

New Debt Collector Regulations Adopted in New York

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On December 3, the New York State Department of Financial Services adopted [new regulations](#) that will impose requirements on debt collectors, including debt buyers, in connection with their collection of debts from consumers.

While there is no express statutory provision in the New York Banking Law or Financial Services Law expressly authorizing the adoption of these regulations, they were promulgated under the Superintendent of Financial Services' implicit powers under New York Financial Services Law §§ 202, 302 and 408, which, among other things, give the Superintendent "the rights, powers, and duties in connection with financial services and products in [New York], expressly or reasonably implied by the Financial Services Law or other applicable law" of New York and the power to prescribe rules and regulations. This is the first time that the state has used its so-called "Gap Authority."

The majority of the substantive requirements will go into effect on March 3, 2015; however, the substantive requirements applicable only to charged-off debt, discussed below, will go into effect on August 30, 2015.

Meaning of Debt

For purposes of the regulations, a "debt" is defined as:

Any obligation or alleged obligation of a consumer for the payment of money or its equivalent which arises out of a transaction wherein credit has been extended to a consumer, and the money, property or service which was the subject of the transaction was primarily for personal, family or household purposes. This term includes the obligation of a consumer who is a co-maker, guarantor, or endorser, as well as the obligation of the consumer to whom the credit was originally extended.

Expressly excluded from the definition of debt is "any obligation or alleged obligation of a consumer for the payment of money or its equivalent which arises 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." This exclusion is significant because it appears broad enough to include the extension of credit by a seller to a purchaser on a retail installment contract and the exclusion would continue to apply to the obligation after it is subsequently assigned or sold to a sales finance company or otherwise.

Meaning of Debt Collector

For purposes of the regulations, a “debt collector” is defined as “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.” The term includes a debt buyer seeking to collect debts, either directly or indirectly.

The regulations contain several important exclusions from the definition of debt collector, including:

- Officers or employees of a creditor collecting debts of a creditor in the name of the creditor;
- A person collecting a debt of a person related by common ownership or affiliated by corporate control, provided the person only acts as a debt collector for such related persons and its principal business is not the collection of debts;
- A person serving legal process on a person in connection with the judicial enforcement of any debt;
- A person collecting a debt owed or due or asserted to be owed or due another to the extent the activity is incidental to a bona fide fiduciary obligation or escrow arrangement;
- A person collecting or attempting to collect any debt owed or due another to the extent such activity concerns a debt which was originated by such person. As a result of this exclusion, an original creditor will be exempt from complying with the regulations even if it retains or subsequently acquires loan servicing rights or is compelled to repurchase delinquent accounts;
- A person collecting or attempting to collect any debt owed or due another to the extent the activity concerns a debt which was not in default at the time it was obtained by such person;
- A person collecting or attempting to collect any debt owed or due another to the extent the activity concerns a debt obtained by such person as a secured party in a commercial transaction involving the creditor.
- A person with respect to (i) serving, filing, or conveying formal legal pleadings, discovery requests, or other documents pursuant to the applicable rules of civil procedure, (ii) communicating in, or at the direction of, a court of law or in depositions or settlement conferences or other communications in connection with a pending legal action to collect a debt on behalf of a client, or (iii) collecting on or enforcing a money judgment.

Debt Collector Obligations

The regulations establish substantive disclosure and conduct requirements that apply to debt collectors. Specifically:

- Within *5 days* of initial communication with a consumer in connection with the collection of a debt, a debt collector will be required to provide a consumer clear and conspicuous notification that the Fair Debt Collection Practices Act prohibits debt collectors from engaging in abusive, deceptive and unfair debt collection efforts, including, but not limited to, the use or threat of violence, the use of obscene or profane language, and repeated phone calls made with the intent to annoy, abuse or harass. The debt collector is

also required to provide a notice in regulatory prescribed form notifying the consumer that state or federal law may prevent a creditor or debt collector from looking to certain types of income to pay a money judgment that the creditor or debt collector receives in court.

