American Financial Services Association

August 15, 2014

Mr. Max Dubin
Assistant Counsel
New York Department of Financial Services
One State Street
New York, NY 10004-1511

Re: Revised Proposed Rulemaking I.D.: DFS-34-13-00002-RP, Debt Collection by Third-Party Debt Collectors and Debt Buyers

Dear Mr. Dubin:

The American Financial Services Association ("AFSA")[1] appreciates the opportunity to comment on the Department of Financial Services' ("Department") revised proposed rules adding Title 23 NYCRR 1 (published in the July 16, 2014 New York State Register) relating to debt collection by third-party debt collectors and debt buyers. We thank you for your consideration of our concerns with the initial proposal, which would have imposed onerous and inappropriate requirements on creditors, and for incorporating many of our recommendations in the revised proposed rules.

We applaud the Department's clarification that the rules are limited to debt buyers and third-party debt collectors and exclude creditors[2] collecting their own debts[3] or who take assignment of current obligations prior to default.[4] AFSA members do not operate like debt buyers or third-party debt collectors. Most AFSA members originate their own accounts or acquire accounts shortly after origination, and usually well before default. In contrast to third party debt collectors or debt buyers which usually collect only mature, static balances from consumers with whom they have no prior or ongoing relationship, creditors usually collect delinquent installments from consumers with whom they have a long-term and continuous relationship and who (absent acceleration) may carry other (current) balances with the creditor. Unlike debt buyers and third-party debt collectors, defaulted loans or accounts are not the primary business of a mortgage or account servicer or other creditor.

We also applaud the Department for making the following additional changes as recommended in our October 2013 letter:

- Modifying certain required disclosures in Section 1.2 so that the information is required at the time the creditor charged-off the debt, rather than at default.
- In Section 1.4, limiting the number of times a consumer can submit a request for verification (now substantiation) of a debt and removing provisions requiring verification of debt to include

[1] AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members are important sources of credit to the American consumer. AFSA member companies offer vehicle financing, payment cards, personal installment loans and mortgage loans.
[2] The term "creditor" as used in this letter means entities who either originate their own obligations or who take assignment of current obligations (generally shortly after origination). These entities service and collect their own debt and those of affiliated entities, and the collection of debt is not their principal business.
[3] When we refer to a company collecting its own debts, we include the debts of their affiliates under common ownership.
[4] This includes for example, mortgage loan servicers which acquire a loan portfolio that is serviced for others and motor vehicle sales finance companies which purchase motor vehicle retail installment sales contracts originated by a dealer.

the customer’s account number with the original creditor at time of default, the current account number, and any intervening account number.

- In Section 1.5, removing the provision prohibiting a debt collector from accepting payment under any repayment schedule or other settlement agreement without first furnishing the written agreement.
- Specifying in Section 1.6 that it is the consumer’s obligation to affirm a voluntarily provided e-mail account is not furnished or owned by the consumer’s employer.
- Delaying the effective date of the rules.

We appreciate the many changes made to the initial proposal based on our recommendations; however, we ask that the Department to clarify some provisions in the revised rule and to reconsider concerns we previously raised. Please consider the following:

§1.3 Disclosures for debts in which the statute of limitations may be expired

We reiterate that the required time-barred debt notice should be provided to the consumer before *soliciting* a payment on the debt. Requiring notice before *accepting* payment on the debt would not be appropriate as many consumers voluntarily make payments to a debt collector or creditor (*i.e.,* to potentially improve his/her credit history and credit score) if the debt is being reported to the credit bureaus. Additionally, we remain concerned that if a consumer has provided a notice/demand that we cease and desist collection activity, the proposal’s language in Section 1.3(b) to satisfy the notice requirement in Section 1.3(a) will give the impression the creditor is violating the consumer’s cease and desist notice. As such, we respectfully request the language be clarified and state “. . . This information is NOT legal advice <u>and is not an attempt to collect a debt.</u> . .” Furthermore, notwithstanding the disclaimer, the proposed disclosure amounts to giving legal advice as it requires a debt collector to advise the consumer how to stop a potential lawsuit, informs the consumer of the debt collector’s understanding of the consumer’s rights with respect to the debt and interprets the applicable statute of limitations.

§1.4 Substantiation of consumer debts

Section 1.4(c)(ii) requires “the charge-off account statement, or equivalent document, issued by the original creditor to the consumer.” In most cases, when accounts are charged-off, our members do not issue charge-off statements to consumers, nor are they required by law to send such statements. In addition to this type of statement not being available, it would provide no additional information to a customer. Section 1.2(b)(2) already requires an itemized accounting of the debt as of charge-off. Additionally, there are instances where contracts are purchased prior to default, where the long-term creditor is not the “original creditor,” *e.g.,* vehicles financed by automobile dealerships and then purchased by banks or finance companies. We recommend that you either remove this requirement or require debt collectors to provide validation of the debt based on the creditor’s records.

Section 1.4(c)(2) requires the complete chain of title from the original creditor to the present creditor. Some of our members transfer contracts as part of structured financial transactions, *i.e.,* asset-backed securitization. The creditor continues to service the accounts in the creditor’s own name, with the transferee having no involvement with the receivable or contact with the consumer. The consumers are not aware of these transactions. The creditor is the only party the consumer ever knows. Adding the entities to which the receivables were assigned to the chain of title will confuse the consumer and add no value to substantiating the debt. In order to avoid confusing consumers, we recommend adding the

following language to the end of Section1.4(c)(2),"…not including assignments made to facilitate asset backed securitizations or other structured financial transactions."

We further recommend that prior settlement agreements required under Section1.4(c)(3) only be a required when a consumer claims a previous settlement agreement. Sending previous settlement agreements that are not the subject of the dispute or the request for substantiation could lead a consumer to believe the settlement offers are still valid when they are not. It could also lead the customer to believe that no more than the amount in the previous agreement must be paid even when the settlement agreement is no longer valid. In addition, coordinating all settlement agreement records of previous debt collectors will be onerous for creditors. If creditors have to retain records of each debt collector's agreements to accept less than the full balance, it may be more expedient for creditors to prohibit settlements or to send the accounts directly to suit rather than risking not being able to maintain the records of each debt collector's settlement agreements. Neither scenario will benefit consumers. To address settlement agreements when they are an issue, we recommend the addition of the following language at the end of Section1.4(c)(3): "…when the consumer disputes a settlement agreement, claims a settlement agreement was still valid, or claims the debt was settled in full."

Our last question in this section is about the record retention requirement of Section 1.4(d), which states proof of substantiation must be retained "until the debt is discharged, sold, or transferred." The definition of "transferred" from the perspective of a debt collector collecting on behalf of a creditor is unclear. Does the debt collector no longer need to retain the substantiation it provided to the consumer when the creditor recalls the debt from that particular debt collector and the debt is either "transferred" back to the creditor or to a different third party collector? If this is not the intention of the retention requirement, please provide additional explanation on when a debt would be considered "transferred."

§1.7 Effective date

Except for two parts, the effective date is 90 days after publication, with Section 1.2(b) and Section 1.4(a) being effective in 180 days after publication. We respectfully request that all of Section 1.4 become effective 180 days after publication, as both debt collectors and creditors will have to create processes to comply with new substantiation requirements.

On behalf of our members, thank you again for your consideration of our concerns and for incorporating several of our recommendations in the revised proposed rules. If you have any questions, or would like to discuss this further, please do not hesitate to contact me at 952-922-6500 or dfagre@afsamail.org.

Sincerely,

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