November 29, 2023

DCWP
42 Broadway
New York, NY 10004
Via email: rulecomments@dcwp.nyc.gov

Re: Proposed amendments to DCWP rules relating to debt collectors

On behalf of the American Financial Services Association ("AFSA"),[1] thank you for the opportunity to provide comments on the Department of Consumer and Worker Protection's ("DCWP") updated proposed amendments to its rules relating to debt collectors. We share DCWP's goal of promoting fair debt collection practices, and we appreciate DCWP's efforts to clarify the requirements and conform them with state and federal requirements. We appreciate DCWP's consideration of our previous comments, but we believe some further clarity is necessary to ensure the rules are clear for the sake of consumers and financial institutions alike.

Definition of "Debt Collector"

We appreciate DCWP's proposed amendments narrowing the definition of "debt collector" and clarifying the scope of the rules. Congress recognized in establishing the federal Fair Debt Collection Practices Act ("FDCPA"), that creditors "generally are restrained by the desire to protect their good will when collecting past due accounts," which distinguishes them from debt collectors who are "likely to have no future contact with the consumer and often are unconcerned with the consumer's opinion of them." Creditors inherently operate differently than debt buyers or third-party debt collectors, because most creditors originate their own accounts or acquire accounts shortly after origination and well before default. In contrast to third-party debt collectors or debt buyers that usually collect mature, static, full-account balances from consumers with whom they have no prior or ongoing relationship, creditors usually collect more recent 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 creditors, debt buyers and third-party debt collectors may operate with very limited information regarding the consumer or the account involved and must rely on the data and documentation provided by the original creditor. Creditors may continue to service an account when the consumer is past due, while debt buyers and third-party debt collectors solely engage in debt management or debt collection activities and are more likely to collect charged-off debts.

We applaud the proposed amendments that would bring the definition of debt collector more in line with the FDCPA and the New York State Department of Financial Services' ("DFS") regulations and believe several additional revisions could make this renewed scope even clearer. Specific clarification related to creditors' employees and to persons collecting debt that was not in default at the time it was obtained, both of which are present in the federal and state requirements, are missing from DCWP's proposed amended rules. Such clarification is necessary for the rules to clearly exclude creditors' employees from scope—as it would not make sense for creditors to be excluded from scope but not their employees—and to ensure that the rules reflect

DCWP's intent. For these reasons, to align the rules with the federal and state definitions, we respectfully request that the rules be further clarified to amend the definition of "debt collector" in Section 5-76 of Part 6 of Subchapter A of Chapter 5 of Title 6 of the Rules of the City of New York to read:

> Debt collector. The term "debt collector" means any person engaged in any business the principal purpose of which is the collection of any debts or who regularly collects, or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due to another person. The term does not include:
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> (1) any officer or employee of the United States, any State or any political subdivision of any State to the extent that collecting or attempting to collect any debt owed is in the performance of their official duties;
> (2) any person while engaged in performing an action required by law or regulation, or required by law or regulation in order to institute or pursue a legal remedy;
> (3) any individual employed by a nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors;
> (4) any individual employed by a utility regulated under the provisions of the Public Service Law, to the extent that New York Public Service Law or any regulation promulgated thereunder is inconsistent with this part;
> (5) any person while performing the activity of serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt, or serving, filing or conveying formal legal pleadings, discovery requests, judgments or other documents pursuant to the applicable rules of civil procedure, where such person is not a party, or providing legal representation to a party, to the action;
> (6) <u>any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor; or</u>
> (7) <u>any person collecting or attempting to collect any debt owed or due, or asserted to be owed or due to another, to the extent such debt collection activity:</u>
>
> <u>(A) Is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement;</u>
>
> <u>(B) Concerns a debt that such person originated;</u>
>
> <u>(C) Concerns a debt that was not in default at the time such person obtained it; or</u>
>
> <u>(D) Concerns a debt that such person obtained as a secured party in a commercial credit transaction involving the creditor.</u>

Each of these additions aligns with the FDCPA[1] and would support the DCWP's mission without excluding persons that are members of the debt collection industry. Collection agencies that regularly seek repayment on behalf of others, debt buyers that make a business out of purchasing charged off debt and debt collection, and 'persons' that receive accounts and intend to sue to collect, all would still be within scope of the proposed amendments because they would either

[1] See 15 U.S. Code § 1692a(6)(a) and 15 U.S. Code § 1692a(6)(f)

have a "principal" business of debt collection and/or they would regularly collect on behalf of another. These slight amendments would ensure the focus is on those that make a business out of collecting debts, rather than entities that extend credit and seek repayment as part of their regular business.

