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“Start Spreading the News”: Recent New York Regulations Impact Debt Collection and Default Servicing

U.S. Consumer Financial Services Alert

By: Steven M. Kaplan, Gregory N. Blase, Christopher E. Shelton

Last month, the New York Department of Financial Services (“DFS”) finalized a regulation with a number of novel requirements affecting debt collection (including servicing delinquent loans) in New York.¹ Previously, debt collection in New York was subject to (1) relatively limited requirements set by New York statute² and several municipal ordinances, and (2) the federal Fair Debt Collection Practices Act (“FDCPA”).³ While parts of the new DFS regulation are modeled on the FDCPA, other requirements depart drastically from the federal framework. Areas of novel regulation include disclosures to consumers regarding statutes of limitations and charged-off debts, as well as restrictions on sending emails to consumers. The Consumer Financial Protection Bureau (“CFPB”) is drafting a debt collection regulation to supplement the FDCPA, and it remains to be seen whether the New York regulation becomes a bellwether of changes at the federal level or by other states.

Below, we compare the New York debt collection regulation to the FDCPA and the CFPB’s ongoing rulemaking and highlight the major issues that are likely to confront debt collectors and servicers of delinquent loans in New York.

I. Applicability of the New York Regulation

The starting point in assessing the impact of the New York regulation is to understand which entities it covers and how its coverage compares to the FDCPA.

Similar to the FDCPA, the New York regulation applies to “debt collectors,” which is defined to include 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.”⁴ The New York regulation also incorporates several of the FDCPA’s exceptions from the definition of “debt collector,” including the exemption for any “debt which was not in default at the time it was obtained by” the person.⁵ Thus, the servicing of loans that were current at time that they were obtained does not appear to be covered by the New York regulation.

There are several distinctions between the definition of entities covered by the New York regulation as compared with those covered by the FDCPA. The New York regulation’s coverage is potentially *narrower* than the FDCPA’s in the following areas:

- While the FDCPA applies to a “creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts,” the New York regulation omits this language.⁶

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- The New York regulation omits the FDCPA’s coverage of “any business the principal purpose of which is the enforcement of security interests.”⁷
- The New York regulation exempts collection of obligations “aris[ing] 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.”⁸ Thus, the New York regulation does not appear to apply to collection on seller-financed transactions.
- The New York regulation exempts certain activities related to filing and conducting lawsuits or collecting on a money judgment of a court.⁹

On the other hand, the New York regulation may be *broader* than the FDCPA in the following areas:

- The New York regulation expressly applies to “a buyer of debts who seeks to collect such debts either directly or indirectly,” while the FDCPA does not expressly cover such debt buyers.¹⁰
- The New York regulation expressly applies to the obligations of “a co-maker, guarantor, or endorser,” not just a primary debtor.¹¹
- Unlike the FDCPA, the New York regulation is not limited to interstate commerce.¹²

Interestingly, apart from debt buyers, the New York regulation does not apply to persons who collect debts on their own behalf. Indeed, the New York DFS has emphasized that its “rule is focused on the activities of third-party debt collectors and debt buyers.”¹³ In contrast, the CFPB is currently considering whether to include “first-party” debt collectors in its upcoming federal regulation on debt collection.¹⁴

II. Initial Disclosures

The New York regulation requires a debt collector to provide “initial disclosures” within five days of the initial communication made in connection with the collection of any debt, unless the consumer has already paid the debt. The disclosures are required to include (1) a summary of some of the consumer’s rights under the FDCPA; and (2) a list of types of income that may be protected from collection or garnishment under state or federal law.¹⁵

Moreover, with respect to any “charged-off” debt, a debt collector must disclose (within **five** days of the initial debt collection communication) the name of the original creditor and an itemized accounting of the debt.¹⁶ The regulation defines the term “charge-off” to mean “the accounting action taken by an original creditor to remove a debt obligation from its financial statements by treating it as a loss or expense.”¹⁷ The “original creditor” is “any person or such person’s successor in interest by way of merger, acquisition, or otherwise, who extends credit creating a debt.”¹⁸

III. Statute of Limitations Research and Disclosures

Another novel feature of the New York regulation is its new requirements surrounding statutes of limitations. This topic is not specifically addressed in the FDCPA, but the CFPB is considering addressing time-barred debts in its upcoming debt collection regulation.¹⁹

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First, the New York regulation requires a debt collector to “maintain reasonable procedures for determining the statute of limitations applicable to a debt it is collecting and whether such statute of limitations has expired.”²⁰

Second, the New York regulation requires a debt collector to provide several disclosures to the consumer if the debt collector “knows or has reason to know that the statute of limitations for a debt may be expired, before accepting payment on the debt.”²¹ Perhaps most controversially, one of the required disclosures is a statement that “suing on a debt for which the statute of limitations has expired is a violation of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq.,”²² although nothing in the FDCPA expressly prohibits the collection of time-barred debt.

