National Consumer Law Center
Fighting Together for Economic Justice

NATIONAL HEADQUARTERS
7 Winthrop Square, Boston, MA 02110
(617) 542-8010

WASHINGTON OFFICE
Spanogle Institute for Consumer Advocacy
1001 Connecticut Avenue, NW, Suite 510
Washington, DC 20036
(202) 452-6252

NCLC.ORG

December 19, 2022

New York City Department of Consumer and Worker Protection
42 Broadway
New York, NY 10004
rulecomments@dcwp.nyc.gov
VIA E-mail

RE: Proposed amendments to rules related to debt collectors

Dear Department of Consumer and Worker Protection:

My name is April Kuehnhoff, and I am a Staff Attorney at the National Consumer Law Center ("NCLC"), where my work focuses on federal and state advocacy related to fair debt collection. My colleague, Nicole Cabañez is a Skadden Fellow at NCLC whose work focuses on consumer law issues impacting immigrant communities, including language access for consumers with limited English proficiency ("LEP").

We submit these comments to support the Department of Consumer and Worker Protection's ("DCWP") efforts to strengthen its debt collection regulations and to offer suggestions for additional improvements and clarifications.

Proposed Amendments in the Context of Other Relevant Developments

NCLC's comments will focus on the relationship between DCWP's proposed amendments, the federal Fair Debt Collection Practices Act ("FDCPA"), and federal debt collection regulations issued to implement the FDCPA ("Regulation F"). Regulation F has many gaps and weaknesses, and we commend the DCWP's proposal for its efforts to fill some of these gaps.

We also note that the New York Department of Financial Services ("DFS") has proposed but not yet finalized its own debt collection regulations. In light of the unfinished DFS rulemaking, we recommend that DCWP release a revised version of this proposal for further comments once the DFS rules are finalized and can be taken into consideration in revising any proposed amendments to DCWP regulations.

Stronger Consumer Protections are Not Preempted by the FDCPA or Regulation F

On many issues, DCWP proposes amendments to its debt collection rules that will provide greater protections for consumers than the FDCPA or Regulation F. We applaud DCWP's efforts to strengthen consumer protections and note that stronger consumer protections are *not* preempted by the FDCPA, which says:

> This subchapter does not annul, alter, or affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency. For purposes of this section, a State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection provided by this subchapter.

Regulation F contains similar language, and also clarifies that provisions in Regulation F - like the FDCPA - do not preempt stronger state consumer protections.

The FDCPA and Regulation F define the term "state" to include a "political subdivision" of a state. Thus, New York City has the same ability to enact consumer protection that exceed the baseline created by the FDCPA and Regulation F as a state.

In our discussion below, we cite some of the ways in which the DCWP's proposed amendments provide additional protections to consumers and why those additional protections are important.

Delivery of Validation Notices

The proposed amendments make clear that the validation notice must be provided in writing. This protection is important because Regulation F authorizes oral-only delivery of validation information in the initial communication. Consumer advocates surveyed six months after Regulation F's implementation date reported that debt collectors are communicating validation information orally and that this practice creates consumer comprehension problems. By clearly requiring that the validation information must be provided in writing, DCWP's proposed amendments provide an important consumer protection that exceeds the protections available to consumers under Regulation F.

The proposed amendments also address electronic delivery of validations notices. However, there appears to be some internal inconsistency in the proposed amendments related to this provision as well as a conflict with Regulation F as outlined in the bullets below.

- The proposed amendments state that debt collectors may deliver a validation notice electronically. However, this seems to be at odds with the proposed language in § 5.77(f)(1), which requires "a written notice by mail or a delivery service."

- The proposed amendment stating that debt collectors may deliver a validation notice electronically requires debt collectors to do so "in accordance with § 5.77(b)(5)." However, allowing electronic delivery of the validation notice seems to be at odds with the proposed language in § 5.77(b)(5)(i), which says that the debt collector "must provide a written validation notice to the consumer . . . prior to contacting a consumer by electronic communication." It is unclear whether sending a validation notice electronically satisfies this requirement.

