Assessment of Public Comment

In response to its Notice of Proposed Rulemaking published December 15, 2021, the Department of Financial Services ("Department") received comments from sixteen entities, including seven industry organizations, five debt collection companies (including one debt buyer), and four consumer advocacy organizations. The Department is providing this assessment of public comment in accordance with State Administrative Procedure Act ("SAPA") § 202 (4-a)(b) and § 202 (4-a)(c)(ix).

(1) **Comment:** Industry associations and debt collectors requested clarity as to the intended meaning of the term "person" and the term "consumer" in the regulation.

Response: The Department agrees that in some instances, the term "consumer" offers more clarity than "person" and has made revisions accordingly. In cases where the revised proposed rule describes, for example, communications with an alleged debtor, "consumer" is used consistently. However, where the revised proposed rule refers to an individual who may not be an alleged debtor, or a "person" who may be either a natural person or a corporate entity, "person" is used.

(2) **Comment:** Industry associations and debt collectors proposed revising the definition of "creditor" by adding, "at the date of default or the date of charge-off" to the end of the definition.

Response: The Department determined that there are instances in the regulation where this would confuse the meaning of the text, such as § 1.1(g), § 1.4(a)(1)(c)(3)(ii), and § 1.4(f). Instead, the revised proposed rule specifies when it is referring to the creditor at the time of charge-off or default.

(3) **Comment:** Consumer advocates commented that the definition of "creditor" in § 1.1(d) should explicitly exclude debt buyers so that exemptions in § 1.6(f) do not apply to debt buyers.

Response: The definition of "debt collector" in the proposed rule and the revised proposed rule (§ 1.1(g)) states that "notwithstanding the exceptions contained [therein]," the term "debt collector includes without limitation a buyer of debts." Further, a minor revision to § 1.6 ensures that debt buyers are not excluded from limits on communication with consumers. Section 1.6(g), which sets

forth certain exclusions from communication limits now clearly indicates that it excludes only debt collector communications with certain parties other than the consumer, including the consumer's attorney, the creditor's or debt collector's attorney, and a court.

(4) **Comment:** Industry associations and debt collectors objected to the elimination of the term "original creditor" and suggested reinstating the term by incorporating the definition used in CPLR 105(q-1) or by inserting a new defined term for "charge-off creditor."

Response: The Department declines to make this change because the definition in the CPLR does not have the meaning the Department requires for the rule. In the limited instances where the rule refers to the entity that originated a debt, it explicitly states this rather than relying on a defined term.

(5) **Comment:** Industry associations and debt collectors requested that § 1.2(a) mirror 15 U.S.C. 1692g(a), a provision of the Fair Debt Collection Practices Act ("FDCPA") requiring that certain information be provided to a consumer within five days after a debt collector's initial communication with a consumer.

Response: The Department has determined that for consumer protection purposes, this information should be provided clearly and conspicuously either in writing or in an accessible format requested by the consumer pursuant to General Business Law § 601-b. The FDCPA does not require the information to be in writing, and therefore, § 1.2(a) of the revised proposed rule does not mirror the FDCPA.

(6) **Comment:** Industry associations, debt collectors, and consumer advocates advised that the proposed restriction on the use of charge-off date as a reference date for itemization would be impractical for debts arising out of revolving or open-end credit accounts, and, because of the newly enacted Consumer Credit Fairness Act ("CCFA"), Laws of 2021, Chapter 593, our proposed language would result in consumers receiving inconsistent itemization information between litigation and non-litigation communications. One industry association noted that charge-off balances are highly regulated. Consumer advocates supported the requirement that debt collectors provide consumers

with their last payment date, noting that last payment date is the most informative to consumers in identifying an alleged debt when used as the itemization date for non-revolving or non-open-end accounts. These consumer advocates believe the last payment date should be mandated as the itemization date if it is available. They commented as well that debt collectors should clearly label the type of date used for itemization to further assist consumers in identifying the alleged debt.

Response: The Department has revised § 1.2(a)(1) so that charge-off date may be used as the itemization reference date for revolving and open-end accounts, but debt collectors may not use it as a reference date for itemization for closed-end or other accounts, and debt collectors must use the last payment date as the itemization date for closed-end or other accounts if it is available. § 1.2(a)(1)(ii) of the revised proposed rule provides that the debt collector must include a "statement indicating which type of reference date . . . was relied on by the debt collector in determining the itemization date."

