



## NEW YORK FINALIZES DEBT COLLECTOR AND DEBT BUYER REGULATIONS

New York Governor Andrew Cuomo recently announced new regulations designed to protect consumers against abusive and deceptive debt collection practices. The New York Department of Financial Services issued the final regulations nearly 19 months after it published its original proposal in July 2013.

The governor described the regulations as "nation-leading" reforms that will help to combat aggressive and deceptive practices, help stop suits on so-called "zombie debts," establish a new "substantiation" requirement and address other alleged abuses perceived to be widespread in the debt collection industry. The DFS promulgated the regulations under the first use of its so-called "gap authority," which allows regulation of previously unregulated providers of financial products and services.

### Applicability and General Requirements

The regulations define "debt collector" as any person engaged in a business the principal purpose of which is the collection of any debts, or any person who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. This definition, along with the specific exclusions listed, essentially follows the federal Fair Debt Collection Practices Act's definition.

The New York regulations also expressly provide that a debt collector includes, without limitation, a buyer of debts who seeks to collect such debts either directly or indirectly. The regulations expressly exclude any person with respect to (i) serving, filing, or conveying formal legal pleadings, discovery requests, judgments or other documents pursuant to the applicable rules of civil procedure, (ii) communicating in, or at the direction of, a court of law or in depositions or settlement conferences or other communications in connection with a pending legal action to collect a debt on behalf of a client, or (iii) collecting on or enforcing a money judgment.

While the DFS noted in its issuance of the final regulations that commentators urged it to include original creditors under the definition of debt collector, it states that the regulations are focused on the activities of third-party debt collectors and debt buyers.

The regulations define "debt" as any obligation or alleged obligation of a consumer for the payment of money or its equivalent

which arises out of a transaction wherein credit has been extended to a consumer, and the money, property or service which was the subject of the transaction was primarily for personal, family or household purposes.

The term includes the obligation of a consumer who is a co-maker, guarantor, or endorser, as well as the obligation of the consumer to whom the credit was originally extended. Debt specifically does not include any obligation or alleged obligation of a consumer for the payment of money or its equivalent which arises out of a transaction wherein credit has been provided by a seller of goods or services directly to a consumer exclusively for the purpose of enabling that consumer to purchase such consumer goods or services directly from the seller.

In addition to definitions, the regulations set forth requirements for initial disclosures, disclosures for debts beyond the statute of limitations, substantiation of debts, debt payment procedures, communicating through electronic mail and effective dates.

### Initial Disclosures

Debt collectors will be required to make the following disclosures within certain specified time-frames:

- A disclosure that debt collectors, in accordance with the federal FDCPA, are prohibited from engaging in abusive, deceptive, and unfair debt collection efforts, including, but not limited to, (i) the use or threat of violence, (ii) the use of obscene or profane language and (iii) repeated phone calls made with the intent to annoy, abuse, or harass.
- A written notice using the language specified in the regulations that notifies the debtor of the types of income (*e.g.*, supplemental security income, social security, public assistance, spousal support, maintenance or child support, *etc.*) that may be protected under state and federal law from being used to pay the debt in the event a creditor or debt collector receives a money judgment against the debtor in court.
- With respect to charged-off debts, notification of (i) the name of the original creditor and (ii) an itemized accounting of the debt.

In its issuance of the final regulations, the DFS noted that while some collectors never sue, the DFS views the disclosure of consumers' rights regarding protected income to be important and thus required by the new regulation. Commentors suggested

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reducing the number of disclosures given by posting information about consumer rights on websites in lieu of such disclosures. The DFS stated that while such links are not required, debt collectors are free to link to additional information in their correspondence.

Disclosures for Debts Beyond the Statute of Limitations (SOL)

A debt collector will be required to maintain reasonable procedures for determining the SOL applicable to a debt and whether such SOL has expired. If a debt collector knows or has reason to know that the SOL may be expired, it must provide the consumer with clear and conspicuous notice that (i) the debt collector believes the SOL may be expired, (ii) suing on a debt with an expired SOL violates the federal FDCPA, (iii) if the consumer is sued on a debt with an expired SOL, the consumer may be able to stop the suit, (iv) the consumer need not acknowledge the debt or waive the SOL and (v) if the consumer makes a payment on or acknowledges the debt, the SOL may restart. The regulations set forth sample language for the notice.

This notice must be made using the same medium (*e.g.*, telephone, email, *etc.*) by which the debt collector will accept payment, and must be given before accepting payment.

Substantiation of Debts

The regulations establish the debtor's right to "substantiation" of charged-off debts upon request. The regulations outline procedures for notifying the debtor of the right to substantiation. A debt collector will be required to provide to the consumer written substantiation of a charged-off debt within 60 days of receiving a request for substantiation and must cease collection of the debt until the substantiation is provided.

Substantiation of a charged-off debt must include (i) a copy of a judgment against the debtor or (ii) a group of documents that include the signed contract or application, or a copy of a document provided to the debtor while the account was active (for revolving accounts, the most recent monthly statement may be sufficient), the charge-off account statement, a statement describing the complete chain of title, and any prior settlement agreement reached under the new regulations.

If a debtor requests substantiation, a debt collector will be required to retain the request and the documents provided until the debt is discharged, sold, or transferred.

Debt Payment Procedures

Within five days of agreeing to a debt payment schedule or other agreement to settle the debt, a debt collector will be required to provide the consumer with (i) written confirmation of the payment schedule or agreement and (ii) the same notice discussed above regarding the types of income that may be protected by state and federal law from being used to pay the debt.

The debt collector will also be required to provide periodic accountings while payments are being made and written confirmation of satisfaction of the debt.

Communication Through Electronic Mail

After the initial disclosures are provided, the debt collector will be permitted to communicate with the debtor through electronic mail only if the consumer has (i) voluntarily provided an email account which the consumer has affirmed is not furnished or owned by the consumer's employer and (ii) consented in writing, including by electronic signature, to receive email from the debt collector in reference to a specific debt.

Effective Date and Enforcement

The regulations will take effect March 3, 2015, except that the requirements regarding the initial disclosures with respect to charged-off debts and substantiation will not take effect until August 30, 2015. In its issuance of the final regulations, the DFS noted that the regulations are enforceable by the DFS, along with other regulators or prosecutors, but that they are not privately enforceable.

In addition to state law requirements, there are municipalities in New York (*e.g.*, New York City, *etc.*), which also have collection laws that may apply. The New York Unified Court System also recently adopted new rules specifically designed to prevent unwarranted default judgments in consumer credit debt collection cases. *See our* ALERT dated September 26, 2014. Debt collectors, debt buyers and creditors should carefully examine these laws and regulations in the context of their specific collection practices and third-party vendor relationships to ensure compliance. □

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