- The proposed amendments specify that debt collectors "may only use a specific email address, text message number, or specific electronic medium of communication" if the debt collector obtains consumer consent or the consumer previously used that specific medium of communication to communicate with the debt collector and certain other conditions are met. This means that the debt collector would not be able to provide a validation notice in the initial communication. Regulation F specifies that where the debt collector seeks to provide a validation notice electronically within five days of the initial communication, the debt collector must comply with the federal E-SIGN Act. This requirement is currently not reflected in DCWP's proposed amendments.

We believe that postal mail is the best method of delivery for the validation notice unless the debt collector has direct consent from the consumer that complies with the federal E-SIGN Act to allow electronic delivery of the validation notice.

If DCWP does allow electronic delivery of the validation notice, it should consider which methods of delivery to allow. In a survey 6 months after Regulation F took effect, consumer advocates reported that debt collectors are sending validation information to consumers electronically as an attachment to or hyperlink in an email and as a hyperlink in a text message. In interviews, some advocates also reported that consumers tend to be more suspicious of electronic communications due to concerns about fraud and scams. These concerns are particularly well founded where the methods of delivery would require consumers to click on a hyperlink or download an attachment in order to view a validation notice. We have asked the CFPB to clarify that such methods of delivery do not satisfy Regulation F's requirement to send the notice "in a manner that is reasonably expected to provide actual notice." Consumers should not risk losing access to important debt collection disclosures because they appropriately avoid clicking on links and downloading items from unknown senders to protect themselves from malware. Thus, if the DCWP does allow electronic delivery of the validation notice, it should prohibit delivery by hyperlink or attachments.

Limits on Communication Frequency

New York City's current regulations generally limit debt collectors to no more than two calls in a seven-day period. This provides significantly more protection than Regulation F, which only creates a presumption that the debt collector intends to annoy, abuse, or harass the consumer if it calls more than seven times in a seven-day period.

The proposed regulations would amend this provision to prohibit debt collectors from communicating or attempting to communicate more than three times in a seven-day calendar period "by any medium." We believe that DCWP intends the three-communication limit to apply in total across all communication media - for example one voicemail, one email, and one letter in a seven-day period would reach the three communication limit. However, as currently phrased, this provision could be read as allowing three communications per medium - for example three voicemails, three emails, and three letters in a seven-day period. We recommend that DCWP clarify that the first interpretation is what it intended by revising this provision.

As so revised, this amended regulation will continue to provide protection for consumers that exceeds the protection provided by Regulation F—both by providing a lower number of permissible telephone calls and by specifying a limit to the total number of communications or attempted communications that

applies across all media. Such an amended provision would function in a way that is similar to the current law in Washington State, which has existed since 1971.

To provide further protections for consumers, we recommend that DCWP clarify that these limits apply *per consumer*, not *per account*. This will avoid the problem that arises where a debt collector is collecting multiple accounts for the same consumer - *e.g.,* a debt collector collecting five medical accounts for the same consumer that claims to be allowed to communicate or attempt to communicate 15 times in a seven-day period.

The proposed regulations would also prohibit debt collectors from contacting the consumer again during a seven-day period after having "an exchange with the consumer in any medium." Regulation F creates a presumption that the debt collector intends to annoy, abuse, or harass the consumer if it places a telephone call to a consumer within seven days of a previous telephone conversation. DCWP's proposed language seeks to extend that consumer protection by applying it to exchanges in any medium. We support efforts to consider how this protection may apply to other communication media, but we recommend that the DCWP clarify what constitutes "an exchange," especially with respect to communications via text or live chat on the collector's website since such conversations may involve multiple responses as part of the same thread.

Other Issues Related to Electronic Communications

Consent

We support DCWP's proposal to add consumer consent requirements before debt collectors can contact consumers electronically or via social media. These provisions exceed the protections provided by Regulation F, which do not require consumer consent. However, to clarify that consumer consent does not transfer from the creditor to the debt collector, we recommend using the same language that Regulation F does in other portions of the regulations - "prior consent of the consumer, given directly to the debt collector."

