



**National
Consumer Law
Center**

*Fighting Together
for Economic Justice*

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Meredith Weill
Consumer Protection and Financial Enforcement
New York State Department of Financial Services
One State Street, 20th Fl.
New York, NY 10004
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VIA E-mail

RE: Draft of Revised Proposed Amendment to 23 NYCRR 1¹

Dear Attorney Weill:

My name is April Kuehnhoff, and I am a Staff Attorney at the National Consumer Law Center (“NCLC”),² 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”).

NCLC submitted comments in response to the previous version of the proposed amendments.³ We commend the efforts of the Department of Financial Services (“DFS”) to continue to

¹ https://www.dfs.ny.gov/system/files/documents/2022/12/rp23a1_text_20221228.pdf.

² The National Consumer Law Center (“NCLC”) is a national research and advocacy organization focusing on the legal needs of consumers, especially low income and elderly consumers. For over 50 years NCLC has been the consumer law resource center to which legal services and private lawyers, state and federal consumer protection officials, public policy makers, consumer and business reporters, and consumer and low-income community organizations across the nation have turned for legal answers, policy analysis, and technical and legal support. Fair debt collection has been a major focus of the work of NCLC, which publishes Fair Debt Collection (10th ed. 2022), a comprehensive treatise to assist attorneys and debt collectors to comply with the law, and Collection Actions (5th ed. 2020), detailing defenses to consumer debts.

³ https://www.nclc.org/wp-content/uploads/2022/08/NYCRR_1_comments-1.pdf.

strengthen these regulations and to fill gaps in consumer protections⁴ left by the federal debt collection regulations issued to implement the Fair Debt Collection Practices Act (Regulation F).⁵ We submit these comments to support the DFS' efforts and offer additional recommendations for improvements.

Section 1.2

1.2(a)(5) - Language Access

Proposed section 1.2(a)(5) requires debt collectors to provide the following disclosure within five days after the debt collector first communicates with the consumer:

A statement informing the consumer of any language access services available, including whether a translation of any communication into a language other than English is available to the consumer, as well as a request for a consumer's language preference if other than English.

It also requires debt collectors to "record the consumer's language preference if other than English."

We applaud DFS's decision to require debt collectors to provide this disclosure. In a study conducted by New York City's Department of Consumer and Worker Protection (DCWP) on language access services in debt collection, researchers found that while some debt collectors claimed to offer some language services, consumers could not readily access those services.⁶ This problem largely stems from inefficiencies in directing consumers to appropriate resources, and can be addressed by asking consumers about their language preference as soon as possible. A uniform practice of asking consumers about their preferred language also enables debt collectors to expand the scope of their language services in a thoughtful manner, bearing in mind the unique needs of the consumers from which they collect. These new disclosures are a step in the right direction towards offering more effective language assistance to New Yorkers facing debt collection.

While we appreciate this addition to New York's debt collection regulations, we recommend altering this provision slightly to bring this amendment into conformity with the language access provisions in the anticipated amendments to New York City's debt collection rules, which

⁴ See, e.g., National Consumer Law Center, CFPB Changes Need to Prevent New Debt Collection Rules from Hurting Consumers (Jan. 2021), available at: <https://www.nclc.org/resources/issue-brief-cfpb-changes-needed-to-prevent-new-debt-collection-rules-from-hurting-consumers/>.

⁵ 12 C.F.R. Part 1006.

⁶ New York City Dep't. of Consumer and Worker Protection, Lost in Translation, Findings from Examination of Language Access by Debt Collectors, 16 (Sept. 2019), https://www1.nyc.gov/assets/dca/downloads/pdf/partners/LEPDebtCollection_Report.pdf.

DCWP announced last fall.⁷ While DCWP similarly requires debt collectors to ask consumers about their language preference, the regulations go a step further in requiring debt collectors to transfer that information whenever the debt collector returns, sells, or refers an account to debt collection litigation.⁸ This requirement is critical. Without it, debt collectors may comply with the text of the regulations by asking a consumer about their language preference and failing to convey the information when the account is returned to the creditor or sold or transferred to future debt collectors. This practice requires consumers to repeatedly inform future debt collectors of their language preference during an already confusing, and often scary process.

While asking consumers about their language preference is a necessary step to providing language access, it is by no means sufficient to fully meet the needs of New York consumers with limited English proficiency. Debt collectors would be able to fully comply with the proposed rules by offering no language assistance to consumers - so long as they ask about and record language preference. This is concerning, especially given that roughly 12.6% of New York state's residents have limited English proficiency.⁹

To address this immediate need for improved language access in debt collection, New York should require debt collectors to provide both a Spanish translation of the validation notice to all consumers as a matter of course, and 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.¹⁰ The first of these recommendations could be implemented fairly quickly, as the CFPB already provides a Spanish translation of the model validation notice, and DFS could always publish translations for any relevant changes or additions to the language in the model validation notice required by these amended rules. All told, these changes would quickly improve language access for a large proportion of New York's LEP population.

