

December 19, 2022

DCWP
42 Broadway
New York, NY 10004
Via email: rulecomments@dcwp.nyc.gov

Re: Proposed amendments to DCWP rules relating to debt collectors

On behalf of the American Financial Services Association (“AFSA”),¹ thank you for the opportunity to provide comments on the Department of Consumer and Worker Protection’s (“DCWP”) proposed amendments to its rules relating to debt collectors. We share DCWP’s goal of promoting fair debt collection practices, and we appreciate DCWP’s efforts to clarify the requirements and conform them with state and federal requirements. We do believe some further clarity is necessary to ensure the rules are clear for the sake of consumers and financial institutions alike, and we look forward to engaging with DCWP throughout the amendment process.

Definition of “Debt Collector”

We appreciate DCWP’s proposed amendments narrowing the definition of “debt collector” and clarifying the scope of the rules. Congress recognized in establishing the federal Fair Debt Collection Practices Act (“FDCPA”), that creditors “generally are restrained by the desire to protect their good will when collecting past due accounts,” which distinguishes them from debt collectors who are “likely to have no future contact with the consumer and often are unconcerned with the consumer’s opinion of them.” Creditors do not operate like debt buyers or third-party debt collectors, with most creditors originating their own accounts or acquiring accounts shortly after origination and well before default. In contrast to third-party debt collectors or debt buyers that usually collect only mature, static, full-account balances from consumers with whom they have no prior or ongoing relationship, creditors usually collect delinquent installments from consumers with whom they have a long-term and continuous relationship and who (absent acceleration) may carry other (current) balances with the creditor. Unlike creditors, debt buyers and third-party debt collectors may operate with very limited information regarding the consumer or the account involved. Creditors continue to service an account when the consumer is past due, while debt buyers and third-party debt collectors solely engage in debt collection activities and are more likely to collect much older charged-off or time-barred debts.

We applaud the proposed amendments that would bring the definition of debt collector more in line with the FDCPA and the New York State Department of Financial Services’ (“DFS”) regulations and believe several additional revisions could make this renewed scope even clearer. Specific clarification related to creditors’ employees and to persons collecting debt that was not in default at the time it was obtained, both of which are present in the federal and state requirements, are missing from DCWP’s proposed amended rules. Such clarification is necessary for the rules to clearly exclude creditors’ employees from scope—as it would not make sense for creditors to be excluded from scope but not their employees—and to ensure that the rules reflect

DCWP's intent. For these reasons, to align the rules with the federal and state definitions, we respectfully request that the rules be further clarified to amend the definition of "debt collector" in Section 5-76 of Part 6 of Subchapter A of Chapter 5 of Title 6 of the Rules of the City of New York to read:

Debt collector. The term "debt collector" means any person engaged in any business the principal purpose of which is the collection of any debts or who regularly collects, or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due to another person. The term does not include:

- (1) any officer or employee of the United States, any State or any political subdivision of any State to the extent that collecting or attempting to collect any debt owed is in the performance of their official duties;
- (2) any person while engaged in performing an action required by law or regulation, or required by law or regulation in order to institute or pursue a legal remedy;
- (3) any individual employed by a nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors;
- (4) any individual employed by a utility regulated under the provisions of the Public Service Law, to the extent that New York Public Service Law or any regulation promulgated thereunder is inconsistent with this part;
- (5) any person while performing the activity of serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt, or serving, filing or conveying formal legal pleadings, discovery requests, judgments or other documents pursuant to the applicable rules of civil procedure, where such person is not a party, or providing legal representation to a party, to the action;
- (6) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor; or
- (7) any person collecting or attempting to collect any debt owed or due, or asserted to be owed or due to another, to the extent such debt collection activity:

(A) Is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement;

(B) Concerns a debt that such person originated;

(C) Concerns a debt that was not in default at the time such person obtained it; or

(D) Concerns a debt that such person obtained as a secured party in a commercial credit transaction involving the creditor.

