a review of the California Insurance Law, the DCLA should not apply to entities/individuals licensed and regulated by the DOI, including those with express authority to engage in the 'type of loan transactions otherwise permitted by law' without obtaining another license.").

30. Letter from Diana R. Dykstra, Cal. Credit Union League, to Cal. Dep't of Fin. Prot. and Innovation (Aug. 26, 2022), https://dfpi.ca.gov/wp-content/

(b) The licensing exemption in section 100001, subdivision (b)(1) of the Financial Code applies to the listed entities only. The exemption does not apply to parent entities, subsidiaries, or to affiliates.[31]

(c) Original[32] creditors: A creditor seeking, in its own name, repayment of consumer debt arising from credit the creditor extended is not engaged

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uploads/sites/337/2022/10/PRO-05-21-California-Nevada-Credit-Union-Leagues-8.29.22_Redacted.pdf

However, while § 1850. l(a) addresses employees acting within the scope of their employment with a licensed debt collector, it does not specifically address employees acting within the scope of their employment with an entity that is expressly exempt from the DCLA's licensing requirements. Financial Code § l0000l(b)(l) provides that the DCLA (with limited exception), and the licensing obligation in particular, do not apply to certain entities already regulated under other laws, including state and federal credit unions. In light of § 1850.l(a), it would be reasonable to infer that an individual employee of an exempt depository institution under § 100001 (b)(1), when acting as the agent of the depository institution, would also be covered by this exemption and therefore not required to be individually licensed under the DCLA, although this is not expressly stated.

31. Letter from Missy Meggison, *supra* note 28 ("Duplicative licensing requirements place unnecessary burdens and expenses on debt collectors and debt buyers. For this reason, the CRC recommends that entities maintaining a CFL license be exempt from also obtaining a DCLA license for any part of their business."); Letter from Matthew Kownacki, *supra* note 20

We urge the DFPI to reconsider Section 1850.1(b), which given the extensive requirements under state and federal law with which existing licensees and other federally chartered financial institutions already comply, additional requirements under the DCLA would be duplicative and unnecessarily create a significant compliance burden with limited consumer benefit and will only serve to distract the DFPI from the main target of the law and licensing requirements—California debt collectors with no existing state or federal oversight. . . . [W]e respectfully urge DFPI to reconsider Section 1850.1(b), and instead apply the depository institution exemption referenced in Section 10001(b)(1) of the DCLA to subsidiaries and affiliates of depository institutions.

32. Letter from Matthew Kownacki, *supra* note 20

With indirect financing, whether a depository institution or non-depository finance company that took assignment of the contract upon it being signed is indistinguishable to a consumer. The entity that was assigned the new contract is the creditor that is going to service the account, take the consumers' payments, and bring the contract to conclusion. . . . [W]e request § 1850.1(c) be amended to read, in part: (c) Original Creditor: A creditor *person* seeking, in its own name, repayment of consumer debt arising from credit the creditor extended, *financed under the original contract, or previously owned, and who* is not engaged in the business of debt collection for purposes of licensure . . . .

in the business of debt collection for purposes of licensure under the Debt Collection Licensing Act,[33] unless it meets one[34] or more of the following criteria:[35]

33. *Compare* Letter from Ctr. for Responsible Lending, et al., Comment Letter on Proposed Regulations on the Scope of Debt Collection Licensure Required by the Debt Collection Licensing Act (January 20, 2023)

> We oppose the proposal to exempt original creditors from the licensing requirement unless certain, narrow criteria are met. This proposed exemption is contrary to the text of the Act itself and is unjustified as a policy matter. Even if resource limitations prevent the inclusion of most original creditors in the present rulemaking, the Department can and should signal that it may revisit the issue in a future proceeding.

with Letter from Lauren Kimzey, PayPal, to Cal. Dep't of Fin. Prot. and Innovation (Aug. 29, 2022), https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/10/PRO-05-21-PayPal-8.29.22-Remediated.pdf ("PayPal believes the Department should provide additional clarity and certainty that creditors need not obtain a debt collection license. . . . To provide greater consistency and certainty, PayPal requests the Department consider removing all exceptions to the definition of 'Original Creditor' proposed in Section 1850.1(c)(1)-(3)."); *accord* Letter from Matt Tremblay, Elec. Transactions Ass'n, to Commissioner of Fin. Prot. and Innovation (Aug. 29, 2022), https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/10/PRO-05-21-Electronic-Transactions-Association-8.29.22_Redacted.pdf.

34. Letter from Thomas Leonard, Cal. Fin. Serv. Providers, to Cal. Dep't of Fin. Prot. and Innovation (Aug. 29, 2022), https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/10/PRO-05-21-California-Financial-Service-Providers-8.29.22_Redacted.pdf?emrc=90663f

> CFSP supports the proposed exemptions pertaining to first-party creditors. However, the current proposed definitions are incomplete. Specifically, what happens if a creditor or servicer meets the exemption threshold, then has a bad year (as may be upcoming if there is a recession) and exceeds the threshold? Is the creditor or servicer then out of compliance, or must it just then apply for a DCLA license?

35. Letter from Benjamin J. Aron, CTIA—The Wireless Ass'n, to Cal. Dep't of Fin. Prot. and Innovation (Aug. 29, 2022), https://api.ctia.org/wp-content/uploads/2022/09/CTIA-Comments-before-the-California-Dept.-of-Financial-Protection-and-Innovation-re-Proposed-Regulation-for-Debt-Collectors.pdf

> For the reasons discussed above, an entity that is pursuing repayment of consumer debt in its own name arising from credit that the entity itself extended—i.e., an "original creditor"—is not "engaging in the business of debt collection." It is simply a "debt collector" and as such is not subject to the licensing requirement regardless of the amount of the debt owed. As a result, it does not appear that the proposed carve-outs are "necessary" to the implementation of the DCLA and they should not be included.

(1) Five percent or more of the creditor's annual profits over the last twelve months,[36] whether contracted for or received,[37] constitute collection fees, late fees, or any other charges[38] added to the original consumer credit transaction that created the debt.

(2) Within the last 12 months, an average of ten percent or more of the creditor's inventory[39] was repossessed at least once, either by the creditor directly or through a third-party.

(3) The creditor has a monthly average over the last 12 months of twenty-five percent[40] or more of the gross amount of its accounts receivables[41] ninety or more days past due.

(d) A person solely[42] servicing debts not in default on behalf of an original creditor, as described in subdivision (c), is not engaged in the business of debt collection for purposes of licensure under the Debt Collection Licensing Act.[43] For purposes of this section, "default" means more than

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36. Letter from Matthew Kownacki, *supra* note 20 ("[W]e recommend changing the 'within the last 12 months' language of each part instead to reflect the previous calendar year.").
37. *Id*. ("[I]t isn't clear what 'whether contracted for or received' means.").
38. Letter from Law Offices of Keith Levey, *supra* note 27. ("It is unclear whether 'other charges' would include accruing interest on the unpaid balance, as according to the underlying contract. It could be argued that a charge and interest are not the same thing, especially where the proposed rule give examples such as late charges and collection charges. Either way, this ought to provide clear direction.").
39. Letter from Matthew Kownacki, *supra* note 20 ("[W]hat does 'inventory' mean? Is this referring to the debt collector's portfolio of debt? If so, is it limited to the portfolio of debt secured by a motor vehicle?").
40. Letter from Maria Garcia, *supra* note 22 ("However, the 25% threshold for the proposed 10 CCR 1850.1(c)(3) is not particularly large. . . . FMCNA proposes removing this subsection completely . . . .").
41. Letter from Matthew Kownacki, *supra* note 20 ("[I]t is not clear whether the gross amount of accounts receivables is limited to just California debtor accounts as defined in the Act.").
42. Letter from Thomas Leonard, *supra* note 34 ("[W]hat happens if one debt in a performing portfolio goes delinquent? Is the servicer then then out of compliance, or must it just then apply for a DCLA license? What if the servicer then just transfers the non-performing debt to a DCLA licensee: will that suffice to maintain the exemption?").
43. Letter from Thomas Curran, Upgrade, Inc., to Cal. Dep't of Fin. Prot. and Innovation (Apr. 29, 2022), https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/10/PRO-05-21-Upgrade-Inc.-8.29.22.pdf

("Considering the above, Upgrade suggests changing 'A person solely servicing debts not in default on behalf of an original creditor . . .' to 'A person solely servicing debts not in default *when obtained* on behalf of the creditor . . . .' This exemption provides clarification to responsible non-bank platforms and service providers where servicing debts in default is

> 90 days past due, unless the contract governing the transaction or another law provides otherwise.
>
> (e) Notwithstanding subdivision (c), a healthcare provider, healthcare facility, or hospital is not engaged in the business of debt collection for purposes of licensure under the Debt Collection Licensing Act if the only debt it collects is on its own behalf and is payment for medical or other services or products it provided.[44]

> a very small part of the business model.).

accord Fresenius Med. Care N. Am. State Gov't Affs., Comment Letter on Proposed Regulations on the Scope of Debt Collection Licensure Required by the Debt Collection Licensing Act (Aug. 7. 2022); Letter from Matthew Kownacki, *supra* note 20

> [W]e recommend that the DFPI adopt a requirement similar to the FDCPA definition of the servicer exception: if the servicer receives the account before it is in default, the servicer is not considered a debt collector. "(d) A person solely servicing debt not in default on behalf of an original creditor, as described in subdivision (c), is not engaged in the business of debt collection for the purposes of licensure under the Debt Collection Licensing Act *if the debt was not in default at the time it was obtained from the creditor and the person's principal purpose is not the business of debt collection*. For purposes of this section, 'default' means more than 90 days past due, unless the contract governing the transaction or another law provides otherwise."

