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# CALIFORNIA MEANS BUSINESS

## **BUT IS IT GOOD FOR BUSINESS?**

**What You Need to Know About California's  
New Consumer Financial Protection Laws**

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**California Governor Gavin Newsom recently signed three laws that will significantly impact financial service providers doing business in the state. Starting next month, this trio of new California laws will pose far-reaching enforcement and regulatory risks. At the same time, opportunities for innovators may exist.**

**So why does this matter?**

- *Entrenched and powerful agency now has greater authority and resources to bring to bear.*
- *Given size and breadth of California, hard to view this as a single state measure which can be skirted by careful venue work.*
- *Past is prologue. Likelihood is that the newly-resourced agency will demonstrate its authority with significant actions.*

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# California Consumer Financial Protection Law (CCFPL)



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## **CCFPL: Applicability**

- DFPI (Renaming of DBO effective upon Gov. Newsom's signing of law)
- CCFPL
  - "Covered person"
  - "Service provider"
- Exemptions
  - Licensees of another state agency acting under such authority
  - Certain DFPI licensees – banks, credit unions, etc.



California Department of  
**Financial Protection  
and Innovation**

## **CCFPL: DFPI Authority**

- Rulemaking
  - Complaints, registration requirements, UDAAP, disclosures and clarifications regarding credit cost limitations
- Supervision/Oversight
  - Annual or special reports and examinations
- Enforcement
  - Substantial enforcement tools and civil penalties
  - Generally, four-year statute of limitations

## CCFPL: UDAAP Authority

- The CCFPL incorporates into California state law a prohibition, reaching covered financial services businesses and their service providers, against engaging in any unlawful, unfair, deceptive, or abusive act or practice (UDAAP).
- The law also authorizes the DFPI to define UDAAP in connection with the offering or provision of commercial financing, or offering financial products and services to small businesses.
- The DFPI's enforcement authority over UDAAP will mirror that of the CFPB's authority over similar acts and practices under the Dodd-Frank Act (DFA).
- Notably, the DFA already provides state attorneys general and state financial regulators with concurrent enforcement authority over UDAAP in parallel with the CFPB. And California's attorney general has the power to enforce existing state law, which has long penalized unfair and deceptive acts or practices.
  - Duplication and expansion of similar existing authority
  - Two enforcers in the same state
- Both the DFPI and the California Attorney General's Office will now have co-extensive authority over alleged UDAAP violations. And the DFPI may exercise a more expansive view of UDAAP enforcement than done currently under the DFA.



## CCFPL: The Renaming of the DBO

- The CCFPL did not repeal existing California licensing laws, such as the California Financing Law (CFL) or the California Residential Mortgage Lending Act (CRMLA).
- As the newly named DFPI is a continuation of the DBO, the opinions of the DBO remain in effect, unless there was an expiration date for the opinion, the opinion was formally withdrawn, or the statutory provision on which the opinion was based was amended by the newly enacted CCFPL.

## CCFPL: DFPI Office of Innovation

- The CCFPL requires that the DFPI establish a Financial Technology Innovation Office.
  - This signals California's renewed focus on financial innovation in the state.
- Time will tell what regulatory innovations the DFPI may deploy in the fintech space, but it is clear that now is an important time for fintech leaders to keep abreast of California regulatory initiatives that may impact them.

## CCFPL: DFPI Resources

- The DFPI has been given additional resources as part of the legislation, and we should see activity in direct proportion to those resources.
  - Significant expansion of the state’s consumer protection capacity with addition of dozens of investigators and attorneys (adding 90 positions over the next three years) to supervise financial institutions.
- The CCFPL provides that all monies collected by the DFPI, including registration fees and penalties, are to be deposited into a newly created Financial Protection Fund, which will fund the agency’s budget appropriations.
- Such direct linking of the agency’s funding and its level of “busyness” (including enforcement activity) potentially could result in a greater number of enforcement actions and higher amounts demanded by agency staff attorneys for civil penalties and administrative fines.
- Potential prosecutorial competition between the DFPI and the California Attorney General’s Office, taken together with the DFPI’s reliance on fees and penalties as its only source of revenue, may spur a greater degree of enforcement activity in the state and potentially higher fees and annual assessments for licensees.