Each of these additions aligns with the FDCPA¹ and would support the DCWP's mission without excluding persons that are members of the debt collection industry. Collection agencies that regularly seek repayment on behalf of others, debt buyers that make a business out of purchasing

¹ See 15 U.S. Code § 1692a(6)(a) and 15 U.S. Code § 1692a(6)(f)

charged off debt and debt collection, and ‘persons’ that receive accounts and intend to sue to collect, all would still be within scope of the proposed amendments because they would either have a “principal” business of debt collection and/or they would regularly collect on behalf of another. These slight amendments would ensure the focus is on those that make a business out of collecting debts, rather than entities that extend credit and seek repayment as part of their regular business.

Definition of “Debt”

Notwithstanding changes to “debt collector,” the DCWP should also consider amending its current definition of “debt,” which does not currently distinguish between “obligations” currently owed and those that are in default. Because it does not, the current definition risks the unintended consequence of bringing in businesses that merely seek repayment of point-of-sale for goods provided or services rendered.² Accordingly, we would also suggest that the DCWP revise its definition of “debt” to only focus on an “obligation or alleged obligation” that is alleged to be *in default* at the time the demand for payment is made. Otherwise, individual persons that merely ask for money in exchange for goods could be considered “debt collectors” demanding repayment of “debt” merely because they ask for payment.

Communication Restrictions

Section 5-77(b)(1)(iv) limits communicating or attempting communication by any medium with a consumer with “excessive frequency,” which is subsequently defined as more than three times in a seven-day period, or once within that same period after having had an “exchange” with the consumer.

In finalizing Regulation F, the Consumer Financial Protection Bureau (CFPB) declined to implement a communication frequency limit for debt collectors and instead restricted only the frequency of calls. Under the final rule, there is a presumption of compliance when a debt collector places no more than seven calls within a seven-day period. *See* 12 C.F.R. § 1006.14(b)(2). In doing so, the CFPB recognized that mediums of communication such as text and email are not as disruptive or intrusive to consumers as calling. That is especially true when you consider Regulation F’s rules requiring clear and conspicuous opt-out instructions in texts and emails and that any such opt-outs be honored. Given the less intrusive nature of digital communications, the fact that consumers can easily opt-out of any such communications, and the fact that more and more customers prefer to receive texts or emails rather than phone calls, we respectfully request that the communication frequency restriction be revised to align with Regulation F—*i.e.*, creating a presumption of compliance by placing no more than seven calls within a seven-day period without restrictions on other mediums of communication.

² Examples may include store clerks asking a customer to pay for goods, home service companies like plumbers or electricians that are following up with an invoice for services rendered, book or movie rental stores that seek payment when an item is returned, and the multitude of other businesses of all sizes making point-of-sale requests for repayment. Each employee employed by these ‘persons’ that ask consumers to pay, per their obligation, as part of a consumer transaction could be within scope.

The frequency limit proposed in the rules is also particularly problematic in that it seemingly applies *per customer* rather than *per debt*. Thus, a debt collector attempting to communicate with a consumer who has multiple delinquent accounts would still be limited to a total of three attempts in a seven-day period despite that consumer owing more than one debt. A per consumer rather than per debt limitation is also inconsistent with the CFPB’s approach in Regulation F, which excludes creditors and applies the seven-call limit *per debt*. See 12 C.F.R. § 1006.14(b)(2). For these reasons, we propose that the rules be amended to adopt Regulation F’s approach to communication frequency limitations.

Verification of Debt Requirements

To provide “debt collectors” clear instructions on what information is required when validating a debt and responding to verification of debt (“VOD”) requests, we suggest the DCWP further clarify what is required when responding to a VOD request. Specifically, the proposed addition of section 5-77(f)(5)(i)-(iii) could benefit from the use of defined terms and additional clarity around what is required when responding to a VOD request. The proposed language uses industry terms that should be defined (e.g. “original creditor”); uses similar but different terms; is unclear whether the terms are intended to describe the same person (e.g. ‘originating’ versus ‘original’); and requires unclear or unspecified information when itemizing an account without using a reference point like charge-off. Failure to provide such a reference point can result in unhelpful and confusing disclosures, especially with respect to open and revolving credit accounts. Otherwise, open and revolving accounts could be used, paid off, used again, then charged off, and the disclosures provided could itemize charges that never contributed to the full and accelerated balance.