44. Letter from Maria Garcia, *supra* note 23

> FMCNA supports the addition of this exemption. . . . FMCNA understands that the DFPI may want to ensure entities are not using this sort of affiliate exception as a pretext to perform debt collection in other contexts, outside of the healthcare industry. FMCNA proposes the following revision: "A person who acts as a debt collector for another person that is a healthcare provider, healthcare facility, or hospital, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for healthcare providers, healthcare facilities, or hospitals to whom the person is so related or affiliated with, is not engaged in the business of debt collection for purposes of licensure under the Debt Collection Licensing Act."

see also Letter from Lois Richardson, Cal. Hosp. Assoc., to Cal. Dep't of Fin. Prot. and Innovation (July 25, 2022), https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/10/PRO-05-21-California-Hospital-Association-7.26.22_Redacted.pdf

> The California Hospital Association (CHA), representing more than 400 hospitals and health systems in California, appreciates the clarification included in proposed subdivision (e) of Section 1850.1, namely, that hospitals and other health care providers are not engaged in the business of debt collection for purposes of licensure under the Debt Collection Licensing Act if the only debt collected is on their own behalf and is payment for medical or other services/products provided.

(f) Notwithstanding subdivision (c), a local, state, or federal government body of the United States is not engaged in the business of debt collection for purposes of licensure under the Debt Collection Licensing Act when collecting debt owed to a government body. For the purposes of this division, "government body" includes: a state, county, city, tribal, district, public authority, public agency, judicial branch public entity, state-chartered public[45] college[46] or university,[47] and any office, officer, department, division, bureau, board, or commission thereof.

45. Letter from Elizabeth L. Clark, Nat'l Ass'n of Coll. and Bus. Officers, to Cal. Dep't of Fin. Prot. and Innovation (Aug. 29, 2022), https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/10/PRO-05-21-National-Association-of-College-and-University-8.29.22_Redacted.pdf

> NACUBO appreciates the exemption for state-chartered public colleges and universities provided in subdivision (f) for government bodies, indicating that they are not engaged in the business of debt collection for purposes of licensure under the DCLA. However, we believe that there should not be disparate treatment of private nonprofit colleges and universities; they should be treated equally under the regulations . . . .

46. *Id.* ("We request that DFPI amend § 1850(j) to state 'For the purposes of this chapter, public and private nonprofit colleges and universities are exempt, as they do not engage in the business of debt collection' for profit or gain."); Letter from J.H. Jennifer Lee, ArentFox, to Cal. Dep't of Fin. Prot. and Innovation (Aug. 29, 2022), to Cal. Dep't of Fin. Prot. and Innovation ("[T]he DCLA should be clarified to include an exemption for private, non-profit universities, alongside the other categories of businesses already exempted from the DCLA's licensure requirements in the current proposal.").

47. Letter from Dolores Niccolai, Univ. of Cal., Office of the President, to Sandra Navarro, Cal. Dep't of Fin. Prot. and Innovation (August 3, 2022), https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/10/PRO-05-21-University-of-California-8.8.22_Redacted-Remediated.pdf

> Public colleges and universities can be established by a State in multiple ways, including, through a charter, statute, constitutional provision, or other action issued by an appropriate State agency or State entity. Therefore, we recommend the DFPI further clarify the definition of a "government body" by revising "state-chartered public college or university" to "public institution of higher education," as [follows]: "(f) Notwithstanding subdivision (c), a local, state, or federal government body of the United States is not engaged in the business of debt collection for purposes of licensure under the Debt Collection Licensing Act when collecting debt owed to a government body. For the purposes of this division, 'government body' includes: a state, county, city, tribal, district, public authority, public agency, judicial branch public entity, state chartered public college or university, *public institution of higher education*, and any office, officer, department, division, bureau, board, or commission thereof."

(g) A person whose debt collection activity is limited exclusively to debt collection regulated pursuant to Division 12.5 of the Financial Code is not required to obtain a debt collector license.[48]

(h) Notwithstanding subdivision (c), a public utility[49] is not engaged in the business of debt collection for purposes of licensure under the Debt Collection Licensing Act when acting under the supervision of the California Public Utilities Commission in accordance with its authority under Public Utilities Code section 701.

3. *Legal instruments subject to regulation.*

The proposed regulations seek to adopt a section 1850.2, that would define and limit the definition of a "consumer credit transaction" under the DCLA.

§ 1850.2 Consumer credit transactions.

48. Letter from Alex Graves,Ass'n of Indep. Cal. Colls. & Univs., to Commissioner Christopher S. Shultz, Cal. Dep't of Fin. Prot. and Innovation (Aug. 29, 2022), https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/10/PRO-05-21-Association-of-Independent-California-Colleges-and-Universities-8.29.22_Redacted.pdf

> Unfortunately, this exemption, although helpful, does not cleanly resolve the issue for nonprofit colleges and universities. Division 12.5 of the Financial Code does not address the totality of situations in which university staff may be recovering debts owed as part of their normal operations. . . . It appears that this subdivision provides an exemption for an IHE if they initiate the consumer debt. However, it is unclear if the same exemption would apply to debt collection or loans that are managed by the university but issued by the federal government. We appreciate that this addresses one potential debt collection activity on a university campus; however, unfortunately it does not provide an exemption from licensure requirements for staff collecting debts owed for various other activities that fall within the normal operations of a nonprofit college or university. . . . We propose . . . "An independent institution of higher education, as defined in Education Code 66010 (b), is not engaged in the business of debt collection if the debt it collects is on its own behalf and is payment for educational, housing, or other services it provided."

49. Letter from Eric Sezgen et al, to Cal. Dep't of Fin. Prot. and Innovation (Aug. 29, 2022), https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/10/PRO-05-21-Pacific-Gas-and-Electric-Company.pdf

> The Utilities support the draft text, which clarifies that public utilities regulated by the California Public Utilities Commission ("CPUC") are not engaged in the business of debt collection for purposes of licensure under the DCLA when acting under the supervision of the CPUC in accordance with its authority under Public Utilities Code section 701, and are therefore not required to be licensed pursuant to the DCLA.

(a) The following types of debt[50] are not consumer debt within the meaning of section 100002, subdivision (f) of the Financial Code:

(1) Residential rental debt, except as provided in subsection (a)(2).[51]

(2) Debt owed pursuant to a Homeowners' Association Declaration of Covenants, Conditions, and Restrictions[52] or other equivalent written agreement.[53]

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50. California Courts of Appeal, for example, have held that a consumer vehicle lease is not a "consumer credit contract." *LaChapelle v. Toyota Motor Credit Corp.*, 102 Cal. App. 4th 977, 987 (2002) ("The lease agreement therefore does not meet the definition of a consumer credit contract, and that the FTC Holder Rule, therefore, does not apply to it."); *Bescos v. Bank of Am.*, 105 Cal. App. 4th 378, 393 (Cal. Ct. App. 2003) ("Furthermore, the lease agreement does not qualify as a 'consumer credit contract.'").

51. Ctr for Responsible Lending, et al., Comment Letter on Proposed Regulations on the Scope of Debt Collection Licensure Required by the Debt Collection Licensing Act (January 20, 2023)

> The equation of unpaid rent to "consumer debt" is not just true by operation of law. It is also true as a matter of fact and common sense. The hallmark of a "consumer credit transaction" is the notion of "credit": a person obtaining and being able to use for personal use a monetary benefit now, with an obligation to pay it back later. . . . As noted, we recognize that because of resource limitations or other prudential concerns the Department may not believe it appropriate at this time to license landlords who collect rental debt, including from the COVID-19 period. But any such concerns do not justify exempting third-party debt collectors from being licensed when collecting such rental debt.

