December 10, 2024

Department of Consumer and Worker Protection
42 Broadway
New York, NY 10004
Via email: rulecomments@dcwp.nyc.gov

Re: Proposed Amendment of Rules Relating to Debt Collectors

1. INITIAL STATEMENT

On behalf of the American Financial Services Association ("AFSA"),[1] thank you for the opportunity to provide additional comments on the Department of Consumer and Worker Protection's ("DCWP" or "the Department") updated proposed amendments to its rules relating to debt collectors. We share DCWP's goal of promoting fair debt collection practices, and we appreciate DCWP's consideration of our previous comments. Likewise, we welcome DCWP's efforts to clarify the proposed rules and to bring them into line with state and federal requirements, but we believe further amendment is necessary to avoid significant unintended consequences for consumers and financial institutions alike. In addition, we note the unreasonably truncated final comment period for the amended rules, given recent clarifications that have far-reaching consequences for AFSA members. Finally, we believe that unless DWCP either discards the current proposed amendment as it relates to creditors or implements additional amendments, the viability of the rules will be impaired because of federal and state preemption.

Comment Period and Due Process

As is evidenced by the length and depth of this AFSA submission, our members have significant concerns about the proposed amendments, yet have been forced, by the extremely short final comment period for the amended rules, and the far-reaching and unexpected implications for their businesses of recent clarifications, to hastily review, assemble and submit comments to amendments that, for over 24 months, have not, as proposed, included creditors collecting their own debts.

For that reason we believe that the entire rulemaking process should be reopened to allow careful, considered assessments to be made, over a realistic period. This is the only way we believe that the Department can access the feedback required to avoid the unintended consequences outlined in this letter.

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[1] Founded in 1916, the American Financial Services Association (AFSA), based in Washington, D.C., is the primary trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including direct and indirect vehicle financing, traditional installment loans, mortgages, payment cards, and retail sales finance. AFSA members do not provide payday or vehicle title loans.

2. CONSUMER HARM

All of AFSA's concerns boil down to the cumulative effect of the proposed rules on its members' customers in residing in New York City ("NYC"). For example, early communication with struggling customers is critical to decreasing the likelihood of advanced delinquency and helping customers get back on track before they are so far behind that they are facing bankruptcy, vehicle repossession, or foreclosure. In the most basic cases, immediate contact after a missed payment due date often triggers payment by customers who have simply forgotten to pay. Limiting these communication options is counterproductive and means more NYC consumers will face the consequences of advanced delinquency, negatively affecting credit score/credit history, limiting future access to credit and other financial services, and lessening their chances of increased financial capability and mobility. This risk is greater for consumers with limited financial literacy who may not know how to request information on their options. Further, significant new and unexpected responsibilities for creditors mean an increased compliance burden, which raises costs, which, in turn, increases the cost of credit, and reduces its availability for those who rely on it.

3. CREDITORS COLLECTING THEIR OWN DEBTS DIFFER RADICALLY FROM THIRD-PARTY DEBT COLLECTORS

The definition of "Debt Collector" should exclude, at a minimum, creditors collecting their own debt, under their own name.

AFSA members are primarily concerned about the recent clarification issued during the November 7th DCWP 101 Webinar, that the definition of "Debt Collector" applies to original creditors. Prior to this, based on the plain language of the proposed change to this definition, it was clear that the first drafts of the proposed rule did *not* apply to creditors. Indeed, it is apparent that the original proposed rules were drafted with *only* third-party debt collectors in mind. Given this abrupt and fundamental change, AFSA members suddenly and unexpectedly must work out how they will comply with significantly increased and duplicative oversight, and onerous, burdensome new requirements. Most importantly, these ill-advised changes will lead to consumer harm.

Creditors chosen by consumers are fundamentally different from traditional debt collectors or debt buyers.