Like the New York DFS, the CFPB also suggests the FDCPA prohibits the collection of time-barred debt.²³ The CFPB bases its interpretation on district court decisions that take issue with the “filing of a lawsuit debt that *appears* to be time-barred,” without the debt collector having first determined after *a reasonable inquiry* that that limitations period *has been or should be tolled*.²⁴ This appears to be a more expansive interpretation of the law than the caselaw would support and is troubling for this reason.

IV. Special Treatment of Charged-Off Debts

The New York regulation contains additional procedures regarding “charged-off” debts.²⁵

First, as noted above, with respect to a charged-off debt, the debt collector must provide the consumer with (1) a clear and conspicuous written notice of the name of the original creditor, and (2) an itemized accounting of the debt, containing certain items prescribed by the regulation.²⁶ The required timeframe for this written notice is the same as the initial disclosures under the New York regulation and the debt validation notice under the FDCPA.²⁷

Second, the New York regulation contains a process for “substantiation” of charged-off debts that is different from the validation of debts under the FDCPA.²⁸ If a consumer “disputes, orally or in writing, the validity of a charged-off debt or the right of the debt collector to collect on a charged-off debt,” then the debt collector must comply with certain procedures to notify the consumer about how to request substantiation of the debt.²⁹ The notification procedures can be avoided if “the debt collector has already provided the consumer the information required” regarding how to request substantiation.³⁰ Accordingly, debt collectors might ease their compliance burden by supplying this information at the same time as the initial disclosures.

If the consumer makes a request for substantiation, the debt collector must generally: (1) provide substantiation within 60 days of receiving the request; and (2) cease collection activities until the substantiation is provided.³¹ The substantiation must be in written form and must include one of several specified documents, including a copy of a judgment, the charge-off account statement, a complete chain of title, or certain records regarding a prior settlement agreement.³²

The FDCPA contains a different schedule for validation of debts, with the consumer having only 30 days after receipt of the debt validation notice to dispute the debt.³³ The FDCPA is also less prescriptive regarding the validating documents that must be provided to the debtor.³⁴ Situations could arise in which both validation under the FDCPA and substantiation

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under the New York regulation are necessary. It is possible that a debt collector could craft a single communication to comply with both sets of requirements. Note that a debt collector could quickly complete validation of a debt for purposes of the FDCPA and substantiation of a debt for purposes of the New York regulation, but still have to wait the full 30-day period required by the FDCPA before resuming collection activities.

V. Procedures for Payment of Debts

The New York regulations contain a novel procedure for when a debt collector agrees “to a debt payment schedule or other agreement to settle a debt.”³⁵ Within five business days of the agreement, the debt collector must send to the consumer: (1) a written confirmation, containing “all material terms and conditions relating to the payments and schedule”; and (2) a disclosure regarding social security and other income that is protected from being taken to pay the debt.³⁶ While the consumer is making scheduled payments, the debt collector is required to send an accounting of the debt on at least a quarterly basis.³⁷

Additionally, within “20 business days of the receipt of a payment satisfying a consumer’s debt, the debt collector shall send to the consumer a written confirmation of the satisfaction of the debt that identifies the original creditor and the account number.” This requirement applies whether or not the debt collector paid off the debt in accordance with a settlement agreement.

We note that the CFPB has requested public comment on whether there should be restrictions on what it terms “payment acts and practices,” including whether “there any State or local laws that are useful models to consider.”³⁸ Thus, the New York regulation may influence federal regulation on this issue.

VI. Restrictions on Email with Consumers

After the debt collector has provided the initial disclosures required by the New York regulation, the debt collector is prohibited from corresponding by email with a consumer unless:

The consumer has voluntarily provided an email address to the debt collector that “the consumer has affirmed is not an electronic mail account furnished or owned by the consumer’s employer”; or

The consumer has consented in writing, including by electronic signature, to receive emails from the debt collector in reference to a specific debt; or

The debt collector sends an email to a consumer only in order to satisfy the above requirements.³⁹

VII. Effective Date

Most provisions of the New York regulation will take effect on March 3, 2015. However, the various requirements related to charged-off debt are effective on August 30, 2015.⁴⁰

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VIII. No Private Right of Action for Noncompliance

DFS has noted that some debt collectors have “inquired whether the rule creates a private right of action. The rules are not privately enforceable. The rules are state regulations enforceable by the Department, and may be enforceable by other regulators or prosecutors.”⁴¹ Thus it appears that the rules cannot be directly enforced through a private lawsuit.

* * *

The New York debt collection regulation will force any entities that collect debts in New York to reevaluate their procedures, primarily by incorporating new consumer disclosures, but also by researching applicable statutes of limitations and curtailing email communications with consumers.

