

The two New Yorks and their proposed debt collection rules

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The New York Department of Financial Services and the New York City Department of Consumer and Worker Protection are simultaneously engaged in amending their consumer debt collection rules. While the DFS rulemaking has been underway for nearly two years, the DCWP began its efforts last fall.

The DFS amendments would be a significant overhaul of its existing regulations and would cover new debt types. And, any time coverage of debt types is expanded, the scope of covered persons can increase. An unexpected twist in New York City's proposal is the elimination of creditors from its coverage.

Both would introduce new disclosure requirements and additional restrictions on communications — particularly electronic communications.

The DFS proposed amendments are available here.¹ The DCWP proposed amendments are here.²

Final amendments may be different

Both agencies have only proposed amendments. The comment period on the DFS amendments is still underway, while comments and a public hearing on the DCWP amendments were completed last December. It could be months before we see a final rule from either agency, and either may make significant changes to what we have today. To be sure, DFS first proposed its amendments in 2021 and has made significant changes to arrive at the current version released in December 2022.

Effective dates

As to the effective date of the amendments, it depends on when the agencies publish their final rule amendments. DFS is proposing 180 days following the adoption of its amendments.

Since DFS typically conducts a thorough review of submitted comments, the earliest I would expect publication of their amendments is mid-March, meaning that whatever is finally adopted would not be effective, *at the earliest*, until sometime in September. My guess is that it will take a bit longer for DFS to finalize its amendments.

DCWP could provide little more than 30 days before its amendments take effect. At the earliest, we could see the final amendments sometime later this month or mid-March.

Here is a look at some of the most significant amendments.

Covered debt — DFS adds medical debt, sale of goods, judgments

First, both regulations remain limited to consumer debt, which is incurred primarily for personal, family, or household purposes. DFS' existing regulation covers debt "wherein credit has been extended to a consumer." The proposed amendment would strike this limitation.

An unexpected twist in New York City's proposal is the elimination of creditors from its coverage.

Existing DFS regulations exclude most debt arising out "of a transaction wherein credit has been provided by a seller of goods or services ..." and the amendment would strike this exclusion too. The result of these changes would be to capture medical debt and indirect motor vehicle loans, among other debt types.

Another material change proposed by DFS is to include judgments within covered debt.

I expect these proposals will be part of the final amendments.

Covered persons — DCWP's creditor exclusion, potential creditor inclusion under DFS, tighter attorney regulation

At least a dozen other states and locales (including New York City and New York State) include creditors within their debt collection laws or regulations. New York City proposes to exclude creditors which bucks the trend seen in other locales, like the District of Columbia.

Effective Jan. 1, DC's debt collection law was expanded³ to include more types of creditors ("first party collectors"), even those collecting their own "past due" debt. DCWP's proposed creditor exclusion would be the first time I can recall any covered entity being removed from a debt collection regulation. You would have expected consumer advocates to push back.

In 2014, the National Consumer Law Center submitted comments to the Consumer Financial Protection Bureau, urging it to include first-party collectors within certain provisions of Regulation F. Surprisingly, comments from the National Consumer Law Center to DCWP had no objection to the creditor exclusion, nor did comments from several other consumer advocacy groups. I expect the creditor exclusion to remain in the DCWP final amendments.

The Department of Financial Services proposal is a significant departure from its existing rule and the requirements imposed on debt collectors under the federal Fair Debt Collection Practices Act.

Both DCWP and DFS propose amendments that tighten regulation over attorneys collecting debt, a trend observed in recent activity in both the District of Columbia and California.

DFS also proposes amendments that might capture creditors who acquire portfolios of debt containing non-performing loans. While I do not believe this was intended, the troublesome language has not changed since DFS first proposed it in 2021.

Initial disclosures

DFS overhauls its requirements for initial disclosures and expressly provides they must be delivered “in writing” and prohibits electronic delivery. DCWP also makes slight revisions to its initial disclosure requirements to better align with DFS’ proposed amendments and federal law. As to electronic delivery of the initial disclosures, DCWP proposes that it can be made “in accordance with § 5.77(b)(5):”

However, proposed § 5.77(b)(5)(i) requires that a debt collector “must provide a written validation notice to the consumer ... prior to contacting a consumer by electronic communication.”

DFS also proposes that its initial disclosures provide “instructions on how to dispute the validity of the debt.” There are innumerable ways a consumer could dispute a debt under both the proposed DFS regulations and federal law, making this requirement nonsensical and dangerous for both debt collectors and consumers.

Verification/substantiation

One of the most significant proposed amendments by DFS is to trigger a debt collector’s requirement to provide verification (or “substantiation” as DFS calls it) in response to a *dispute*, regardless of whether that dispute is made verbally or in writing.

