

**COMMISSIONER JONATHAN MINTZ
NEW YORK CITY
DEPARTMENT OF CONSUMER AFFAIRS
42 BROADWAY
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**COMMENTS OF ACA INTERNATIONAL
IN RESPONSE TO THE DEPARTMENT OF CONSUMER AFFAIR'S
REQUEST FOR COMMENT RE:**

**Proposed Rule Regarding Requirements Governing Debt Collection
Agency Licensees**

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INTRODUCTION

The following comments are submitted on behalf of ACA International, *the Association of Credit and Collection Professionals* (“ACA”), in response to the New York City Department of Consumer Affairs’s (DCA) request for comments regarding a proposed rule which seeks to implement required practices pursuant to Local Law No. 15 (2009) and impose record retention requirements on debt collection agencies operating in New York City (Rule).

ACA respectfully submits the following comments in an effort to highlight changes that it supports, and also comment on those provisions of concern to its membership and solutions to resolve potential workability issues for the industry.

I. Statement on ACA

ACA International is an association of credit, collection, and debt purchasing professionals who provide a wide variety of accounts receivable management services. Founded in 1939 and headquartered in Minneapolis, Minnesota, ACA represents approximately 5,500 third party collection agencies, asset buyers, attorneys, credit grantors, and vendor affiliates. ACA members include sole proprietorships, partnerships, and corporations ranging from small businesses to firms employing thousands of workers.

ACA helps its members serve their communities and meet the challenges created by changing markets through leadership, education, and service. ACA members comply with all applicable federal and state laws and regulations regarding debt collection as well as ethical standards and guidelines established by ACA. In addition to the regulatory and enforcement powers of the DCA, ACA members are regulated by the Federal Trade Commission under the Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. §§ 1692 – 1692o, the Fair Credit Reporting Act (“FCRA”), 15 U.S.C. § 1681 – 1681x, and other state and federal laws.

The collection services provided by ACA members are an essential part of a healthy domestic economy. ACA members return billions of dollars to the United States economy every year. In 2007 alone, debt collectors recovered more than \$40 billion, a massive infusion of money into the economy.¹ Debt collectors also help consumers obtain or regain favorable credit, help businesses design credit policies that minimize bad debt, and lower the economic burden placed on responsible consumers who ultimately bear the cost of bad debt.

II. Summary of Comments

Members of the credit and collection industry that support the local economy by attempting to collect debt in New York City have raised significant compliance concerns with respect to the enactment of Local Law No. 15 in March 2009 by the New York City Council. While ACA appreciates the DCA's proposed rule as a way to offer clarification for agencies operating in New York City, ACA respectfully submits the proposed rule raises a number of compliance concerns for agencies attempting to collect debt in New York City. ACA is committed to developing a dialogue with the DCA to discuss the proposed rule and the interpretation of Local Law No. 15.

III. Specific Comments to Proposed Rule

ACA respectfully submits the proposed rule poses significant practical concerns for debt collectors and consumers alike for the following reasons. Specifically, ACA wishes to comment regarding the provisions of the proposed rule concerning the collection of time-barred debt (§ 2-191), the confirmation of a debt payment schedule or settlement agreement (§ 2-192), and record retention (§ 2-193).

¹ PricewaterhouseCoopers, *Value of Third-Party Debt Collection to the U.S. Economy in 2007: Survey and Analysis*, June 12, 2008.

1) The DCA Should Remove the Formatting Requirements Under § 2-191 and Provide Additional Information in the Statement to Permit a Consumer to make an Informed Decision Regarding Payment of a Debt

ACA respectfully submits the statement required to be included in any permitted communication from a debt collection agency to a consumer must be amended to properly inform the consumer about her rights and obligations concerning a debt that may or may not be barred from judicial enforcement under applicable state statutes of limitation.

Section 2-191(a) requires debt collection agencies, in any permitted communication for each debt the agency is seeking to collect beyond the statute of limitations, to include a disclosure which attempts to provide the consumer information as to her legal rights and obligations. ACA understands the intent behind this proposal is to provide a consumer with information about her legal rights in circumstances where a debt collection agency is attempting to collect a time-barred debt.

ACA underscores the statute of limitations in New York remains an affirmative defense that must be pled by a defendant in a civil action. According to New York Civil Practice Law and Rules and case law, a respondent to a pleading must assert the statute of limitations as an affirmative defense in the responsive pleading. The expiration of the statute of limitations is an affirmative defense for the very reason it may be appropriate for litigants in a civil action to undertake discovery to determine the applicable statute of limitations or to consider whether the statute of limitations was revived. Further, because the statute of limitations is an affirmative defense, there is a legal presumption a consumer owes an existing financial obligation.

