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

RE: 2023 proposed amendments to rules related to debt collectors

Dear Department of Consumer and Worker Protection:

My name is April Kuehnhoff, and I am a Senior Attorney at the National Consumer Law Center ("NCLC"),[1] 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 proposed debt collection regulations and to offer suggestions for additional improvements and clarifications. The comments below respond to the 2023 proposed amendments to rules related to debt collection,[2] updating the comments that NCLC previously submitted in response to the DCWP's 2022 proposed amendments.[3]

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[1] 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.

[2] Available at: https://rules.cityofnewyork.us/wp-content/uploads/2023/09/DCWP-NOH-Proposed-Amendment-of-Rules-re-Debt-Collectors-2.pdf

[3] Available at: https://www.nclc.org/resources/nycs-proposed-amendments-to-rules-related-to-debt-collectors/

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"),[4] and federal debt collection regulations issued to implement the FDCPA ("Regulation F").[5] Regulation F has many gaps and weaknesses,[6] 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.[7] 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.[8]

Regulation F contains similar language, and also clarifies that provisions in Regulation F - like FDCPA provisions - do not preempt stronger state consumer protections.[9]

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[4] 15 U.S.C. §§ 1692-1692p.

[5] 12 C.F.R. Part 1006.

[6] *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/.

[7] New York State Department of Financial Services, 2021 Proposed Amendments to 23 NYCRR 1 and 2022 Proposed Amendments to 23 NYCRR 1. *See also* NCLC's comments on the proposed 2021 DFS amendments are available at: https://www.nclc.org/resources/comments-to-new-york-dept-of-financial-services-regarding-draft-of-proposed-amendment-to-23-nycrr-1/ and comments on the amended 2022 DFS proposal are available at: https://www.nclc.org/resources/comments-to-new-york-department-of-financial-services-regarding-draft-of-revised-proposed-amendment-to-23-nycrr-1/

[8] 15 U.S.C. § 1692n.

[9] 12 C.F.R. § 1006.104.

The FDCPA and Regulation F define the term "state" to include a "political subdivision" of a state.[10] Thus, under federal law, New York City has the same authority as a state to enact consumer protections that exceed the baseline created by the FDCPA and Regulation F.

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.

Medical Debt

The 2023 proposed amendments add new provisions related to medical debt. Currently the term "medical debt" is defined in § 5-77(f)(10). We recommend moving that definition to the definition section and using the term consistently throughout. For example, § 5-77(f)(6)(iii) describes medical debt rather than using the defined term "medical debt."

We applaud DCWP for proposing a required disclosure about medical debt financial assistance in the validation notice.[11] This addition is important because Regulation F does not require such a disclosure and at least one court has held that debt collectors do not violate the federal Fair Debt Collection Practices Act when they fail to include notice about the hospital's financial assistance policy in billing statements.[12] This disclosure is also important because, although federal law requires non-profit hospitals to "widely publicize" their financial assistance policies,[13] many consumers are unaware of available financial assistance.[14]

The proposal also includes a requirement that the verification of a medical debt include "any information in its possession or available to the debt collector required to be disclosed by federal, state or local law, including the relevant financial assistance policy."[15] It is unclear what this requirement includes, and we recommend specifying what information must be provided in response to a consumer request instead. For example, we recommend that debt collectors be required to provide an itemized bill in response to a consumer's request for verification of a medical debt.

The proposal clarifies that debt collectors must treat consumer statements that a medical debt should have been covered by insurance, financial assistance, etc. as disputes.[16] This clarification is helpful because debt collectors do not always treat this information as a dispute, and therefore may not provide a verification of the debt.[17] Moreover, the proposal recognizes the fact that consumers often receive

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[10] 15 U.S.C. § 1692a(8); 12 C.F.R. § 1006.2(*l*).

[11] Proposed 6 RCNY § 5.77(f)(1)(v).

[12] *Klein v. Affiliated Group, Inc.*, 994 F.3d 913 (8th Cir. 2020).

[13] 26 U.S.C. § 501(r)-4(b)(5).

[14] Zachary Levinson, et al, KFF Hospital Charity Care: How It Works and Why it Matters (Nov. 03, 2022), available at: https://www.kff.org/health-costs/issue-brief/hospital-charity-care-how-it-works-and-why-it-matters/.

[15] Proposed 6 RCNY § 5.77(f)(6)(iii).

