



**NEW YORK  
CITY BAR**

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**CIVIL COURT COMMITTEE  
CONSUMER AFFAIRS COMMITTEE**

**COMMENTS ON PROPOSED RULEMAKING BY THE  
NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES  
23 NYCRR 1 REGARDING DEBT COLLECTION BY  
THIRD-PARTY DEBT COLLECTORS AND DEBT BUYERS**

The New York City Bar Association (“City Bar”) submits these comments with regard to the second publication of proposed rules by New York State Department of Financial Services (“DFS”) to 23 NYCRR 1 regarding debt collection by third-party debt collectors and debt buyers. As noted in the City Bar’s prior comments regarding DFS’s first set of proposed rules,<sup>1</sup> the City Bar commends DFS for seeking to enhance regulation and oversight of debt collection through its rulemaking authority. Debt collection consistently ranks as a top sector for consumer complaints by New Yorkers with federal, state, and local consumer protection agencies. The City Bar strongly supports the proposed rules subject to the suggestions and comments set forth below.

**ILLEGAL DEBT COLLECTION PRACTICES WARRANT RULEMAKING BY DFS**

Debt collection agencies are regulated under the federal Fair Debt Collection Practices Act (“FDCPA”) and under New York State law pursuant to the Fair Debt Collection Law (Art. 29-H of the General Business Law), which also covers the debt collection activities of original creditors. New York City residents also enjoy consumer protections set out in local ordinances and enforced by the New York City Department of Consumer Affairs (“DCA”).<sup>2</sup> Despite these statutory protections, debt collection complaints often rank at or near the top of complaints received by oversight agencies.

New Yorkers file complaints against debt collectors in significant numbers. DCA reported that, in 2013, debt collection abuses were the second most common consumer

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<sup>1</sup> New York City Bar, Comments from the Civil Court Committee and Consumer Affairs Committee on Proposed Rulemaking by the New York State Department of Financial Services Regarding Debt Collection (Oct. 2013), available at <http://www2.nycbar.org/pdf/report/uploads/20072577-CommentsonProposedRulemakingbyNYSFinancialServices.pdf>.

<sup>2</sup> See, e.g., N.Y.C. Admin. Code 20-488 *et. seq.* (2014).

complaint.<sup>3</sup> Similarly, the New York State Consumer Protection Division reported that in 2011 debt collection was the second highest complaint, next to Do Not Call registry violations.<sup>4</sup>

The City Bar's previous comments detailed the focus by the Federal Trade Commission's ("FTC") on the debt collection industry and its series of reports beginning in 2007.<sup>5</sup> Since the reports' issuance, the Consumer Financial Protection Bureau ("CFPB") has issued data and information related to consumer debt collection. In March 2014, the CFPB reported that debt collection is the largest source of complaints per month, and the FTC reported that it receives more complaints about debt collection than any other industry.<sup>6</sup> The CFPB noted that, among its complaints, the three most common types of consumer debt collection complaints are: attempts to collect a debt that is not owed; failure of debt collectors to verify the debt; and communication tactics.<sup>7</sup>

Enhanced oversight and regulation by DFS through its rulemaking authority will help ensure appropriate and adequate consumer protection in New York State, especially for economically distressed consumers and other vulnerable persons.

## RECOMMENDATIONS

### **DFS Should Regulate Debt Collection by Original Creditors**

DFS titled its proposed revised regulation "Debt Collection by Third-Party Debt Collectors and Debt Buyers." Many banks, however, retain and collect their own delinquent consumer debts. Unfortunately, banks, like third-party collectors, too often use problematic and abusive collection practices,<sup>8</sup> despite the commonly-held belief that maintaining "goodwill" with

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<sup>3</sup> Press Release, N.Y.C. Dep't. of Consumer Affairs, Department of Consumer Affairs (DCA) Announces Home Improvement Contractors Are the Top Complaint for 2013 (Mar. 6, 2014), available at [http://www.nyc.gov/html/dca/html/pr2014/pr\\_030614.shtml](http://www.nyc.gov/html/dca/html/pr2014/pr_030614.shtml). DCA reported receiving 500 complaints about debt collectors in 2013. *Id.* Not surprisingly, in the aftermath of Superstorm Sandy, home improvement contractors accounted for the most complaints in 2013.