As currently drafted, the regulations provide two alternate methods of consent for electronic communications but only one method of consent for social media communications. DCWP should clarify when something is a "specific electronic medium of communication" for which there are two methods of consent and when the debt collector is communicating via a "social media platform" for which there is only one method of consent. This will ensure that platforms that approximate text messaging, such as WhatsApp, Groupme, and Signal, are appropriately categorized.

Opt-Out

We recommend that DCWP amend the proposed provision requiring debt collectors to provide an opt-out notice in every electronic communication to add a requirement that debt collectors allow consumers to opt-out by replying "stop." Specifying a universal method to opt-out of electronic messages makes it easier to educate the public about how to opt-out of messages. It also prevents debt collectors from requiring consumers to click on links from an unknown sender just to opt-out, potentially putting the consumer at risk of malware. Forcing the debt collector to allow consumers to reply "stop" also prevents debt collectors from sending no-reply emails or one-way text messages that would otherwise force the consumer to use a different form of media in order to communicate with the

debt collector (*e.g.*, going to the debt collector's portal and logging in to update communication preferences).

Add "Attempt to Communicate"

Some provisions in the proposed regulations only apply to communications. To make these provisions parallel to similar provisions in Regulation F, DCWP should amend them to add "attempt to communicate."

Work Email or Text

DCWP's proposed amendments eliminate exceptions in Regulation F that allowed for debt collectors to communicate with consumers in some circumstances via a work email address or work phone number via text messages. We agree that most of these exceptions should be eliminated but recommend adding an exception for communications with the "prior consent of the consumer, given directly to the debt collector."

Notice Before Credit Reporting

DCWP's proposed amendments require that the debt collector provide notice about the alleged debt before credit reporting and that the notice inform the consumer that "the debt may be reported to a credit reporting agency." Such information would provide more details to the consumer than a similar notice requirement in Regulation F. However, to avoid violations of the FDCPA as the result of debt collectors threatening to take an action that they do not intend to take, DCWP should clarify that such notice should not be included in the validation notice where the debt collector does not actually plan to report the alleged debt co a credit reporting agency.

To align its proposed amendments with Regulation F, DCWP should also amend this provision to specify that the 14-day waiting period applies when the notice is provided in a validation notice, not just "by mail" as stated in paragraph (i).

Time-Barred Debt Collection

We are concerned about the ability of the least sophisticated consumer to understand time-barred debt disclosures. As such, we recommend that DCWP prohibit all collection of time-barred debt to protect consumers against abusive practices related to the collection of time-barred debts.

However, to the extent that DCWP retains a disclosure-based approach rather than prohibiting all collection of time-barred debts, we applaud efforts to revise the disclosure to make it easier to read and understand. Moreover, because we believe that two, different time-barred debt disclosures are more likely to confuse consumers than one well-crafted disclosure, we encourage DCWP to work with DFS to test and implement the most effective consumer disclosure.

Additionally, we urge DCWP and DFS to jointly craft a single disclosure that will fit (using a readable font size) in the space reserved for time-barred debt disclosures in the CFPB's model validation notice. This is because we believe that consumers will be more likely to notice the disclosure if it appears on the front of the notice.

We agree that a disclosure-based approach is more likely to be effective when, as here, the disclosure must be made in every communication. We recommend striking the word "permitted," since the disclosure should be made whether or not the communication is permitted. Furthermore, we recommend that DCWP require all debt collection communications on time-barred debt to be made in writing-only. When dealing with a complicated topic like time-barred debt, it is far more likely that the consumer will be able to understand that disclosure or find someone to help explain it when the disclosure is in writing than when it is made orally over the phone.

Finally, we note that DCWP's proposed rules list as unfair "selling, transferring, or placing for collection or with an attorney or law firm to sue a consumer to recover any debt where the debt collector knows or should know that the time to sue on the debt has expired, without including a clear and conspicuous notice to the recipient of the debt that the statute of limitations on such debt has expired." Because these debts are so old that they cannot be collected without mistakes or deception, we urge DCWP to completely prohibit selling, transferring, or placing time-barred debt for collection.