[16] Proposed 6 RCNY § 5.77(f)(10)(i).

[17] *See, e.g., Leeb v. Nationwide Credit Corp.,* 806 F.3d 895, 896 (7th Cir. 2015).

multiple related bills from a single hospitalization and would require debt collectors to also treat related bills as disputed.[18]

The proposed rule would require debt collectors to provide verification of all of these related bills at the same time that the debt collector provides verification of the disputed medical bill.[19] We are concerned that the volume of information provided to the consumer might be overwhelming and potentially overshadow the information about the account that the consumer originally disputed. We recommend that the requirement be changed to state that the debt collector must produce a list of the account numbers and balances of the related medical bills that the debt collector will treat as disputed. Debt collectors should also be required to inform the consumer that they can request verification for any of these related medical bills.

We applaud DCWP for proposing a requirement that collection must cease if the debt collector knows or should know that "the patient has an open application for financial assistance."[20] We encourage you to extend this prohibition to include situations where the debt collector knows or should know that the consumer has an ongoing insurance appeal.

The proposed amendments would also prohibit debt collectors from collecting medical debt where the debt collector knows or should know that the financial assistance policy should have provided financial assistance to the consumer[21] or the debt collector knows or should know that a misrepresentation was made to the consumer about financial assistance.[22] We recommend clarifying in this section that the debt collector itself must not make misrepresentations about financial assistance and requiring debt collectors to refer all questions about eligibility for financial assistance to the medical provider.

Finally, the proposed amendments include a provision for specific corrective action to be taken when a debt collector obtains information that "the financial assistance policy was not disclosed to the patient as required by law or that there is a violation of federal, state, or local law."[23] We think that it may be difficult to establish when the debt collector "obtained information" to trigger this requirement. As a result, we think that debt collectors are unlikely to comply with this provision frequently. Thus, we recommend that in addition to this corrective action provision and the required disclosure in the validation notice,[24] DCWP add the following additional requirements:

- Require debt collectors to include notice about any financial assistance policy in all communications with consumers - not just the validation notice.

[18] Proposed 6 RCNY § 5.77(f)(10)(iii).

[19] Proposed 6 RCNY § 5.77(f)(10)(iii)(C).

[20] Proposed 6 RCNY § 5.77(j)(1)(ii).

[21] Proposed 6 RCNY § 5.77(j)(1)(iii).

[22] Proposed 6 RCNY § 5.77(j)(1)(iv).

[23] Proposed 6 RCNY § 5.77(j)(2).

[24] Proposed 6 RCNY § 5.77(f)(1)(v).

- Require debt collectors to provide notice about any financial assistance policies when consumers indicate that they are experiencing financial hardship - even if the consumer does not specifically ask about financial assistance.

Delivery of Validation Notices

We applaud DCWP for making clear that the validation notice must be provided in writing.[25] This protection is important because Regulation F authorizes oral-only delivery of validation information in the initial communication.[26] 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.[27] By clearly requiring that the validation information must be provided in writing and not exclusively orally,[28] DCWP's proposed amendments provide an important consumer protection that exceeds the protections available to consumers under Regulation F.

The requirement that the validation notice must be in writing is also important because the CFPB interprets the FDCPA and Regulation F to authorize electronic-only delivery of the validation notice if that electronic communication is the initial communication[29] and only requires debt collectors to comply with the federal E-SIGN Act when the debt collector seeks to provide a validation notice electronically within five days of the initial communication.[30] The DCWP's proposed amendment will eliminate this method of avoiding compliance with the E-SIGN Act.

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.[31] In interviews, some advocates also reported that consumers tend to be more suspicious of electronic communications due to concerns about fraud and scams.[32] 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

[25] Proposed 6 RCNY §§ 5.77(f)(1).

[26] 12 C.F.R. § 34(a)(1)(ii).

[27] April Kuehnhoff and Yaniv Ron-El, National Consumer Law Center, Evaluating Regulation F: A Six-Month Check-Up on New Federal Debt Collection Regulations, at 26-28 (Nov. 2022), available at: https://www.nclc.org/wp-content/uploads/2022/10/report-evaluating-regulation-f.pdf [hereinafter "Evaluating Regulation F"].

[28] Proposed 6 RCNY § 5.77(f)(2)(i). *But see* Proposed 6 RCNY § 5.77(f)(1) (creating an exception where debt is paid after the initial communication).