As we noted previously, creditors collecting their own debts are different from third-party debt collectors and operate under different incentives and standards. DCWP recognizes the distinction between creditors and true debt collectors through the declaration in the code with respect to "the practices of debt collection agencies whose sole concern is the collection of debts."[2] Congress has also recognized this in the Fair Debt Collection Practices Act ("FDCPA"), establishing that

[2] New York City, N.Y., Code § 20-488, New York City, N.Y., Code § 20-488

creditors "generally are restrained by the desire to protect their goodwill when collecting past due accounts," which distinguishes them from debt collectors who are "likely to have no future contact with the consumer and often are unconcerned with the consumer's opinion of them." The FDCPA definition of "debt collector" excludes various entities from its scope and recognizes that a creditor seeking to collect debts on its own behalf and under its own name ordinarily does not qualify as a "debt collector."[3] The FDCPA also preempts state and local laws that are inconsistent with the FDCPA, as the proposed rule is as currently drafted.[4] Creditors inherently operate differently from debt buyers or third-party debt collectors, because their customer relationship with the consumer and their communications with that consumer, ***are not limited to the business of collecting on a debt***. Specifically:

- Creditors originate their own accounts or acquire accounts shortly after origination and well before default. AFSA members and other creditors usually collect more recent installments from consumers with whom they have a long-term, ongoing relationship and who may have multiple accounts with the creditor.
- AFSA members interact with consumers with the goals of preserving existing customer relationships and building future customer relationships.
- Third-party debt collectors and debt buyers most often collect mature, static, full-account charged-off balances from consumers with whom they have no prior or ongoing relationship.
- Debt buyers and third-party debt collectors may operate with very limited information regarding the consumer, or the account involved, and must rely on the data and documentation provided by the original creditor.
- Creditors may continue to service an account, working towards mutually beneficial solutions when a customer's account is delinquent, with the goal of preserving or rehabilitating a customer to a performing/current status relationship.
- Debt buyers and third-party debt collectors solely engage in debt management or debt collection activities, with less regard for maintaining a relationship with the customer.

Aside from conflicting with the FDCPA, these NYC efforts also conflict with New York state law and policy that recognize the critical distinction between original creditors and debt collectors.[5] This distinction is reflected in Article 29-H of the New York General Business Law that distinctly defines "principal creditor" and "debt collector."[6] This distinction is also evident in how the New York State Department of Financial Services (DFS) regulates debt collection practices through its Debt Collection Regulation, which is Part 1 of Title 23 of the New York Codes, Rules, and Regulations. Specifically, those DFS regulations separately define "original creditor" and "debt collector," the latter definition expressly excluding "any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor."[7] This

[3] 15 U.S.C. § 1592a(6).
[4] 15 U.S.C. § 1592n
[5] *See Eric M. Berman, P.C. v. City of New York*, 25 N.Y.3d 684, 690 (2015) (recognizing state preemption occurs when a local government adopts a law inconsistent with New York State law).
[6] N.Y. Gen. Bus. Law § 600 (3, 7).
[7] N.Y. Comp. Codes R. & Regs. tit. 23, § 1.1 (e, f).

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distinction is also found across other New York laws, including the Civil Practice Laws and Rules governing enforcement of default judgments, as highlighted in the lawsuit recently brought by ACA International, Inc. that seeks to enjoin these NYC proposed rules. Not only do these New York state laws and regulations distinguish creditors from debt collectors in their defined terms, but they also differentiate based on the types of obligations to which the parties are subject. For example, DFS regulations, including requirements to provide statements of consumer rights, debt validation notices, an itemized accounting of the debt, and restrictions on electronic communication apply to third part debt collectors and specifically exclude creditors. The proposed NYC amendments clearly conflict with the state's approach to regulating the activities of debt collectors differently from those of creditors, by imposing the types of obligations that the state of New York intentionally chose not to require of creditors.

The amended proposed rules will harm consumers if applied to creditors

Most importantly, we encourage DCWP to discard this proposed amendment to avoid significant unintended consequences for consumers. The same requirements that may benefit consumers when applied to third-party debt collectors are likely to harm consumers if applied to creditors. While we provide more detail in the following sections, it is worth highlighting a few of the most critical issues.

First, the contact restrictions will lead to more consumers losing access to credit. Existing financial institution customers are accustomed to ongoing communications about their debts, ranging from monthly statements and payment reminders, to outreach about delinquency management programs and opportunities. The proposed rules will restrict these standard, day-to-day communications between financial institutions and their customers, including electronic communications through online apps that consumers today rely upon. This is due to:

1. The overbroad definitions of "debt" in the existing rules, ostensibly covering accounts in good standing, let-alone ones that have just entered delinquency;
2. The overbroad definition of "debt collector" in the proposed rules;
3. An unworkable customer and omni-channel communications cap in the proposed rule;
4. An impossible requirement to name a single person and telephone number answered by a natural person for each customer to contact for an undefined period of time; and,
5. A requirement that creditors have expressed written consent to send digital communications, to collect a debt even from those customers who have already requested that the creditors communicate with them digitally and are regularly receiving these digital communications from the creditor.