(7) **Comment:** Industry associations and debt collectors raised concerns about which account number must be provided as part of a validation notice, as circumstances are different between closed-end and open-end or revolving debt.

Response: Section 1.2(a)(1)(iii) of the revised proposal addresses this concern. It provides that the debt collector must tell the consumer the account number (or use a truncated version thereof) "associated with the debt on the last payment date, or, if the consumer made no payment on the debt, associated with the debt on the last statement date, with a statement informing the consumer that the account number or truncated account number is associated with either the last payment date or the last statement date, as applicable."

(8) **Comment:** An industry association asserted that including the merchant brand, affinity brand, or facility name, if any, associated with the debt in the validation notice should be optional because it may not always be readily identifiable. Another industry association suggested that if the Department maintains this provision that the requirement may be satisfied by attaching an account

statement reflecting the merchant brand, affinity brand, or facility name rather than transcribing it into a notice to limit the risk of transcription error.

Response: The Department included this requirement because consumers are more likely to be able to identify a debt using this information. Consumers may not be as likely to recognize the underwriting bank of a retail store card. Validation information must allow the consumer to identify or dispute the alleged debt. The Department has adopted a version of the proposal that attaching an account statement with the relevant information would satisfy the requirement.

(9) **Comment:** Consumer advocates commented that debt collectors should be required to inform a consumer that the debt at issue has been reduced to a judgment and noted that for debts reduced to a judgment, the name of the court where the judgment was entered and the date of entry, the caption, and the index number associated with the judgment are essential information for a consumer attempting to find the court records.

Response: Section 1.2(a)(1)(vii) provides that for debts reduced to a judgment, the debt collector must include a statement in its validation notice that the "debt that has been reduced to a judgment, a statement that the debt has been reduced to a judgment, the name of the court in which judgment was entered and the date entered, the caption, and the index number associated with the judgment." Such information should be readily available to a debt collector and is likely to be useful to a consumer.

(10) **Comment:** Industry associations and debt collectors commented that debt collectors should not be required to state the statute of limitations applicable to the alleged debt because the CCFA has resolved confusion about what limitations period applies. They also stated that (1) determination of the applicable statute of limitations is complex and requires an attorney, (2) telling a consumer the applicable statute of limitations period would constitute improper provision of legal advice, and (3) at the outset of collection, when the disclosures in § 1.2 must be made, non-law firm debt collectors do not involve attorneys in the process because they are not anticipating litigation. Consumer advocates proposed that the rule require debt collectors to state the date upon which the statute of

limitations period for the alleged debt would expire.

Response: The Department has determined to maintain the requirement as originally proposed. It is not the case that all debts that may be collected by debt collectors covered by the 23 NYCRR 1 will be subject to the statute of limitations established by the CCFA. Moreover, under the existing rule and the proposed rule, debt collectors are required 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," and under the proposed rule and the revised proposed rule, a debt collector is required to notify the consumer if the alleged debt is time-barred, so the debt collector will have to make a determination at the time of its initial communication with a consumer as to the alleged debt's statute of limitations period. The Department will not adopt the recommendation to require debt collectors to provide a specific statute of limitations expiration date to the consumer, as this could produce misinformation. The date could change, including as a result of payments made between the time the validation documents are prepared and when the consumer receives them.

(11) **Comment:** Consumer advocates commented that in 2021, New York enacted legislation exempting Covid-19 stimulus relief funds from garnishment and advised that they be added to the list of types of funds that may be exempt from garnishment.

Response: The Department determined it would be appropriate to add Covid-19 stimulus relief funds to the list set forth in § 1.2(a)(4).

(12) **Comment:** Consumer advocates asked the Department to incorporate a language access requirement comparable to the New York City municipal rule on unconscionable and deceptive trade practices, 6 RCNY § 5-77(h) into our regulation. This municipal rule obligates a debt collector to notify a consumer of any translation services available, to make a record of the consumer's language preference, and, if the debt collector has the capacity to do so, to make services available in the consumer's preferred language.

Response: Because this would be useful to consumers across the state, and because many debt

collectors operating in New York already likely comply with this requirement because they collect debts in New York City, the Department has accepted this request. A statewide requirement is unlikely to significantly burden industry and could potentially improve consumer comprehension of debt collection communications and prevent consumers from paying debts they do not owe.