52. Dennis Burke, *Debt Collection Licensing Act Requirements Do Not Apply to Collection of Routine HOA Assessments*, Cal. Laws. Ass'n (June 23, 2022), https://calawyers.org/real-property-law/debt-collection-licensing-act-requirements-do-not-apply-to-collection-of-routine-hoa-assessments/

> Based on the above statement from the Department's website, collection of routine HOA assessments does not require licensure under the DCLA. This will remove some of the uncertainty regarding the potential need to seek and obtain a debt collector license for those entities engaged in common interest developer assessment collection efforts. There are still a myriad of other debt collection statutes, over and above the DCLA, that potentially apply to and regulate entities involved in assessment collection efforts. The above statement from the Department's website only applies to the DCLA and does not preclude application of those other debt collection statutes, such as the Federal Fair Debt Collection Practices Act or the California Rosenthal Fair Debt Collection Practices Act. The Department website does not appear to have any information as to what the Department considers a "routine HOA assessment." The implication is that collection of non-routine assessments would not be exempt. Nor does it appear that the Department has issued any guidance on whether collection of other typical homeowner association charges (e.g., transfer fees, user fees, cable charges, water bills, pool key charges and special assessments) might trigger licensure. It remains to be seen whether the

(b) Debt arising from a consumer's acquisition of healthcare or medical services, where payment is deferred, is presumed to be consumer debt

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Department will interpret and apply the DCLA in a way that recognizes that unpaid homeowner association charges over and above routine assessments are not really consumer credit transactions/consumer debts.

53. A number of HOAs sent identically signed statements to the DFPI. *See* Letter from Benn Ackley, Seastrand Owners' Ass'n, to Cal. Dep't of Fin. Prot. and Innovation (August 13, 2022), https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/10/PRO-05-21-Seastrand-Owners-Association.pdf ("Therefore, for the continued financial health of thousands homeowners' associations across California, I urge you to pass the proposed amendment to exclude HOA debt from the DCLA." citing *Frequently Asked Questions* #10, CAL. DEP'T OF FIN. PROT. & INNOVATION, https://dfpi.ca.gov/debt-collection-licensee)); *accord* Letter from Shannon Hoffman Hall, The Manor Ass'n, to Cal. Dep't of Fin. Prot. and Innovation (August 15, 2022), https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/10/PRO-05-21-The-Manor-Association-8.15.22_Redacted_remediated-10-05.pdf; Letter from Karen Squaglia, Valle Vista Mgmt. Ass'n, to Cal. Dep't of Fin. Prot. and Innovation (August 11, 2022), https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/10/PRO-05-21-Valle-Vista-Management-Circle-8.15.22_Redacted_remediated-10-05.pdf; Letter from Isaiah Henry, Seabreeze Mgmt. Co., to Cal. Dep't of Fin. Prot. and Innovation (August 10, 2022), https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/10/PRO-05-21-Seabreeze-Management-Company-8.15.22_Redacted.pdf; Letter from Modern Cmty. Mgmt., to Cal. Dep't of Fin. Prot. and Innovation (August 10, 2022), https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/10/PRO-05-21-Modern-Community-Management-8.15.22_Redacted.pdf; Letter from Monica Fay, Lake Don Pedro Owners Ass'n, to Cal. Dep't of Fin. Prot. and Innovation (August 17, 2022), https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/10/PRO-05-21-Lake-Don-Pedro-Owners-Association.pdf; Letter from Carol Mitchell, HOA Quality Mgmt., to Cal. Dep't of Fin. Prot. and Innovation (August 24, 2022), https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/10/Pro-05-21-HOA-Quality-Management-LLC-8.24.22_Redacted-Remediated.pdf; Letter from Kim Smith, Hidden Valley Lake Ass'n, to Cal. Dep't of Fin. Prot. and Innovation (August 10, 2022), https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/10/PRO-05-21-Hidden-Valley-Lake-Association-8.10.22_Redacted.pdf; Letter from Maria Lee, Headlands HOA, to Cal. Dep't of Fin. Prot. and Innovation (August 15, 2022), https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/10/Pro-05-21-Headlands-Homeowners-Association-Board-8.15.22_Redacted-Remediated.pdf; Letter from Carla Morgan, CYA Prop. Mgmt., to Cal. Dep't of Fin. Prot. and Innovation (August 10, 2022), https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/10/PRO-05-21-CYA-Property-Management-8.15.22_Redacted.pdf; Letter from Cmty. Ass'n Manager Common Interest Mgmt. Servs., to Cal. Dep't of Fin. Prot. and Innovation (August 10, 2022), https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/10/PRO-05-21-Common-Interest-Management-Services-8.10.22_Redacted.pdf; Letter from Kelly Houlihan, Brittany Landing Bay, to Cal. Dep't of Fin. Prot. and Innovation (August 18, 2022), https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/10/PRO-05-21-Brittany-Landng-Bay-8.19.22_Redacted.pdf; Letter from Baywood Village HOA, to Cal. Dep't of Fin. Prot.

within the meaning of section 100002, subdivision (f) of the Financial Code.

(c) The failure of a personal check to clear does not create a consumer credit transaction under the Debt Collection Licensing Act.[54]

4. *Annual reporting requirements for licensees.*

The proposed regulations seek to adopt a section 1850.70, that would define and clarify the Annual Reporting requirements for licensees.

§ 1850.70 Annual Reports.

(a) The annual report required by Financial Code section 100021 shall be submitted by each licensee with an attestation to its accuracy and completeness signed by a principal officer or sole proprietor of the licensee. The report must be submitted electronically according to instructions provided by the department.

(b) "Preceding year" means calendar year, January 1 through December 31.

(c) The total number of California debtor accounts[55] should be counted by transaction, not by debtor. If a single debtor has multiple accounts, each account should be counted separately.[56]

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and Innovation (August 15, 2022), https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/10/PRO-05-21-Baywood-Village-Homeowners-Association-8.22.22_Redacted.pdf; Letter from Bob Breitenstein, Associated Project Servs., to Cal. Dep't of Fin. Prot. and Innovation (August 10, 2022), https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/10/PRO-05-21-Associated-Project-Services-8.15.22_Redacted.pdf; Letter from Bob Breitenstein, Advanced Prop. Mgmt., to Cal. Dep't of Fin. Prot. and Innovation (August 10, 2022), https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/10/PRO-05-21-Advanced-Property-Management-8.15.22_Redacted.pdf.

54. Letter from Thomas Leonard, *supra* note 34 ("CFSP agrees that the failure of a personal check to clear does not create a consumer credit transaction under the Debt Collection Licensing Act.").

55. Letter from Letter from Thomas Curran, *supra* note 43

> Specifically, we request the DFPI to clarify the definition of "California debtor account" under Section 1850.70 and how an entity like Upgrade should report accounts "collected in full", "collected where . . . a balance remains due", "for which collection was attempted", as well as the "face value dollar amount of California debtor accounts . . . regardless of when the accounts entered the portfolio." This clarification is needed in order to provide accurate data for accounts that go into default and are subsequently cured multiple times during the same reporting period.

56. Letter from Lauren Kimzey, *supra* note 33 ("PayPal respectfully suggests the Department revise the proposed regulation so that information is reported at the account level—e.g., '[t]he total number of California debtor accounts should be counted by **account**, not by debtor. If a single debtor has multiple accounts, each account should be counted separately.'"); *accord* Letter from Matt Tremblay, *supra* note 32; Ali Ammar, Comment Letter on Proposed Regulations

(d) The total number of California debtor accounts collected[57] in the preceding year shall include the following:

(1) the total number of California debtor accounts collected in full.

(2) The total number of California debtor accounts collected that settled for less than the full amount of the debt.[58]

(3) The total number of California debtor accounts collected where less than the full amount of the debt was collected, and a balance remains due.[59]

(e) The total dollar amount of California debtor accounts purchased in the preceding year means the total amount owed[60] by all California debt-

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on the Scope of Debt Collection Licensure Required by the Debt Collection Licensing Act (Aug. 29, 2022) ("1. The proposed information needed for reports and retention for small businesses, especially law offices, is overly and unnecessarily burdensome. 2. It is not reasonable that total number of California debtor accounts should be counted by transaction and not by debtor.").

57. Letter from Law Offices of Keith Levey, *supra* note 27

> With regards to a collection attorney who only accepts cases for litigation on an hourly or fixed fee basis, but does not otherwise provide debt collection services to the creditor and does not receive any collection percentage where all payments are made directly to or remitted to the creditor, there would be no easy way to track payments made to the creditor directly. Does this section only require a report of money received by the attorney?