All of this will be to the detriment of consumers, who will have less information about their accounts and the options available to them when facing hardship.

Second, while the rules' credit reporting restrictions and validation notice requirements may be well-intended, as applied to creditors they are vague and impossible to comply with until, at a minimum, an account is charged off. The reporting restrictions are triggered by the sending of the validation notice, but it is unclear when that letter is triggered. On the one hand, the

ambiguous definitions of "debt" and "debt collector" suggests it should be sent pre-charge off, and maybe pre-delinquency. On the other, the requirement that certain information be included as of the "Itemization Reference Date" suggests it can only be sent post-charge-off.

Is DCWP requiring creditors to charge-off accounts immediately after a customer receives a statement, even if it is in good standing, so that the required information can be included in a dunning letter? Is it also requiring creditors, who have been furnishing information to credit bureaus since account opening, to stop furnishing after the account is 14 days past due? If so, how is this done while complying with the Fair Credit Reporting Act completeness and accuracy requirements? Most importantly, this may confuse consumers, hurt their credit scores and decrease their access to information about their accounts at a critical time.

The proposal fails to consider the differences between consumers' ongoing relationships with the creditors of their choice and consumers' intermittent interactions with third-party debt collectors. Consumers select their creditors for financial products and services that they can use for months or years, and those who are dissatisfied can take their business elsewhere. Financial institutions are incentivized to communicate fairly and effectively with their customers, and to seek mutually beneficial solutions when customers have difficulty paying their debts. Financial Institutions are also subject to extensive state and federal regulatory oversight of their activities, including those related to collections. In contrast, consumers have no choice in third-party debt collectors, who are typically less regulated entities with no incentive to earn the repeat business of the customers they contact. These distinct circumstances carry different types and levels of risk for consumers, which the proposed rules disregard.

For these reasons, AFSA believes that the proposed restrictions should not be applied to creditors collecting their own debt, in their own name, on the grounds that the amendments will likely significantly harm NYC customers, and, therefore, that the applicability of the proposed rule to creditors should be removed. It is important to remember that creditors are already subject to federal requirements regarding how to clearly bill customers and handle any billing disputes that may be raised by the customers in a timely manner. Additionally, customers generally have an opportunity to choose their creditor based on reputation, product offerings, and communication methods.

Finally, the proposed restrictions impact the relationship that consumers have chosen to establish with their creditors and negatively affects the ability of creditors to meet customer needs and service their accounts in a way that is best for the consumers. Simply put, creditors are often in the best position to help their customers and must be able to communicate with them to assess their needs and help those in financial difficulty.

Specific Clarification:

- Clarify that the proposed rules do not apply to creditors collecting their own debt by returning to the proposed definition of debt collector, which was:

- "The term 'debt collector' means any person engaged in any business with the principal purpose of which is the collection of any debts or who regularly collects, or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due to another person."

4. CONSUMERS ARE HARMED WHEN CREDITORS FACE SIGNIFICANT OPERATIONAL DISRUPTION

In addition to the overall unworkability of the proposed rules as applied to creditors, the individual revisions themselves are vague and likely impossible to comply with.

Definition of "Debt"

Without withdrawing its preemption-based objections and absent the removal of the rules' applicability to creditors, AFSA recommends that DCWP amend its definition of debt, so it is only applicable to collections of charged-off debt. There are provisions contained within the rule that explicitly assume that the debt is charged-off that cannot be reconciled with collections on pre-charge-off debt, such as the provisions related to the Itemization Reference Date and the validation documentation required to provide a charge-off statement. Clearly, a creditor cannot provide a charge-off statement on an account that has not been charged-off. If it is DCWP's intention to force creditors to charge off accounts that are merely delinquent, such an outcome would harm consumers who wish to keep their accounts, and in the case of banks would interfere with bank operations to a degree that would give rise to preemption under the National Bank Act. For more detailed discussion of preemption, see below.

Fundamentally, there is a significant difference between a debt that is delinquent but not charged-off and one that has been charged off and pertains to a closed account. In the former situation, and notwithstanding the implications of TILA, Reg. Z, and the Fair Credit Billing Act that take precedence over state and local laws, a creditor should not be forced into an adversarial relationship with a customer whose account might still be rehabilitated. For instance, it would not be fitting to apply the provisions related to the Itemization Reference Date and the validation documentation required to provide a charge-off statement in a pre-charge-off context, as they are only relevant at the point of charge-off.

