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February 13, 2023

By email to Meredith.Weill@dfs.ny.gov
Attn: Meredith Weill
New York State Department of Financial Services
One State Street
New York, NY 10004

Re: Comment in Response to Revised Notice of Proposed Rule Making regarding Debt Collection by Third-Party Debt Collectors and Debt Buyers I.D. No. DFS-50-21-00016-P

Dear Ms. Weill:

Access Justice Brooklyn appreciates the opportunity to comment on the Department of Financial Services' revised proposed amendments to its debt collection rules. The revised proposed amendments will go a long way toward helping curb debt collection abuses by third-party debt collectors, and will address some of the gaps left by the Consumer Financial Protection Bureau's (CFPB) debt collection rule, Regulation F.

At Access Justice Brooklyn, we envision an equitable Brooklyn where everyone knows their rights and has access to legal support. In furtherance of this vision, Access Justice Brooklyn provides high-quality, pro bono legal services and community education to our neighbors in need. Using the collective talents of our dedicated staff and volunteers, we help ensure a more accessible legal system and equitable Brooklyn.

Access Justice Brooklyn's primary referral areas prioritize essential aspects of life, with a focus toward family stability, aging safely and comfortably, personal finances, housing, and freedom of movement. As part of our Consumer Debt practice, Access Justice Brooklyn provides pro se assistance and limited scope representation to people facing insurmountable debt due to job loss, a family crisis, or serious medical challenges.

Access Justice Brooklyn is pleased to see that the revised proposed amendments include the following vital protections for New Yorkers:

- A requirement that debt collectors label the type of itemization date being disclosed (section 1.2(a)(1)(ii));
- Provisions permitting debt collectors to use the charge-off date as the itemization date for only revolving credit accounts (section 1.2(a)(1)(i)(a)) and requiring debt collectors to use the last payment date as the itemization date, if available, for all other accounts (section 1.2(a)(1)(i)(b));

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- A requirement that debt collectors identify whether the account number disclosed is associated with the last payment date or with the last statement date (section 1.2(a)(1)(iii));
- A requirement that debt collectors disclose whether a debt has been reduced to a judgment and, if so, that they identify the name of the court in which the judgment was entered, the date the judgment was entered, and the caption and index number associated with the judgment (section 1.2(a)(1)(vii));
- The addition of COVID-19 stimulus relief funds to the list of exempt funds that debt collectors must disclose (section 1.2(a)(4)); and
- A requirement that debt collectors inform consumers of any language services available (section 1.2(a)(5)).

We urge DFS to make the following minor but important changes to further strengthen its debt collection rules, including to clarify the purpose of the revised proposed amendments and avoid any unintended consequences:

1. **Clarify that the definition of "creditor" does not include debt buyers (section 1.1(d)).**

We recommend clarifying that DFS' proposed revised definition of "creditor" does not include debt buyers, by explicitly stating that a debt buyer is not considered a creditor under DFS' debt collection rules. Though DFS's definition of "debt collector" expressly includes debt buyers, DFS should make clear that a debt buyer is not *also* a creditor under these rules, by expressly *excluding* debt buyers from the definition of "creditor."

2. **Require *all* debt collectors, *i.e.*, including those seeking to collect on a revolving credit account, to clearly and conspicuously identify the merchant brand, affinity brand, or facility name, if any, associated with the debt (section 1.2(a)(1)(iv)).**

DFS should not permit debt collectors seeking to collect on a revolving credit account to fulfill the proposed requirement in section 1.2(a)(1)(iv) by attaching an account statement bearing the name of the merchant brand, affinity brand, or facility name, to the validation notice. Instead, DFS should require debt collectors collecting on those debts, like other debts, to provide this information clearly and conspicuously on the validation notice along with other key information that debt collectors must disclose as part of the validation notice.

3. **Align the proposed language access provision with improvements recently proposed to New York City's language access provision (section 1.2(a)(5)).**

We are pleased that DFS' revised proposed amendments include language access provisions, as consumer advocates had recommended in the February 14, 2022 comment on DFS' original Notice of Proposed Rule Making. However, in the fall of 2022, the New York City Department of Consumer and Worker Protection (NYC DCWP) announced a public comment period ending December 19, 2022 – prior to the publication of DFS' Revised Notice of Proposed Rule Making

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– on proposed amendments to New York City's debt collection rules, including its language access provisions. We therefore recommend that DFS make minor amendments to its language access provisions to mirror the anticipated amendments to NYC DCWP's language access provisions to the extent possible. At a minimum, DFS should require debt collectors to indicate a consumer's language preference when returning, selling, assigning, or referring for debt collection any consumer account (*see* section 5-77(d)(19) of NYC DCWP's proposed amendments).

We further note, however, that in our many years of experience helping low-income New York City residents, including many with limited English proficiency, we have yet to hear of any debt collectors that have provided required written notices and other correspondence in the consumer's primary language. To ensure meaningful language access for the estimated 2.5 million New York State residents with limited English-language proficiency, debt collectors should be required to have and offer language access services. For instance, if the original contract giving rise to the alleged debt is in a language other than English or if a debt collector uses a language other than English in the initial oral communication with a consumer, debt collectors should be mandated to provide required notices in that language.