58. Letter from Tamar Yudenfreund, *supra* note 26

> It is highly unusual for a state licensing regulatory body to require such sensitive information; in fact, after a review of all other state debt collector licensing regimes, we are unaware of any other state regulator that requests data about the total number of accounts collected that settled for less than the full amount of the debt. We respectfully ask that this subsection to be removed. In addition, we ask that the DFPI ensure that annual reports and the information in them will not be shared publicly.

59. Cal. Ass'n of Collectors, Comment Letter on Proposed Regulations on the Scope of Debt Collection Licensure Required by the Debt Collection Licensing Act (undated) ("[R]equiring the reporting of both (a) the total number of 'settled' accounts and (b) the total number of accounts where less than the full amount was collected and a balance is still owed . . . . This data can be duplicative and could be difficult to extract in reporting.").

60. Ali Ammar, Comment Letter on Proposed Regulations on the Scope of Debt Collection Licensure Required by the Debt Collection Licensing Act (Aug. 29, 2022)

> It is unreasonable to require that law firms (and probably also collection agencies) calculate as of the end of the year the "total amount owed." Law firms will have to manually calculate on spreadsheets how much is owed. We do not have systems like banks do that can just open an account or run a balance owed on all accounts. Until the accounts are reduced to a judgment that have different interest rates. Sometimes they do not accruing interest. It would make more sense to require the amount on the

ors on all California accounts purchased in the preceding year before any fees or other charges are added by the licensee.

(f) The face value dollar amount of California debtor accounts in the licensee's portfolio in the preceding year means the total amount owed by all debtors on all accounts before any fees or other charges are added by the licensee, as of December 31 of the preceding year, regardless of when the accounts entered the portfolio.

(g) In addition to the requirements of Financial Code section 100021, the report shall include the following:

(1) The number of California debtor accounts in the licensee's portfolio on December 31 of the preceding year.

(2) The total number of California debtors whose accounts are in the licensee's portfolio on December 31 of the preceding year.

(h) The report shall include the total number and dollar amount of California debtor accounts for which collection was attempted during the preceding calendar year.[61] This number shall not include the California debtor accounts reported in subdivision (d), paragraphs (1) through (3).

5. *Document retention requirements for licensees.*

The proposed regulations seek to adopt a section 1850.71, which would define and clarify the Document Retention requirements for licensees.

§ 1850.71 Document Retention.

(a) Each licensee shall make and preserve a record of any contact with, or attempt to contact, anyone associated with a debtor account, regardless of who initiated the contact and whether the attempt at contact is successful. The record shall include, at a minimum:

(1) the name of the employee making the attempt or who received contact from a person regarding the debtor account, and the name of the person who contacted the licensee (if available).

(2) the date and time of contact.

(3) the name and contact information of the person the licensee is attempting to contact.

(4) whether the attempt resulted in direct or indirect communication with the debtor.[62]

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account as of the date assigned and/or the date the last payment was received.

61. Letter from Tamar Yudenfreund, *supra* note 26 ("Other state licensing regulators typically ask for the dollar amount of the outstanding balance of active state debtor accounts as of a specific date, and we ask the DFPI to clarify that it is asking for the dollar amount of the outstanding balance of accounts as of December 31 of the preceding year.").

62. Letter from Missy Meggison, *supra* note 28

[P]roposed § 1850.71(a)(4) requires that licensees maintain evidence of whether the attempt to contact the consumer resulted in a "direct or indirect" communication; but there is no definition of an "indirect com-

(5) a summary of the substance of the contact or message conveyed, and whether payment was made as a result of the contact.[63]

(6) if the call was recorded, the recording shall be retained.

(b) Subdivision (a) does not apply to contacts made between licensees and debt buyers or creditors.

(c) Each licensee shall keep and maintain the following information:

(1) All employee records.[64]

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munication." Therefore it would be impossible for licensees to know what information should be retained. While it is presumed that an "indirect communication" could be a communication such as a message left on a voicemail or with a third person, the regulations should define or further clarify this term in order to ensure that a licensee is complying. An example of such confusion is the fact that under Regulation F, a particular type of voicemail message called a "limited content message," *see* 12 C.F.R. § 1006.2(j) does not qualify as a "communication." Does this mean that it qualifies as an "indirect communication?" Or since it doesn't meet the definition of a "communication" such messages do not have to be retained at all?

63. *Id*.

Payments are not always made simultaneously with a communication. Furthermore, the proposed regulation suggests that the licensee would be required, in some instances, to analyze which payments correspond to which communication. Sometimes payments are the result of multiple communications and trying to pinpoint the exact communication that finally tipped the scales that led to the payment is, at best, unduly burdensome and, at worse, impossible. Such an analysis seems unnecessary. A licensee's collection notes which details the conversation with a consumer along with a payment history should be more than efficient to show the nature of the communication and the payments made by the consumer.

64. Letter from Susan D. Appel, *supra* note 26

The regulations do not define what type of employee records are covered. "Employee records" covers a myriad of information that is not relevant to debt collection or the DFPI's purpose, such as Family and Medical Leave Act information that could include medical records. The DFPI's regulations should be limited to those employee records relevant to debt collection, such as training logs, corrective actions, and employment dates.

Letter from Tamar Yudenfreund, *supra* note 26

We ask for clarity on what "all employee records" under Section 5, Subsection (c)(1) means. Would "all employee records" include, for example, medical and other personal information about employees? Or is the DFPI only referring to records about employees relating to disciplinary action, compliance training, and other items relevant to how California accounts are handled?

Cal. Ass'n of Collectors, Comment Letter on Proposed Regulations on the Scope

(2) The records created pursuant to subdivision (a).

(3) All documents and records the licensee is required to maintain pursuant to any other law,[65] including but not limited to titles 1.6C and 1.6C.5 of Part 4 of Division 3 of the Civil Code, commencing with section 1788, and Division 24 of the Financial Code, commencing with section 90000.

(4) All records of fees, interest, and any charges on debtor accounts accrued since acquisition of the account by the licensee.

(5) Records establishing that the licensee is no longer attempting to collect on accounts that have been settled and that the consumer has been informed[66] of the settlement and that no further collection efforts will be made.

(6) Complaint records, responses, and documentation establishing compliance with the regulations adopted pursuant to Division 24 of the Financial Code.

(d) Each licensee shall retain the information in subdivision (c), in a form readily accessible, for at least seven years[67] after any of the following, whichever occurred last:

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of Debt Collection Licensure Required by the Debt Collection Licensing Act (undated) ("Mandating that 'all employee records' be retained for seven years and potentially turned over to the DFPI as the regulations imply would violate the privacy rights of California employees. . . . In substantially narrowing the retention request under Section 1850.71(c)(1), it is important to remember that employees are not independently licensed.").

65. Cal. Ass'n of Collectors, Comment Letter on Proposed Regulations on the Scope of Debt Collection Licensure Required by the Debt Collection Licensing Act (undated)

> The reference to "other law" includes every other law the collection agency is subject to, goes far beyond the scope of debt collection, and extends well beyond the purview of the DFPI, with no supportable reason for this requirement. . . . . This requirement regarding the storage of all records relating to "other laws" should be deleted altogether . . . .

66. *Id.*

> [I]s this Section requiring that a new notice or other communication be sent to the consumer when an agreement has been made to accept less than full payment for an account? If so, what is the statutory basis for this new notice requirement? If a new notice will be required under these circumstances, will the DFPI develop a sample notice to be used?

67. Letter from Susan D. Appel, *supra* note 26

> We note that the Consumer Financial Protection Bureau imposed a three-year call recording retention requirement in Regulation F. 12 CFR Part 1006.100. We urge the DFPI to consider bifurcating the record retention requirement to create (1) a three-year requirement for call recordings, consistent with Regulation F, and (2) a six-year requirement for all other account records.