Furthermore, with respect to credit card accounts, charge-off is dictated by regulation of the Federal Financial Institutions Examination Council.[8]

Communications Restrictions

AFSA members operate relationship-based businesses which rely on close communication between the creditor and its customers. In fact, the CFPB issued an advisory opinion just over a year ago emphasizing the duty of large banks under the Consumer Financial Protection Act to

[8] *See* 65 FR 36903

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maintain and facilitate the flow of information to consumers. [9] The amended rules limit creditor communications attempts to three times in seven days, regardless of the number of accounts held by a customer. While intended to reduce harassment, this approach fails to account for the practical realities of creditors managing multiple accounts for the same customer. It also fails to account for the fact that a single consumer can have multiple accounts that are issued by a single creditor, but which are managed by different business units of that creditor.

We are concerned that the combining of communications about multiple accounts into a single message could confuse NYC customers and thus potentially run afoul of the FDCPA or UDA(A)P principles. Furthermore, some creditors do not have the systematic capabilities for lines of business to communicate with each other. As a result, it will be impossible to provide a singular message to a consumer who is delinquent on various products. We are also concerned that limiting contact frequency will prevent creditors from reaching their customers early in the delinquency cycle, when interventions like hardship programs are most effective (see Consumer Harm, above). The restrictions, as applied to pre-charge-off accounts, could also interfere with the duties of creditors under the Fair Credit Billing Act, the Fair Credit Reporting Act, and the Real Estate Settlement Procedures Act. To that extent, DCWP risks a finding of preemption, and we assess the rules can run contrary to consumer interests by interfering with procedures that are already in place to protect consumers. For instance, we believe an unintended consequence of the communication restrictions will simply be for creditors to pursue litigation as a strategy to recover from NYC customers because attempting to communicate with them will be fraught with so many potential problems because of the amended rule.

This is particularly true for creditors who offer a variety of different credit and loan products, who will face challenges complying with the contact attempt restrictions at the consumer level. In these scenarios, it will be more feasible to avoid collection communications and instead deploy a strategy of placement with third-party debt collection agencies and law firms, resulting in NYC consumers being unable to avail themselves of the benefits of the various hardship programs creditors can offer (examples of which range from simple due date changes through to long-term workout programs).

To that end, we recommend, at a minimum, amending the proposed rules so contact frequency limitations for creditors collecting their own debt are applied at the account level rather than the customer level and only post charge-off. This approach balances DCWP's desire to prevent perceived excessive communication with the necessity of addressing each account to appropriately assist consumers when they need it most.

Specific Clarifications:

- If the DCWP still intends to apply communications restrictions to creditors in some form:
    - Revise the communications restrictions in (b)(1)(iii) to apply:
        - after the institution of debt collection procedures; and

[9] https://files.consumerfinance.gov/f/documents/cfpb-1034c-advisory-opinion-2023_10.pdf

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    - at the account-level, rather than customer level
- Clarify what constitutes a customer "responding" to a communication when calculating the seven-day contact frequency window? For example, if a creditor sends a letter and the customer telephones five days later, would the rules consider that to be a response, or a contact initiated by the customer?

Debt Validation Notices

AFSA requests that the rules be amended so the debt validation notice is not required for creditors, since their customers already have federal dispute rights under TILA, Card Act, Reg E, and FCRA. The utility of the debt validation notice appears to be to help the customer recognize the debt and determine if it is a valid debt that the third-party debt collector should be collecting on behalf of the creditor. Since a creditor has a direct relationship with the consumer and has had ongoing communication with their customer from the inception of the credit relationship, including for example, providing monthly statements and other account alerts (e.g. for fraud), the existence of the debt should not be a surprise or require a separate notification. Furthermore, consumers' dispute rights are already encompassed in the Fair Credit Billing Act. Furthermore, as written, the debt validation notice is (1) impossible to comply with unless an account is charged off and (2) unclear as to the information required to be included. As noted above, the combination of various definitions requires information that can only exist post-charge-off, yet also requires that the letter must be sent prior to any communication about a "debt." Given the content of the notice, it would be incredibly confusing for a consumer to receive this notice while in good standing or, when received from their creditor who is required to provide monthly billing statements and is governed by TILA, even in delinquency. The rule also suggests that the notice must include items required by federal or New York state law but does not name those laws. While AFSA believes DCWP is referring to the FDCPA and New York State debt collection rules, neither of those are applicable (and thus required to be included) for non-debt-buyer creditors. It is unclear whether the Department is saying that now everyone must include it, or whether only those required to comply with the laws in question need to include it.

