The Consumer Finance Podcast: Navigating New York City's New Debt Collection Rules
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Chris Willis:

Welcome to *The Consumer Finance Podcast*. I'm Chris Willis, co-leader of Troutman Pepper's Consumer Financial Services Regulatory Practice. Today, we're going to be talking about the new, New York City debt collection rule amendments, and their effect on creditors and non-creditors alike.

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Now, as I said, today we're going to be talking about some recent amendments to the New York City Department of Consumer and Worker Protections debt collection rules. That was a mouthful. I'm joined by what I think has to be one of the leading authorities on this subject anywhere, which is my partner Stefanie Jackman. So, Stefanie, thank you for being on the podcast today to talk to our listeners about this important development.

Stefanie Jackman:

Thank you, Chris. Happy to be here.

Chris Willis:

So, these debt collection rules have been around for a while, but there were some recent amendments to them. I think it'd be great for you to just start to tell the audience what's happened recently. What are these amendments?

Stefanie Jackman:

Yes. I'd be happy to do that. It's a little bit of a story because there's been several series of amendments. They were first proposed by the New York City Department of Consumer and Worker Protection. We'll just call it the department because to your point, it's a mouthful, earlier during the summer, early fall. Since then, we've had a delay of the enforcement date, then a delay of the effective date. We've also had a lawsuit. We'll talk about all of these later, and we've had yet another set of amendments, it just came out and the comment period is currently open. That set of amendments made clear these do apply to creditors collecting their own debt. We'll get into that in a minute.

But at a high level, the rules are significantly amending to your point, Chris. Rules that have been in place since I want to say 2012 or 2014 in New York City that the department put out, but there are substantial revisions and not in a way that makes anything easier. Really at a high level, there's kind of five main categories I'd put them into. There's communication methods related requirements and restrictions, validation and debt itemization/verification, because that's New York's special word for debt validation, credit reporting, record keeping, overall disclosures, and then there's this sixth category if you are engaged in medical debt collections.

At a high level, we could spend, I feel like, a day, and we're not going to, talking about these. But the rules are increasing the number of permitted debt-related communications in any seven-day period from two to three. So, you can make three debt-related communications in a seven-day period, but they made clear that is inclusive of every type of communication. It's not three calls, three emails, three texts. It's three, total of everything.

The rules also prohibit using email text or other electronic methods to collect a debt or attempt to do so without prior written consent from the consumer, directly get into the debt collector, and the rules bar debt collectors from contacting consumers at their places of employment without any prior consent from the consumer.

As I noted, there are credit reporting restrictions. One of them that I want to highlight is it requires disclosure of the debt at least 14 days before any credit reporting begins or any furnishing to a credit reporting agency. I talked about the validation notice requirements. There's a new itemization date. It's called the itemization reference date. It doesn't correlate exactly with Reg. F. In fact, it really only permits two of the five types of itemization dates that Reg. F would allow. And some of those don't exist. It requires disclosure of your collection license. It requires itemization figures for both pre-charge-off and post-charge-off periods. These are all defined terms in the amended rules.

The validation notice itself has to have all sorts of additional disclosures, enhanced itemization. It makes you say that you cannot collect on a debt if you fail to respond within 45 days, even though it still says you have, the debt validation period is 30 days, consistent with Reg. F. But under Reg. F and the FDCPA, a debt collector doesn't have to respond within any period of time. They can't continue collecting the account until they provide the response to the validation request.

But in New York City, you have 45 days. And if you don't do it, the rules will make you give a notice of unverified debt. It is a specific letter that you have to give to the consumer that says we

failed to verify and validate your debt within 45 days, so we can't collect on it anymore. We won't do so. Here's where we credit-rewarded it, and we'll make a record of this insurance transferred with your account if it's subsequently sold or transferred to other third parties. Oh, and there's language translation requirements, but Chris, do you want to ask something in a little more detail about that?