<sup>4</sup> *Hearing on the Effectiveness of the Consumer Protection Division (CPD) Within the Department of State (DOS)* 19-20 (Nov. 28, 2012), N.Y.S. Assembly Standing Committee on Consumer Affairs and Protection, [hereinafter *Hearing of Effectiveness of the CPD*] (Testimony of Marcos Vigil, Deputy Secretary for Business and Licensing, N.Y.S. Dep't. of State), available at <http://assembly.state.ny.us/write/upload/hearings/2012/20121128Consumer.pdf>. See also New York State Department of State, *2011 Annual Report: Activities of the Division of Consumer Protection* 6 (2012), available at <http://www.dos.ny.gov/consumerprotection/publications.html>.

<sup>5</sup> New York City Bar, Comments from the Civil Court Committee and Consumer Affairs Committee on Proposed Rulemaking by the New York State Department of Financial Services Regarding Debt Collection, *supra* note 1, at 1-2.

<sup>6</sup> Consumer Financial Protection Bureau, *Fair Debt Collection Practices Act: CFPB Annual Report 2014* 2, 17 (Mar. 20, 2014), available at <http://www.consumerfinance.gov/reports/fair-debt-collection-practices-act-annual-report/>.

<sup>7</sup> *Id.* at 15.

<sup>8</sup> See, e.g., Jessica Silver-Greenberg and Edward Wyatt, *U.S. Vows to Battle Abusive Debt Collectors*, N.Y. Times, July 10, 2013, 2:05pm, available at [http://dealbook.nytimes.com/2013/07/10/u-s-vows-to-battle-abusive-debt-collectors/?\\_php=true&\\_type=blogs&\\_r=0](http://dealbook.nytimes.com/2013/07/10/u-s-vows-to-battle-abusive-debt-collectors/?_php=true&_type=blogs&_r=0) (detailing examples of abusive debt collection by original creditors).

existing customers incentivizes banks to avoid abusive collection practices. Banks are squarely within DFS's regulatory jurisdiction under New York Financial Services Law Section 104(2), and should be made subject to the proposed rules. In the experience of Committee members, consumers routinely complain about in-house debt collection abuses, especially by banks issuing credit cards which are subject to DFS jurisdiction.

The FTC reported that, in 2013, of consumer debt collection complaints, 17% related to in-house debt collection and the remainder to third-party debt collection.<sup>9</sup> Recognizing that original creditors may engage in problematic debt collection, the CFPB issued CFPB Bulletin 2013-07, which expressly stated that original creditors must refrain from engaging in unfair and deceptive practices when collecting their own debts.<sup>10</sup> In addition, the Office of the Comptroller of the Currency ("OCC") has investigated and brought enforcement actions related to banks' in-house debt collection activities.<sup>11</sup> Many of the proposed protections and disclosures would be helpful for consumers facing debt collection by in-house collectors working for original creditors.

In Committee members' experience, some credit card issuing banks prefer to handle a substantial amount of debt collection in-house, rather than outsourcing it to third-party agencies. In-house debt collectors routinely contact consumers to request payment of charged-off debts. In many complaints received by the Committees' members, the consumers had only exempt income, and the alleged debts were quite old and likely time-barred, with the alleged amount due having ballooned far in excess of the original credit limit. Banks that collect their own debts often proceed to litigation, filing suit against their customers, when other collection efforts fail. Consumers rarely have legal counsel to inform them of their rights during the collection process, including litigation. Under these circumstances, protections such as the exempt income and statute of limitations disclosures and the post-charge-off itemization of the debt would be relevant and helpful. The protection afforded by a written settlement agreement is equally important for people who are negotiating settlements of debt directly with their creditors as such protection is to people negotiating with third party collectors and debt buyers.

Given the known problems associated with in-house debt collection (which are subject to New York's Debt Collection Procedures Act, discussed below), it makes no sense to deprive consumers of the substantial protections set forth in the proposed rules simply because the debt collector works in-house for an original creditor instead of at a third party collection agency. The potential unfair and deceptive practices faced by the consumer are the same. The

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<sup>9</sup> Consumer Financial Protection Bureau, Consumer Financial Protection Bureau, *Fair Debt Collection Practices Act: CFPB Annual Report 2014 2*, *supra* note 5, at 17. The FTC reported a similar percentage of original creditor complaints for 2012. *Id.* at 17-18.

<sup>10</sup> Consumer Financial Protection Bureau, CFPB Bulletin 2013-07 (July 10, 2013), *available at* <http://www.consumerfinance.gov/guidance/#more> ("[o]riginal creditors and other covered persons and service providers under the Dodd-Frank Act involved in collecting debt related to any consumer financial products or service are subject to the prohibitions against UDAAPs in the Dodd-Frank Act").