Absent the removal of the debt validation notice requirements for creditors, DCWP must take steps to clarify that the debt validation notice should only be sent after institution of debt collection proceedings. This change will mirror the current requirements which only require debt validation notices to be sent after institution of debt collection procedures. Since debt collection procedures refer to late stage collection efforts that generally coincide with charge-off, such as collecting after the creditor ceases periodic statements, taking or threatening to take legal action, or accelerating the unpaid balance, this change will alleviate some of the concerns on how to comply with the debt validation notices for pre-charge-off debt, such as the provisions related to the itemization reference date and the validation documentation required to provide a charge-off statement.

Specific Clarifications:

- Clarify in f(1)(viii) in general and f(1)(viii)(A) specifically, that only those entities that are required to comply with the FDCPA and New York State debt collection law are required to provide that information;
- Clarify that the validation letter in f(1) is only required after the institution of debt collection procedures;
  - if not, clarify how a covered entity can comply with f(1) prior to charge-off, including but not limited to:
    - for pre-charge-off revolving accounts, what itemization does DCWP envision beyond the latest periodic billing statement?
    - for pre-charge-off closed-end accounts where a payment has not been made or the date of last payment is not available, how can a debt be itemized if there is no charge-off date?

Unverified Debt Notices

Perhaps one of the most concerning challenges posed by the proposed regulations institutions is contained in Section 5-(77)(f)(8), creating a notice of "unverified debt." The unverified debt notice requirement appears to mandate that banks permanently stop collecting and notify consumers that debts cannot be verified – i.e., collected. This is based on an arbitrary, 45-day deadline to respond to consumer validation requests which could have been missed due to oversight/inadvertence, as opposed to some lack of underlying documentation to prove the debt. Notably, no other law requires those subject to verification of debt requirements to respond within a certain period of time or seemingly permanently lose their ability to collect the debt.

Permanently barring financial institutions from collecting debts that are otherwise owed significantly interferes with their rights and creates safety and soundness issues in the credit industry as a whole. Furthermore, this could arguably constitute an unconstitutional taking. By requiring creditors to send an unverified debt notice and permanently cease collections, the DCWP risks impacting the ability of creditors lacking the required documentation for purposes of verification from pursuing an account stated theory in court–which is permitted in NY. See NY CPLR Rule 3016(j)(4)–for which they may have the required documentation to prove their cause of action.

Electronic Communication Consent

The amended rules require written E-Sign Act-compliant consent for electronic communications related to debt collection, even when consent has already been provided. This requirement is unnecessary and disrupts well-established communication channels that exist between creditors and their customers. This presents a real risk of consumer harm, as it has the potential to impair electronic fraud alerts and the multi-factor authentication that is a critical part of creditors' anti-fraud practices. Those types of communications occur even on delinquent accounts.

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Fundamentally, it would require creditors to put NYC consumers at a material disadvantage by not providing them with the types of electronic communications that are provided to all their other customers. More specifically, opt-out requirements already provide consumers the option to stop communications in a channel they do not want. Customers who have received prior electronic communications from a creditor, and have not opted-out of such messaging, should be entitled to receive those messages once they become past due. To require a change in communication channel is unfair to the customer who is accustomed to being alerted through electronic channels and will not expect to suddenly receive important and potentially time-sensitive notices in a format that could cause delay such as letters through U.S. Mail. This will result in consumer harm (e.g., incurrence of fees and interest, past-due credit reporting, loss of benefits on an account such as charging privileges or reward points) and an increase in consumer frustration and complaints.

AFSA requests that the requirements for written consent on electronic communications be removed if consent of any kind has already been obtained by the creditor. Many customers favor receiving electronic communications from their creditor and have opted for this method of communication prior to the debt becoming delinquent.

Specific Clarifications:

- Revise b(5)(i)(A) to remove the "in writing" requirement;
- Clarify that new consent is not required from a customer who has already requested electronic notifications prior to the account becoming delinquent once the account becomes delinquent.