Chris Willis:

Yes, I was just going to react to the notice of unverifiable debt in the 45-day timeline because we know that currently there are entities out there that take advantage of that on the credit reporting front where if you don't investigate a credit reporting dispute within a certain number of days that has to get deleted off of the credit report, and this seems like another opportunity for those same parties to try to get debts discharged altogether if the debtor happens to live in New York City.

Stefanie Jackman:

Absolutely, because this unverified debt notice, the rules do not say that it makes the debt uncollectible, but from a practical perspective, that's the impact. Because even if you're able to down the road prove the debt, say you're a FDCPA covered debt collector and upon being unable to get the documentation or information you need to verify the debt for the New York City consumer within this 45-day period, you transfer the account back to the creditor. And the creditor can do so, right? Maybe just the person over there was missed the request to give it in the first place.

The first thing a consumer is going to do is come back and say, “Wait a minute, I've got

this notice, so even if you can prove it, you're going to spend more time and money doing so.” So, from a practical perspective, my opinion and that of many in the industry is the sending of an unverified debt notice is basically going to result in that account becoming uncollectible because of just the cost associated with trying to overcome that written communication that must be mailed, can't even be emailed, must be mailed or delivered using a delivery service to the consumer.

Chris Willis:

Stefanie, let me ask you one other thing. You mentioned some enhanced disclosures and other things that would go presumably in an initial sort of Reg. F-type validation notice. Where do they go? Do they go on like the back side where the state disclosures are supposed to be under Reg. F? What does a debt collector do with that?

Stefanie Jackman:

So, the rules do say you can put them on the back side, but there's a specific disclosure you have to give on the front. The first page of the notice, it says essentially they have specific language, don't have it right in front of me, but essentially important disclosures of New York City consumers on back. If you put it on the back, you need to be careful, especially if you're

subject to Reg. F as a third-party FDCPA debt collector. You need to be careful that the disclosures don't run onto the tear-off because another important piece, Chris, is the rules say you cannot deliver - this is in direct contradiction of the FDCPA you cannot deliver a validation notice electronically or verbally.

The FDCPA permits that. Here it says, if you do that, you got to follow it up with something in mail. So, you want to be careful these disclosures don't go below that tear-off if you're using the model form of Reg. F to allow the consumer to get back to you with any validation requests or other disputes. I've already helped a client try to fit this all in. They weren't able to do it. And they had it as a New York-specific notice. So, they got to get the New York state disclosures, the New York City disclosures, and they're on to another page. That's going to up your mail cost.

But yes, they can go in the back, Chris. It's just a question of how many pages you have to add to get them in there. Some companies don't manage it state by state. They'll have all the disclosures for Minnesota residents, for New York City residents, for – this is just going to add a lot of length and complexity and cost to the letter mailing process because you have to mail it.

Another thing that's really intriguing about New York City's approach is that they say two things about foreign language. To the extent that your first communication as a debt collector with a consumer is in a language other than English, you then must provide the validation notice in that language within five days and provide all subsequent responses to disputes, complaints, other communications in that language. So, it is essentially mandating a language from start to finish if you as the debt collector begin in that language.

The rule also though, and I think this is interesting, the rule also says even if you as the debt collector don't start in one language, you start in English, but a consumer requests the notice be translated in some other language, you have to give them that. And you also have to give them the model. If you're subject to the FDCPA and Reg. F, the model form is already translated in Spanish. It's essentially mandating Spanish from start to finish on any Spanish language account, as I read it, or at least as plaintiffs' lawyers or the department would argue.

This is the most expansive servicing and collections related, and I say servicing and collections because of what we get to in a moment talking about how this applies to creditors. All creditors, at least as currently proposed, collecting their own accounts. So, servicing and collections, anything past due, you have foreign language, limited English proficiency related requirements that span anything I'm aware of in any context in the current financial services industry, whether origination, servicing collections or otherwise.