[29] 85 Fed. Reg. 76,734, 76,854 (Nov. 30, 2020) ("[t]he Bureau has determined that the FDCPA does not require the validation notice information to be provided in writing when it is contained in the initial communication.").

[30] 12 C.F.R. § 1006.42(b).

[31] Evaluating Regulation F at 26.

[32] Evaluating Regulation F at 28-29.

to send the notice "in a manner that is reasonably expected to provide actual notice."[33] 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. Nor should they be denied important information about alleged debts because messages went to old email addresses or were diverted to spam folders as might occur in electronic-only delivery of validation notices. DCWP's proposed amendments will address these concerns.

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.[34] 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.[35]

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 of communication or in person."[36] This amended regulation will 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.[37] Such an amended provision would function in a way that is similar to the current law in Washington State,[38] which has existed since 1971.[39]

We interpret these proposed limits as applying *per consumer*, not *per account*.[40] However, if DCWP issues any guidance with these new regulations, we recommend confirming this interpretation in that guidance. Applying the communication limits per consumer will provide greater protection than

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[33] Evaluating Regulation F at 29.

[34] 6 RCNY § 5.77(b)(1)(iv).

[35] 12 C.F.R. 1006.14(b)(2)(i)(A).

[36] Proposed 6 RCNY § 5.77(b)(1)(iv)(A).

[37] Regulation F Official Interpretations clarify that a violation of FDCPA § 1692d's general prohibition against "conduct the natural consequence of which is to harass, oppress, or abuse" may be the result of the "cumulative effect of the debt collector's conduct through any communication medium the debt collector uses, including in-person interactions, telephone calls, audio recordings, paper documents, mail, email, text messages, social media, or other electronic media." Reg. F Official Interpretations § 14(a)-2. However, Regulation F does not specify when the volume of communications across all media reaches that threshold.

[38] Wash. Rev. Code § 19.16.250(13)(a), (b) ("A communication shall be presumed to have been made for the purposes of harassment" if the debtor is contacted more than once per week at work or the debtor or spouse are contacted more than three times per week in "any form, manner, or place").

[39] *See* 1971 1st Ex. Sess. c 253 § 16.

[40] Proposed 6 RCNY § 5.77(b)(1)(iv)(A) ("Excessive frequency means either 1) any communication or attempted communication by the debt collector *with a consumer*, by any medium of communication or in person, in connection with the collection of debt more than three times during a seven-consecutive-calendar-day period . . .") (emphasis added).

Regulation F, which applies phone call limits per account in collection.[41] Providing per consumer rather than per account limits 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 already having had an interaction with the consumer within such seven-consecutive-calendar-day period."[42] 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.[43] DCWP's proposed language seeks to extend that consumer protection by applying it to exchanges in any medium. We applaud DCWP's proposal to extend this protection to other types of communication media.

Other Issues Related to Electronic Communications

Consent

We support DCWP's proposal to add consumer consent requirements before debt collectors can contact consumers electronically[44] or via social media.[45] These provisions exceed the protections provided by Regulation F, which do not require consumer consent.[46] We note, however, that the rule as drafted would not permit collectors to send an initial electronic message in order to obtain permission to communicate electronically as outlined by DFS regulations.[47] We think that a narrowly crafted exception like the one in the DFS regulations is appropriate and encourage DCWP to coordinate with DFS regarding their proposed amendments to this portion of the DFS regulations.

Opt-Out Notice

As currently drafted, the proposed regulations only require an opt-out notice in every "electronic mail communication" rather than in every "electronic communication."[48] To ensure that opt-out notices are included in all types of electronic communications, including email, text, and direct messages, we recommend that DCWP amend the first and last sentence of this section to delete the word "mail" and instead use the broader defined term "electronic communication."

[41] 12 C.F.R. 1006.14(b)(2)(i).

[42] Proposed 6 RCNY § 5.77(b)(1)(iv)(A).

[43] 12 C.F.R. 1006.14(b)(2)(i)(B).

[44] Proposed 6 RCNY § 5.77(b)(5)(i).

[45] Proposed 6 RCNY § 5.77(b)(7).

[46] *Contrast* 12 C.F.R. §§ 1006.6(d), 22(f)(4).

[47] N.Y. Comp. Codes R. & Regs. Tit. 23 § 1.6(b).