In addition, although a debt may be time-barred, it remains an obligation of the consumer under the Fair Credit Reporting Act (FCRA) as well as the Fair Debt Collection Practices Act (FDCPA). It is important to highlight debt collectors who furnish information concerning debt to

consumer reporting agencies are permitted under the FCRA to report time-barred debt.² The FCRA specifically states accounts placed in collections may be reported for a period of seven years. As a result, a debt may continue to be reported by a debt collector after the statute of limitations to judicially enforce the debt has expired. The FTC's consumer alert on time-barred debt also suggests time-barred debt can be reported to consumer reporting agencies, regardless of whether the debt is time-barred or not, so long as the debt is reported for the permissible time period.³

Given a time-barred debt may continue to be reported to a consumer's credit report for longer than the applicable statute of limitations on the debt, ACA fears consumers will disregard attempts by debt collection agencies to resolve a financial obligation if debt collectors are required to inform consumers as to the judicial unenforceability of a debt and the potential for revival of the debt. This ultimately leaves the consumer owing the obligation and potentially having his or her credit suffer because of the resulting lack of communication between debt collection agency and consumer.

To highlight the above concern, a consumer's credit history will still show a consumer owes an outstanding obligation even if a debt collector cannot enforce the obligation in a court of law. If the consumer applies for a loan, the potential lender will obtain a copy of the consumer's credit report to verify credit worthiness and will see the outstanding obligation. The lender, in turn, may require the consumer to satisfy the existing obligation to provide the consumer credit.

That being said, if the goal of § 2-191 is to inform consumer as to the consequences of paying a debt, ACA submits consumers should also be informed about the consequences of not paying a debt. ACA suggests that to offer the consumer a full understanding of her rights and

² 15 U.S.C. §§ 1681c(a)(4); 1681c(c) (2008).

³ *Time-Barred Debts*, FTC Consumer Alert, Oct. 2004.

obligations with respect to the financial obligation at issue, the required disclosure should be amended to include an additional sentence which is underlined for demonstrative purposes only:

WE ARE REQUIRED BY LAW TO GIVE YOU THE FOLLOWING WARNING ABOUT PAYMENTS ON THIS DEBT. The statute of limitations bars a creditor from taking legal action, including using arbitration, to make you pay this debt. **BE AWARE** that if you voluntarily pay anything toward this debt, such payment can restart the creditor's right to take legal action to make you pay the entire debt. Please remember that failure to pay the debt may still affect your ability to obtain credit or employment.

A time-barred debt can continue to be reported on a consumer's credit report, and consumers should be aware of this consequence before deciding whether to decline paying a debt.

In addition, ACA urges the DCA to remove the formatting requirements under § 2-191(b) concerning how the required statement under § 2-191(a) must be provided in a permitted communication. Section 2-191(b) requires the statement be provided in at least 12 point type that is set off in a sharply contrasting color from all other type on the permitted communication and placed adjacent to the identifying information about the amount claimed to be due or owed on such debt.

ACA is concerned that requiring agencies to provide the required disclosure pursuant to the formatting requirements under § 2-191(b) created compliance concerns with respect to the overshadowing provision of the FDCPA. As a result of the conflicting obligations between the FDCPA and proposed rule, consumers will suffer from greater confusion and misunderstanding of the rights and obligations disclosed to them with respect to a particular debt.

The FDCPA prohibits debt collectors from including information in the initial validation notice in a manner which overshadows the information required to be included by a debt collector in the first written communication to the consumer under the FDCPA.⁴

⁴ 15 U.S.C. § 1692g(a) (2006).

The formatting requirements of the disclosure regarding time-barred debt prescribed by the proposed rule overshadow the validation notice language required by the FDCPA. The validation notice requirement of the FDCPA is crucial to ensure consumers are aware of their rights and obligations when contacted by a debt collector. The proposed rule, however, in practice draws consumer attention away from reading important information regarding how to dispute a debt and seek verification of a debt because other information in the letter must be included in a larger font and set off in a sharply contrasting color from the information required to be provided under the FDCPA.

ACA believes providing the required statement in the same font and font color as remaining text in the collection letter is sufficient so long as the language is provided in a font size similar to the remaining text in the collection letter. The statement includes a sentence that is in all capital letters which sufficiently attracts the consumer's attention. In addition to being in violation of the FDCPA, requiring debt collection agencies to provide the statement in a contrasting color will require many agencies to completely overhaul their letter formatting services, including paying an additional and very high expense to print a letter in color.