But quickly, a couple other things. Immense changes to recordkeeping and reporting requirements for debt collectors in licensed collection agencies. Additional time-barred debt disclosures must maintain reasonable processes to determine when an account goes past the statute of limitations. And if you are in medical debt collection, all sorts of additional restrictions that we would need another podcast for, Chris.

Chris Willis:

Let's skip the medical for now in the interest of time. But let's go back to what you just mentioned, which is the coverage of creditors. There are some states, and I guess this is a local debt collection law that covers collection of creditors, but there's a bit of a story on coverage of creditors on these amendments too. So, why don't you tell the audience that story?

Stefanie Jackman:

Yes. It's an interesting story. So, when the rules were originally promulgated by the department back in 2014, they applied to creditors collecting their own debt. The definition made that clear. There was a separate validation notice process for creditors and first-party servicers who began servicing pre-default. And that was in the prior version of 6RCNY5-77F1. And then F2 was the process in New York City for FDCPA-covered debt collectors.

So, we had an existing rule that covered creditors. Fast forward to 2024, and the department publishes a rule that didn't seem to do that. They removed that portion of the definition of a debt collector that covered creditors, and they removed F1 of 5-77, the creditor-specific debt validation process. That's great news. And the definition of a debt collector said, FDCPA covered, right? They don't ever get out of coverage. "Those acting on behalf of others," so first-party servicers and licensees could be covered, collection licensees, and they made clear debt buyers. Then of course, creditors using any creditor, and this is consistent with the FDCPA. Any creditor using a name other than their own falsely to collect the debt, you'd be subject to the FDCPA. So, creditors, please don't ever do that. Use your true name.

But that's what we had, it was great news. So, I've been focusing on talking to our creditor clients about how to support the covered collectors that they work with on the documentation that'll be needed to avoid these unverified debt notices I mentioned earlier, and just facilitating the very onerous enhancements that their collection partners would be subject to.

But lo and behold, on November 7, after understanding there was confusion in receiving different questions from across the collection space, New York City held a webinar to frame which they put up some slides that said, "Oh, you're all mistaken." Creditors and notwithstanding the plain language of the definition of the term that says either having a principal purpose of debt collection, which a creditor certainly does not, or essentially collecting on behalf of somebody else. So, they got the first and third-party servicer, FDCPA-covered debt collector world. It's what it said. It said we didn't mean that, we meant for creditors to be covered and we're going to put out another amended rule that says that which they did on November 12th. They published a rule that does nothing other than change the definition of the debt collector to the following: Those that have a principal purpose of debt collection or anyone, "Who regularly collects or attempts to collect directly or indirectly, debts owed or due, or asserted to be owed or due to another person," and now the new language, "or to the person collecting or attempting to collect the debt."

The good news, Chris, is creditors and others have an opportunity to comment. Comments are due by December 12th of this year to the department. But the department came out and made it crystal clear that everything applies equally. Everyone is a debt collector now in New York City from the biggest banks in the world collecting the accounts they originated in their own name,

using their own employees to your more traditional FDCPA-covered debt collector or debt buyer, everybody is now going to share if the amendment is ultimately finalized in the joys of complying in New York City. So, that was a huge change that caught basically the entire industry off guard.

Chris Willis:

Yes. I can understand why, since the definition changed seemingly to exclude creditors, but I guess the New York City Department of Consumer and Worker Protection just wants to call a do-over on that, which I guess they're going to do.

Let's get back to all these new requirements that you started off the podcast telling our listeners about. When are they set to take effect?

Stefanie Jackman:

Because they are quite onerous and substantial and different than anyone is having to do currently, even under the most generous consumer-oriented collection program. The department realized that and they have moved the original effective and enforcement date from December 1st of this year to April 1st of next year. So, April Fool's Day is currently the date of 2025, and I don't think it's a joke right now, for enforcement and the effective date.