[48] Proposed 6 RCNY § 5.77(b)(5)(v).

We also recommend that DCWP add a requirement that debt collectors must 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.[49] To make these provisions parallel to similar provisions in Regulation F, DCWP should amend them to add "attempt to communicate."[50]

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.[51] 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."[52] Such information would provide more details to the consumer than a similar notice requirement in Regulation F, which requires debt collectors to take steps to notify consumers about the alleged debt but does not require debt collectors to inform consumers that the account will be reported to a consumer reporting agency.[53]

We also note that New York Assembly Bill A6275A / Senate Bill 4907 is currently awaiting Governor Hochul's signature.[54] This legislation would prohibit credit reporting of medical debts. If this legislation is signed into law, this portion of the proposed rule should be amended to note that reporting of medical debt is prohibited.

[49] Proposed 6 RCNY §§ 5.77(b)(6) - (8).

[50] 12 C.F.R. §§ 1006.22(f)(3) - (4), 14(h).

[51] *Compare* Proposed 6 RCNY § 5.77(b)(6) *with* 12 C.F.R. § 1006.22(f)(3).

[52] Proposed 6 RCNY § 5.77(e)(10).

[53] 12 C.F.R. § 1006.30(a).

[54] Available at: https://www.nysenate.gov/legislation/bills/2023/A6275/amendment/A.

Time-Barred Debt Collection

We are concerned about the ability of the least sophisticated consumer to understand time-barred debt disclosures.[55] 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.

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. However, we are concerned that a disclosure that tells people both that they "can't be sued" and then tells them what to do if they are sued will be confusing to consumers.[56] We recommend further simplification of the proposed disclosure language.[57]

We applaud DCWP for taking steps to ensure that consumers will only see one time-barred debt disclosure by stating that, "[a] debt collector may include additional language to the time-barred-debt disclosure as may be required by the State of New York to send the consumer one disclosure notice."[58] However, we still believe that it would be better for DCWP to work with DFS to test and implement the most effective consumer disclosure rather than creating two disclosures that debt collectors might combine in ways that would be less comprehensible to consumers.

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.[59] This is because we believe that consumers will be more likely to notice the disclosure if it appears on the front of the notice.

The proposed rule requires a time-barred debt disclosure to be made to the consumer in the "initial written notice."[60] Our understanding is that DCWP intends to require debt collectors to contact consumers to collect time-barred debts with a written communication first and that this communication must be in writing. We think that this refers to the validation notice and recommend that DCWP revise the language here to avoid introducing another term. Instead the regulations can simply specify that for the collection of time-barred debts the initial communication must be a written validation notice with a time-barred debt disclosure.

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[55] See NCLC, Comments to the Consumer Financial Protection Bureau on its Supplemental Notice of Proposed Rulemaking p. 12 (Aug. 4, 2020) available at: https://www.nclc.org/images/pdf/debt_collection/NCLC-Comments-forSupplemental-Debt-Rule.pdf (discussing concerns that the CFPB has failed to propose time-barred debt disclosures that are comprehensible to the least sophisticated consumer); Evaluating Regulation F at 34-39 (discussing observations by consumer advocates that consumers are generally confused about the concept of time-barred debt even when the fact that the debt is beyond the statute of limitations is disclosed).

[56] Proposed 6 RCNY § 5.77(i).

[57] *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 validation notices).

[58] Proposed 6 RCNY § 5.77(i)(5).

[59] *See* 12 C.F.R. § 1006.34(d)(3)(iv)(B).

[60] Proposed 6 RCNY § 5.77(i)(2).

For subsequent communications, DCWP proposes that debt collectors would have to provide written notice "within 5 days after each oral communication."[61] Such follow-up communications may well come after the consumer has already agreed to make a payment on the time-barred debt. We recommend that DCWP instead 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 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."[62] Because of the unfairness, deception, and abusiveness associated with the collection of time-barred debts,[63] 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,[64] disputes,[65] and requests for original creditor information[66] 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.[67] 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.

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[61] Proposed 6 RCNY § 5.77(i)(4).

[62] Proposed 6 RCNY § 5.77(e)(12).