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¹ Debt Collection by Third-Party Debt Collectors and Debt Buyers Regulation, N.Y. Comp. Codes R. Regs. tit. 23, pt. 1 (*available at* <http://www.dfs.ny.gov/legal/regulations/adoptions/dfs23t.pdf>).

² See Debt Collection Procedures Law, N.Y. Gen. Bus. Law art. 29-H.

³ 15 U.S.C. § 1692 *et seq.*

⁴ Compare N.Y. Comp. Codes R. Regs. tit. 23, §§ 1.1(d)-(e) with 15 U.S.C. §§ 1692a(5)-(6).

⁵ Compare N.Y. Comp. Codes R. Regs. tit. 23, § 1.1(e)(6)(iii) with 15 U.S.C. § 1692a(6)(F)(iii).

⁶ 15 U.S.C. § 1692a(6).

⁷ *Id.*

⁸ N.Y. Comp. Codes R. Regs. tit. 23, §§ 1.1(d).

⁹ N.Y. Comp. Codes R. Regs. tit. 23, §§ 1.1(e)(7).

¹⁰ N.Y. Comp. Codes R. Regs. tit. 23, § 1.1(e).

¹¹ N.Y. Comp. Codes R. Regs. tit. 23, § 1.1(d).

¹² 15 U.S.C. § 1692a(6).

¹³ N.Y. Reg. vol. 36, issue 48 at 20 (Dec. 3, 2014) (notice of adoption).

¹⁴ See Debt Collection (Regulation F), 78 Fed. Reg. 67848, 67854 (Nov. 12, 2013) (advance notice of proposed rulemaking).

¹⁵ N.Y. Comp. Codes R. Regs. tit. 23, § 1.2.

¹⁶ The regulation states that the itemization shall include: “(i) the total amount of the debt due as of charge-off; (ii) the total amount of interest accrued since charge-off; (iii) the total amount of

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non-interest charges or fees accrued since charge-off; and (iv) the total amount of payments made on the debt since the charge-off.” N.Y. Comp. Codes R. Regs. tit. 23, § 1.2(b)(2).

¹⁷ N.Y. Comp. Codes R. Regs. tit. 23, § 1.1(a).

¹⁸ N.Y. Comp. Codes R. Regs. tit. 23, § 1.1(f).

¹⁹ See Debt Collection (Regulation F), 78 Fed. Reg. 67848, 67875-78 (Nov. 12, 2013) (advance notice of proposed rulemaking).

²⁰ N.Y. Comp. Codes R. Regs. tit. 23, § 1.3(a).

²¹ N.Y. Comp. Codes R. Regs. tit. 23, § 1.3(b).

²² *Id.*

²³ See Debt Collection (Regulation F), 78 Fed. Reg. 67848, 67875 (Nov. 12, 2013) (advance notice of proposed rulemaking) (citing *Kimber v. Fed. Fin. Corp.*, 668 F. Supp. 1480 (M.D. Ala. 1987); *Basile v. Blatt, Hasenmiller, Liebsker & Moore LLC*, 632 F. Supp. 2d 842, 845 (N.D. Ill. 2009)).

²⁴ See, e.g., *Baptist v. Global Holding & Inv. Co.*, No. 04-CV-2365, 2007 WL 1989450, at *5 (E.D.N.Y. July 9, 2007) (quoting *Kimber v. Fed. Fin. Corp.*, 668 F. Supp. 1480, 1487 (M.D. Ala. 1987)) (emphasis added).

²⁵ N.Y. Comp. Codes R. Regs. tit. 23, § 1.1(a).

²⁶ N.Y. Comp. Codes R. Regs. tit. 23, § 1.2(b).

²⁷ See 15 U.S.C. § 1692g(a).

²⁸ See 15 U.S.C. § 1692g(b).

²⁹ N.Y. Comp. Codes R. Regs. tit. 23, § 1.4(a).

³⁰ *Id.*

³¹ N.Y. Comp. Codes R. Regs. tit. 23, § 1.4(b).

³² N.Y. Comp. Codes R. Regs. tit. 23, § 1.4(c).

³³ See 15 U.S.C. § 1692g(b).

³⁴ *Id.*

³⁵ N.Y. Comp. Codes R. Regs. tit. 23, § 1.5(a).

³⁶ *Id.*

³⁷ N.Y. Comp. Codes R. Regs. tit. 23, § 1.5(b).

³⁸ See Debt Collection (Regulation F), 78 Fed. Reg. 67848, 67874 (Nov. 12, 2013) (advance notice of proposed rulemaking).

³⁹ N.Y. Comp. Codes R. Regs. tit. 23, § 1.6(b).

⁴⁰ N.Y. Comp. Codes R. Regs. tit. 23, § 1.7.

⁴¹ N.Y. Reg. vol. 36, issue 48 at 20 (Dec. 3, 2014) (notice of adoption).

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