February 14, 2022

Meredith Weill
New York Department of Financial Services
One State Street, 20th Floor
New York, NY 10004

Re: Proposed Amendment to 23 NYCRR 1

Dear Ms. Weill:

On behalf of the American Financial Services Association ("AFSA"),[1] thank you for the opportunity to provide comments on the Department of Financial Services' ("DFS") proposed amendments to rules governing debt collection (23 NYCRR 1). We appreciate DFS' efforts to clarify the requirements for debt collectors. While AFSA shares the DFS' goal of promoting fair debt collection practices, we believe that many of the proposed amendments create unnecessary ambiguity and duplicative requirements. We believe clear rules that reflect the statute benefit consumers and financial institutions alike, and we look forward to engaging with the Department throughout the rulemaking process.

Definition of Original Creditor

The proposed amendments remove the definition of "original creditor" which was defined as "any person or such person's successor in interest by way of merger, acquisition, or otherwise, *who extends credit* creating a debt." The amendments also remove multiple references to "original creditor" and instead refer to "the creditor to whom/which the debt was originally owed." As currently written, the definition broadly includes creditor who charged off the debt; however, the proposed amendments create ambiguity whether the rules cover just the creditor who originated the account, the creditor who owned it at default or the creditor who charged off the debt. In many cases, the charge-off creditor may be the most relevant creditor to a debtor, because it was the last creditor from whom the debtor received a communication. Accordingly, we request that DFS retain the previous definition of "original creditor" or amend the proposed rules to clarify that the charge-off creditor is included in the definition of the "creditor to whom the debt is originally owed."

Definition of Debt Collector

Many creditors acquire portfolios of accounts from other creditors that primarily contain current accounts. This practice differs significantly from debt buying because, unlike debt buyers, they acquire the debt before charge-off and the acquiring creditor continues to service the account. While the larger portfolio may include individual accounts that have been charged off by the creditor that originated the debt, these accounts are incidental to the acquisition. The proposed amendments insert new language stating: "*[n]otwithstanding the exceptions contained in this subdivision*, debt collector includes without limitation a buyer of debts who seeks to collect such debts either directly or indirectly [.]" We are concerned that this amended definition could apply to creditors that acquire non-delinquent accounts, despite the significant differences with debt buying. To reflect these differences and clarify that creditors acquiring non-delinquent accounts are not debt collectors, we request that the proposed rules remove the 'notwithstanding' line and further clarify that a debt buyer does not include a person, "that acquires

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delinquent or charged-off debt as an incidental part of acquiring a portfolio of debt that is predominantly not delinquent."

Definition of Debt

We also propose that DFS revise the definition of "debt" to limit it to accounts that are in default. The proposed amended definition of debt would broadly include accounts that are current, delinquent and in default, meaning the requirements would affect routine activities related to account servicing, rather than just collections activities following default. Accordingly, we propose an amendment to the definition of debt to read: "any obligation or alleged obligation *that is alleged to be in default...*"

Call Restrictions

Paragraph (2) of section 1.6 would limit calls to a maximum of three call attempts and one telephone call with a consumer in any 7-day period for every debt. Direct phone calls to a borrower are a crucial tool for helping a consumer get back on track with the borrower's account. In emergency situations, like the current pandemic, the quickest way for creditors to provide relief to borrowers who need it may be to proactively reach out to share information on available relief programs or other options for keeping their accounts current. This restriction would prevent many creditors from taking these steps or even taking steps to service individual accounts, because it is extremely difficult to reach a borrower in three attempted phone calls over a 7-day period. This will result in the consumer falling further behind on the credit obligation and make it more likely the creditor will need to exercise other remedies available to recover the amounts due. Furthermore, this restriction is more restrictive than Regulation F, which allows for seven call attempts in 7-day period (12 CFR § 1006.14(b)(3)). We suggest that the DFS amend the rules to remove this section entirely or directly align the rules with the federal requirements.

