November 29, 2023
Re: DCWP Proposed Amendments to Rules Relating to Debt Collectors

To: Department of Consumer and Worker Protection
Submitted via email: rulecomments@dcwp.nyc.gov

Comment to Proposed Amendment of Rules Relating to Debt Collectors

The Consumer Relations Consortium (CRC) is an organization comprised of more than 60 national companies representing creditors, data and technology providers, and compliance-oriented debt collectors that are larger market participants. Established in 2013, CRC is dedicated to a consumer-centric shift in the debt collection paradigm. It engages with all stakeholders—including consumer advocates, federal and state regulators, academic and industry thought leaders, creditors, and debt collectors—and challenges them to move beyond talking points. The CRC focuses on fashioning real-world solutions that seek to improve the consumer's experience during debt collection. CRC's collaborative and candid approach is unique in the market.

CRC members exert substantial positive impact in the consumer debt space, servicing the largest U.S. financial institutions and consumer lenders, major healthcare organizations, telecom providers, government entities, hospitality, utilities, and other creditors. CRC members engage in millions of compliant and consumer-centric interactions every month at all stages of the revenue cycle. Our members subscribe to the following core principle:

"Consumer protection and debt collection are not mutually exclusive ideas; they can, *and should,* co-exist."

We appreciate the opportunity to respond to the Notice of Public Hearing and Opportunity to Comment on the Amendment of Rules Related to Debt Collectors, dated September 30, 2023. As explained in the enclosed comment, the CRC is concerned that the DCWP's proposed rule will (a) create unnecessary consumer confusion, (b) unreasonably burden debt collectors with little to no countervailing benefit to consumers, and (c) create other negative unintended consequences. The CRC believes the Proposed Amendment must be significantly updated to avoid these consequences.

Sincerely,

Missy Meggison

Missy Meggison
Co-Executive Director, Consumer Relations Consortium

CONSUMER RELATIONS CONSORTIUM COMMENT RE:
PROPOSED AMENDMENT OF RULES RELATED TO DEBT COLLECTORS

The Consumer Relations Consortium is submitting its comments, feedback, and suggestions in response to the New York City Department of Consumer and Worker Protection's Proposed Amendment of Rules Related to Debt Collectors, dated September 30, 2023.

As explained in further detail below, the CRC's position is that, the proposed amendment will (a) create unnecessary consumer confusion, (b) unreasonably burden debt collectors with little to no benefit to consumers, and (c) create other negative unintended consequences for the following reasons:

1. The proposed validation notice requirements are inconsistent with federal disclosure requirements and will Create Consumer Confusion.

2. The new validation period calculation will create consumer confusion because it does not align with Regulation F. (Page 6)

3. Verification requirements under the proposed rule cannot be reconciled with regulation F and will confuse consumers. (Page 7)

4. The contact frequency rules are unclear and should be clarified to apply "per person, per account" to avoid inconsistency with federal law. (Page 8)

5. The proposed rule harms consumers by eliminating their ability to choose a communication preference. (Page 10)

6. The proposed rules regarding medical debt are unnecessarily onerous, overbroad, and place unreasonable burdens on debt collectors. (Page 13)

7. The proposed credit reporting notice imposes tremendous costs on the debt collection industry with little countervailing benefit to consumers. (Page 16)

8. The proposal's use of clarifying language creates unintended negative consequences. (Page 22)

Within this comment, the CRC has included suggestions for the DWCP to achieve its goals without creating additional confusion, hardships, and other negative consequences.

1. The New Validation Notice Requirements Are Inconsistent with Federal Disclosure Requirements and Will Create Consumer Confusion

The proposed update to § 5-77(f)(2) contemplates a significant overhaul of the information required to be included in the validation notice in a way that interferes and potentially contradicts

federal law and will likely cause consumer confusion. The proposed rule should be amended to reconcile the City requirements with federal law and to eliminate potential consumer misunderstanding. This can be accomplished in at least the following ways:

a. Allow the validation notice to be sent electronically.

