

Client Update

New York's New Debt Collection Rules Extend Well Beyond the FDCPA and May Influence the CFPB's Rulemaking

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INTRODUCTION

On December 3, 2014, the New York Department of Financial Services ("DFS" or the "Department") issued final regulations on debt collection practices for third-party debt collectors and debt buyers.¹ Announced by Governor Andrew M. Cuomo as "reforms that will protect consumers against abusive and deceptive debt collection practices,"² the regulations impose significant new requirements on certain companies that engage in debt collection in New York State. By defining "debt collectors" as excluding creditors the regulations limit their overt reach to third-party collectors and debt buyers. But, creditors will face new demands from their debt collectors and debt buyers for additional information about customers and debts, so that these entities can comply with the regulations. The new requirements extend well beyond current federal law and may foreshadow the anticipated federal rulemaking on debt collection by the Consumer Financial Protection Bureau ("CFPB").

DFS'S FINAL REGULATIONS

The DFS regulations take effect on March 3, 2015, except for certain regulations relating to itemization of the debt to be provided in initial disclosures and relating to substantiation of consumer debts, which go into effect on August 3, 2015. Requirements under the new debt collection regulations fall into five categories:

¹ Debt Collection by Third-Party Debt Collectors and Debt Buyers, 23 NYCRR 1 (Dec. 3, 2014), available at <http://www.dfs.ny.gov/legal/regulations/adoptions/dsf23t.pdf>

² See Press Release, Governor Cuomo Announces New Regulations Against Abusive and Deceptive Debt Collection Practices (Dec. 3, 2014), at <http://www.dfs.ny.gov/about/press2014/pr1412031.htm>

Initial Disclosures by Debt Collectors.

The DFS regulations require significant additional information to be disclosed to consumers in initial communications, beyond the information required in the “validation notice” prescribed by the Fair Debt Collection Practices Act (“FDCPA”). In particular, under the regulations, third-party debt collectors must send a written notification containing: (a) disclosure that debt collectors are prohibited from engaging in abusive, deceptive and unfair debt collection; (b) notice of the types of income that may not be taken to satisfy a debt; and (c) detailed account-level information including the name of the original creditor and an itemization of the amount of the debt, including totals for interest, fees, charges and payments.

Disclosures About Debts for which the Statutes of Limitations May Be Expired.

If a debt collector “knows or has reason to know” that the statute of limitations has expired, the debt collector must, prior to accepting payment on the debt, provide the consumer with notice that: the debt collector believes the statute of limitations may be expired; suing on expired debt violates the FDCPA; and if the consumer is sued on such debt, the consumer may be able to halt proceedings by alerting the court that the statute of limitations has expired. The debt collector must also explain that the consumer is not required to acknowledge the debt and that any acknowledgment or promise to pay the debt could restart the statute of limitations. This section mandates that debt collectors maintain “reasonable procedures” for determining whether the statute of limitations has expired.

Although the FDCPA itself does not require such disclosures, courts have found that filing or threatening to file an action in court to collect on a debt for which the statute of limitations has expired violates the FDCPA.

Substantiation of Consumer Debts.

If a consumer disputes a debt, the debt collector may treat the dispute as a request for substantiation or must provide instructions as to how to make a written request for substantiation of the debt. Debt collectors must provide substantiation within 60 days of receiving a consumer’s request and must cease collection efforts during that time. The regulations also define the type of documentation required for substantiation, which includes either a copy of a judgment against the consumer or: (a) the signed contract or some other document provided to the alleged debtor while the account was active demonstrating that the debt was incurred by the debtor; (b) the charge-off

account statement (or equivalent document) issued by the original creditor; (c) a description of the complete chain of title, including the date of each assignment, sale and transfer; and (d) records reflecting any prior settlement agreement reached under the regulations. Debt collectors must retain all evidence of the request, including all documents provided in response, until the debt is discharged, sold or transferred.

These requirements create additional obligations related to the substantiation of debt and the retention of records, which are likely to impose a significant burden on debt collectors, as many of the now-necessary documents may not be consistently retained by, or initially obtained from, creditors.

Debt Payment Procedures.

If an agreement to a debt payment schedule or settlement is reached, the debt collector must provide written confirmation of the agreement and notice of exempt income. The debt collector must also provide a quarterly accounting statement while the customer is making scheduled payments.

Communication through Electronic Mail.

After mailing the initial required disclosures, debt collectors may communicate with a consumer through email upon receipt of consumer consent, provided the email account is not owned or provided by the consumer's employer.

CONCLUSION

Under the new DFS regulations, third-party debt collectors and debt buyers will face increased scrutiny and regulation of debt collection activities, including additional document retention and disclosure requirements. Although these regulations do not themselves cover creditors (as some consumer groups had urged), creditors likely will be affected by the heightened information needs of third-party debt collectors and debt buyers. These entities will have to provide a significant amount of information to consumers under the new regulations, which they will need to obtain from creditors, either in the course of collecting on their behalf or in connection with the purchase of accounts in debt sales. Creditors therefore will need to be equipped to provide this information in connection with both debt collection and debt sales activities, and this is likely to have a significant operational impact on creditors.

Beyond DFS, further federal and state regulation of debt collection remains likely. As one of the first state agencies to issue such extensive regulations on

debt collection, DFS's regulations may provide a guidepost for other states. Moreover, the new DFS regulations may impact the CFPB's efforts, given the overlap with areas addressed in the CFPB's Advance Notice of Proposed Rulemaking ("ANPR"), published on November 12, 2013, regarding a planned rulemaking related to debt collection under the FDCPA and the Dodd-Frank Act.³ The ANPR requested comments on state debt collection laws and practices, indicating that the CFPB may be looking to track state law requirements at the federal level, including those related to consumer disclosures for validation notices, time-barred debt and verification of debt. Thus, the DFS regulations signal increased scrutiny and regulation of third-party debt collectors and debt buyers, and the likelihood of heightened state and federal regulation in this area.

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Please do not hesitate to contact us with any questions.

³ Debt Collection (Regulation F), 78 Fed. Reg. 67848 (Nov. 12, 2013).