2) Section 2-192 Should Be Amended to Ensure Final Payment is Fully Processed Before Written Confirmation of the Satisfaction of Indebtedness is Sent to the Consumer

Section 2-192 of the proposed rule requires a debt collection agency within 10 days after receipt of final payment to send the consumer a written confirmation of the satisfaction of the indebtedness upon the consumer's payment of a debt as modified in the debt payment schedule or settlement agreement.

ACA submits the 10-day period is insufficient to ensure any final payments are fully processed so that written confirmation of the satisfaction of indebtedness sent to the consumer is accurate. The purpose of this provision appears to be that the consumer should receive a notice

informing her of final payment resulting in the satisfaction of a debt pursuant to the terms of a debt payment schedule or settlement agreement. ACA believe the objective of this provision is to give an *accurate* confirmation that a payment schedule or settlement agreement is confirmed. A final payment, however, may not be sufficiently processed within ten days to ensure the written confirmation is accurate.

The 10-day period may confuse consumers if, for example, they receive confirmation, and then their payment cannot be processed, requiring the debt collection agency to send a new notice informing the consumer the payment schedule or settlement agreement is not completed. One particular example evidencing the above scenario is if a consumer writes a check to the debt collection agency as final payment under the terms of a debt payment schedule or settlement agreement. If the check is not honored for insufficient funds, ten days is an insufficient time for the agency to properly notify the consumer her payment was not honored.

As the current rule stands, ACA believes it is likely situations will arise whereby a debt collection agency sends the consumer written confirmation before final payment is fully processed which will create consumer confusion if final payment is not properly processed.

To mitigate this concern, ACA suggests the DCA amend § 2-192(d) to require debt collection agencies to provide written confirmation of satisfaction of a debt after final payment within **30** calendar days after receipt of final payment to provide sufficient time for the consumer's final payment to be properly processed.

3) ACA Urges the DCA to Reconsider Requiring Debt Collection Agencies to Record Complete Conversations

While ACA appreciates the DCA's efforts to require debt collection agencies operating in New York City to adopt certain record retention requirements, ACA strongly believes any benefits from requiring debt collection agencies to record telephone calls under the proposed rule

are outweighed by the significant administrative and financial burdens that would be imposed on the agencies.

In particular, the costs of requiring debt collection agencies to implement call recording systems, pursuant to § 2-193(b)(2), is far outweighed by the benefit of having calls recorded for purposes of the DCA enforcing compliance with the disclosure and documentation requirements of applicable laws and regulations. While ACA applauds the DCA for offering debt collection agencies the option to record a randomly selected sample of at least 5% of all calls made or received, a debt collection agency must still bear the cost of obtaining call recording software and implementing such software into its business practices.

ACA understands the DCA's need to enforce compliance with applicable laws and regulations. As an alternative to requiring all agencies to record calls under the proposed rule, ACA urges the DCA to require the recording of collection calls only as a potential mechanism to enforce a consent decree or other disciplinary action taken against an agency for violation of applicable laws or rules.

4) Section 2-193 Should Clarify the Applicability of the Record Retention Requirements

Section 2-193 of the proposed rule requires a debt collection agency maintain a separate file for each debt the agency attempts to collect for each consumer in a searchable or retrievable manner as well as retain a number of particular records to document agency collection activities with respect to each consumer.

In addition to ACA's comments regarding the recording of calls, two additional and significant concerns with this section are raised: (1) the section does not condition the retention of certain records upon compliance with applicable federal and state law; and (2) the section does not identify the length of time records must be retained. ACA underscores applicable

federal and state law as well as industry standards, which require the destruction of certain records after a certain period of time, are in direct conflict with § 2-193.

The Fair Credit Reporting Act (FCRA),⁵ the Gramm-Leach-Bliley Act (GLBA),⁶ the Health Insurance Portability and Accountability Act,⁷ and other federal laws contain provisions requiring debt collectors and asset buyers to develop policies and procedures to prevent the unauthorized disclosure and reduce the risk of fraud by redacting or otherwise destroying sensitive consumer financial and personal information.

To ensure debt collection agencies do not violate federal or state law when complying with any record retention requirements imposed by the DCA, ACA suggests § 2-193(a) be amended by including the following phrase at the beginning of subsection (a): Unless otherwise prohibited by federal or state law or by the Laws of the City of New York Including this provision protects debt collection agencies from retaining sensitive consumer personal or financial information in violation of federal, state, or local law.

Furthermore, ACA suggests DCA amend § 2-193 to require debt collection agencies to retain any records of communications with the consumer for a period of three years from the date of the communication and retain any additional records for a period of three years from the date the agency receives or obtains the account from its client, forwarder, or seller of the account.⁸ Adopting this amendment clarifies the period of time for which debt collection agencies must retain certain records.