The proposed rule currently states that the notice must be "written" and "sent by U.S. mail or delivery service." *See § 5-77(f)(2).* For the reasons discussed in greater detail in Sections 4 and 5 below, the proposed rule should be amended to relax the rules for communicating electronically to provide consumers with better control over selecting the mode of communication.

b. Remove the "natural person for the consumer to contact" requirement.

Section 5-77(f)(2)(iii) and (iv) require the validation notice to include "the name of a natural person for the consumer to contact" and a "telephone number that is answered by such natural person" This requirement is unclear. For example, is providing the name of the individual who works regular hours sufficient, even when that person may not be working at the time of a consumer's call? If the person is not available – not working that day, no longer employed, or occupied on another call, is it acceptable for the call to be answered by a different person, or is a voicemail box required for that specific individual? Does the telephone number need to be a direct line, as most frontline agents do not have specific direct lines? Can the disclosure also include alternative contact information, like either a specific individual or company email address?

In addition to the challenges such a requirement creates, this disclosure is also unnecessary, as it presupposes that there is a specific individual responsible for collecting a specific account. Collection agencies are not generally built that way however, accounts are worked by teams and any agent on that team answering a call would be equally available and knowledgeable to discuss an account with the consumer. Of Course, consumers can elect to ask for a specific agent to whom they have established a relationship, but including a specific name for a specific account at the

outset does not benefit consumers and actually makes it less likely a consumer will be able to communicate with a natural person when calling the debt collector because it contemplates only one person being available, when that person may not be available when the consumer calls. This requirement should be removed from the proposed rule.

c. Remove Dispute disclosure requirements or conform them to the FDCPA

The disclosure in § 5-77(f)(2)(v) creates irreconcilable conflict with the Fair Debt Collection Practices Act (FDCPA). For example, the disclosure requires the debt collector to tell the consumer "**There is no time limit to dispute the debt in collection.**" (emphasis in original). This disclosure directly contradicts the FDCPA, which requires the debt collector to provide a specific date by which the validation period will end. *12 C.F.R. § 1006.34(c)(3)(i)-(iii).* Simultaneously telling a consumer that a request for validation is required by a date certain while notifying the consumer that there "is no time limit to dispute the debt" provides a consumer with two different and contradictory pieces of information, creating a high likelihood of consumer confusion on the timing and manner in which they may dispute their debt.

Further, the disclosure in § 5-77(f)(2)(v) requires that consumers be told that the dispute can be done in "any of the ways they contact you, including by phone." This language contradicts the FDCPA, which requires the verification request to be done in writing to trigger validation rights. *Se 15 U.S.C. 1692g(a)(4).* Again, consumers are told conflicting information under the proposed rule, which is likely to cause consumers to unknowingly forgo their federal dispute rights by disputing their debts in ways that do not trigger federal verification obligations.

d. Remove subjective and vague itemization language requirements.

The itemization proposal in § 5-77(f)(2)(viii) also creates potential confusion and misunderstanding. The proposed rule says the itemization is to be done in a way that "allows the consumer to recognize the total amount of the outstanding debt as of the itemization reference

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date." Establishing a standard on what will "allow" a consumer to recognize the amount of the debt is too subjective and uncertain. This language should be removed.

e. Allow itemization from any of the Regulation F itemization dates.

The specific itemization breakdown contemplated by the proposed rule is confusing and unnecessary as a detailed itemization is already required by federal law. The proposed rule says the itemization needs to be tied to the "itemization reference date", a term specifically defined in § 5-76(3) to be only "the date of the last written notification sent to the consumer "on an open-ended credit account, or "the date of last payment…or the date of the last written notification sent to the consumer" for a closed-end account." This itemization period is artificially limited and contradicts with Regulation F, which allows for 1 of 5 different itemization dates.