Letter from Tamar Yudenfreund, *supra* note 26 ("We ask that while all account

> (1) The account has been settled,[68] whether for full payment or a different amount, and the consumer has been informed that they no longer owe the debt and that no further contact or collection attempts will be made by the licensee, or

documents—which reflect all calls made and received—be maintained under a six-year standard, the DFPI maintain a three-year retention standard for call recordings, consistent with the CFPB's rule."); Cali. Ass'n of Collectors, Comment Letter on Proposed Regulations on the Scope of Debt Collection Licensure Required by the Debt Collection Licensing Act (undated) ("The retention period should at a minimum be shortened, and CAC suggest that the retention period should be consistent with Regulation F's three-year requirement."); Letter from Missy Meggison, *supra* note 28 ("Not only is the level of detail significant but a requirement of a licensee to retain records for 7 years, surpasses anything required under federal law and most state laws. Furthermore, the proposed regulations under the California Consumer Financial Protection Law (CCFPL) only imposes a 5-year retention period for complaints."); Letter from Thomas Leonard, *supra* note 34 ("CFSP believes that the proposed seven-year record retention rule is excessive. No other agency has such a long record retention rule, and nothing in the DCLA or its legislative history suggest that such an unreasonably long record retention period was contemplated by the Legislature."); Letter from Matthew Kownacki, *supra* note 20

> We recommend that any requirement to retain records be limited to three years, consistent with existing California Financing Law, which only requires records be retained "for at least three years after making the final entry on any loan recorded therein." *See* Cal. Fin. Code 22157. Similar to part (a), we recommend that the seven-year retention requirement in part (d) also be limited to three years.

Ali Ammar, Comment Letter on Proposed Regulations on the Scope of Debt Collection Licensure Required by the Debt Collection Licensing Act (Aug. 29, 2022) ("Therefore it does not make sense to require records to be kept for seven (7) years. Also, due to privacy issues, it is dangerous to keep records for that long.").

68. Cal. Ass'n of Collectors, Comment Letter on Proposed Regulations on the Scope of Debt Collection Licensure Required by the Debt Collection Licensing Act (undated)

> Pursuant to Section 1850.71(d)(1), if the settlement requires payments over 48 months, does this section require the license to retain the relevant records for nine years after the parties agree to the settlement? For example, the consumer and licensee agree to a settlement on September 1, 2022, and the settlement requires payments for two years until September 1, 2024. The consumer makes the last payment in September of 2024. Is the licensee required to retain the records until September of 2031? Also, as noted above, after an account is settled, the account is still subject to being reported as settled, resolved, partially paid, etc.

(2) the account has been returned to the creditor whether or not payments have been made,[69] or

(3) the account is sold or all collection attempts[70] have ceased.

IV. DFPI Proposed Amendments to Regulations to the Proposed Complaint Regulations

A. Background of Proposed Amendments.

On December 22, 2022, the DFPI issued a Notice of Modifications to the proposed Complaint Regulations that it previously had issued.[71] The proposed modifications include clarifications on exemptions for persons or entities from the CCFPL, expanded definitions of a complaint and what it does not include, complainants, and complaint inquiries.[72] The DFPI provided until January 13, 2023, to submit public comments on these modifications regarding the economic impact of the revised rules.[73] The DFPI issued another set of proposed revisions on March 23, 2023 and, then, yet another set of revisions on April 14, 2023.[74]

69. *Id.*

> Most licensees have the ability, upon the assignment of any account, to return any account that the licensee elects not it pursue. In these circumstances, the licensee has reviewed the account, but not taken any action to collect the account. Is the licensee still required to retain for seven years the records relating to an account for which it undertook no collection activity? Section 1850.71 (d)(1), at a minimum, should be conditioned upon the licensee having taken any collection activity on the subject account.

70. *Id.* ("Does 'collection attempts' include the reporting of the debt even after a settlement has been completed? If the licensee elects not to file a lawsuit and elects not to send any further letters or make any calls, but the licensee elects to continue reporting the account, when does the seven-year retention period commence?").

71. *See* Cal. Dep't. of Fin. Prot. and Innovation, *Notice of Modification to Proposed Rulemaking Under the California Consumer Financial Protection Law: Consumer Complaints and Inquiries* (Dec. 22, 2022), https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/12/PRO-03-21-Notice-of-Modification.pdf?emrc=7a83de.

72. *See* Willis, Jackman, & Nikdel, *California DFPI Announces Modifications to Proposed Rules Relating to Companies' Responses to Consumer Complaints*, Consumer Fin. Servs. L. Monitor (Dec. 23, 2022), https://www.consumerfinancialserviceslawmonitor.com/2022/12/california-dfpi-announces-modifications-to-proposed-rules-relating-to-companies-responses-to-consumer-complaints/.

73. *Id.*

74. *See* note 10, *infra.*

The release of these proposed amendments was welcomed by commentators with even less reporting than the original news, and those that did report on it merely summarized the proposed revisions.[75]

B. Annotation of the DFPI's Proposed Amendments to the Complaint Regulations.

1. *Amended Definitions to Complaint Regulations.*

There were three sets of proposed regulations issued by the DFPI between May, 2022 and March, 2023.[76] The notable proposed additions and revisions to the issued Complaint Regulations sought to clarify both who would be exempt from responding to consumer complaints and inquiries, and to provide clarification as to what constitutes a "complainant" and "complaint."

(a) Exemptions: Text and Public Comment.

§1070: Exemption

The proposed regulations will not apply to:

(a) A person or entity already exempted from the California Consumer Financial Protection Law under Section 90002 of the Financial Code.

(b) A consumer reporting agency as defined by the Fair Credit Reporting Act (FCRA).

75. *See id.*; *see also DFPI Modifies Proposed Regulations for Complaints and Inquiries Under the CCFPL*, InfoBytes Blog (Jan. 6, 2023), https://buckleyfirm.com/blog/2023-01-06/dfpi-modifies-proposed-regulations-complaints-and-inquiries-under-ccfpl.

76. "After seeking stakeholder comments in 2021, on May 20, 2022, the DFPI published a notice of proposed rulemaking in the California Regulatory Notice Register regarding consumer complaints and inquiries. The proposed regulations set forth procedures under Financial Code section 90008, subdivision (a) of the CCFPL, which authorizes the DFPI to promulgate rules establishing reasonable procedures for covered persons to provide a timely response to consumers regarding complaints and inquiries, and Financial Code section 90008, subdivision (b) of the CCFPL, which authorizes the DFPI to promulgate rules establishing reasonable procedures for covered persons to provide a timely response to the DFPI concerning consumer complaints and inquiries. The DFPI received 35 comment letters and these comments are publicly available on the DFPI website. On December 22, 2022, the DFPI proposed modifications to the draft regulations. The comment period was extended based on the request from the public and ended on January 20, 2023. On March 23, 2023, the DFPI published further modifications for public comment. After extensive review, DFPI has decided to continue work on this rulemaking through 2023, with the goal of finalizing in 2024. The proposed regulations establish important consumer protections intended to ensure consumers can resolve complaints in a timely manner." DFPI's, Annual Report of Activity under the California Consumer Financial Protection Law (2022) pp. 4-5. https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/06/DFPI-CCFPL-2022-annual-report.pdf.

(c) A student loan servicer.

§ 1071: Definitions

(a) "Complaint" is amended to include an oral[77] or written expression of dissatisfaction[78] from a complainant regarding a specific issue or problem with a financial product or service.[79]

77. Letter from David Reid, Receivables Mgmt, Ass'n Int'l to Cal. Dep't of Fin. Prot. and Innovation (Jan. 20, 2023), https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/02/PRO-03-21-RMAI-General-Counsel.pdf ("RMAI respectfully requests that complaints be in writing and not oral. The intent of what is said in verbal communications can sometimes be subjective and result in different understandings between the two parties.").

78. Letter from David Tuyo, Univ. Credit Union, to Cal. Dep't of Fin. Prot. and Innovation (Jan. 7, 2023), https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/02/PRO-03-21-David-L.-Tuyo-II-University-Credit-Union-1.17.23.pdf ("A complaint is defined as an oral or written expression of dissatisfaction. This means that any escalation over the phone, Ask the CEO emails or social media posts would need to be addressed through this new process. This is a dramatic change in how escalations are handled.").

79. Letter from Richard Segol, Alliance Credit Servs., Inc., to Cal. Dep't of Fin. Prot. and Innovation(Jan. 20, 2023), https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/02/PRO-03-21-Richard-Segol-Alliance-Credit-Services-Inc.pdf?emrc=6403d30d69fa5 ("Due to the broad definition of 'complaint' and 'inquiry,' [debt collectors] may have to log, track, respond to, and report (in a detailed manner) more than ___ 'complaints' and 'inquiries'," which "will be a substantial cost [. . .] We estimate that we will have to add one full time person to handle complaints as defined by DFPI because the definition is so broad."); Letter from Am. Fintech Council, to Cal. Dep't of Fin. Prot. and Innovation (Jan. 20, 2023), https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/02/PRO-03-21-Yana-Miles-American-Fintech-Council.pdf ("We urge the DFPI to revise the definition of complaint to account for the fact that many providers receive complaints and inquiries outside the scope of the provider's services."); Yaklin, Cindy California Association of Collectors, Inc. ("This definition is rather broad and will impose unrealistic requirements on covered persons. Determining the difference between a complaint, a dispute and an inquiry will be challenging enough based on their definitions. Having to log, track and report oral complaints will be unduly burdensome, time consuming and costly."); Letter from Stephen Fernandez, Coachella Valley Collection Serv., to Cal. Dep't of Fin. Prot. and Innovation (Jan. 20, 2023) https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/02/PRO-03-21-Stephen-Fernandez-Coachella-Valley-Collection-Redacted.pdf?emrc=63de01fa0f703 ("This overly broad definition will impose impractical obligations on companies like mine. It will be extremely challenging to determine the difference between a complaint, a dispute and an inquiry. If during any call a consumer mentions to a collector any form of dissatisfaction or frustration with a financial product or service or even mentions a negative comment about a service provider, that comment would be subject to the proposed regulations. This broad approach is overly burdensome and will do little to help the consumer. Under this approach, actual complaints would take the same level of resources as a mere comment made by a con-

(1) A "complaint" does not include:[80]

(A) An oral complaint directly filed by the complainant with the covered person, but only if the complainant has verbally confirmed that the matter has been fully resolved.