Credit Bureau Reporting Restrictions

Notification of credit bureau furnishing is provided upon account opening and AFSA members report throughout the life cycle of the account. The requirement to provide a separate notification of furnishing and stop the reporting for 14 days once the account becomes delinquent, would be confusing to the customer and is unnecessary since the customer already can dispute reporting under the FCRA. It also raises a myriad of technical issues from a creditor furnishing perspective, as discussed above.

Furthermore, a law that imposes requirements or prohibitions with respect to a subject matter already regulated under sections of the FCRA will be considered preempted. Specifically, AFSA highlights that *any* attempt by DCWP to regulate the duties of data furnishers is expressly preempted.[10]

Additionally, this prohibition not only prohibits furnishing negative account information, but also would prohibit furnishing positive information (paying as agreed) prior to sending the

[10] 5 U.S.C. § 1681t(b)(1)(F).

validation notice, preventing the consumer from gaining the associated positive effects on their credit score.

AFSA requests that credit bureau furnishing restrictions be removed, at a minimum, for creditors that are furnishing information to credit reporting agencies on their own accounts.

<u>Specific Clarifications:</u>

- Clarify that paragraph (e)(10), which prohibits credit reporting until after sending the validation notice and waiting 14 days, does not apply to creditors.

Natural Person-Related Requirements

Natural person-related requirements also are not workable for large creditors with multiple lines of business and application to creditors will likely lead to earlier outside collection placements.

Section 5-77(f)(1) (ii-iii) requires that the validation notice must include the name of a natural person for the consumer to contact and a telephone number answered by a natural person. These requirements are unduly burdensome and without any obvious benefit to the customer. Companies managing thousands of accounts daily cannot feasibly assign a specific individual to each account for direct consumer contact. In addition, many of our customers have multiple accounts across multiple lines of business with banks and other creditors offering multiple credit products. There frequently is no one person who can assist customers with all their needs, especially across multiple product lines. While creditors are committed to providing exceptional service, it is impractical for any business to include a specific person's name on every communication for direct consumer contact. Even if creditors invested a substantial amount of time and money to be able to offer a natural person's name to the customer, it would be unsustainable and lead to poor customer experience. If multiple customers are calling the same person, this will result in long customer wait times and frustration without any benefit for the customer, when any available agent could provide the help that the customer needs.

Moreover, most companies utilize automated voice systems to initially route calls to the appropriate department and gather essential information from the consumer. This process ensures that when the call reaches an agent, they have the necessary details to assist the consumer more efficiently. Requiring direct contact with a natural person from the outset would disrupt this streamlined process, potentially reducing the overall effectiveness of customer service operations.

These requirements also would be impractical for a large entity with multiple lines of businesses and thousands of employees across multiple states to manage effectively. Inevitably, due to internal turnover, promotions, and cross-department moves, whomever is listed as the "point of contact" in a communication, may not be in such a role in the future. Customers may become confused by seeing different names on different communications sent to them because of this turnover and natural movement within our work force. There are, of course, also privacy

concerns related to the provision of the names of individual staff members to thousands of customers.

5. PREEMPTION CHALLENGES BY NATIONAL BANKS

"Banks with federal charters – called national banks – are subject primarily to federal oversight and regulation," and the Office of the Comptroller of the Currency (OCC) serves as that primary regulator.[11] The Supreme Court has "repeatedly made clear that federal control shields national banking from unduly burdensome and duplicative state regulation."[12] "[W]hen state prescriptions significantly impair the exercise of authority, enumerated or incidental under the [National Bank Act], the State's regulations must give way."[13]

A practical assessment reveals that the Department's proposed rules would significantly interfere with routine customer communications, even before an account is charged off and potentially reaching multiple unrelated accounts, and deprive national banks of this critical credit risk management tool and the flexibility national banks need to "manage credit risk exposures,"[14] thus significantly interfering with national banks' ability "to carry on the business of banking."[15] The OCC has warned of the risks of such regulation by states, saying:

> *"….state laws that would affect the ability of national banks to underwrite and mitigate credit risk, manage credit risk exposures, and manage loan-related assets, such as laws concerning the protection of collateral value, credit enhancements, risk mitigation, loan-to-value standards, loan amortization and repayment requirements, circumstances when a loan may be called due and payable, escrow standards, use of credit reports to assess creditworthiness of borrowers, and origination, managing, and purchasing and selling extensions of credit or interests therein, would meaningfully interfere with fundamental and substantial elements of the business of national banks and with their responsibilities to manage that business and those risks."*[16]