Accordingly, we think the proposed amendments would materially benefit from a few changes that would enable “debt collectors” to know what to provide. We propose the following changes:

- (i) requiring information back to the “original creditor,”
- (ii) defining the “original creditor” to be the creditor that owned the account at the time of charge off, and
- (iii) permitting account itemization from the point of charge off, as the New York State legislature permitted in 2021.³

These changes should enable “debt collectors” to provide the information the DCWP wants them to provide (e.g., a final account statement) in a way that makes sense for the consumer in light of their account use.

VOD “Original” and “Originating” Creditor Language

In section 5-77(f)(5)(i)-(iii), the DCWP requires certain information from the “originating” creditor in some instances and the “original” creditor in others. In (i), the “originating” creditor is tasked with providing evidence of the debt which may include the charge-off account statement. Similarly in (ii), the “principal balance” required is a balance due “to the originating creditor [.]” It is not clear what is meant by “originating creditor” and whether that is different from the

³ “Consumer Credit Fairness Act”, NYSB153/NYAB2382 (2021)

“original creditor,” which is also used. It is also not clear if the focus is on the ‘originator’ of the account, or the balance at issue. Because accounts can be transferred and sold between banks, for example, for reasons unrelated to debt collection and before the accounts charge off and have their balances accelerated, we think it would benefit the DCWP if it further amended these proposed changes to:

- Replace all references to the “originating” creditor with the “original” creditor, and
- At least within the context of (f), include a definition of “original creditor” that is “the person that owned a consumer debt at the time the account is charged off.”

These two revisions should align the requirements between each other and also allow entities to provide the information the DCWP is explicitly requiring herein. The charge off statement mentioned in (i) and the full principal balance mentioned in (ii) only become known once the account charges off, so these changes are necessary in order for the entities to provide the documentation the DCWP recognizes is helpful to consumers, at least with respect to revolving credit accounts (e.g., the charge-off statement).

Itemization Requirements

Separately, in section 5-77(f)(5)(ii), the DCWP requires “debt collectors” to provide certain account itemization information without defining the terms used or clearly outlining what should be provided. Unfortunately, these revisions also face issues similar to those outlined above. Terms like ‘principal balance’ are not defined; it is not clear if itemization can start from the point of charge-off; it is not clear what constitutes ‘charges’ and ‘fees,’ and whether these are different than the individual charges and fees contributing to the ‘principal balance’ while the account was open and in use, as opposed to court costs, for example; and it is unclear how debt collectors should itemize ‘interest’ within the context of these changes. Rather than rearrange and redefine the existing language, we would suggest the DCWP borrows from the CCFA and replace section 5-77(f)(5)(ii) with the following:

“(ii) to the extent not already provided in the validation notice:

- (a) the written documentation itemizing the amount sought, by (i) principal; (ii) finance charge or charges; (iii) fees imposed by the original creditor; (iv) collection costs; (v) attorney’s fees; (vi) interest; and (vii) any other fees and charges, or
- (b) If the account was a revolving credit account, an itemization of the amount sought, by: (i) the total amount of the debt due as of charge-off; (ii) the total amount of interest accrued since charge-off; (iii) the total amount of non-interest charges or fees accrued since charge-off; and (iv) the total amount of payments and/or credits made on the debt since charge-off⁴

⁴ C.P.L.R. §3016(j)

These changes would mirror the language passed by the New York State Legislature in 2021. For consumers, this change gives the added benefit of consistent account itemizations throughout the collection process. By contrast, if the DCWP requires disclosures and itemizations that differ from those required by the CCFA, it could cause confusion and make it difficult for consumers to engage productively in the process. Accordingly, we think consumers and the City would be best served if these amendments are further revised for clarity as outlined above.

Thank you in advance for your consideration of our comments. If you have any questions or would like to discuss this further, please do not hesitate to contact me at 202-469-3181 or mkownacki@afsamail.org at your convenience.

Sincerely,

A handwritten signature in blue ink that reads "Matthew Kownacki". The signature is written in a cursive, flowing style.

Matthew Kownacki
Director, State Research and Policy
American Financial Services Association