There was a period of time, Chris, where only the enforcement date had moved. The effective date was still December. That was causing some confusion. Thankfully, the department has at least brought those together. I think part of the reason they might have brought that together was the ACA lawsuit that was filed on October 18th, as I recall, challenging the rules, and we'll get to that in a minute. But the day after that was filed was when the first change was made here. Then the proposed amendment we were just talking about that added creditors also updates the effective and enforcement date to April 1st.

Chris Willis:

Okay. So, assuming it's not an April Fool's joke, you mentioned enforcement. What exactly are the enforcement mechanisms for the amended rules? I mean, what trouble can a creditor or a debt collector get into if they don't comply with all this new stuff you told us about?

Stefanie Jackman:

It's interesting. So, these are promulgated by the department, and I've looked at this for clients in the past. There is no private right of action for violating the New York City regulations. They're enforced by the department. However, that doesn't mean we can't see a private right of action for their violation being created. So let me unpack that a little bit. Creditors, not debt buyers, not FDCPA debt collectors, not servicers. I mean, creditor, the entity was just assumed who originated the debt and to whom the debt is owed, collecting it using its own name, using its own people. That's my most conservative creditor definition. They're most likely to only see problems in New York City being identified through them, compliance problems, I should say, by the department, right?

So, the department enforcing its own rules, how would the department find out that creditors are calling consumers too much or not following the validation procedures and verifying debts directly, or getting unsubstantiated notices, well, that would probably be through complaints and disputes, right? That either come to the department or go to the CFPB or go to the FTC, Better Business Bureau, however. It isn't impossible that a plaintiff's attorney could find a New York state law like an invasion of privacy-based claim or some UDAP fair business claim and try to bootstrap this in. I haven't had occasion to look at whether or not that would hold up, but sometimes they do, right?

That's one way we've seen people weaponize in Massachusetts, the Attorney General regulations that also don't have a private right of action, but sometimes can make their way in through, I think it's a 2A claim or 93A claim under the Massachusetts UDAP. You could see something similar to that happen in New York. I haven't seen it in the past. It's not something I've seen happening. Generally, creditors in the past didn't get a lot of attention from the department. Even under the old rules, it clearly covered them. Which is another reason why everybody was like, “Yes, it makes sense that these don't cover us anymore because the department really wasn't enforcing them against us in the past.”

For collectors, and let me define that, for anyone who is collecting on behalf of another, whether you started pre-default or not. So, first party, you might be under the FDCPA allowed to collect in the creditor's name even. Of course, FDCPA covered debt collectors and debt buyers, it's a different story. So, New York City could come after you, of course, because you're going to have a license with them. But on top of that, these are going to be alleged to be FDCPA violations left and right. That's what we usually see. And they also could add on a New York state claim, like I said, with creditors.

So, I don't expect the only enforcement, Chris, to come through the department, but at least for creditors, the good news is it doesn't seem likely that private litigation would be a big driver here. That's not the case for the rest of their service and collection partners.

Chris Willis:

You mentioned that there was a litigation challenge going on from one of the trade associations. Can you talk about that and what other options there might be for challenging these amended rules?

Stefanie Jackman:

Sure. So, on October 18th of this year, ACA International and Independent Recovery Resources coordinated to file a lawsuit in the Eastern District of New York, so we’re in federal court here, against the department and New York City mayor, Eric Adams. In the lawsuit, which I thought was a – I read the complaint, I thought it was really well done, raised some really interesting arguments, similar arguments that we've been seeing sort of more generally with CFPB challenges of late. So, there were a lot of pieces of that that I'm seeing being brought to this municipal level.