Definition of "Debt"

Notwithstanding changes to "debt collector," the DCWP should also consider amending its current definition of "debt," which does not currently distinguish between "obligations" currently owed and those that are in default. Because it does not, the current definition risks the unintended consequence of bringing in businesses that merely seek repayment at point-of-sale for goods provided or services rendered.[2]

Further, if a debt collector has to send Validation Notices for accounts in good standing, consumers could be easily confused with the differing tones between the NYC Validation Notice and their monthly billing statements. Both sets of disclosures would itemize the balance, inform the consumer of their dispute rights, and provide other important account information. However, one would be speaking about the account as if it is in good standing (billing statements) while the other speaks as if the account is in debt collection (the Validation Notice).

Accordingly, we would also suggest that the DCWP revise its definition of "debt" to only focus on an "obligation or alleged obligation" that is alleged to be in default at the time the demand for payment is made.

Definition of "Itemization reference date"

Section 3 of the proposed rules would add a definition of "itemization reference date" that is limited to the date of the last written notification for open-end accounts and the date of last payment or written notification for closed-end accounts. We suggest providing additional flexibility within the definition by amending it to include the charge-off date for either open-end or closed-end accounts. This change would be consistent with federal requirements, which allow for the use of the charge-off date and relieve some of the compliance burden of the new rules, while still providing the consumer with substantially similar information to what is already proposed.

Communication Restrictions

Section 5-77(b)(1)(iv) limits communicating or attempting communication by any medium with a consumer with "excessive frequency," which is subsequently defined as more than three times

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[2] Examples may include store clerks asking a customer to pay for goods, home service companies like plumbers or electricians that are following up with an invoice for services rendered, book or movie rental stores that seek payment when an item is returned, and the multitude of other businesses of all sizes making point-of-sale requests for repayment. Each employee employed by these 'persons' that ask consumers to pay, per their obligation, as part of a consumer transaction could be within scope.

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in a seven-day period, or once within that same period after having had an "interaction" with the consumer.

In finalizing Regulation F, the Consumer Financial Protection Bureau (CFPB) declined to implement a communication frequency limit for debt collectors and instead restricted only the frequency of calls. Under the final rule, there is a presumption of compliance when a debt collector places no more than seven calls within a seven-day period. *See* 12 C.F.R. § 1006.14(b)(2). In doing so, the CFPB recognized that mediums of communication such as text and email are not as disruptive or intrusive to consumers as calling. That is especially true when you consider Regulation F's rules requiring clear and conspicuous opt-out instructions in texts and emails and that any such opt-outs be honored. Given the less intrusive nature of digital communications, the fact that consumers can easily opt-out of any such communications, and the fact that more and more customers prefer to receive texts or emails rather than phone calls, we respectfully request that the communication frequency restriction be revised to align with Regulation F—*i.e.*, creating a presumption of compliance by placing no more than seven calls within a seven-day period without restrictions on other mediums of communication.

The frequency limit proposed in the rules is also particularly problematic in that it seemingly applies *per customer* rather than *per debt*. Thus, a debt collector acting on behalf of a creditor attempting to communicate with a consumer who has multiple delinquent accounts with that creditor would still be limited to a total of three attempts in a seven-day period despite that consumer owing more than one debt. Further complicating matters, if a debt collector holds multiple accounts for a single customer from multiple creditors, the proposed restrictions will almost certainly mean one creditor's accounts might not get an attempted collection communication for a week's time. Not only does this put debt collectors in a difficult position of trying to determine which client's accounts to prioritize, but it could force creditors to sue earlier in the default cycle because the chances of recovery diminish the longer a debt remains unpaid. Furthermore, in order to ensure compliance with the 3x7 rule per customer, it will require debt collectors to create a central repository to track the call attempts potentially putting each creditor's data at risk.