- Debt collectors are required to maintain reasonable procedures to determine the statute of limitations applicable to a debt and whether that statute of limitations has expired. When the debt collector knows or has reason to know that the statute of limitations on a debt has expired, the debt collector must provide a consumer with a clear and specific notice containing specific information prescribed by regulation prior to the acceptance of a payment. This notice must be provided in the same medium by which the debt collector will accept payments (i.e., if a telephonic payment, the notice is provided telephonically) and the regulations contain a script/notice that can be used to satisfy this requirement.
- Within *5 business days* of agreeing to a debt payment schedule or other agreement to settle a debt, a debt collector must provide a written confirmation of the debt payment schedule or other agreement to the consumer, along with a regulatory prescribed notice notifying the consumer that state or federal law may prevent a creditor or debt collector from looking to certain types of income to pay a money judgment that the creditor or debt collector receives in court.
- When a consumer is making scheduled payments under a debt payment schedule or other agreement, a debt collector must provide a consumer with an accounting on at least a quarterly basis.
- Within *20 business days* of receipt of a payment satisfying a consumer's debt, a debt collector must send written confirmation of satisfaction to the consumer.
- The regulations restrict e-mail communications with consumers by prohibiting a debt collector from communicating with a consumer by e-mail, unless the consumer voluntarily provides an e-mail address, confirms the e-mail address is not furnished or owned by his or her employer and consents in writing to receiving e-mail correspondence with the debt collector. The consumer's consent to e-mail communication must be debt specific.

Debt Collector Obligations Regarding Charged-Off Debt

The regulations also contain requirements applicable only to charged-off debt, which go into effect on August 30, 2015.

Charged-off debt is defined as a debt an original creditor—defined as the person, or their successor or interest by way of merger, acquisition, or otherwise, who extends credit creating a debt—has removed from its financial statements by treating the debt as a loss or expense. In connection with such charged-off debt:

Within *5 days* after an initial communication with a consumer, a debt collector must provide the consumer with an additional clear and conspicuous written notification containing the name of the original creditor and an itemized accounting of the debt.

If a consumer disputes the validity of the debt, the debt collector must treat the complaint as a request for substantiation of the debt or inform the consumer that the consumer may request substantiation of the debt.

When a debt collector receives a request for substantiation, the debt collector must provide the consumer with written substantiation of the debt within 60 days and cease collection until written substantiation has been provided.

Substantiation of a debt must include a copy of a judgment against the consumer or: (1) a signed contract or signed application that created the debt, or if no signed contract or application exists, a copy of a document provided to the consumer while the account was active demonstrating the debt was incurred by the consumer (in connection with a revolving credit account, the most recent statement recording a purchase, payment or balance transfer); (2) the charge-off account statement issued to the consumer by the original creditor; (3) a statement describing the complete chain of title from the original creditor to the present creditor, which must include the date of each assignment, sale and transfer; and (4) records reflecting the amount and date of any prior debt payment schedule or other agreement reached in connection with the debt.

A debt collector need only substantiate the debt once during the period in which it owns or has the right to collect the charged-off debt. Due to the definition of “original creditor,” arguably these additional requirements relating to charged-off debts will apply only when the “original creditor,” meaning the person that actually extended credit, or his or her successor in interest through a merger, acquisition, or similar transaction “or otherwise”, is the one charging off an account. If a subsequent holder through a loan or portfolio purchase, subsequent to purchase, charges-off the account, the debt may not be subject to the additional requirements mentioned above. It is unclear whether the use of the term “or otherwise” in defining “original creditor” encompasses such a holder, and hence whether a debt charged-off by a subsequent creditor would be subject to the charged-off debt provisions.

In an apparent contradiction, worth noting, a copy of a judgment against a consumer is an item that can be used to substantiate a charged-off debt, but a person that is collecting or enforcing a money judgment is excluded from the definition of a debt collector and thus does not need to comply with these regulations at all.

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