Simplifying Rules for Cease Communications Requests, Disputes, and Requests for Original Creditor Information

We applaud DCWP for removing unnecessary obstacles to exercising consumer rights. Specifically, the proposed amendments remove the requirement that consumers provide cease-communication requests, disputes, and requests for original creditor information to debt collectors in writing.

Requiring a written request creates a barrier to exercising consumer rights, and consumers may not always realize that they need to provide notice in writing to access the legal protection. For example, in a CFPB survey of consumer experiences with debt collection, 87% of respondents who had asked the debt collector to stop contacting them did so by phone or in person only. Removing the requirement that such requests be in writing, as DCWP proposes here, also lowers barriers for those with limited English proficiency or limited formal education who may struggle to put a request in writing. Additionally, it allows consumers to access the full protection of these provisions without needing to rely on the willingness of the debt collector to voluntarily honor oral requests when consumers omit formal written notice.

Additionally, DCWP's proposed amendments will simplify access to consumer protections by allowing consumers to submit disputes and requests for original creditor information "at any time during the period in which the debt collector owns or has the right to collect the debt." In contrast, the FDCPA specifies that the consumer has "thirty days after receipt of the notice" to submit a dispute or request for original creditor information in order to trigger the requirement that:

> [T]he debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector.

The DCWP's proposed amendment means that consumers get the benefit of the collection pause regardless of when they submit the dispute or request for original creditor information. This is important because there are many reasons that consumers may not submit a dispute or request for original creditor information within 30 days of receiving the validation notice. For example, consumers may not notice that they have a right to dispute or request original creditor information when they first

receive a validation notice. They may need to consult an attorney, a friend, or others to understand the validation notice and their rights or to get help disputing the debt or requesting original creditor information. All of this can take time, especially where overwhelmed consumers struggle to cope with stress related to ongoing debt collection.

Debt Verification and Unverified Debt Notice

DCWP proposes important amendments to the debt collection rule related to the verification of debts. First, it proposes to amend the regulations to require debt collectors to respond to a dispute or request for verification or a request for original creditor information within 30 days of receipt. This would be a significant improvement for consumers since neither the FDCPA nor Regulation F requires debt collectors to reply within a specified time.

Next, the proposed amendments outline what information a debt collector must provide in response to a dispute or request for verification. This list is designed to provide the consumer with substantive information about the alleged debt that the consumer can use to assess whether this account is their debt, whether the amount is correct, and what the relationship is between this creditor and the original creditor. DCWP should also consider how this list may be different if the alleged debt has been reduced to a judgment.

Requiring debt collectors to produce certain information in response to a dispute or request for verification is an important consumer protection because the FDCPA and Regulation F simply require "verification of the debt or a copy of a judgment" without explaining what constitutes proper verification of the debt. As a result, debt collectors frequently respond to consumer disputes by simply reiterating that the amount of the alleged debt is correct without providing any kind of documentation of the alleged debt. The proposed amendments would put an end to this practice.

The proposed amendments also specify that debt collectors that cannot provide verification of a debt in response to a dispute or request for verification must provide an "unverified debt notice" stating that the collector is unable to verify the debt and informing the consumer that it will stop collecting on the debt. This would eliminate the current practice, employed by some debt collectors, of simply never responding to a consumer's dispute or request for verification. We recommend that DCWP further amend this provision to clarify that the debt collector "cannot provide a consumer with verification of a debt" when the debt collector cannot provide the specific documentation discussed in the previous paragraph.

Finally, we note that DCWP's proposed amendments list as unfair:

> [S]elling, transferring, or placing for collection or with an attorney or law firm to sue a consumer to recover any debt for which the debt collector was unable to provide written verification of the debt, despite having received a dispute or request for verification of the debt from the consumer, without including a clear and conspicuous notice to the recipient of the debt that the debt was not verified and a copy of the "unable to verify notice" sent to the consumer pursuant to subdivision (f) of this section.