The proposed rules are ill-equipped to address the intricacies of ongoing banking customer relationships and would significantly interfere with the uniform regulation of national banks that is the role of the OCC. These institutions operate under a comprehensive framework of federal regulations that govern their debt collection practices and while state collection laws are generally not preempted under the National Bank Act, these proposals interfere with a national bank's ability to operate in, at a minimum, the following critical and unreasonable ways:

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[11] *Cantero v. Bank of America, N. A.*, 602 U.S. 205, 205 (2024).
[12] *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 11 (2007).
[13] *Id*. at 12 (citing *Barnett Bank of Marion County., N.A. v. Nelson*, 517 U.S. 25, 32–34 (1996)).
[14] OCC, *Office of Thrift Supervision Integration; Dodd-Frank Act Implementation*, 76 Fed. Reg. 43,549, 43,557 (July 21, 2011
[15] *Watters*, 550 U.S. at 6 (quoting 12 U.S.C. § 24).
[16] Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. at 43557.

Definition of "Debt Collector" and "Debt": By expanding the definition of "Debt Collector" to include original creditors, the proposed rules impose additional regulatory burdens on national banks that are already subject to federal oversight. This expansion could lead to duplicative and even conflicting compliance requirements, undermining the operational efficiency of these banks. Furthermore, the broad definition of "Debt" that encompasses pre-charge-off accounts interferes with federal regulations, such as those set by the Federal Financial Institutions Examination Council, which dictate when accounts should be charged off. This interference could trigger preemption challenges under the National Bank Act, as it disrupts the federally regulated processes that banks must follow.

Communications Restrictions: The proposed restrictions on communication frequency fail to account for the operational realities of national banks, which manage multiple accounts for individual consumers. As one example, the proposed rules seem to require that once a credit card customer becomes past due on a payment, then all communications must cease or be severely constrained on that customer's other accounts, such as an auto loan, home mortgage and deposit account. These restrictions could significantly interfere with banks' ability to fulfill their duties under federal laws, such as the Fair Credit Billing Act and the Real Estate Settlement Procedures Act, which require timely and effective communication with consumers. By imposing state-level restrictions that conflict with these federal obligations, the rules risk preemption and could lead to legal challenges from national banks seeking to protect their federally mandated communication practices.

Credit Bureau Reporting Restrictions: The requirement for separate notification of credit bureau furnishing and a 14-day reporting delay conflicts with the Fair Credit Reporting Act (FCRA), which preempts state laws that impose additional requirements on data furnishers. National banks, which report credit information as part of their federally regulated operations, could challenge these state-level restrictions as they interfere with their ability to comply with FCRA standards. This preemption issue is likely to result in legal disputes, as national banks seek to maintain their established reporting practices without additional state-imposed burdens.

Electronic Communication Consent: The proposed requirement for written E-Sign Act-compliant consent for electronic communications, even when consent has already been provided, disrupts the established communication channels that national banks use to interact with their customers. This requirement could lead to delays in critical communications, such as fraud alerts, and interfere with banks' anti-fraud practices. By imposing additional consent requirements that conflict with federal electronic communication standards, the rules risk preemption challenges from national banks that rely on efficient and secure communication methods to protect their customers.

Unverified Debt Notice Requirement: As noted above, a requirement that creditors provide certain information to a consumer within an arbitrary period of time or permanently lose their ability to request repayment of the debt significantly interferes

with the rights of national banks to manage their loan credit risk. National banks are already required to comply with a myriad of federal laws and regulations relating to issuance of credit and documentation required to be obtained from and provided to consumers related to account management. To not only require more, but bar collection afterwards, crosses the line as to what a municipality is permitted to do in this space.

6. EFFECTIVE DATE

Since the amended language was clear on its inapplicability to creditors until the recent clarification by the Department, AFSA has significant concerns about the ability of its members to bring themselves to compliance in time for the Effective Date. The rules' omnichannel, consumer-level communications cap alone, will require significant reworking of existing systems that are likely to take significant time. AFSA requests an extension should be provided to delay the rule by a minimum of two years, to allow creditors the appropriate time needed to undertake the modification of a host of operational processes in order to implement the new rules.

7. CONCLUSION

In conclusion, the latest version of the rules will cause undue burden to creditors at a significant cost and will provide little to no benefit to consumers. In fact, the proposed amendments, as they currently stand, risk causing substantial harm to NYC consumers. This is particularly concerning for those with limited financial literacy, who may not be aware of available assistance options and could suffer unnecessarily as a result.