Restrictions on Electronic Communications

Section 1.6 (b) would implement new restrictions on electronic communications. It would allow electronic communications, such as through text message, email, or social media, only if the consumer provides contact information and written consent to receive texts about *each specific debt* to the debt collector. We believe that this requirement does little to help consumers. The rules incorrectly assume that consumers find text / social media communications as disruptive. In reality, consumers may prefer to be contacted via text, email or social media without having to provide written consent for each individual debt they incur. Consumers may already be receiving texts and emails from the debt collector about the debt. Furthermore, requiring consumers to opt-in to these communications creates an additional step that many consumers may find burdensome. Consumers can easily and immediately opt-out/unsubscribe from text and email communications. Regulation F (12 CFR § 1006.6) recognizes this distinction and accordingly does not require consumers to provide consent prior to receiving electronic communications from a debt collector. We believe that these restrictions will unfortunately lead to less contact with consumers to resolve debts and more litigation against consumers. We urge the DFS to modify these requirements to align with relevant provisions in Regulation F and/or modify the provision to remove the requirement to provide written consent for each individual debt.

In addition to the aforementioned restrictions, Section 1.6(b)(5) of the proposed rules provides that "such electronic communication is private and direct to the person, in a form and manner reasonably

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expected to comply with 15 U.S.C. § 1692c(b)" of the Federal Fair Debt Collection Protection Act. Virtually all "debt collectors", as defined by the proposed rule, are already subject to the FDCPA. We believe that this subsection may create uncertainty about whether the rule is imposing a more stringent standard because of the additional requirement that the communication be "private and direct." In order to avoid this ambiguity, we propose that the DFS remove the subsection or replace it with the following provision: "Electronic communications discussed in this section that are subject to the Fair Debt Collection Practices Act (15 U.S.C. section 1692 et seq.) must comply with all applicable sections of that statute, including but not limited to 15 U.S.C. § 1692c(b)."

Time-Barred Debt

Section 1.3 of the proposed rules prohibits a debt collector from making telephone calls to collect time-barred debt unless a consumer has provided written consent or a court has granted permission. Requiring written consent to receive a telephone call adds an unnecessary hurdle for consumers seeking information on how to resolve debts and would not even allow collectors to respond to customers' verbal requests for return phone calls. Therefore, we request that the DFS remove this requirement.

Debt Validation Notice

Section 1.2 of the amended rules would require debt collectors to provide additional types of information about the debt in the collector's written notice made within five days after initial communication. Subsections (a)(1)(i) to (a)(1)(v) of these notice requirements are largely duplicative, of requirements already required under the Consumer Financial Protection Bureau's (CFPB) recent revision to Regulation F (12 CFR § 1006.34), effective November 30, 2021. In some cases, these requirements omit or contradict the provisions of Regulation F. The proposed rules would require debt collectors to provide a separate debt validation notice to consumers specific to the DFS's requirements that does not provide significant new information or consumer benefit. A New York-specific validation notice would cause significant costs to compile this information, which would ultimately reduce the availability of credit in the state, while introducing more confusion for consumers. We suggest amending the notice requirements to align with the existing requirements under Regulation F or removing subsections (a)(1)(i) to (a)(1)(vi) entirety due to their duplicative nature.

Section 1.2(a)(1)(i) of the amended rules prohibit a debt collector from using the charge-off date as a reference date for the debt's itemization date. The charge-off date is a useful point of reference for both creditors and consumers, so excluding the charge off date does not provide any consumer benefit. This prohibition contradicts 12 CFR § 1006.34(b)(3)(ii), which explicitly lists the charge-off date as one of the five reference dates a debt collector can use as the debt's itemization date. It also special considerations for mortgage servicers in 12 CFR § 1006.34(5), which allow mortgage servicers to attach the most recent periodic statement in lieu of providing an itemization of the debt.