A per consumer rather than per debt limitation is also inconsistent with the CFPB's approach in Regulation F, which excludes creditors and applies the seven-call limit *per debt*. *See* 12 C.F.R. §1006.14(b)(2). For these reasons, we propose that the rules be amended to adopt Regulation F's approach to communication frequency limitations.

Validation Notice - TILA, FCBA, & Regulation Z

DCWP's proposed revisions to Section 5-77(1) should be amended further to require a validation notice to be sent within 5 days after the first initial communication that occurs after the institution of debt collection procedures. Alternatively, the DCWP could keep its current exemption under 5-77(f) for entities that must comply with both TILA and the Fair Credit Billing Act ("FCBA").

Under the current proposal, a Validation Notice must be sent within five days of the initial communication with a New York City consumer in connection with seeking repayment for any

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consumer transaction. This broad requirement could mean that notices must be sent within days of account statements required by federal law or within days of a new transaction on a revolving credit account. Further, the statements required by federal law detail much of the same information that is being required under the proposed Section 5-77(f), so consumers could be left to have to reconcile two sets of disclosures sent around the same time that detail the same account differently.

This concern is particularly apparent for the co-brand and private label credit card industry.[3] These credit cards are commonly offered by issuers who partner with specific retailers or merchants. Sometimes, those retailers and merchants help with account servicing and/or sending billing statements in support of the issuer's TILA and FCBA compliance obligations. In those scenarios, the merchant or retail partner is not exempt under the proposed Sections 5-76 and 5-77, so they could be required to send Validation Notices after each initial communication. Per the statements above, depending on how often the consumer uses their account and communicates with the retailer about their balance or account, the consumer could get voluminous disclosures from the retailer-partner on top of their monthly billing statements.

Simply put, if a retailer or merchant partner discloses much of the same information required by Section 5-77(f) via monthly account statements, they should not be subject to the Validation Notice requirements as well just because they are not the Regulation Z issuer. Otherwise, consumers would again have to reconcile both sets of disclosures to understand their account's status, which could be overwhelming and confusing.

Accordingly, we recommend the DCWP requires the Validation Notice to be sent only after institution of debt collection procedures, or it should keep the existing language in the rule that exempts persons that comply with and provide the disclosures required by TILA and the FCBA. Monthly billing statements often end after an account is accelerated and charged off, so either revision would be positive for the consumer without keeping from them any relevant account information.

Itemization Requirements - Regulation F

The proposed amendment to Section 5-77(f)(1)(viii) requires an itemization of the current amount of the debt overlaps and partially conflicts with existing itemization requirements under federal Regulation F. Some of the information in this new itemization will be duplicative of the Regulation F requirements and is likely to create confusion for consumers. Additionally, because the itemization also differs from the Regulation F requirements by requiring individual transactions to be itemized, it will necessitate debt collectors having to provide two separate itemizations to consumers, one to comply with Regulation F and another to comply with Section 5-77(f)(1)(viii). Regulation F creates a safe harbor when the model validation notice form is used, meaning debt collectors will be forced to use the existing model form, but then create

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[3] Co-brand accounts are general use credit cards that offer unique incentives to partner retailers or merchants. Consumers with co-brand credit cards often take advantage of incentives by using their card to accrue points, which are usable at the partner retailer or merchant business. Private label credit cards are similar except they can only be used at or with that specific retail/merchant partner. Both types of cards often incentivize engagement with that specific partner-retailer or merchant.

separate page(s) of itemization to meet these requirements, thus creating more documents for consumers to read and adding a layer of confusion to the process. Because Regulation F already provides adequate itemization to allow the customer to understand the amount of the debt owed, these additional itemization requirements should be eliminated or similarly provide a safe harbor for the use of Regulation F's model validation notice.

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 202-469-3181 or mkownacki@afsamail.org at your convenience.

Sincerely,

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