(B) A billing error notice.

(C) A dispute filed with a furnisher of information pursuant to FCRA.

(D) A request filed with a creditor for a statement of reasons underlying a decision to deny credit.

(E) A notification filed by a consumer with a debt collector to dispute the validity of the debt.[81]

(F) A notification of error filed with a financial institution pursuant to 15 U.S.C. Sec. 1693f.

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sumer."); Letter from Courtney Reynaud, Creditors Bureau U.S., to Cal. Dep't of Fin. Prot. and Innovation (Jan. 20, 2023), https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/02/PRO-03-21-Courtney-Reynaud-Creditors-Bureau-USA-1.20.23_Redacted.pdf ("This overly broad definition will impose impractical obligations on companies like mine. It will be extremely challenging to determine the difference between a complaint, a dispute and an inquiry."); Letter from Kelly Parsons-O'Brien, Pac. Credit. Servs., to Cal. Dep't of Fin. Prot. and Innovation (undated), https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/02/PRO-03-21-Kelly-Parsons-OBrien-Pacific-Credit-Services-Redacted.pdf ("Based on definition of 'Complaints' in the Proposed Regulations, covered persons will likely have to consider each of the following a 'complaint:' (i) Each letter sent by a credit repair organization, sent on behalf of a consumer, falsely stating that the covered person has not responded to a **consumer, even after the covered person has responded to the consumer. (ii) Any time a consumer says, "you are harassing me," and hangs up. (iii) Any time a consumer is not happy that the covered person is reporting an account to their credit report. (iv) Anytime a consumer complains about a covered person not deleting an account from their credit report. (v) CFPB complaints.").**

80. Letter from Julie Townsend, Purpose Fin., to Cal. Dep't of Fin. Prot. and Innovation (Jan. 20, 2023), https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/02/PRO-03-21-Julie-Townsend-Purpose-Financial-1.19.23_Redacted.pdf ("We respectfully request that the Department clarify exactly what situations are subject to the complaint process and reporting requirements and further, how the eight exclusions are to be treated by covered persons. This would be helpful to both covered persons and consumers.").

81. Letter from Margaret Eardley, Pinnacle Recovery, Inc., to Cal. Dep't of Fin. Prot. and Innovation (Jan. 20,2023), https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/02/PRO-03-21-Margaret-Eardley-Pinnacle-Recovery-Inc.pdf ("Thank you for including the 'complaint' exclusion for debt validation requests under U.S.C. Sec. 1692g. However, please consider providing additional definition to this exclusion. We send the model validation notice which advises consumers that they can 'dispute all or part of the debt' and further provides available options to dispute the debt because 1) 'this is not my debt', 2)'the amount is wrong,' and 3) 'Other'. Does this exclusion apply to all options when sent in response to our initial notice?").

(G) Any matter under litigation.[82]

(H) A dispute submitted to the covered person by a governmental entity other than the DFPI.[83]

(b) "Complainant" is amended to provide that the consumer must have been a resident of California at the time of the act, omission, decision, condition, or policy giving rise to the complaint.[84]

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82. Letter from Andrew Kushner et al, to Clothilde V. Hewlett, Cal. Dep't of Fin. Prot. and Innovation (Jan. 20, 2023), https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/02/PRO-03-21-Yarissa-Ramirez-Consumer-Federation-of-California-Redacted.pdf ("If the Department were to file an enforcement action based on complaints, then a complaint would be a 'matter under litigation' and thus this language could exempt complaints of individuals who have not sued but are affected by the same issue. This problem should be fixed by deleting the current wording and replacing it with language clarifying that "complaints" do not include those implicating matters at issue in litigation filed by the complainant against the covered person . . ."); Letter from Eileen Newhall, Eileen Newhall Consulting LLC, to Cal. Dep't of Fin. Prot. and Innovation (Jan. 20, 2023), https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/02/Eileen-Newhall-Consulting-LLC-Comments-on-Pro-03-21.pdf ("This is a very helpful clarification, but it does pose a question that is unanswered in your regulation; namely, "does a complaint cease to be a complaint as of the date on which it becomes the subject of litigation?" If so, may a covered person dispense with the requirements of the proposed regulations in connection with a specific complaint, as of the date a customer or former customer files suit against the covered person or as of the date the covered person files suit against a customer or former customer in connection with that complaint?").

83. Letter from Thomas L. Leonard, Cal. Fin. Serv. Providers, to Cal. Dep't of Fin. Prot. and Innovation (Jan. 20, 2023), https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/02/PRO-03-21-Thomas-L-Leonard-California-Financial-Service-Providers.pdf ("The proposed regulation states that a complaint does not include: a list of eight situations that are not to be considered complaints by the Departments of Financial Protection and Innovation (DFPI). If these occurrences are not complaints, may a covered person dispense with the requirements of the proposed regulations in connection with these instances and therefore not report these occurrences to DFPI? Clarification of the Department's thoughts regarding this issue would be helpful to both covered persons and consumers."); Letter from Reginald Young, Lithic, Inc., to Cal. Dep't of Fin. Prot. and Innovation (Jan. 20, 2023), https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/02/PRO-03-21-Reginald-Young-Lithic-Inc-Redacted.pdf ("[T]he term [complaint] continues to be overly broad so as to force companies to action and report complaints that are fraudulent, abusive, frivolous and otherwise immaterial.").

84. Letter from Andrew Kushner et al, *supra* note 82 ("Our coalition does not understand the need for the Department's change to the definition of 'Complainant' to add the requirement that the complainant 'must have been a resident of California at the time of the act, omission, decision, condition, or policy giving rise to the complaint.' This change will almost certainly generate added confusion and additional burden for covered persons, as they will have to ver-

(e) "Inquiry" means a question or request for information submitted by an inquirer regarding a specific account or financial product or service.[85] An "inquiry" does not include:

(1) Any matter resolved to the inquirer's satisfaction during the initial contact between the inquirer and the covered person regarding that matter,[86]

(2) A request made pursuant to Title 1.81.5 of Part 4 of Division 3 of the Civil Code regarding personal information collected by a business,

(3) A request for information or documents identified in Civil Code section 1788.14.5(a) and (b), or

(4) A notification filed by a consumer with a debt collector pursuant to 15 U.S.C. Sec. 1692g to request the name and address of the original creditor.

(f) "Inquirer" means the consumer, as defined in Financial Code section 90005(c), who submitted an inquiry to a covered person and is contracted with, has applied to be contracted with, or has had a debt or other obligation assigned to, the covered person. For this Article, an individual consumer, whether submitting the inquiry to the covered person directly or through an agent, trustee, representative, estate, trust, or joint trust, must be a resident of California at the time of the inquiry.

(g) "Officer" means an individual designated by the covered person with primary authority to monitor the complaint process and resolve complaints.[87]

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ify not only that the complainant is a California resident but also that the individual was a California resident at the time of the incident that led to the complaint.").

85. Letter from Chris Schumacher Optio Sol.s, LLC, to Cal. Dep't of Fin. Prot. and Innovation (Jan. 20, 2023), https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/02/PRO-03-21-D.-Lilah-Mclean-Optio-Solutions-LLC-1.20.23_Redacted.pdf ("Given the unreasonably broad definition of 'Inquiry,' covered persons may have to develop and maintain an entire database just for these requirements and will have to commit staff simply to address these requirements.").

86. Letter from Cindy Yaklin, Cal. Ass'n of Collectors, Inc., to Cal. Dep't of Fin. Prot. and Innovation https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/02/California-Association-of-Collectors.pdf ("Why is this limited to the initial contact? If a consumer expresses satisfaction with the resolution of the matter in a subsequent contact, that should resolve the 'inquiry'.").