<sup>11</sup> In 2013, the OCC brought an enforcement action against JPMorgan Chase for its debt collection practices and, while the action focused on debt collection lawsuits, it encompassed both in-house and third-party debt collection. Consent Order, *In re JPMorgan Chase Bank, N.A.*, No. 2013-138 (Dep't of Treas. Sept. 18, 2013), *available at* <http://www.occ.gov/static/enforcement-actions/ea2013-138.pdf>.

Committees recommend that DFS regulations expressly extend to original creditors for debt collection of all debts or at least for charged-off debt.<sup>12</sup>

### **Recommendations Related to Initial Disclosures**

The Committees commend DFS for simplifying the required disclosure language and including in the required written notice set out in Section 1.2(a)(2) the fact that 90% of wages or salary earned by the alleged debtor in the last sixty days is a type of exempt income. The Committees suggest two other important additions to this section.

The Committees recommend expanding Section 1.2(a)(1)(i) to add that prohibited acts include “the use of false statements, impersonation of law enforcement, or threats of imprisonment.” The CFPB reported that, in 2013, 60% of debt collection complaints that related to taking or threatening to take an illegal action involved threats to arrest or jail consumers if they did not pay.<sup>13</sup> Law enforcement actions by both federal and state enforcement agencies also show the need to expressly include this protection. In 2013, the FTC brought action against Rumson, Bolling & Associates—a California firm that collected debts nationwide—for among other abuses “threaten[ing] consumers with . . . arrest.”<sup>14</sup> More recently, on July 21, 2014, the New York State Attorney General and the FTC jointly obtained a federal preliminary injunction against Buffalo-based debt collectors who illegally “threatened consumers with dire consequences—such as lawsuits, arrest, and imprisonment.”<sup>15</sup>

The Committees also recommend adding a reference to the New York State Debt Collection Procedures Law (“DCPL”) as an additional source of authority for the prohibited activities. Section 1.2(a)(1) refers to the federal Fair Debt Collection Practices Act (“FDCPA”) as the legal basis for prohibiting wrongful collection activity. However, New York State also has its own debt collection statute, which offers added protection to residents of New York. It prohibits much of the same activity as the FDCPA. Importantly, the New York DCPL, unlike the FDCPA, applies to both original creditors and third parties. If DFS were to adopt the

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<sup>12</sup> The Committees’ recommendation that DFS regulation extend to original creditors would require amendments to Section 1.1(e), which defines the “Debt Collector.” The provision should be amended to read as follows: “Debt collector means any person who (1) is engaged in a business with the principal purpose of collecting or attempting to collect debts; (2) regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another; or (3) regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due to any person who offers or sells financial products or services to consumers, including an original creditor collecting its own debt” Sections 1.1(e)(1) and (2), which contain exclusions from the definition of debt collector, would be removed.

<sup>13</sup> Consumer Financial Protection Bureau, *Fair Debt Collection Practices Act: CFPB Annual Report 2014*, *supra* note 12, at 14. Consumer complaints related to taking or threatening to take an illegal action comprised 14% of the debt collection complaints received by the CFPB in 2013. *Id.* at 12.

<sup>14</sup> Press Release, Federal Trade Commission, *FTC Settlement Obtains Permanent ban Against Abusive Debt Collection Operation* (Jan. 17, 2013), available at <http://www.ftc.gov/news-events/press-releases/2013/01/ftc-settlement-obtains-permanent-ban-against-abusive-debt>.

<sup>15</sup> Press Release, New York State Office of the Attorney General, *A.G. Schneiderman and FTC Obtain Order Halting Debt Collectors’ Deceptive, Abusive Practices* (July 21, 2014), available at <http://www.ag.ny.gov/press-release/ag-schneiderman-and-ftc-obtain-order-halting-debt-collectors%E2%80%99-deceptive-abusive>.

Committees' suggestion to expand the rules to original creditors, it would be helpful to cite the state law as authority.<sup>16</sup>

In addition, the Committees recommend that Section 1.2(b) include “the date of last payment or, when no payment was made, when the payment was due to be made.” Since the proposed revised regulation requires an itemized accounting of the debt, the date of alleged default should be readily available to both original creditors and third-party debt collectors. Moreover, given the market in time-barred debt,<sup>17</sup> this information is critically important for consumers in order for them to assess whether the statute of limitations has expired.