It also shortens the time to provide substantiation from 60 to 45 days. Specifically, DFS’ proposed language triggers substantiation when a debtor disputes “the validity of a debt or the right of the debt collector to collect on a debt.”

The inclusion of “right to collect” here is at odds with the proposed initial disclosure requirement of informing a consumer only how they can “dispute the validity of debt” noted above.

DFS’ proposal also allows a triggering dispute to occur *at any time* but limits the debt collector’s duty to substantiate to “only once during the period that the debt collector owns or has the right to collect the debt.”

The DFS proposal is a significant departure from its existing rule and the requirements imposed on debt collectors under the federal Fair Debt Collection Practices Act.

For debts that cannot be verified “within 30 days of receiving the dispute or a request,” the DCWP proposal would require a debt collector to provide a consumer with an “Unverified Debt Notice” stating that “the debt collector is unable to verify the debt and will stop collecting on the debt, and provide the reason that the debt could not be verified.”

Communication restrictions — NYC’s extraordinary communication cap proposal

Both agencies propose significant restrictions on electronic communications and DFS expressly requires consumers to opt-in, in writing, before a debt collector makes an electronic communication. DFS proposes that the opt-in take the form of “revocable consent in writing.”

Debt buyers collecting consumer debt in New York State will need a top-down reassessment of their existing collection operations to comply with the amendments.

The proposals from DCWP go even further. The New York City agency proposes to limit *all* communications *and* attempted communications (like limited content messages) to no more than “three times during a seven-consecutive-calendar-day period, or once within such period after having had an *exchange* with the consumer in any medium in connection with the collection of such debt.”

This cap is not limited to telephone calls but includes letters and any other communication “medium.” What DCWP intends to cover by referencing “an exchange” is unclear.

On the flip side, DCWP proposes to exclude from this cap “any communication, attempted communication or *exchange* between a consumer and the debt collector which is initiated by or at the request of a consumer or in response to a communication from the consumer, or any communication which is required by law.” Again, the meaning of “exchange” is unclear.

It is also unclear whether DCWP intends the cap to be *per consumer* or *per debt*. In other words, it is not clear whether a debt collector having multiple debts to collect from the same consumer is limited to communicating three times during the seven-day period as to *all* debts.

Some commentators suggested that DCWP's cap could be interpreted as restricting three communications each week to each medium — meaning, three phone calls, three letters and three emails, for example. That sounds like a strained interpretation, and I expect DCWP to address these issues in its final rule.

DFS does not propose a hard cap on communications but will continue prohibiting excessive communications. It does propose a presumption of compliance with telephone calls if the calls are limited to "one completed telephone call and three attempted telephone calls per seven-day period per alleged debt." It would exclude telephone calls required by DFS rules or other law, "or when such communication is made in response to the consumer's request to be contacted ..."

'Time-barred' debt

Both proposals revise existing "time-barred" debt disclosures to align with recent changes in New York law. Both propose the new disclosures be made in all communications to collect time-barred debt.

While neither prohibits communicating with a consumer orally or in writing to collect such debt, DFS added a prohibition against collecting time-barred debt "exclusively by telephone or by other means of oral communication." As DFS explained in an "Assessment of Public Comment," this would "not bar oral or phone communication entirely."

No private right of action

Neither regulation has a private right of action, and none are proposed.

ARM industry response

Industry trade associations composed of the Receivables Management Association International, ACA International, the New York Creditors Bar, and the New York Collectors Association have engaged DFS on its proposals since 2021 and continue to do so with their written comments to be delivered soon. The same trade associations provided testimony at the Dec. 19, 2022, DCWP hearing.

About the author



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Seven points to remember

1. There are no final amendments from either agency.
2. If or when the agencies will publish final rules is unknown.
3. Both regulations propose greater restrictions on consumer debt collection communications than existing law.
4. Neither contains a private right of action.
5. New York City may exclude creditors, but certain creditors may be pulled into DFS' regulations if they acquire portfolios of consumer debt.
6. If the DFS proposals are adopted in their present form, third-party debt collectors and debt buyers collecting consumer debt in New York State:
 - will need a top-down reassessment of their existing collection operations to comply with the amendments; and
 - may find it difficult, if not impossible, to use Regulation F's Model Validation Notice.
7. If both DFS and DCWP amendments are adopted largely as proposed, covered entities collecting debt in New York City will need to marry their operations to the two regulations, and sort out the several conflicts between the two. DFS proposes that local laws (like DCWP's) are effective if such law provides "greater protection" than DFS' regulations. Particularly, New York City would have additional disclosure requirements and introduces different restrictions on debt collection communications.

This is not an exhaustive outline of all the revisions contained in both proposals, and there are plenty more than written about here. After all, these are just proposals, and the final amendments are yet to be published.

Notes

¹ <https://bit.ly/3laLKRw>

² <https://bit.ly/3HO6zAL>

³ <http://bit.ly/3HMfen3>