In that, ACA and Independent Recovery are seeking declarative and injunctive relief against the department and the city for violation of the U.S. Constitution and based on claims of preemption

by both federal and state law. Because don't forget, New York State has its own collection law and its own regulations through the New York Department of Financial Services, DFS. But just to give you a little bit of a taste of what the complaint said, some of the things they've raised are that specifically the rules discriminate based on the content and speaker of targeted speech without an adequate justification and violation of the First Amendment. The rules are mandating that collectors engage in certain types of speech that are also alleged to violate the First Amendment because it's irrational and unnecessary, both to their detriment and that of consumers.

There's a claim that there's a 14th Amendment due process clause change because the rules were promulgated in a confusing or in contradictory way, contradictory to state law, to the FDCPA, to Reg. F, and have many vague requirements that leave collectors with insufficient guidance to know how to implement them in any sort of reliable way and what actions are permitted or not permitted in many instances.

One of the things that ACA flagged in particular is in promulgating these rules the department didn't provide any specific data, studies, facts, other reason that this level of change is necessary. So, that's further augmenting the claim of a due process violation here. And then there are claims about some of the parts of the rule being preempted by federal law that states additional state regulations aren't permitted. We're seeing a lot of that with the FCRA impacts and how those, what you can furnish, what you can't, how you have to respond to validation requests. It can also be disputes and mandating certain information there.

Then for some litigation-related restrictions, we also see some claims that the rules violate the First Amendment Petitions Clause by changing access to courts based on the identity of who's seeking relief, and that the rules violate the constitution of the state of New York because they're foreclosing. They claim that the rules relating to default judgments should be foreclosed by the state of New York's Constitution and the comprehensive set of laws that have been developed for access to courts in New York. If you haven't read the complaint, it's well done.

It's a good read. We'll have to see where it goes, of course, but it raises a lot of challenges. Will some of the challenges take out potentially, if successful, the whole rule? Sure. But some only challenge certain parts. So, it'll be interesting to see how this goes, even though we're in federal court, we're still in New York. Sometimes the federal courts in New York can be fairly protective of consumers. So, it'll just be interesting to see how this plays out.

Chris Willis:

Yes, I bet it will be interesting. So, last thing I wanted to ask you is, what advice would you give to both creditors and debt collectors regarding compliance with the new amended rules?

Stefanie Jackman:

Well, first, given the new surprise that creditors who were erased from the rule and are now back in, creditors need to read it to the extent that you've spoken to outside counsel, possibly me, where we'd said, "Ah, you don't have to worry about it." That's changed, assuming that the amendment that was just proposed is finalized. So, comment. You have until December 12. Comment with why this isn't workable. There are lots of ways to show that this doesn't make

sense for creditors. Pre-charge off, post-charge off. You may not have it post-charge off, but you still have to say things about it. Having to give 14 days advance notice before credit reporting, you can never credit report, creditor. How would you possibly do that? You'd have to give 14 days, but you're also required, if you've been furnishing while the account was performing, how can you possibly do that?

The language requirements, there's a lot that you can work with to just show some real challenges that New York City would have to answer in finalizing this expansive application to creditors. Then everybody, to the extent you aren't already doing it, you need to be reading these and thinking, we got a little bit of extra time. We got five extra months. But remember, New York City has been trying to update their regs for several years. I think they published the last set in, it was either 2021 or 2022. It was a couple of years ago, conflicted with what the New York Department of Financial Services put out. They both withdrew them. They've been working on this for about two years. They want to update these.

So, some of this is coming, most likely, unless we get success in the ACA lawsuit, some sort of preliminary injunction. But until that happens, we need to be preparing because there are some major changes to your process, to the way that you handle things, and to your ability as a collector to continue collecting accounts, that you need to be thinking through working with your outside creditor or collection partners, whichever side of that aisle you're on, in order to be ready to go as of April 1st. Hopefully we get more time, but we don't know yet.

Chris Willis:

Stefanie, thank you very much for taking us through all this. As you said, an incredibly important development for servicing and collection for both creditors and debt collectors alike. So, thank you for being on the podcast. And of course, thanks to our audience for listening to today's episode also.

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