### **Recommendations Related to Disclosures Regarding Expired Statutes of Limitations**

The sale and collection of time-barred debts has long been recognized as an area of concern.<sup>18</sup> In a seminal study of debt buyers—a critically important sector in debt collection—the FTC noted that “[n]otwithstanding its clear illegality and the consensus among interested parties that collectors should not engage in it, some consumer advocates contend and one recent study concluded that debt buyers, in fact, do file or threaten to file actions to recover on time-barred debt.”<sup>19</sup>

The Committees commend DFS for requiring debt collectors to maintain reasonable procedures for determining the statute of limitations applicable to a debt in Section 1.3(a). The Committees also commend DFS for requiring that the Section 1.3(b) disclosure inform consumers that the threat to sue and actual lawsuits on a time-barred debt are FDCPA violations. In addition, the Committees commend DFS for removing the potentially misleading warning regarding the effect that failure to make payments on a time-barred debt may have on one's credit.

Suing (and threatening to sue) on a time-barred debt is prohibited by the federal Fair Debt Collection Practices Act<sup>20</sup> and also by the New York Debt Collection Procedures Law.<sup>21</sup> The

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<sup>16</sup> The amendment would read as follows: “. . .that debt collectors, in accordance with the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq. and New York General Business Law §601, et seq., are prohibited from engaging in abusive, deceptive, and misleading debt collection efforts, including but not limited to. . . .”

<sup>17</sup> See *infra* Pt. IV.

<sup>18</sup> Federal Trade Commission, *Collecting Consumer Debts: The Challenge of Change; A Workshop Report* 62-64 (Feb. 2009), available at <http://www.ftc.gov/reports/collecting-consumer-debts-challenges-change-federal-trade-commission-workshop-report>.

<sup>19</sup> Federal Trade Commission, *The Structure and Practices of the Debt Buying Industry* 46 (Jan. 2013), available at <http://www.ftc.gov/reports/collecting-consumer-debts-challenges-change-federal-trade-commission-workshop-report>. In its report, the FTC noted that “[t]he data the Commission received from debt buyers suggest that debt buyers usually are likely to know or be able to determine whether the debts on which they are collecting are beyond the statute of limitations.” *Id.* at 49.

<sup>20</sup> See, Brief of Amici Curiae Federal Trade Commission and Consumer Financial Protection Bureau at 9 and 15, *Buchanan v. Northland Group*, No. 13-2523 (6<sup>th</sup> Cir. Mar. 5, 2014), available at [http://www.ftc.gov/system/files/documents/amicus\\_briefs/esther-buchanan-v.northland-group-inc.no.13-2523-6th-cir./1403105buchanan6cir-amicus.pdf](http://www.ftc.gov/system/files/documents/amicus_briefs/esther-buchanan-v.northland-group-inc.no.13-2523-6th-cir./1403105buchanan6cir-amicus.pdf), (last viewed 8/14/2014). See also *Diaz v. Portfolio Recovery Associates, LLC*, No. 10-CV-3920, 2012 WL 1882976, at \*4 (E.D.N.Y. May 24, 2012); *Baptist v. Global Holding & Inv. Co.*,

Committees believe that the most effective way to protect consumers from time-barred would be vigorous regulatory enforcement of the prohibition. Because debt collectors continue to file time-barred lawsuits despite the prohibition, disclosures that alert consumers of important legal rights remain worthwhile. In the statute of limitations area, however, drafting sufficiently understandable and accurate disclosures is very challenging due to the complexity of law. Because information related to time-barred debt is useful to consumers (particularly when they lack legal representation), the Committees recommend that debt collectors be required to include the Section 1.3(b) disclosure in *every* communication with consumers in cases where Section 1.3 applies. Requiring the disclosure in every communication will not impose an undue burden on debt collectors and will go a long way to ensure fair and ethical treatment of time-barred debts.

In addition, the Committees recommend that the Section 1.3(b) disclosure requirements include mention that a consumer should consult an attorney or a legal services organization to obtain information about her legal rights and options. This information is currently only included in the sample notice requirement set out in Section 1.3(c).