Requiring debt collectors to refer consumers to in-language resources can also be an easy way to deliver important information to vulnerable LEP consumers, particularly for those who speak languages without readily available, trusted translations. For example, New York City currently requires debt collectors to provide a disclosure on the validation notice explaining that a

⁷ New York City Dep't. of Consumer and Worker Protection, Notice of Proposed Rules Relating to Debt Collectors, <https://rules.cityofnewyork.us/wp-content/uploads/2022/11/Amended-DCWP-NOH-Debt-Collectors-Rule.pdf>

⁸ Proposed 6 RCNY § 5-77(d)(19).

⁹ New York Dep't. of State, Language Access Plan for Limited English Proficient Individuals, 4 (Aug. 2021), https://dos.ny.gov/system/files/documents/2022/02/dos-lap-2021_0.pdf.

¹⁰ For a discussion of these recommendations and others, please see April Kuehnhoff & Nicole Cabañez, Comments on DCWP's Proposed Amendments to Rules Related to Debt Collectors, 9 (Dec. 19, 2022), <https://www.nclc.org/wp-content/uploads/2022/12/comments-proposed-DCWP-Debt-Collection-Amendments.pdf>.

translated glossary of commonly used debt collection terms is available on DCWP's website.¹¹ This glossary is available in ten of the most commonly spoken languages in New York City.¹² We recommend that DFS similarly require debt collectors to provide a link to state-provided, translated consumer education resources on debt collection in a broad array of languages.

1.2(b) - Electronic Delivery of Disclosures

Proposed section 1.2(b) states:

The disclosures required under subdivision (a) of this section may not be made exclusively by electronic communication pursuant to subdivision (b) of section 1.6 of this Part unless provision by electronic communication has been affirmatively requested by a consumer, including pursuant to section 601-b of the General Business Law.

We recommend simplifying this to say:

The disclosures required under subdivision (a) may be provided via electronic communication only if the debt collector complies with subdivision (b) of section 1.6 of this Part.

Section 601-b of the General Business Law is already referenced in Section 1.6(b) and need not be mentioned separately in Section 1.2(b) as revised.

Revising this section as illustrated would eliminate two concerns with the current drafting. First, it eliminates the word "exclusively," clarifying that debt collectors must comply with Section 1.6(b) whenever they want to provide the disclosures electronically, not just when they want to do so "exclusively." Second, it would eliminate a second method for gaining authorization to provide electronic communication where "provision by electronic communication has been affirmatively requested by a consumer." Section 1.6(b) already defines how the consumer can affirmatively request electronic communication. Allowing additional methods of consent that are not specified in Section 1.6(b) will create a gray area with respect to when the consumer has "affirmatively requested electronic communication."

1.2(c) - Reasonable Accommodation

In order to ensure that people who request a reasonable accommodation with respect to the format also receive information about available language access services, we recommend amending this item to reference 1.2(a)(1)-(5), instead of "paragraphs 1 through 4."

¹¹ 6 RCNY § 5-77(f)(2)(viii)

¹² New York City Dep't. of Consumer and Worker Protection, Glossary of Common Debt Collection Terms, <https://www.nyc.gov/site/dca/consumers/Glossary-of-Common-Debt-Collection-Terms.page>.

Section 1.3

1.3(b) - Time-Barred Debt Disclosure Requirements

We remain concerned about the ability of the least sophisticated consumer to understand time-barred debt disclosures. Consumer testing of different time-barred debt disclosures conducted by the Consumer Financial Protection Bureau showed high rates of confusion with simpler disclosures than the one proposed by DFS.¹³

In order to shorten and simplify the language in the disclosures, we recommend that DFS delete 1.3(b)(2) and (4).

Additionally, we note that New York's Department of Consumer and Worker Protection (DCWP) has also proposed amendments to its debt collection regulations. As we noted in our comments to DCWP,¹⁴ this represents an opportunity for DFS and DCWP to jointly craft a time-barred debt disclosure that would satisfy both sets of regulations. We believe that having two different time-barred debt disclosures will be confusing for consumers, especially if they use different language.

1.3(d) - Written Collection for Time-Barred Debts

Proposed section 1.3(d) states:

The debt collector may not, without the prior written and revocable consent of the consumer alleged to owe such debt given directly to the debt collector, a request from the consumer alleged to owe such debt pursuant to section 601-b of the General Business Law, or the express permission of a court of competent jurisdiction, communicate with such consumer in connection with the collection of such debt exclusively by telephone or by other means of oral communication.

In its Assessment of Public Comment, DFS says:

The Department maintains that communications relating to time-barred debt should be in writing . . . to support consumer comprehension of the legal recourse available to the creditor or debt collector and to prevent misleading oral communication that leads to a

¹³ See Consumer Fin. Protection Bur., Disclosure of Time-Barred Debt and Revival: Findings from the CFPB's Quantitative Disclosure Testing (Feb. 2020), available at: https://files.consumerfinance.gov/f/documents/cfpb_debt-collection-quantitative-disclosuretesting_report.pdf (discussing CFPB testing of different time-barred debt disclosures).