[63] See National Consumer Law Center et al., Comments to the Consumer Fin. Prot. Bureau on its Proposed Debt Collection Rule 130, Docket No. CFPB-2019-0022 (Sept. 18, 2019), available at https://www.nclc.org/resources/group-long-comments-to-cfpb-on-its-proposed-debt-collection-rule/ (discussing why the collection of time-barred debts is unfair, deceptive, and abusive).

[64] Proposed 6 RCNY § 5.77(b)(4).

[65] Proposed 6 RCNY § 5.77(f)(6).

[66] Proposed 6 RCNY § 5.77(f)(8).

[67] Consumer Financial Protection Bureau, Consumer Experiences with Debt Collection: Findings from the CFPB's Survey of Consumer Views on Debt at 34-35 (Jan. 2017) available at: https://files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf.

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."[68] 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.[69]

The DCWP's proposed amendment means that consumers would get the benefit of the collection pause regardless of when they submit a request for original creditor information.[70] However, the proposed rule does not provide for the same collection pause once a dispute has been submitted. Instead, the proposed rule only requires a post-dispute collection pause "if an itemization of the debt was not previously provided to the consumer by the debt collector in compliance with section 5-77(f)(1)(vii)" *and* "if a timely written verification of the debt has not been provided to the consumer." Thus, the consumer would not be entitled to a collection pause if the debt collector provides the required itemization or the debt collector provides a timely written verification.

We recommend that DCWP amend the proposed regulation to require a collection pause after a dispute until the debt collector provides a verification, regardless of when the dispute is submitted. 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 realize 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.[71]

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[72] or a request for original creditor information[73] within 45 days of receipt. This would be

[68] Proposed 6 RCNY §§ 5.77(f)(6), (8).

[69] 15 U.S.C. § 1692g(b).

[70] Proposed 6 RCNY § 5.77(f)(8).

[71] *See* National Consumer Law Center, Fair Debt Collection § 1.3.1.3 (10th ed. 2022), updated at www.nclc.org/library (discussing mental health and consumer debt).

[72] Proposed 6 RCNY § 5.77(f)(6).

[73] Proposed 6 RCNY § 5.77(f)(8).

a significant improvement for consumers since neither the FDCPA nor Regulation F requires debt collectors to reply within a specified time.[74]

Next, the proposed amendments outline what information a debt collector must provide in response to a dispute or request for verification.[75] The required list of items for verification includes the signed contract or documentation of the transaction resulting in indebtedness, records about any prior settlement agreement, and the final account statement or other documentation reflecting the total amount outstanding. These documents will provide the consumer with substantive information about the alleged debt that the consumer can use to assess whether this account is their debt and whether the amount is correct.

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.[76] 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 by specifying what information must be provided.

The proposed amendments would also require debt collectors that "did not provide an itemization of the debt" *and* "cannot provide a consumer with a timely written verification of a debt in response to a dispute or request for verification" to provide a "notice of unverified debt" stating that the collector is unable to verify the debt and informing the consumer that it will stop collecting on the debt.[77] We anticipate that most debt collectors will provide an itemization of the debt and thus be able to avoid the requirement to provide the notice of unverified debt. As a result, this provision will do little to 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 amend this provision to eliminate the itemization loophole and instead require delivery of a "notice of unverified debt" when debt collectors are unable to verify the debt.

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 New York City 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 "Notice of Unverified Debt" sent to the consumer pursuant to subdivision (f) of this section.[78]

[74] *Contrast* 15 U.S.C. § 1692g(b); 12 C.F.R. § 1006.38.

[75] Proposed 6 RCNY § 5.77(f)(6).

[76] *See* 15 U.S.C. § 1692g(b); 12 C.F.R. § 1006.38.

[77] Proposed 6 RCNY § 5.77(f)(7).

[78] Proposed 6 RCNY § 5.77(e)(13).

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 verification 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 clarify that these prohibitions also apply to accounts returned to the creditor.

Language Access

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.[79]

DCWP's current rules do not require that debt collectors offer language services,[80] but they do provide some uniform, market-wide data collection and disclosure requirements that have the potential to lay the groundwork for debt collectors to offer greater language access in the future. For instance, the current rules require that debt collectors obtain, retain, and transfer a record of the language preference for every consumer from whom the debt collector attempts to collect.[81] The current rules also require that debt collectors create and maintain annual reports describing the number of accounts, and the languages used to collect on those accounts. Finally, debt collectors are required to include a notice describing which language services the debt collector offers, and a link to a glossary of commonly used debt collection terms on any website the debt collectors use or refer to consumers as a means to collect.[82] These requirements are a welcome improvement on Regulation F's minimal attention to the pervasive problems language barriers create in debt collection.