Finally, the Committees note that Section 1.3(c)'s sample notice requirement contains several sentences that may not be readily understandable to many consumers, particularly unsophisticated persons. The Committees suggest the following changes:

(c) The following language satisfies the notice requirement contained in Section 1.3(b) of this Part:

“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:

Your creditor or debt collector believes that the legal time limit (statute of limitations) for suing you to collect this debt may have expired. It is a violation of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq., to sue on an expired debt. However, if the creditor sues you to collect on this debt, ~~New York court rules require you to tell the court that the statute of limitations has expired~~ you may be able to prevent the creditor from obtaining a judgment against you. To do so, you must tell the court that the statute of limitations has expired. If you are correct, the court may dismiss the lawsuit. Even if the statute of limitations has expired, you may choose to make payments on the debt. However, be aware: if you make a payment on the debt, admit to owing the debt, promise to pay the debt, or waive the statute of limitations on the debt, the time period in which the debt is enforceable in court may start again. If you would like to learn more about your legal rights and options, you can consult an attorney or a legal assistance or legal aid organization.”

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*L.L.C.*, No. 04–CV–2365, 2007 WL 1989450, at \*5 (E.D.N.Y. July 9, 2007); *Kimber v. Federal Financial Corp.*, 668 F. Supp. 1480 (M.D. Ala. 1987).

<sup>21</sup> General Business Law §601(8).

## **Recommendations Related to Substantiation of Consumer Debts**

The Committees have several recommendations for amendments to strengthen consumer protections related to substantiation of consumer debts.

First, the Committees commend DFS for permitting consumers to dispute debts orally or in writing. This presents an important consumer protection. Under the revised proposed regulations, however, consumers must now also separately request substantiation of the debt pursuant to Section 1.4(a)(2). This requirement is unnecessarily onerous for consumers. The Committees recommend that, if a consumer disputes in writing the validity of a debt, the debt collector should be required to substantiate the debt. Such a requirement would help advance the policy goal of ensuring that debt collectors are collecting on valid debts more efficiently and effectively; moreover, debt collectors should have readily available the information required for substantiation of valid debts.

Second, the Committees recommend that Section 1.4(b) be amended to prohibit debt collectors from selling a debt until written substantiation has been provided to the consumer who has requested such substantiation. As currently written, Section 1.4(b) only prohibits debt collectors from continuing to collect on such debts until written substantiation has been provided. Without this additional provision, unscrupulous debt collectors will be incentivized to sell debts that cannot be substantiated, subjecting consumers to additional debt collection of questionable if not invalid debts, possibly repeatedly. This is a practice that Committee members have seen in their own cases. The practice often leads to unceasing collection efforts, with no verification ever received by the consumer.

Third, the Committees recommend that Section 1.4(c)(1)(i), which pertains to documentation identifying the original creditor, should be amended to specify the “other documents evidencing the indebtedness of the consumer to the original creditor.” Without more, debt collectors may rely on documents that are insufficient to properly substantiate valid debts. For example, the California Debt Buying Practices Act Section 1788.52(b) prohibits a debt buyer from collecting on a debt “in which no signed contract or agreement exists” without “access to a copy of a document provided to the debtor while the account was active, demonstrating that the debt was incurred by the debtor.” The provision further states that “[f]or a revolving credit account, the most recent monthly statement recording a purchase transaction, last payment, or balance transfer shall be deemed sufficient to satisfy this requirement.”

Finally, the Committees recommend that Section 1.4(d) be amended to require debt collectors to retain the required documentation for a period of time following the discharge, sale, or transfer of the debt and / or to transfer the required documentation in the event of the sale or transfer of the debt. In an industry where the sale and resale of debts is common and consumers report many complaints related to debt buyers, the substantiation documentation set out in Section 1.3(c) is critically important to ensure that debt collection occurs for valid debts that can be substantiated and not for debts that are invalid and cannot be substantiated.

## **Recommendation Regarding Uniform Usage of “Must”**

DFS’s proposed revised regulations sometimes articulate mandates utilizing “shall”—such as in Sections 1.2(a), 1.2(b), 1.4(c), 1.5—and other times utilizing “must”—such as in Sections 1.3(a), 1.3(b), 1.4(a), 1.4(b), 1.4(d). In order to ensure uniform application of all requirements in the proposed revised regulations, the Committees recommend that all mandates contain “must.”<sup>22</sup>

### **CONCLUSION**

In conclusion, the City Bar commends DFS for exercising its rulemaking authority to clarify the duties and obligations of debt collectors. Enhanced oversight and enforcement of debt collection—both by original creditors and third-party debt collectors—will help protect all New Yorkers but especially those most vulnerable to abusive, deceptive, and misleading practices.

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<sup>22</sup> See Bryan A. Garner, *Shall We Abandon Shall?* A.B.A. Journal (Aug. 1, 2012), available at [http://www.abajournal.com/magazine/article/shall\\_we\\_abandon\\_shall/](http://www.abajournal.com/magazine/article/shall_we_abandon_shall/).