Currently, debt collectors that cannot verify a debt typically return the account to the creditor, who may then sell the account or place it with another third-party debt collector. That new debt collector may then attempt collection from the consumer, requiring the consumer to dispute or request veri fication of

the debt again in order to enforce their rights. While the DCWP's proposed amendment may discourage some creditors from placing the unverified debt for collection again, we urge DCWP to completely prohibit selling, transferring, or placing debts that cannot be verified for collection.

Language Access

DCWP's current and proposed rules impose stronger language access requirements than Regulation F, which do not impose any meaningful protections to consumers with Limited English Proficiency (LEP). Importantly, all of the Regulation F provisions concerning translated disclosures are permissive and voluntary–a debt collector would be entirely compliant with Regulation F if it offered no language access services, took no efforts to ascertain a consumer's language preference, or obscured the availability of the language services it offers.

While DCWP's current rules do not require that debt collectors offer language services, they lay the groundwork for debt collectors to offer greater language access in the future. For instance, debt collectors must request and record a consumer's language preference before attempting to collect a debt, and transfer the information on the consumer's language preference whenever a debt is sold, transferred, or referred to debt collection litigation. Asking consumers about their language preference is the very first step to offering effective language access, as it enables debt collectors to develop language services according to the greatest language needs in the communities from which they seek to collect the most. Moreover, these requirements allow debt collectors to direct consumers to the resources they need, streamlining the provision of language services. We applaud DCWP's leadership in requiring debt collectors to maintain these records, and hope that other jurisdictions will follow New York City's example.

The proposed amendments further clarify that these record-keeping requirements are not intended to be limited to the subset of debt collectors which offer language services, but they instead apply to all debt collectors. For instance, by deleting "in a language other than English" from section 2-193(c)(3), the proposed amendments clarify that *all* debt collectors must prepare annual reports indicating, by language, the number of consumer accounts on which an employee collected or attempted to collect a debt, and the number of employees that collected or attempted to collect on such accounts. We appreciate that the amendments to this section require all debt collectors to prepare and maintain such reports, even when they do not offer any language services, as it ensures that all debt collectors have a regular opportunity to monitor and evaluate the language services they offer, and consider expanding or changing their language services whenever appropriate.

To strengthen this mandate, we recommend changing the language in section 2-193(c)(3) to include a greater scope of possible language services in the annual report that debt collectors must produce and maintain. We suggest requiring that debt collectors state the number of consumer accounts on which the *debt collection agency* collected or attempted to collect a debt, not simply limiting the report to those actions taken by the agency's employees. For example, these reports should capture a range of other language services beyond the use of multilingual employees, including form letters, emails, text messages, and oral interpretation services. These actions may not always constitute actions taken by the debt collector's employees, as they could be either automated or conducted through its agents, yet they should nonetheless be captured in these annual reports. We also recommend that DCWP collect such information electronically to facilitate DCWP's ability to monitor and report on the state of language access in New York City debt collection.

We also appreciate the clarifications offered in section 5-77(h), which specify that the disclosures concerning the availability of language services and the link to DCWP's glossary of commonly used terms in debt collection must be on the *homepage* of the debt collector's website, or a link accessible from the homepage. We support this clarification, as it prohibits debt collectors from burying these disclosures in a part of the website that is unlikely to receive much traffic.

We want to encourage DCWP to consider expanding on these rules to require debt collectors that do not offer any language services to begin somewhere. As DCWP noted in its 2019 report on this topic, language access provisions are of limited utility if they are left to the discretion of individual debt collectors. Indeed, in a survey six months after Regulation F took effect, 59.4% of consumer advocate respondents reported that debt collectors were generally not providing the CFPB's optional Spanish-language disclosures.