87. *Id*.; Letter from Andrew Kushner, *supra* note 82 ("[T]he proposed regulations permit the 'officer' to be simply any 'individual designated by the covered person with primary authority to monitor the complaint process and resolve complaints.' Respectfully, this change simply makes no sense, for two reasons First, prior to this latest round of proposed changes, 'Officers' were persons who 'have the authority to act on behalf of the corporation, including contract authority.' It is obviously the case that if the 'officer' does not have sufficient authority within the covered person to direct changes to a result or policy in

2. *Amendments to Procedures under the Complaint Regulations.*

(a) Text and Public Comment

§1072: Complaint Processes and Procedures

(b) The covered person shall make the following disclosures to consumers:

(1) All written communications[88] to a consumer[89] that are related to a particular financial product or service used by the consumer, except documents related to a lawsuit such as court pleadings and motions and electronic text messages such as iMessage, Short Message Service ("SMS"), and Multimedia Messaging Service ("MMS"), shall in at least 12-point font[90] disclose:[91]

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response to a complaint or to trends in complaints, then the review required in section 1072(f) is entirely meaningless.").

88. Letter from Richard Segol, *supra* note 79 ("This Section requires a covered person to include certain written disclosures in all written communications with consumers in 12-point font. How are we going to handle electronic communication? Why does this have to be on ALL communication?").

89. Letter from Cindy Yaklin, States Recovery Sys., Inc., to Cal. Dep't of Fin. Prot. and Innovation (Jan. 20, 2023), https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/02/PRO-03-21-Cindy-Yaklin-States-Recovery-Systems-Inc.-1.20.23_Redacted.pdf ("I would respectfully request the DFPI consider the financial impact Section 1072(b)(1) has on California companies and the practical impact the requirement has on consumers. This section requires certain written disclosures to be included in all written communications with consumers. This is unnecessary and should only be required in the initial communication."); Letter from Stephen Fernandez, *supra* note 79 ("These additional disclosures will add significantly to our printing, postage, and mailing costs. Mandating that these disclosures are included in every communication and not just the initial written communication is excessive and will over burden the consumer with excessive paper."); Letter from Matthew Kownacki & Dave Knight, Am. Fin. Servs. Ass'n, to Cal. Dep't of Fin. Prot. and Innovation (Jan. 20, 2023), https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/02/PRO-03-21-Edwin-Portugal-American-Financial-Services-Association-1.20.23_Redacted.pdf ("Part (b)(1) would require disclosure of the complaint procedures in all written communications with the consumer. While we appreciate the Department's clarification from previous drafts that this would not apply to lawsuit documents, this requirement is still overly broad. [. . .] Accordingly, we reiterate our previous request that disclosure of the complaint procedure only be required on the website; in the initial written communication with the consumer or first periodic written statement; or an annual notice, similar to the annual notice the Department requires of student loan servicers.").

90. Letter from Am. Fintech Council, *supra* note 79 ("It is overly burdensome and very costly to apply prescriptive disclosures in 12-point font to every written communication to consumers. Some members estimate that implementation of this requirement would mean updating over 2,000 different communications to its customers, spanning many different modes of communication, including

(A) The procedures for filing complaints[92] with the covered person, both orally and in writing,[93]

(B) A description of any time limits imposed by the covered person for the filing of a complaint, and

(C) The following statement: "You may submit your complaint to the California Department of Financial Protection and Innovation

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many that, similar to text messages, "are subject to character limitations and generally [are] not the primary mode of communicating important information with consumers [. . .] Additionally, requiring covered persons to adhere to a 12-point font size for disclosures will have the unintended consequence of diminishing the effectiveness of the written communication, is not feasible to implement, and lacks precedent across federal and state disclosure regulations).

91. Letter from Celia Hernandez, Fin. Credit Network, to Cal. Dep't of Fin. Prot. and Innovation https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/02/PRO-03-21-Celia-Hernandez-Financial-Credit-Network-Inc.-1.20.23_Redacted.pdf ("Already required disclosures under Regulation F, California Rosenthal Fair Debt Collection Practices Act, SB 531, AB 424, and AB 1020 will only lengthen an already cumbersome written communication process and increase costs to our company significantly."); Letter from Cindy Yaklin, *supra* note 86 ("Requiring the disclosure of 'procedures for filing complaints' and a 'description' of the time limits without more specificity or a sample of the language to be used will unnecessarily subject covered persons to substantial liability in this strict liability environment. And, mandating that the disclosures required in Section 1072(b)(1) must be included in every communication (rather than in the initial written communication) is excessive and unnecessary."); Letter from Courtney Reynaud, *supra* note 79 ("These additional disclosures will add significantly to our printing, postage, and mailing costs. Mandating that these disclosures are included in every communication and not just the initial written communication is excessive and will over burden the consumer with excessive paper.").

92. Letter from Celia Hernandez, *supra* note 91 ("This would normally allow the debt collector to provide validation or process the dispute by investigating such information or forwarding such information to the assigned client for an investigation. From experience, consumers submit both "complaints" and "inquires" during this time. Adding the disclosure may divert the consumer to file a "complaint" instead of allowing the agency to assist the consumer. In many cases, the consumer will not read the definition of a complaint or inquiry prior to submitting a 'complaint'.").

93. Letter from Cindy Yaklin, *supra* note 86 ("Requiring the disclosure of "procedures for filing complaints" and a 'description' of the time limits without more specificity or a sample of the language to be used will unnecessarily subject covered persons to substantial liability in this strict liability environment. And, mandating that the disclosures required in Section 1072(b)(1) must be included in every communication (rather than in the initial written communication) is excessive and unnecessary. Requiring the disclosures found in Section 1072(b)(1) may be confusing to a consumer and are certainly unnecessary if they are included in the final communication with a consumer that includes a closing statement or other indication stating that the debt has been resolved.").

> at any time, including complaints not resolved to your satisfaction and any complaints rejected by the covered person for not being timely filed, using the form available at https://dfpi.ca.gov/file-a-complaint/. You may also contact the Department with questions at 866-275-2677."
>
> (2) The website for the covered person shall prominently display,[94] on any web pages with information related to a financial product or service, a clearly indicated link in at least 12-point font[95] that states, "California Residents: Click here for information about submitting a complaint to [insert covered person's name] or to the California Department of Financial Protection and Innovation." The link shall be to instructions on how complainants may submit their oral and written complaints, including the telephone number, mailing address, and web address for filing a complaint with the covered person and with the Department.[96]

94. *Id*. ("This requirement should be limited to the main page of the covered person's website. Requiring such a disclosure on any web page is unnecessary and excessive. Further, what does it mean to prominently display the link? May the link be placed anywhere on the main page of a covered person's website? Is a specific location on the main page required for the display to be 'prominent'? Can the DFPI provide an example of the prominent display that would satisfy this proposed regulation?"); Letter from Thomas L. Leonard, *supra* note 86 ("It is generally understood that font requirements are meaningless in the context of Internet web sites, because of different device sizes and different user-specific preferences regarding default screen displays. Rather than require a specified font on individual web pages, we recommend that the Department require the web sites of covered persons to prominently display a complaint link, in a font size at least as large as the font size used to describe the covered person's product or service on that web page.").

95. Letter from Am. Fintech Council, *supra* note 79 ("AFC members also urge DFPI to consider revisions to the website disclosure requirements, which would be required on every webpage related to a consumer product or service. Some members estimate that a single company may have over 500 webpages that would need to be updated to meet this requirement. It is unclear how updating certain webpages, such as those designed to share informational blogs or landing pages with complaint disclosures would enhance consumer protection.").

96. Letter from Matthew Kownacki, *supra* note *89* ("Companies operate on a national basis, serving consumers who are not California residents as well as California consumers. A requirement to place California specific contact information on every page could cause confusion for customers who are not California residents, delaying responses and handling of complaints."); Letter from Brenda Bass, Cal. Chamber of Com., to Cal. Dep't of Fin. Prot. and Innovation (Jan. 20, 2023), https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/02/PRO-03-21-Brenda-Bas-California-Chamber-of-Commerce-1.20.23_Redacted.pdf ("[M]any covered businesses operate nationally, meaning that they serve consumers who are not California residents. These disclosures could generate confusion for customers who do not reside in California and may cause delays in response and action on complaints. In other contexts, businesses are required

(c) The complaint process shall include the following regarding the initiation of a complaint:

(1) The covered person shall:

(A) Accept all complaints, whether written or oral,[97] so long as the complaint includes a reason for filing the complaint and sufficient information to identify the complainant; this provision does not preclude a covered person from validating the identity of a complainant prior to accepting a complaint.[98]

(B) Allow the complainant to submit information and supporting documentation to the extent necessary to fully explain the nature and details of the complaint.