Moreover, the proposed rules present significant preemption impediments, particularly concerning national banks. These institutions operate under a comprehensive framework of federal regulations that govern their debt collection practices. The imposition of additional municipal-level requirements could lead to duplicative and even conflicting compliance obligations, undermining the operational efficiency of these banks and triggering preemption challenges under the National Bank Act.

We respectfully request that the Department carefully consider these likely consequences and take action to protect both NYC consumers and financial institutions from the unintended negative impacts of the proposed rules. We urge the Department to exclude creditors collecting their own debts from the amended rules or, at a minimum, limit their applicability to charged-off debts. Additionally, we recommend revising specific provisions to align with the operational realities of creditors and extending the implementation timeline by at least 2 years to ensure smooth and full compliance.

Thank you in advance for your consideration of our comments. If you have any questions or would like to discuss this further, please do not hesitate to contact me at dfagre@afsaonline.org or Elora Rayhan erayhan@afsamail.org at your convenience.

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Sincerely,

Danielle Fagre Arlowe
Senior Vice President
American Financial Services Association

Attached:

ANNEX A: SUMMARY OF THE CONSEQUENCES OF THE PROPOSED AMENDMENTS

ANNEX A

SUMMARY OF THE CONSEQUENCES OF THE PROPOSED AMENDMENTS

Definition of "Debt Collector"

If the definition of "Debt Collector" continues to include original creditors, these entities will face significant compliance burdens that were not anticipated. This will lead to increased operational costs and likely reduce the availability of credit to consumers and raise its cost, as creditors divert resources to meet these new regulatory requirements.

Creditors Chosen by Consumers are Fundamentally Different than Traditional Debt Collectors and Debt Buyers

Applying the same restrictions to creditors as apply to third-party debt collectors will disrupt the beneficial relationships between creditors and consumers. This will result in reduced customer service quality and limit creditors' ability to offer tailored financial solutions, ultimately harming consumers who rely on these relationships for financial capability and support.

Definition of "Debt"

If the definition of "Debt" is not limited to charged-off debts, creditors will be forced to consider accelerating charge-off for accounts that are merely delinquent. This could harm consumers who are actively working to rehabilitate their accounts and interfere with federal regulations, potentially leading to legal challenges while increasing financial instability for affected consumers.

Comment Period and Due Process

Given the implications of recent clarifications, the timeline for public comment is inadequate. For that reason the rulemaking process should be reopened to allow creditors a realistic period to review, assemble, and submit critical feedback to the Department.

Communications Restrictions

The proposed communication restrictions will almost certainly prevent creditors from effectively reaching consumers early in the delinquency cycle. This will lead to an increase in litigation as creditors resort to legal action sooner to recover debts, depriving consumers of the opportunity to engage in hardship and loss mitigation programs and other beneficial intervention such as payment extensions and deferrals.

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Debt Validation Notices

Requiring debt validation notices for creditors will create confusion among consumers who already have established relationships with their creditors. This redundancy may lead to misunderstandings about the status of their accounts and increase the likelihood of disputes, ultimately harming the consumer-creditor relationship. It will also cause consumers to question the reliability of their monthly-billing statements.

Electronic Communication Consent

The requirement to obtain written consent for electronic communications will disrupt established communication channels, leading to delays in important notifications (including, for example, fraud alerts). This will also result in consumers incurring additional fees, interest, or negative credit reporting due to missed communications, ultimately causing financial harm and frustration.

Credit Bureau Reporting Restrictions

Imposing additional credit bureau reporting restrictions on creditors will confuse consumers and disrupt the reporting process. This will lead to inaccuracies in credit reporting and potential legal challenges due to preemption by federal law, ultimately harming consumers' credit scores and access to financial services. If adopted, there will certainly be a preemption challenge to this proposed amendment.

Requests for Further Clarification

Without further clarification on key aspects of the proposed rules, members of AFSA have confirmed they will face operational challenges and increased compliance burdens. This uncertainty will very likely lead to inconsistent application of the rules, resulting in consumer confusion and potential legal disputes.

Customer Harm

The cumulative effect of the proposed rules is highly likely to increase costs for consumers and limit access to credit. Restricting early communication with consumers could lead to more severe financial consequences, such as bankruptcy or foreclosure, particularly for those with limited financial capability and literacy who may not be aware of available assistance options.

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