(13) **Comment:** Industry associations and debt collectors commented that the proposed disclosure relating to time-barred debt in § 1.3(b)(1) not change from its current form because an affirmative statement that the statute of limitations on a debt has expired creates a risk of litigation for the debt collector, as an error could constitute a violation of the FDCPA, and provision of this information, regardless of whether it is accurate, could constitute improperly giving legal advice. Consumer advocates expressed support for the revisions to the disclosure provisions an urged the Department to simplify the disclosure language.

Response: Current § 1.3 requires a debt collector that "knows or has reason to know that the statute of limitations for a debt may be expired" to "provide the consumer with clear and conspicuous notice . . . that [] the debt collector believes that the statute of limitations applicable to the debt may be expired" before accepting payment, and offers model language through which the debt collector can inform the consumer that the "creditor or debt collector believes that the legal time limit (statute of limitations) for suing you to collect this debt may have expired." Proposed § 1.3(b) would have required a more certain statement that "the statute of limitations applicable to the debt has expired," and included corresponding model language. It also added a requirement that debt collectors include notice that a debt is time-barred in all communications relating to the debt, not just at some point before collecting and required that all communication relating to time-barred debts be in writing. Among the goals of the amendment are improving consumer understanding of the implications of a debt's being time-barred and the risk of reviving the statute of limitations period by, for example, admitting to owing the debt, promising to make a payment on the debt, or making such a payment. The CCFA has eliminated the risk of revival of the statute of limitations period for many debts that

are collected by debt collectors subject to this regulation, but not all. In its recent paper, *Evaluating Regulation F*, the National Consumer Law Center ("NCLC") reports that attorneys representing consumers and other consumer advocates find that their clients find the concept of time-barred debt confusing. Despite disclosures, whether and when they need to pay a debt is not clear. NCLC, Evaluating Regulation F, 38-39. Upon consideration of the possibility of generating confusion and giving consumers inaccurate information, the Department is modifying § 1.3 in several ways. First, § 1.3(b) states that the debt collector must inform the consumer that the statute of limitations may be or has expired. Second, it provides two different model disclosures: one for debts covered by CPLR 214-i as added by chapter 593 of the laws of 2021, and one for all other debts. Third, the model disclosure adopts language used in the Department's Industry Letter, dated April 7, 2022, to debt collectors relating to the CCFA that includes the statement, "Your creditor or debt collector will NOT sue you to collect this debt." See https://www.dfs.ny.gov/industry_guidance/industry_letters/il20220407_23nycrrpt1_and_ccfa. And fourth, it otherwise simplifies the disclosure language.

(14) **Comment:** Consumer advocates recommended that the regulation prohibit collection of time-barred debts.

Response: It is currently lawful in New York to collect on time-barred debt, and therefore, the Department declines to adopt this proposal.

(15) **Comment:** Industry associations and debt collectors asserted that the bar on oral/phone communication about time-barred debt with consumers absent permission from the consumer or permission from a court of competent jurisdiction in proposed § 1.3(b)(5) would unconstitutionally restrict their speech.

Response: The Department maintains that communications relating to time-barred debt should be in writing (or in an accessible format requested by the consumer pursuant to General Business Law § 601-b) to support consumer comprehension of the legal recourse available to the creditor or debt

collector and to prevent misleading oral communication that leads to a consumer reviving a statute of limitations period or making payments on a debt based on a misunderstanding. The revised proposed rule requires multiple disclosures in writing relating to time-barred debts, including initial communications, and includes, as noted above, model language for a debt collector to assert in clear language that it will not sue the consumer to collect the debt, but it does not bar oral or phone communication entirely.

(16) **Comment:** Industry associations and debt collectors commented that reduction in the time limit from 60 to 30 days for them to provide substantiation to a consumer set forth in § 1.4 would lead to violations despite a lack of consumer harm. Although, according to the industry associations, debt collectors typically have the documentation necessary to substantiate a debt, some consumers dispute debts on unforeseen bases, and verification of those disputes usually takes longer than 30 days. They were also concerned that ambiguity in the text could mean that substantiation sent before the deadline but received after the deadline would violate the rule. Further, debt collectors wanted the Department to eliminate the time limit entirely, as Regulation F does not have one. Like the Department's regulation, Regulation F prohibits collection activities before substantiation is provided. In contrast, consumer advocates supported the reduction in the time limit.