The proposed rules largely clarify these existing obligations, by specifying that required disclosures must be posted on the homepage of the debt collector's website, and that all debt collectors must create the required annual reports, regardless of whether they communicate with consumers in non-English languages. Our comments will address our recommendations to strengthen the current regulatory framework as proposed, and will offer suggestions for how DCWP could impose market-wide language services requirements that can make a meaningful difference to LEP consumers facing debt collection.

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[79] While 12 C.F.R. § 1006.18(e)(4) requires debt collectors to translate certain disclosures into the "language or languages used for the rest of the communication in which the debt collector conveyed the disclosure," debt collectors can avoid triggering this requirement by only communicating in English. Similarly, in 12 C.F.R. § 1006.34(e)(2), debt collectors can avoid the requirement to provide a Spanish language validation notice in response to consumer requests by excluding the optional Spanish-language disclosures stating that a translated notice is available.

[80] N.Y. Dep't. of Consumer Affs., Frequently Asked Questions: New Rules for Debt Collectors Regarding Language Access, 3 (Aug. 2020), https://www1.nyc.gov/assets/dca/downloads/pdf/businesses/FAQs-Debt-Collectors-Language-Access.pdf.

[81] 6 R.C.N.Y. §§2-193(b)(5), 5-77(d)(19).

[82] 6 R.C.N.Y. §5-77(h). Debt collectors must also include these disclosures on validation notices. See 6 R.C.N.Y. §§ 5-77(f)(2)(vi)-(vii)

Annual Reports

The proposed amendments clarify that all debt collectors must prepare annual reports indicating, by language, the number of accounts collected and the number of employees used to collect on those accounts.[83] By deleting "in a language other than English'' from section 2-193(c)(3), the proposed amendments clarify that all debt collectors must prepare these reports, not only those debt collectors that offer services in languages other than English. Framing these requirements in a uniform manner across the marketplace ensures that all debt collectors face similar obligations, whether they communicate with consumers in other languages or not. These reports also ensure that all debt collectors have a regular opportunity to monitor and evaluate the language services they offer and have the data necessary to consider expanding or changing their language services whenever appropriate.

These reports have the potential to be powerful tools to allow DCWP to regularly assess the availability, quality, and benefit behind providing language assistance to LEP consumers facing debt collection in New York City. However, this recordkeeping requirement's full potential will not be realized unless DCWP collects and analyzes this information across the industry at regular intervals. While debt collectors are required to report on the language services they offer as part of the licensing and renewal processes,[84] DCWP does not gather information on the scope of these services, or how frequently they are used. The annual reports required under section 2-193(c)(3) could assist DCWP in gathering this information, and thus further documenting the need for improved language access in this area, if there were a corresponding requirement to provide this information on an regular basis to DCWP. To enable this more robust data collection, we suggest that DCWP require that debt collectors submit these annual reports as a supplement to the regular licensing renewal forms they already submit.

To this end, we also recommend that DCWP change 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. In addition, 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.

Requiring Language Assistance

We also encourage DCWP to consider expanding on these rules to require all debt collectors to provide a minimum level of language assistance to LEP consumers, beginning with making use of translated validation notices and other vital documents. As DCWP noted in its 2019 report on this topic, language

[83] Proposed 6 R.C.N.Y. §2-193(c)(3)

[84] N.Y. City Dep't. of Consumer and Worker Protection, 2023 Debt Collection Agency New & Renewal License Application Supplement, available at https://www.nyc.gov/assets/dca/downloads/pdf/businesses/Debt-Collection-Agency-Licensing-Renewal-Supplement.pdf

access provisions are of limited utility if they are left to the discretion of individual debt collectors.[85] 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.[86]

Consumers are unable to exercise their rights under federal, state, and local fair debt collection laws if they do not understand what those rights are. Validation notices serve a critical role in alerting consumers of their rights under these laws within a short period of time after a debt collector attempts to collect. LEP consumers should be entitled to receive the same access to these important consumer rights as English-speaking consumers, and the only way to ensure that LEP consumers will receive this information is to require that all debt collectors provide it.

