February 13, 2023

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 Debt

The proposed regulation defines 'debt' as an obligation "whether absolute or contingent". It is unclear why these terms, which are not included in the federal Fair Debt Collection Practices Act (FDCPA), are necessary in this definition. For clarity and consistency with the FDCPA, we propose removing them from the rules.

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 delinquent accounts, 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 accounts that have not been charged off, despite the significant differences with debt buying. To reflect these differences and clarify that creditors acquiring non-charged off accounts are not debt collectors, we request that the proposed rules remove the 'notwithstanding' line or clarify that "debt collector includes without limitation a buyer of charged off debts who seeks to collect such debts either directly or indirectly".

Additionally, the proposed amendments at Section 1.1(g)(6)(ii) strike an exclusion concerning "a debt which was originated by such person" without explanation. This change would also be inconsistent with FDCPA, and we request that the Department leave the exclusion intact.

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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 in November 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)(a) of the amended rules prohibit a debt collector from using the charge-off date as a reference date for the debt's itemization date unless the account was a revolving or open-end credit account. 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. Part 1.2(a)(1)(i)(b) would require use of the last payment date if it is available. This requirement does not comport with the federal guidelines to allow for the calculations to be clearly laid out and explained in such a way that is practical to the consumer or the party responsible for compiling such information and could potentially be confusing as the definition "payment" is not defined in the rules, whereas 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". The ambiguity could invite needless litigation over its meaning. Additionally, the last payment date will not apply to any accounts that are in default without ever making a first payment, and while the rule contemplates this situation, it forces creditors and collection agencies to have two separate processes for accounts in default with no first payment and all other accounts in default. These separate processes can lead to implementation errors and customer confusion.

Section 1.2(a)(1)(i) also fails to include the 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)(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 a consumer determine if the debt is time-barred or when it may become time-barred and may cause confusion,

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because the particular facts and circumstances will dictate from when the statute of limitations began to run, including whether it was tolled or extended. Such information may also be problematic to provide in cases where there is a good faith dispute as to what statute of limitations applies. 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 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. This requirement is vague and does not specify how detailed the instructions must be. Would informing the consumer that they can dispute it over the phone or in writing be sufficient or must there be step-by-step instructions?

The proposed changes also add a number of disclosure requirements for "initial communications." Regulation F offers a limited safe harbor if initial communications use a model form. Processes and procedures have been implemented to ensure that outside collection agencies use the model form. Accordingly, we request that DFS offer more detail about how the proposed disclosures can be given consistent with the safe harbor protections offered under the federal regulation.

Further, the restrictions on delivery of disclosures by electronic means are too restrictive and reflect a rather archaic view. Electronic communications are a ubiquitous part of the modern consumer economy and should not be restricted to an affirmative opt-in basis. Hardcopy mailing is expensive, can result in unnecessary litigation, and is not an ideal method to ensure delivery to consumers who travel or move without updating their mailing address.

Substantiation

Section 1.4(c) outlines the requirements for various documents to be provided to substantiate a debt, but every creditor may not maintain certain documents. For example, a creditor may not be able to provide a charge-off account statement and should not have to create a new form of document just to comply with this rule. Accordingly, documents should only be required to be provided if maintained by the creditor in the ordinary course of business.

Part 1.4(c)(3) requires that substantiation include a complete chain of title. While 1.4(c)(3)(i) allows for a chain of title from the time of charge off for open-end accounts, part 1.4(c)(3)(ii) requires chain of title from the creditor to whom the debt was originally owed. In many instances, particularly closed-end accounts such as home lending, documenting the sale of accounts from one creditor to another may end

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up confusing the customer rather than simply providing the customer with the name and address of the current creditor or the creditor at charge off. Accordingly, we recommend aligning the requirements for closed-end accounts to match those of open-end accounts.

Section 1.4(h) allows for electronic submission of disputes but requires the website generate automatically a copy of each written dispute that a consumer can print, save, or have emailed to them. This requirements presents risk in the forms of data retention and security, privacy, and the success of submission. We request the rules provide flexibility for creditors to make the dispute information available to the consumer consistent with the creditor's existing security practices.

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 recent 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 *a 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 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

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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).”

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. We encourage the DFS to keep these requests in mind as it reviews comments submitted throughout this process. If you have any questions or would like to discuss it further, please do not hesitate to contact me at mkownacki@afsamail.org or at (202) 469-3181.

Sincerely,

Matthew Kownacki
Director, State Research and Policy
American Financial Services Association