## CCFPL: DFPI a mini-CFPB?

- The DFPI's broad jurisdiction over UDAAP, among other authorities, will significantly expand the new agency's reach as compared to the DBO's relatively cabined authority
- Not such a "mini" CFPB
- Other states may follow California's lead by creating wholly new agencies with broad jurisdiction over consumer financial products and services, effectively supplementing the work currently done by various state attorneys general offices when exercising their UDAAP authority under the DFA
  - For some states, including Pennsylvania, New Jersey, and Maryland, establishing their own "mini-CFPBs" may be on the agenda in the near future

## CCFPL: Certain Exemptions Need to Be Clarified

- When certain depository institutions, and other institutions governed by California, are exempt from registration under the CCFPL
- Certain persons are exempt from registration under the CCFPL, but not from the entire CCFPL
- A person or entity licensed as a real estate broker under the California Real Estate Law is not expressly exempt from the CCFPL or its registration obligation

# Debt Collection Licensing Act (DCLA)



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## SB 908: DCLA

- Applies to creditors, third-party agencies, and debt buyers:
  - “Persons” attempting to collect debts from California residents OR
  - “Persons” located in California collecting debts from anyone
    - “Person” defined as “a natural person, partnership, corporation, limited liability company, trust, estate, cooperative, association, or other similar entity”
- **Note California’s expansive definition of “resident” and “located in California.” Especially troubling in the context of online/fintech.**
- Exempts:
  - Depository institutions
  - Licensees under California’s Financing Law, Residential Mortgage Lending Act, and Real Estate Law
  - A trustee performing acts in connection with a nonjudicial foreclosure
  - Debt collection regulated by the Student Loan Servicing Act
  - Persons subject to the Rental-Purchase Act

## SB 908: DCLA (cont'd)

- Commissioner authorized to begin adopting regulations on 1/1/21; enforcement to commence 1/1/22
  - Will be able to collect so long as apply before enforcement date
  - While this law does not provide authority for the DFPI to issue regulations regarding debt collection practices generally, the DFPI's general UDAAP rulewriting authority under the CCFPL may ultimately be used to issue a regulation that identifies certain debt collection practices as UDAAPs
- No branch licensing requirements
- Affiliates can share one license; DFPI Commissioner to define what constitutes an affiliate
- Preempts local licensing requirements
- Must include license number in written collection communications in 12 point font
- Creates a 7-member Debt Collection Advisory Committee; at least one member shall represent consumers



## SB 908: DCLA (cont'd)

- Licensing requires submitting any application subject to penalty of perjury, payment of an application fee, and submitting to a criminal background check
- Commissioner has authority to:
  - Require at least annual reporting and payment of an annual fee (likely to be managed through the NMLS)
  - Require a surety bond
  - Exam licensees
  - Investigate complaints and engage in enforcement activities
  - Require payment of refunds, restitution, disgorgement, and damages
  - Share information with other federal and state regulators

# **Student Loan Servicing Act (SLSA): Student Borrower Bill of Rights**



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## **Student Borrower Bill of Rights (AB 376)**

- New Title 1.6C.10 in Civil Code
- Establishes Student Loan Ombudsman position
- Gives DFPI Commissioner market monitoring authority
- Law applies more broadly than servicer licensing law
  - Exemptions for debt collectors collecting on defaulted student loans only
  - The law gives the DFPI authority to regulate student loan servicers who are presently exempt from California's student loan servicer licensing law
    - Partial exemptions for FFELP guaranty agencies and postsecondary educational institutions
    - No exemption for depository institutions other than federal credit unions
  - As with the existing student loan servicer licensing law, the law applies to servicers located in California or whose activities include California borrowers