Other jurisdictions are starting to lead the way in this area. For example, on January 1, 2023 the District of Columbia began requiring 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.[87] DCWP should consider implementing a similar requirement for debt collectors in New York, beginning by requiring that all debt collectors provide a Spanish translation of the validation notice to all consumers as a matter of course.

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,[88] which would enable debt collectors to satisfy the requirement without needing to expend resources in translating the notice. 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.[89] 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 consumer requests a validation notice in a language with an available model translated validation notice provided by a federal, state, or local government entity. Thus, as the number of languages included in the pool of government-provided translations grows, language access in debt collection will also continue to expand across languages of lesser dispersion. Finally, to the extent that DCWP's amended

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[85] N.Y. Dep't. of Consumer Affs., Lost in Translation: Findings from Examination of Language Access by Debt Collectors, 12 (Sept. 2019), https://www1.nyc.gov/assets/dca/downloads/pdf/partners/LEPDebtCollection_Report.pdf

[86] Evaluating Regulation F at 33-34.

[87] Protecting Consumers from Unjust Debt Collection Practices Amendment Act of 2022, D.C. Law 24-154(m)(2)(C), to be codified at § 28–3814(m)(2)(C).

[88] Consumer Fin. Protection Bur., Debt Collection Model Forms Model Validation Notice - Spanish translation (Oct. 2021), https://files.consumerfinance.gov/f/documents/cfpb_debt-collection_model-validation-notice_spanish.pdf

[89] N.Y.C. Mayor's Off. of Immigrant Aff's, 2021 Report, 15 (2021), https://www.nyc.gov/assets/immigrants/downloads/pdf/MOIA-2021-Report.pdf.

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.

Without such uniform mandates, we worry that proposed section 5-77(f)(3) 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 "disputes, complaints, requests for verification of the debt and cease and desist requests by the consumer completely and accurately in the same language as the validation notice."[90] 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, especially a notice that is intended to alert consumers of their rights under law. Without a uniform 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.

In addition, we recommend deleting the word "exclusively" from the third sentence in section 5-77(f)(3). The sentence as it is currently proposed reads "[a] debt collector may not contact a consumer *exclusively* . . . in a language other than English to collect debt without providing the consumer . . . a validation notice written accurately in the language used by the debt collector. . . ."[91] We appreciate that DCWP intends to forbid the practice of selectively communicating with LEP consumers in their preferred language only when it benefits the debt collector, while obscuring the consumer's rights contained in the validation notice by sending the consumer English-only notices. However, the word "exclusively" in this sentence renders the provision a nullity, as the debt collector could easily avoid violating this provision by saying a single word to the consumer in English.

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.[92] 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,[93] and building out a repository of translated notices and disclosures would be a natural next step.

Definitions

To the extent that the DCWP proposes to adopt definitions that mirror those in Regulation F, we recommend simply cross-referencing those definitions in Regulation F. Currently, it is unclear if the

[90] Proposed 6 R.C.N.Y. §5-77(f)(3)

[91] *Id*.

[92] N.Y.C. Mayor's Off. of Immigrant Aff's, 2021 Report, 8 (2021), https://www.nyc.gov/assets/immigrants/downloads/pdf/MOIA-2021-Report.pdf.

[93] N.Y. Dep't Consumer & Worker Protection, Glossary of Common Debt Collection Terms, available at https://www.nyc.gov/site/dca/consumers/Glossary-of-Common-Debt-Collection-Terms.page

differences between Regulation F and the proposed definitions are always intentional. For example, the proposed definition of "limited-content message" includes all of the required content[94] but none of the optional content.[95] It is unclear whether this difference is significant.

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.[96] 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."[97] 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."[98]

DCWP should clarify whether the requirement to retain "[a] copy of all communications and attempted communications with the consumer"[99] applies to phone calls and, if so, how this provision relates to the requirement to either record "all telephone communications, including limited content messages, with all New York City consumers or with a randomly selected sample of at least 5% of all calls made or received."[100] 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,

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[94] 12 C.F.R. § 1006.2(j)(1).

[95] 12 C.F.R. § 1006.2(j)(2).

[96] Proposed 6 RCNY § 2.193.

[97] 12 C.F.R. § 1006.100(a).

[98] Reg. F Official Interpretations § 100(a)-2.

[99] Proposed 6 RCNY § 2.193(a)(1).

[100] Proposed 6 RCNY § 2.193(b)(2).

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