



June 23, 2015

NEW YORK ANSWERS ADDITIONAL QUESTIONS REGARDING NEW DEBT COLLECTION REGULATIONS

The New York Department of Financial Services (DFS or Department) late last year released regulations governing debt collectors and debt buyers. See our ALERT dated Dec. 22, 2014. The final regulations were issued nearly 19 months after the publication of the original proposal in July 2013. New York Governor Andrew Cuomo described the regulations as "nation-leading" reforms designed to protect consumers against abusive and deceptive debt collection practices and, in particular, to help stop suits on so-called "zombie debts." The regulations also established a new "substantiation" requirement and addressed other alleged abuses perceived to be widespread in the debt collection industry.

Questions and concerns raised by the collection industry lead the DFS to issue answers to "Frequently Asked Questions" in February 2015. See our ALERT dated Feb. 24, 2015. At that time, the DFS provided answers to 16 FAQs. The DFS recently added answers to 12 new FAQs, bringing the total FAQs to 28.

The regulations require that certain information be provided to the consumer in a "clear and conspicuous" manner. Section 1.1 of the regulations defines "clear and conspicuous" to mean that the statement, representation or term being disclosed is of such size, color, and contrast and/or audibility and is so presented as to be readily noticed and understood by the person to whom it is being disclosed. If such statement is necessary as a modification, explanation or clarification to other information with which it is presented, it must be presented in close proximity to the information it modifies, in a manner so as to be readily noticed and understood.

With respect to "clear and conspicuous," the FAQs answer the following question:

- (1) Does "clear and conspicuous" disclosure of required information mean that information must be provided on the front page of a mailing?
 - A. "Clear and conspicuous" is a fact-specific standard. Facts could necessitate that a disclosure be on the front page of a communication by a debt collector, but not necessarily in every case. Debt collectors should consider factors such as the prominence of the disclosure, the proximity to related

information, whether the disclosure is likely to be seen, and whether the information is readable and understandable.

The regulations introduced the concept of "substantiation" of a debt and require the debt collector to provide notice of substantiation and to substantiate the debt in certain circumstances and within certain time-frames.

With respect to "substantiation," the FAQs answer the following questions:

- (1) In lieu of providing information required in 23 NYCRR 1.4(c) to substantiate a debt, can a debt collector issue a satisfaction of the debt in order to avoid being in violation of the regulation?
 - A. Yes. Failure to provide the required information within 60 days of receipt of the request for substantiation is a violation of the rule enforceable by the Department. However, if a debt collector extinguishes the debt within the 60-day time period and there is no longer a debt for which to provide substantiation, the debt collector would not be in violation of the rule if substantiation were not provided within 60 days.
- (2) If a debt collector cannot provide substantiation of a debt and is not the owner of a debt, and therefore cannot forgive the debt, can the debt collector return the debt to the creditor?
 - A. A debt collector cannot satisfy the obligation to provide substantiation by returning the debt to the creditor. Debt collectors who do not own the debt and therefore cannot extinguish the debt can avoid potential violations by ensuring that the debt can be substantiated **before** commencing collections or receiving assurance from the creditor that the debt can be extinguished if substantiation is requested but cannot be provided. (emphasis in original)
- (3) Can a third-party debt collector have the original creditor provide documents responding to a request for substantiation of a debt?
 - A. Yes, a debt collector may have the original creditor provide the required information. However, the debt collector, who received the request is still responsible

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for ensuring that the information is provided within the time frame required by the rule.

The FAQs also set forth the DFS' answers to the following questions:

- (1) If a consumer is represented by an attorney for purposes of the debt, should the debt collector send the required notices to the attorney of record or to the consumer directly?
- (2) Does the definition of debt include tort claims or utility bills?
- (3) Is a bank an original creditor if the bank purchases a portfolio of debts from another bank?
- (4) If a specific timeline in the regulation refers to "days" and not "business days," does this mean that the requirement refers to "calendar days"?
- (5) May a debt collector combine a disclosure required by the FDCPA and a disclosure required in 23 NYCRR 1 in one communication?
- (6) What information should be included in the accountings required in 23 NYCRR 1.5(b)?
- (7) If a debt collector and consumer agree to a debt payment plan that would satisfy the debt at less than the total amount due, do statements provided to the consumer making payments pursuant to the payment plan need to include the total balance due as if there was no settlement agreement?
- (8) Under 23 NYCRR 1.5(b), may the debt collector provide the quarterly accounting of the debt on a calendar quarter basis, regardless of when a payment or settlement arrangement is entered?

As we noted previously, while it may be helpful to understand the DFS' position with respect to the regulations, we caution that enforcement positions not based on statute, formal regulation or authoritative legal opinion can change over time and so involve a measure of risk. It would be prudent to check back periodically to confirm that the DFS has not changed its position. □

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