4. **Clarify that debt collectors must obtain an affirmative request directly from a consumer in order to provide required disclosures only by electronic communication (section 1.2(b)).**

Proposed section 1.2(b) states that debt collectors may provide the disclosures required under section 1.2(a) exclusively by electronic communication if "electronic communication has been affirmatively requested by a consumer." DFS should clarify that the consumer must have affirmatively requested electronic communication *directly from the debt collector that would be providing the disclosures* in order for the debt collector to be allowed to provide the disclosures only by electronic communication, in order to prevent debt collectors from evading the spirit of this provision by, for example, deeming consent purportedly obtained through a consumer's passive assent to a form contract with a creditor to constitute an affirmative request.

5. **Correct the typo in section 1.2(c).**

Section 1.2(c) should refer to "notice as described in paragraphs 1 through 5," not "paragraphs 1 through 4."

6. **Simplify the statute of limitations disclosure requirements and safe-harbor language (section 1.3(b), (c), (e), and (f)).**

To the extent that DFS continues to allow the collection of time-barred debt, we support requiring disclosure of the fact that a debt is time-barred and limiting collection on time-barred debts to written communications. We strongly recommend, however, that DFS simplify the disclosure requirements and the corresponding safe-harbor language in section 1.3(e), which in

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our experience would be far too confusing and wordy to be meaningful for New Yorkers, especially the disclosures that subsections 1.3(b)(2), (3), and (4) would require. We therefore suggest the following simpler and clearer safe-harbor language:

- For time-barred debts on which the statute of limitations cannot be revived by payment or acknowledgment, pursuant to Section 214-i of the Civil Practice Law and Rules: "NYS regulations require us to disclose the following: We believe that it is illegal for you to be sued on this debt because this debt is too old. To learn more about your legal rights and options, consult an attorney or a legal assistance or legal aid organization."
- For time-barred debts on which the statute of limitations may be revived by payment or by written acknowledgement pursuant to General Obligations Law section 17-101: "NYS regulations require us to disclose the following: We believe that it is illegal for you to be sued on this debt because this debt is too old. However, be aware that if you make a payment on this debt or admit in writing that you owe this debt, then you will give the creditor or debt collector more time under the law to sue you to collect on this debt. To learn more about your legal rights and options, consult an attorney or a legal assistance or legal aid organization."

We also strongly recommend that DFS:

- Clarify that debt collectors must state that they will not sue on the debt because the debt is too old (this language is included in the safe-harbor language in section 1.3(e) and (f), but the underlying requirement is not listed among the required disclosures in section 1.3(b)); and
- Change the language in both section 1.3(b) and section 1.3(b)(1) to read "the statute of limitations has expired" instead of "the statute of limitations for a debt may be or has expired," so that it is consistent with the statement in the safe-harbor language that the debt "is" too old to be sued on.

(We also note, as a technical matter, that the current proposed safe-harbor language in section 1.3(f) does not actually include the disclosures that section 1.3(b)(2) and (4) would require, though we recommend omitting these disclosures.)

7. Clarify that debt collectors may attempt to collect on time-barred debts only in writing (section 1.3(d)). DFS should clarify that debt collectors may attempt to collect on time-barred debts *only* in writing by deleting the term "exclusively" from section 1.3(d). We also recommend clarifying the wording of section 1.3(d) along the following lines: "When collecting on a debt that the debt collector has identified as time-barred pursuant to subdivision (a) or (b) of this section, the debt collector may only communicate with the consumer in writing unless:

(i) the consumer contacts the collector via telephone, in person, or in another manner requiring oral communication by the debt collector,

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(ii) the consumer requests a return call from the collector,
(iii) the consumer requests a method of communication pursuant to section 601-b of the General Business Law that is not in writing,
(iv) the consumer provides written and revocable consent to oral communication directly to the debt collector, or
(v) a court of competent jurisdiction provides express permission."

8. Clarify the communication requirements (section 1.6).

We strongly recommend that DFS:

- Clarify that section 1.6(a) does not permit a debt collector to have a completed telephone call and then three attempted telephone calls during the same seven-day period;
- Issue FAQs regarding the finalized debt collection rules, including to clarify, in section 1.6(a), what a "completed" call is (as discussed by the CFPB);
- Limit the number of additional calls, in section 1.6(a), that a debt collector may make during a seven-day period with a consumer's consent;
- Omit the word "exclusively" from section 1.6(b), which purports to limit the circumstances under which a debt collector may communicate with a consumer through electronic communication; otherwise, debt collectors may evade the requirements in section 1.6(b) simply by using at least one non-electronic method of communication;
- Require debt collectors, in section 1.6(c), to allow consumers to opt out of electronic communications by replying "stop," in addition to whatever other opt-out methods are available, as this is a well-established, universal opt-out method and would prevent reply messages; and
- Clarify that any communications pursuant to section 1.6(e) must still comply with section 1.6(c) and (d);

Thank you for the opportunity to comment. Please feel free to contact me at 718-624-3895 with any questions.

Sincerely,

Sidney Cherubin

Sidney Cherubin
Director of Legal Services