Section 1.2(a)(ii) and (v) require debt collectors to provide a statement indicating the (ii) reference date relied on for the debt itemization and (v), if not used as the itemization date, the date of the last payment, including any partial payment. These provisions also conflict with Regulation F, which does not require debt collectors to provide a statement of the date relied on for the itemization or the date of the last payment made. In addition, the requirement to provide the date of last payment differs from Regulation F, which could potentially be confusing as the definition "payment" is not defined in the rules, whereas

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section 1006.34(b)(3)(iii) of Regulation F explicitly defines the last payment date as "the date the last payment was applied to the debt" does not contain references to "partial payments". The ambiguity could invite needless litigation over its meaning.

Section 1.2(a)(iii) requires that the validation notice include "[t]he account number, if any, or a truncated version of such account number, associated with the debt at the time of the transaction giving rise to the debt." This requirement is incompatible with debts arising from open-end/revolving lines of credit, such as credit card debt, as it implies that the debt is the result of a single "transaction" associated with a single "account number." This could potentially create confusion if a consumer's account number changes, such as for a credit card if the card is lost or stolen, because the account number during the "time of the transaction" may be the consumer's previous number, not the revised number which would be the current account number of the entire debt. This requirement can also be interpreted as obligating the debt collector (and thus the creditor for which they are collecting) to list every account number that existed of the life of the card account, with a list of transactions on the account separated by the account number under which they occurred. In contrast with the proposed rules, Regulation F does not contain any reference to a specific transaction, and instead requires debt collectors to provide the account number "associated with the debt *on the itemization date*" (12 CFR § 1006.34(c)(2)(iv)).

Section 1.2(a)(iv) requires debt collectors to include in the validation notice "[t]he merchant brand, affinity brand, or facility name, if any, associated with the debt". Among debt collectors, the merchant or other brand associated with a debt may not always be readily identifiable—a fact acknowledged by the CFPB in its commentary to Reg F (see Dec. 2020 Final Rule at 239-42). Accordingly, section 1006.34(d)(3)(vii) of Regulation F makes this disclosure optional.

Section 1.2(a)(vi) requires debt collectors to include in the validation notice the applicable statute of limitations for the debt, expressed in years, for any debt not reduced to judgment. We believe that this information is not necessary, because consumers will receive a disclosure that debt is time-barred if and when the debt becomes time-barred. Furthermore, determining the applicable statute of limitations can be complicated and often involves a legal evaluation, especially because the applicable governing law set forth in the credit agreement differs from the consumer's current state of residence or where multiple obligors reside in different state. Each state also has different provisions governing the start of a statute of limitations, a fact recognized by the CFPB and numerous consumer groups. Providing the applicable statute of limitations, expressed in years, alone in a validation of debt notice does not help consumer determine if the debt is time-barred or when it may become time-barred and may cause confusion. If the DFS seeks to retain this provision, we suggest the following substitute language:

> "We are required by regulation of the New York State Department of Financial Services to notify you of the following information. This information is NOT legal advice:
> The legal time limit (statute of limitations) for suing you to collect this debt is [INSERT NUMBER] years. When that time limit expires may vary.
> To learn more about your legal rights and options, it is recommended that you seek legal advice by consulting an attorney or a legal assistance or legal aid organization."

Section 1.2(a)(3) requires a disclosure in the validation notice stating "[t]hat the consumer has the right to dispute the validity of the debt, in part or in whole, including instructions on how to dispute the validity of the debt." As currently written, that phrase can be read to mean that the consumer can dispute

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not only the validity of the debt but may also dispute the instructions that were provided about how to dispute a debt. That was presumably not the intent of this requirement and that what was meant was that a consumer must be informed that they can dispute a debt's validity and must be given instructions about how to do so.

Delayed Effective Date

The proposed rules would require numerous updates to existing operational systems. Therefore, we request that the final rules include a delayed effective date, at least 270 days after being published in the state register, which will allow affected financial institutions adequate time to implement the required changes. DFS afforded a similar timeframe in 2014, and we believe it would again be appropriate.

Thank you in advance for your consideration of our comments. If you have any questions or would like to discuss this further, please do not hesitate to contact me at 952-922-6500 or dfagre@afsamail.org at your convenience.

Sincerely,

Danielle Fagre Arlowe
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