Other jurisdictions are starting to lead the way in this area. For example, on January 1, 2023 the District of Columbia will begin to require that debt collectors provide validation notices to consumers in both English and Spanish, unless another language was "principally used in the original contract with the consumer or by the debt collector in the initial oral communication with the consumer," in which case the debt collector must provide the validation notice to the consumer in both English and that other language.

DCWP should consider implementing a similar requirement for debt collectors in New York. We recommend that DCWP begin by requiring that all debt collectors provide a Spanish translation of the validation notice to all consumers as a matter of course, with an exception for when a consumer has otherwise indicated a preference for a different language. We recommend requiring debt collectors to send the Spanish translation by default for two reasons. First, the CFPB provided a model validation notice translated into Spanish when it promulgated Regulation F, which would enable debt collectors to satisfy the requirement without needing to expend resources in translating the notice. To the extent that DCWP's amended regulations change or add to the language presented in the model validation notice, DCWP can publish a translation of the relevant changed or additional language. In addition, Spanish is the most commonly spoken language among the foreign-born population in New York City, with Spanish speakers representing nearly 40% of the city's foreign-born population. Such a mandate would improve language access for a large proportion of New York's LEP population.

Moreover, debt collectors should be required to send translated validation notices whenever the debt collector is both aware of a consumer's language preference and there is a model translated validation notice in that consumer's preferred language. Thus, as the number of languages included in the pool of government-provided translations grows, and as debt collectors continue to track and transfer consumer language preference, language access in debt collection will also continue to expand.

Without such mandates, we worry that proposed section 5-77(f)(2) will disincentivize debt collectors from using the CFPB's Spanish translation of the model validation notice, and any future translations provided by government sources. The proposed section requires debt collectors that offer consumers translated validation notices to respond to consumer requests for verification or dispute letters in the same language as the translated validation notice with either a translated verification letter or a translated unable to verify notice. We worry that requiring more of debt collectors that voluntarily offer translations will discourage debt collectors from using translations that are already available to them. Without a mandate to use translated notices, nothing in the proposed rules would prevent debt collectors that currently use translated validation notices from discontinuing their use of translated

notices in the face of these additional requirements. At a minimum, to mitigate this risk, we suggest that DCWP provide model translations for an "unable to verify" notice, and offer sample translations for verification letters.

Finally, we suggest that DCWP work in conjunction with the CFPB and relevant New York state government agencies to translate the model validation notice, and other standard notices and disclosures, into additional languages beyond Spanish. New York City is one of the most diverse cities in the world. Its residents speak over 200 languages, and nearly 25% of the population has Limited English Proficiency. Thus, New York is uniquely positioned to lead the charge in the effort to provide language services to a broader array of consumers facing debt collection. DCWP has already taken steps towards serving this population by providing a glossary of commonly used terms in debt collection in eleven languages, and building out a repository of translated notices and disclosures would be a natural next step.

Record Retention

DCWP proposes to amend its regulations regarding record retention to add additional items that debt collectors must retain as part of the record retention policy. This section is important because Regulation F does not provide any details about what records must be retained, stating only that, "a debt collector must retain records that are evidence of compliance or noncompliance with the FDCPA." DCWP's more detailed regulations provide more information to debt collectors about what information must be retained. Moreover, they provide details to debt collectors regarding what information must be recorded, unlike Regulation F, which states that there is "[n]o requirement to create additional records."

DCWP should clarify whether the requirement to retain "[a] copy of all communications and attempted communications or exchanges with the consumer" applies to phone calls and, if so, how this provision relates to the requirement to either record "all telephone communications with all NYC consumers or with a randomly selected sample of at least 5% of all calls made or received." We recommend that DCWP require recording and retention of all oral communications.

Private Right of Action

To facilitate enforcement of the DCWP's expanded debt collection regulations, we recommend adding a private right of action to allow consumers to sue debt collectors for violations of these regulations.

Thank you for your time and attention to these comments. Please feel free to contact us at the email addresses below if you have any questions.

Sincerely,

April Kuehnhoff
Staff Attorney
akuehnhoff@nclc.org

Nicole Cabañez
Skadden Fellow
ncabanez@nclc.org