¹⁴ <https://www.nclc.org/wp-content/uploads/2022/12/comments-proposed-DCWP-Debt-Collection-Amendments.pdf>.

consumer reviving a statute of limitations period or making payments on a debt based on a misunderstanding.¹⁵

However, including the term “exclusively” in Section 1.3(d) creates the mistaken impression that debt collectors can initiate oral communication regarding time-barred debts as long as they provide the disclosures in writing - thereby providing at least one non-oral communication - as required by Section 1.2. We believe that this is not what DFS intended since Section 1.3(b) specifies that the time-barred debt disclosure must be in “all communications” and be “in writing unless the consumer has requested communication in another form.”

We recommend revising Section 1.3(d) to clearly limit debt collectors to written communications to collect a time-barred debt where those communications are initiated by the debt collector unless certain other conditions are met. As stated in our previous comments, we support this approach since it will give consumers more time to comprehend time-barred debt disclosures and seek assistance from friends, family, or an attorney. We recommend revising this section as follows:

(d) When collecting on a debt that the debt collector has identified as time-barred pursuant to subdivision (a) or (b) of this section, the debt collector may only communicate with the consumer in writing unless:

- (i) the consumer contacts the collector via telephone, in person, or in another manner requiring oral communication by the debt collector,
- (ii) the consumer requests a return call from the collector,
- (iii) the consumer requests a method of communication pursuant to section 601-b of the General Business Law that is not in writing,
- (iv) the consumer provides written and revocable consent to oral communication directly to the debt collector, or
- (iv) a court of competent jurisdiction provides express permission.

This proposal would “not bar oral or phone communication entirely” - as DFS stated in its Assessment of Public Comment, but it would generally require collector-initiated communications to be in writing to maximize consumer comprehension of the time-barred debt disclosure.

1.3(f) - Safe harbor for debts not covered under the Consumer Credit Fairness Act

We previously recommended deleting 1.3(b)(2) and (4) to simplify the time-barred debt disclosure. However, to the extent that DFS does not do so, we note that the safe harbor language in 1.3(f) does not contain language to comply with these requirements.

¹⁵ https://www.dfs.ny.gov/system/files/documents/2022/12/rp23a1_apc_20221228.pdf.

Section 1.6

1.6(a) - Call frequency

Proposed section 1.6(a) states:

For the purposes of this section, as to communication by telephone, it shall be presumed that a debt collector is in compliance with this section if the debt collector does not . . . communicate with a consumer in connection with the collection of any debts by more than one completed telephone call and three attempted telephone calls per seven-day period per alleged debt.

We recommend that you clarify that a debt collector that completes a telephone call cannot then continue to attempt to call the consumer during that seven-day period.

We also recommend that DFS place limits on the exception in Section 1.6(a), which allows calls “in excess of such limits . . . when such communication is made in response to the consumer’s request to be contacted.” A similar provision Regulation F, specifies that any additional calls must be made “within a period no longer than seven consecutive days after receiving the prior consent.”¹⁶ DFS should add a similar duration to the period of consent and clarify that the consent ends with a completed call.

DFS previously issued FAQs for the debt collection industry that provide additional information about the current version of the rules.¹⁷ We recommend that DFS publish updated FAQs when it finalizes these amendments. That FAQ should clarify what is meant by “completed” in Section 1.6(a). Specifically, we recommend that a call be considered “completed” if the consumer answers the phone, regardless of the content of any conversation that follows.

1.6(b) - Consent to electronic communication

DFS should delete the word “exclusively” in Section 1.6(b). Otherwise any debt collector that provides one non-electronic communication - such as a phone call or mailing a letter - will be able to avoid these requirements since their communication to the consumer would no longer be exclusively through electronic communication.

1.6(c) - Opt-out

We recommend requiring all debt collectors to allow consumers to opt out by replying “stop” in addition to whatever other methods the debt collectors specify in the opt-out message. This would simplify consumer education since consumers would always be able to reply “stop”

¹⁶ 12 C.F.R. § 1006.14(b)(3)(i).

¹⁷ https://www.dfs.ny.gov/faqs/industry_faqs/debt.

regardless of the sender and the type of electronic communication. Moreover, it would prohibit collectors from sending one-way text messages or no-reply email messages since such communication tactics do not permit consumers to reply “stop” to opt-out of future messages.

1.6(e) - Messages to obtain consent to communicate electronically

Section 1.6(e) would permit debt collectors to communicate with a consumer electronically in order to satisfy Section 1.6(b). DFS should clarify that such communications must also comply with Section 1.6(c) and (d) and not be sent to an account or phone number that the debt collector knows or should know to be provided by the consumer’s employer. Additionally, DFS should place limits on such messages to prevent consumers from being inundated with requests for consent to communicate electronically. We recommend that DFS limit communications under 1.6(e) to once per email address or phone number.

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,

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