Response: The Department recognizes that the bar on collection activity between the time of a consumer dispute and substantiation on its own does offer some protection to consumers. However, consumers should be protected from being pursued at all for debts they do not owe. Debt collectors should ensure in advance of initiating collection that they are not attempting to collect a debt not owed and be prepared to respond promptly to a dispute. For these reasons, revised proposal still contains a period within which a debt collector must substantiate a debt, although for purposes of practicality, the proposed period has been increased to 45 days.

(17) **Comment:** Consumer advocates requested clarification as to whether substantiation must be produced in writing either electronically or in hard copy and as to whether disputes may be

submitted electronically. Consumer advocates also suggested that if a debt collector offers consumers the option of submitting a dispute through a website, that website shall generate a receipt in some form, with a copy of the dispute, that the consumer can save, print, or receive by email.

(18) **Response:** The proposed rule and the revised proposed rule state that a debt collector must provide substantiation in hard copy by mail unless the consumer has requested electronic communication in accordance with the provisions of the rule. Section 1.4(b) of the revised proposed rule additionally provides that if a consumer in accordance with General Business Law § 601-b has requested communication in a format other than hard copy writing, substantiation shall be provided in such requested format. The revised proposed rule also provides that disputes may be submitted orally or in writing (whether or not electronic), and a new § 1.4(h) provides that if a debt collector offers consumers the option of submitting a dispute through a website, the website "must generate automatically a copy of each written dispute that a consumer can print, save, or have emailed to them."

(19) **Comment:** Industry associations and debt collectors commented that the document retention period for substantiation records should be three years, rather than seven, to align with federal rules and to protect consumer data by not keeping it longer than necessary.

Response: The Department has adjusted the retention period in the revised proposal to six years. Legal services attorneys have advised that these records are needed by consumers disputing alleged debts for longer than three years, and current New York City rules require record retention for six years.

(20) **Comment:** Industry associations and debt collectors objected to the attempted call and completed call limits set in proposed § 1.6, because they differ from those in Regulation F. Some debt collectors asserted that call limits would harm consumers because limits delay communication and resolution of debts. Further, industry associations and individual debt collectors asserted that the limits, as proposed, would unconstitutionally restrain their speech. Consumer advocates expressed

support for the call limits.

Response: The proposed limit of one completed call per seven-day period matches that of Regulation F. The proposed limit of three attempted calls per seven-day period differs from Regulation F's limit of seven attempted calls. The rule is intended to prevent phone calls made with a frequency that consumers experience as harassing from being used as a debt collection tactic. The Department notes that these limits apply per debt, which means that under the federal regulation, a consumer with three debts could be called 21 times per week, whereas under the proposed rule, that same consumer could be called nine times. As the Department noted in its 2021 proposal, no commenters responding to the Department's draft rule published for small business input offered data on the number of attempted and completed calls that are typically required to achieve their business goals; nor did any commenter suggest a limit that would accommodate reasonable business practices. One debt collector told the Department that because debt collectors often do not start out with reliable contact information for consumers, it may take many phone calls initially to reach the consumer, but once the debt collector does reach the right party, it usually takes only one call to make a payment plan arrangement; after that, a completed call every seven days would be more frequent than average. No commenters on the draft rule provided data on the time it takes for a debt collector to make enough calls to find the right party. The revised proposed regulation, like the proposed regulation, will still allow debt collectors to call a consumer more frequently if the consumer requests more frequent calls. The revised proposed rule differs from the proposed rule in that it now prohibits excessive communication generally. As to phone calls, compliance with this prohibition will be presumed if the debt collector stays within the limits set by the rule, but such presumption is rebuttable.

(21) **Comment:** Industry associations and debt collectors commented that the Department should adopt an "opt-out" model for electronic communications rather than the "opt-in" model it proposed. Advocates supported the "opt-in" model and that, generally, the proposal does not permit debt

collectors to rely exclusively on electronic communication.

Response: The Department declines to adopt an opt-out model. The Needs and Benefits section of the Regulatory Impact Statement included with this notice of revised proposed rule making details the Department's reasons for requiring debt collectors to obtain permission from consumers before contacting them through electronic communication methods.

(22) **Comment:** Industry associations and debt collectors requested an effective date 270 days after adoption.

Response: The Department is proposing an effective date 180 days after adoption of the rule. The Department does not believe a longer transition period is necessary. The Department removed transitional language in the text of its revised proposal because it is not necessary, as the Department can set an effective date in its adoption notice in the State Register.