## **Student Borrower Bill of Rights (AB 376): Selected Protections**

- Treatment of military borrowers, borrowers working in public service, older borrowers, and borrowers with disabilities is singled out, as is handling of IDR applications
- Borrower telephone calls that request specific information or report an account error and cannot be resolved in single call (qualified requests) are treated like qualified written requests
- Caps late fees at 6% of amount past due; must be reasonable and proportional to total costs incurred as result of late payment
- Adds prohibition on abusive servicing practices
- Plus: provisions on payment processing, servicing transfers, payment application, service provider oversight, and more

# Student Borrower Bill of Rights (AB 376): Enforcement

- Private right of action (individual **and** class)
  - Violations of Title **and** applicable federal student loan servicing laws and regulations are actionable
  - \$500 minimum award for actual damages
  - \$1,500 minimum award for treble damages
  - Attorney’s fees & punitive damages are available
  - No cap on class action recovery
  - Requires notice to servicer and opportunity to cure alleged violations before bringing action for damages or injunctive relief
  - No damages for unintentional violations due to bona fide error
- Public enforcement by DFPI Commissioner

# Key Takeaways, Updates, and Wrap- Up

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## Key Takeaways

- **It's Not Just a New Name.** The agency has new funding and new authority which make it a competitor to key federal and state agencies such as the CFPB and California Office of the Attorney General.
- **The new resources are backed by a mandate from the Governor, State Senate & Assembly.** There is pressure to perform and that means investigations & prosecutions.
- **California is the fifth largest economy in the world. Standards established by California are effectively national standards.** But, they are a floor rather than a ceiling and thus, any other state or federal agency could be tougher.

## Key Updates

- DFPI held a “listening session” to gather feedback on the CCFPL and provided an update on its rulemaking and licensing efforts under the DCLA.
- DFPI rulemaking will take place in distinct packages beginning with registration and enforcement.
  - Newly covered persons should not anticipate being required to submit a registration before 2023.
  - Invitation for comments is expected in mid-2021 and final rules should be issued by end of 2021.
- Debt collectors must submit a license application before the end of 2021 to continue engaging in business in California as a debt collector in 2022.
  - Application window for licensure will open late summer or fall 2021 and licensed debt collectors should not need to separately register under the CCFPL.



# Presenters



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With a focus on complex litigation, Michelle Park Chiu represents clients facing unfair competition claims, including claims brought pursuant to California Bus. & Prof. Code § 17200; state and federal antitrust litigation; and financial institutions clients facing a variety of consumer claims, such as those brought under the Fair Credit Reporting Act and Truth In Lending Act. Michelle has experience in litigating class actions, government law enforcement actions, multidistrict litigation, and arbitrations. She has represented clients through all phases of litigation, from pre-trial strategy assessment to trial and appeals.

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Nicholas M. Gess serves clients by providing strategic advice which bridges the gap between law and policy, state and federal government investigative, enforcement, and regulatory actions and their impact on business. He advises clients on how to achieve results with governmental agencies and how to manage the risks of government action, particularly in the multistate, multi-agency and fraught-with-parallel proceedings environment where state enforcement authorities conduct parallel investigations with federal authorities such as the CFPB, DOJ, and the FTC.

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David Monteiro focuses his practice on counseling companies facing government investigations and enforcement litigation. A former enforcement attorney with the Federal Trade Commission's Bureau of Consumer Protection, Division of Financial Practices, David guides financial institutions, retailers, technology firms, and other companies in complying with state and federal consumer protection laws and regulations, responding to examinations and investigations, and defending litigation against the government. David has experience in building, implementing, and overseeing complex, large-scale customer remediation programs both to address self-identified compliance issues and to comply with consent orders.

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Robin Nunn has a wealth of experience gained in private practice as well as working in-house for Fortune 500 companies. Robin's practice focuses on complex civil litigation, enforcement litigation, white collar defense, and investigations. Handling cases in federal and state courts around the United States, Robin primarily represents financial services firms, and other clients offering consumer financial services in purported class actions that claim his clients have violated federal statutes, state consumer fraud statutes, breach of fiduciary duty, and breach of contract. She also counsels on novel issues connected to new communication technologies, blockchain, cryptocurrencies, payments, artificial intelligence, and big data. Robin is co-leader of the firm's banking industry team.