⁵ 15 U.S.C. § 1681w (2008) requires any person that maintains or possesses consumer information derived from consumer report for a business purpose to properly dispose of such information.

⁶ 16 C.F.R. § 314.3 (2009) requires financial institutions to develop and implement a written information security program containing administrative, technical, and physical safeguards appropriate to the institution's size and complexity, the nature and scope of its activities, and the sensitivity of the customer information at issue.

⁷ 45 C.F.R. §§ 160; 164 (2009) require business associates to implement safeguards that reasonably and appropriately protect the confidentiality, integrity, and availability of electronic protected health information.

⁸ ACA assumes the period for retaining any records as determined by rule is three years pursuant to N.Y.C. Admin. Code § 20-104(b)(4).

In conjunction with these record retention requirements, if the DCA requires debt collection agencies to record complete conversations with consumers made or received by agencies pursuant to § 2-193(b)(2), ACA urges the DCA to only require agencies to maintain call recordings for a period of no longer than one year from the date of the recording. While the technology required to record calls is expensive, the cost of maintaining electronic recorded files for thousands of consumer communications is exorbitant and will impose a very significant financial burden on agencies to retain such information for any longer than one year from the date of the communication.

5) The Date of Effectiveness and Enforcement of the Proposed Rule Should be Postponed to Permit Debt Collectors Sufficient Time to Comply

Almost all of the provisions included in the proposed rule will undoubtedly require debt collection agencies operating in New York City to conduct a comprehensive and lengthy review of their internal collection policies and procedures, collection letters, phone call scripts, and retention procedures. Should any rule be promulgated, ACA respectfully urges the Commissioner and the DCA to delay the effective date and enforcement of the rule for a period of no less than one year to give agencies a sufficient amount of time to review and understand the rule and develop and implement necessary changes to their internal policies and procedures.

IV. Additional Comments Related to Local Law No. 15

ACA respectfully offers two suggestions to the DCA in the hope the DCA can provide additional clarification regarding the application of Local Law No. 15. Specifically, ACA requests DCA address in the proposed rule the provisions of Local Law No. 15 requiring a debt collection agency in any permitted communication to provide a call-back number to a phone that is answered by a natural person (§ 20-493.1(a)(i)) as well as requiring a debt collector to provide verification to the consumer upon the consumer's request (§ 20-493.2(a)).

ACA believes a strict reading of § 20-493.1(a)(i) will significantly deteriorate the ability of debt collection agencies to communicate with consumers in New York City. Debt collection agencies attempt to provide the best customer service for consumers in order to establish communication and resolve financial obligations. As the DCA is well aware, debt collection agencies make thousands of contacts with consumers each day. Conversely, consumers make contact with debt collection agencies as well.

Because of the high volume of communications, debt collection agencies, just as many other industries who communicate with consumers every day, use interactive voice response (IVR) technology to properly direct a consumer to speak with the correct collector (either for a particular account or to speak in a particular language), business contact, or to perform a particular function, such as paying a debt by telephone. IVR is used as a tool to improve customer service for consumers. If debt collection agencies are prohibited under § 20-493.1(a)(i) from using any form of IVR technology, and are required to only answer incoming telephone calls via live operator, ACA is confident consumers in New York City will receive a diminished level of customer service and suffer a decrease in their ability to communicate with agencies to negotiate resolution of financial obligations.

At the same time, ACA appreciates concerns express by the DCA with respect to consumers being essentially frozen in an IVR system whereby they are on the telephone waiting to speak to a live person for an unreasonable amount of time. As a potential solution, ACA requests the DCA clarify this requirement permits agencies to use an interactive voice response (IVR) or other similar technology to answer a call to the call-back number so long as the IVR is used to direct a consumer to a natural person and a natural person answers the call within a reasonable period of time.

In addition, debt collection agencies rarely operate twenty-four hours a day. Section 20-493.1(a)(i), however, does not identify whether a natural person must answer a call placed to a call-back number at any time of day. ACA requests the DCA clarify a debt collection agency is only required to answer any call to the call-back number within the agency's public hours of operation.

Lastly, ACA respectfully urges the DCA to clarify a debt collection agency is only required to verify a debt, pursuant to § 20-493.2, upon the consumer's *written* request. Requiring a consumer to submit a written request for verification to the debt collection agency creates a tangible record an agency can use to ensure it is not communicating with the consumer and track its verification response.

CONCLUSION

ACA appreciates the opportunity to testify at the June 26, 2009 hearing and the opportunity to provide written testimony. ACA looks forward to working with the Commissioner and the DCA with respect to the proposed rule.

Sincerely,

ACA INTERNATIONAL



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