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to provide certain state-specific disclosures, there is flexibility in where links are located and where further details can be provided."); Letter from Eric. Ellman, Consumer Data Indus. Ass'n, to Cal. Dep't of Fin. Prot. and Innovation (Jan. 20, 2023), https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/02/PRO-03-21-Webb-Mcarthur-Hudson-Cook-LLP-Redacted.pdf ("DIA recognizes the Department's revisions to this proposal, specifically changing the placement requirement to make clear to consumers its relation only to covered financial products or services and making clear the notice relates only to California residents. However, CDIA still urges the Department to remove this requirement or, alternatively, permit greater flexibility in displaying this notice."); Letter from Courtney Reynaud, *supra* note 79 ("The DFPI needs to provide clarification on what is meant by "prominently". Additionally, this requirement should be limited to the main page of a website. Requiring this a disclosure on as web page is unnecessary and excessive."); Letter from David Tuyo, *supra* note 78 ("[T]he requirements for every web page with information on financial products must have a statement and link within instructions for oral and written complaints seems unrealistic. Our Marketing Team would have concerns with this. I can see having the statement and link on one web page and then have it be a standard function with Al bots in web, digital banking apps, and contact center.").

97. Letter from Maryrose Diaz, Grant Mercantile Agency, Inc., to Cal. Dep't of Fin. Prot. and Innovation (Jan. 20, 2023), https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/02/PRO-03-21-Maryrose-Diaz-Grant-Mercantile-Agency-Inc.pdf ("Based on definition of 'Complaints' in the Proposed Regulations, covered persons will likely have to consider each of the following a 'complaint': (i) Each letter sent by a credit repair organization, sent on behalf of a consumer, falsely stating that the covered person has not responded to a consumer, even after the covered person has responded to the consumer. (ii) Any time a consumer says, "you are harassing me," and hangs up. (iii) Any time a consumer is not happy that the covered person is reporting an account to their credit report. (iv) Anytime a consumer complains about a covered person not deleting an account from their credit report. (v) CFPB complaints.").

98. Letter from Margaret Eardley, *supra* note 81 ("Please clarify Section 1072 (c)(1)(A) to define verbal complaints as a consumer stating they want to 'file' a complaint. Debt collection inherently involves consumers complaining about their debt when many times it is venting and not an actual request for complaint resolution.").

> (2) The covered person shall not:
>
> (A) Request personal identifying information beyond what is reasonably necessary to identify the complainant[99] and to send correspondence, or
>
> (B) Request financial information unrelated to the specific complaint of the consumer.[100]

C. Additional Revisions to Proposed Complaint Regulations.

On March 23, 2023, the DFPI issued a Notice of Second Modification to Proposed Regulations under the CCFPL.[101] This second round of proposed revisions to the Complaint Regulations responded to a number of complaints and comments submitted to the prior round of revisions by both debt collectors and consumer rights groups alike.

(a) **Section 1070: Applicability of the rules and exemptions**

The proposed revisions clarified that the proposed regulations only apply to debt collectors that are required to be registered with the DFPI.[102]

(b) **Section 1071: Definitions**

The DFPI added a "notice of error" under 12 CFR Section 1005.33 to the list of excluded items from the definition of "complaint" under Section 1071.[103] It also clarified the exemption to "complaints" related to matters

99. Letter from Cindy Yaklin, *supra* note 86 ("This [language] is vague and unclear and may lead to unnecessary liability exposure in this strict liability environment. The better solution is to list the information that may be requested (e.g., name, aliases, former names, addresses (current and former), date of birth, place of employment, social security number, among other data items to be specifically listed).").

100. *Id.* ("This [Section] is problematic if it prohibits a covered person from inquiring about the finances of the consumer in a joint effort (e.g., during a phone call) to reach a settlement or agree upon a payment plan."); Letter from Thomas L. Leonard, *supra* note 83("It is entirely possible that a covered person could reasonably need general financial information from a consumer without that information being specifically related to an individual complaint (e.g., a bank account number into which to deposit a refund). For that reason, we recommend applying the same criteria to both of those prohibitions and prohibiting a covered person from requesting personal identifying information or financial information, beyond what is reasonably necessary to investigate and resolve the complaint.").

101. *See* Cal. Dep't. of Fin. Prot. and Innovation, *Notice of Second Modification to Proposed Regulations under the California Consumer Financial Protection Law (CCFPL): Consumer Complaints and Inquiries (PRO 03-21)* (Mar. 23, 2023), https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/03/PRO-03-21-Second-Modification-to-the-Text.pdf?emrc=3361b6.

102. *Id.* § 1070(a)(1)-(2).

103. *See id.* § 1071(a)(1)(G) ("A 'complaint' does not include . . . A notice of error filed with a remittance transfer provider pursuant to 12 C.F.R. Sec. 1005.33").

being litigated, to be "[a]ny matter at issue in litigation filed by the complainant against the covered person . . ."[104]

(c) **Section 1072: Complaint Processes and Procedures**

In response to the overwhelmingly negative commentary submitted in response to Section 1072(b)(1) (requiring all communications to include disclosures in 12 point font), the DFPI changed this requirement to only include "an annual notice issued to consumers at least once each calendar year and the initial written communication to each consumer," and limited such disclosures to "consumers [. . .] who reside in California . . ."[105] It also revised the requirement for debt collection websites to only require "the main homepage or main contact page of the covered person" to include "a legible font at least as large as the largest text on that page" to include such disclosures.[106]

Next, the DFPI incorporated comments submitted by consumer groups by setting time periods in which a live representative must be available to handle consumer complaints,[107] and requiring all written communications to the consumer be in the language in which the contract was communicated.[108] It also clarified requirements for the "officer [who] monitor[s] the complaint process" on behalf of covered persons, by stating they must have actual accountability and authority to "change, amend, or rescind the acts, omissions, decisions, conditions, or policies of the covered person or service provider related to the financial product or service that is the subject of a complaint and to forgive or extinguish any debt, charge, or obligation of a consumer."[109]

The DFPI also clarified that if a member wishes to seek additional time to respond to a complaint, they must have "objective, good cause for and need[] additional time to respond," and that such response must be pro-

104. *Id.* § 1071(a)(1)(H).
105. *Id.* § 1072(b)(1) ("The covered person shall make the following disclosures to consumers of its financial products and services who reside in California: (1) In an annual notice issued to consumers at least once each calendar year and in the initial written communication to each consumer related to a particular financial product or service used by the consumer, the covered person shall disclose the procedures for filing a complaint. These disclosures may be provided electronically if the consumer has agreed to receive electronic correspondence from the covered person and shall provide the following information, in a legible font at least as large as the largest text in the notice . . . . .").
106. *See id.* § 1072(b)(2).
107. *See id.* § 1072(b)(3) ("The covered person shall maintain a telephone number, which complainants can use to file complaints orally with a live representative. The live representative shall be available to accept oral complaints at least twenty (20) set hours each week, between 8 a.m. to 8 p.m. Pacific Time, Monday through Friday.")
108. *See id.* § 1072(b)(4).
109. *See id.* § 1072(f).

vided "no later than the end of the third business day after the initial 15-business day period ends."[110] The DFPI also removed the requirement that any response to a complaint contain text in "12 point font," instead requiring the font be "legible boldface font at least as large as the font size used for the required explanation."[111] It also provided members with the ability to "tak[e] appropriate action to respond to . . . instances where the covered person has a legal obligation to report suspected illegal contact."[112] Finally, following a number of comments, the DFPI clarified annual complaint reporting requirements for covered persons under the proposed regulations.[113]

V. Conclusion

It should be cautioned that the proposed Scope Regulations are interim and have not been adopted. As a result, it is still unclear where the DFPI will come out on many of these proposed revisions. Another set of proposed Scope Regulations is expected, and may have been issued as of the time of publication of this Article.

The proposed Complaint Regulations, however, have been through multiple rounds of revision and comment. The authors have been advised that, while the proposed Complaint Regulations are farther toward promulgation than the Scope Regulation, another set of Complaint Regulations may be in the works.

For potential licensees, AB 156 makes clear that the amnesty permitting covered persons to operate in California—so long as they had applied for a DCL—expired December 31, 2022. Now, covered persons who had not yet applied for a DCL will not be able to conduct operations in California until they formally obtain issuance of a DCL.

110. *See id*. §§ 1072(g)(1)(A), 1074(b)(1)(D).
111. *See id*. § 1072(g)(2).
112. *See id*. § 1072(g)(3).
113. *See id*. § 1072(j).