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Eamonn Moran regularly handles matters in the financial services industry, including those pertaining to consumer financial services, consumer protection, fair lending, the Dodd-Frank Act, regulatory compliance, and the Consumer Financial Protection Bureau (CFPB), where he previously served as counsel in the Office of Regulations. Eamonn helps lenders, fintech and regtech companies, marketplace lending platforms, payments companies and systems, card issuers and networks, banks, investors, and other financial services providers navigate issues arising under state and federal financial services laws. He has also handled matters involving mobile banking, mobile payments, mobile wallet products and services, and bank-fintech partnerships. Eamonn serves on the firm's fintech and digital banking industry teams.

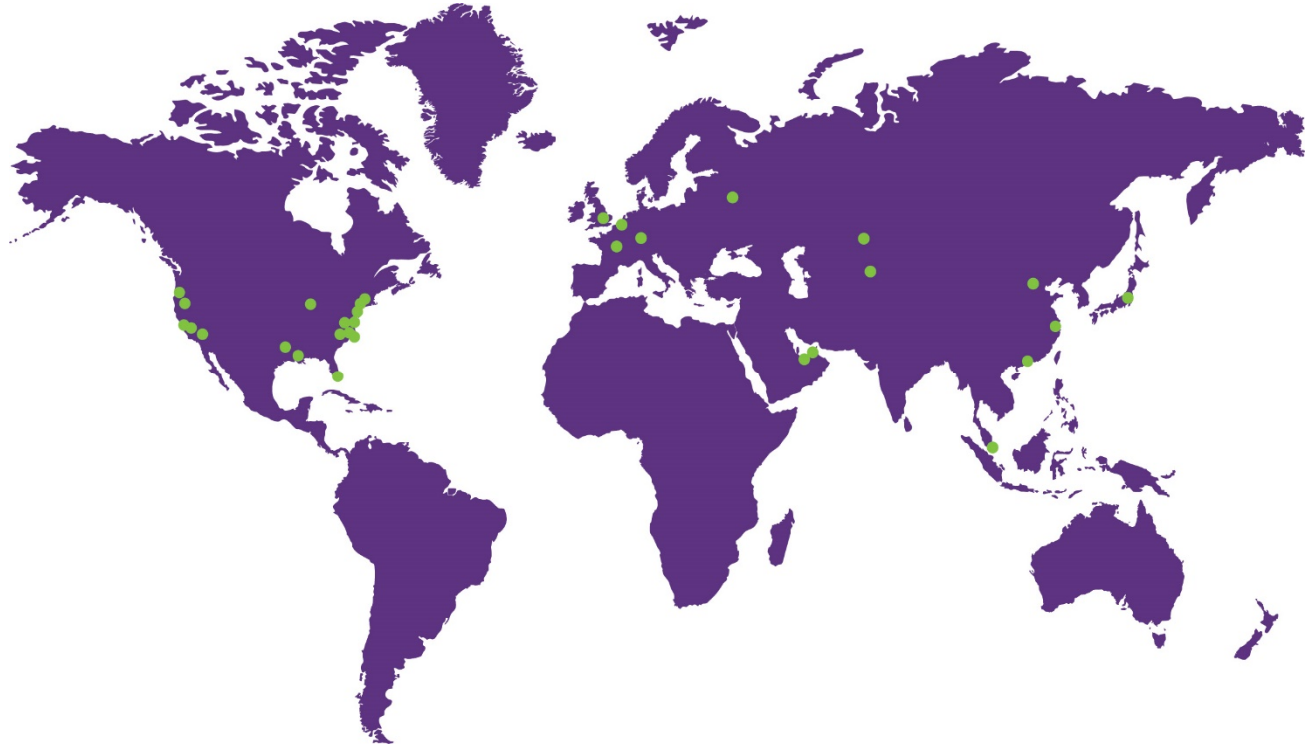
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