The specific dates required by the proposed rule are not always available to debt collectors, making the proposed itemization impossible and requiring greater flexibility on available itemization dates. Moreover, the proposed rule creates a possible scenario when the itemization for Regulation F will be different than the itemization done for New York City. This will likely cause additional consumer confusion when consumers receive different itemization tables. The proposed rule should be modified to allow the itemization from any of the Regulation F itemization dates.

f. Modify itemization requirements to avoid consumer confusion and the unintended consequence of requiring debt collectors to provide legal advice.

The itemization contained within § 5-77(f)(2)(v)(B) includes the "date, amount, and description of each fee, payment, credit, or interest applied to the debt since the itemization reference date" This is an unworkable level of detail for an initial notice and outside the knowledge or obtainable by debt collectors. For example, how is a debt collector reasonably expected to know the date of each interest charge since the itemization reference date? To what level of specificity

is the "description" of each charge required? Is each payment required to be individually stated and include the manner of the payment for example? Rather than burying the consumer in excessive detail at the outset, the proposed rule should be modified to simply require the amounts of each fee, payment, credit and interest charge.

Similarly, including the "basis of the consumer's obligation to pay each separate charge, interest, or fee, including if allow by contract or by law" is burdensome. The proposed rule is not limited in time or scope, and suggests a legal determination is to be performed by the debt collector on what the creditor is charging a consumer. A debt collector should not be required to exercise legal judgment in sending the validation notice to each consumer. At a minimum, the proposed rule should be modified to allow that, if accurate, stating that each charge is allowed by the consumer's agreement with the creditor or the law satisfies this obligation. Otherwise, debt collectors are required to articulate the basis for a charge applied by the creditor by expressing a legal conclusion.

2. <u>The New Validation Period Calculation Will Create Consumer Confusion Because it does not align with Regulation F</u>

Section § 5-77(f)(4) of the proposed rule defines the validation period as extending "for 30 consecutive days from the date a consumer receives or is assumed to receive a validation notice." Though the proposal seems to track the Regulation F validation period calculation methodology, the proposed rule should be clarified that a debt collector satisfies the obligation of providing a validation period by giving the consumer a specific end date that is at least 5 days after sending of the validation notice plus 30 consecutive business days consistent with Regulation F. In other words, the debt collector can provide the consumer a date certain when the validation period will end, provided that date meets the 5 delivery day plus 30 day requirement.

The proposed rule should clarify that debt collectors can allow for a validation period beyond this time as well. Otherwise, the proposed rule potentially creates two different validation periods under federal and New York City law. As a result, the proposed rule should allow the debt collector to calculate and provide a specific validation period of 5 days for delivery plus at least 30 days like Regulation F so as not to have 2 different validation periods. Such a revision of the proposed rule will only increase consumer benefits with more time while removing potential confusion.

3. Verification Requirements Under the Proposed Rule Cannot be Reconciled with Regulation F and will Confuse Consumers

Section 5-77(f)(6) of the proposed rule allows a consumer to dispute the debt or make a request for verification "orally or in writing, or electronically if the debt collector uses electronic communication to collect debt, at any time during the period in which the debt collector owns or has the right to collect the debt."

This proposal requires amendment, as it directly contradicts the FDCPA. Regulation F requires the debt collector to specifically tell the consumer that a request for verification must be made within a specific time period and in writing. The proposed rule undermines this specific disclosure and will lead to consumer confusion as it is not possible to reconcile federal disclosures with the proposed rule in a non-misleading way. The proposed rule should be modified to require that a request for verification cannot be effectively made verbally (though most debt collectors will honor a verbal request) and that the request must be made within the validation period so as to remove any contradiction with the FDCPA disclosure.

The requirement that the debt collector "must treat a first dispute by the consumer as a request for verification of the debt" should be removed. This proposal conflates a dispute with a request for verification, and requiring the debt collector to respond to a dispute, standing alone,

with verification is unnecessary. If a consumer simply disputes the debt, but does not ask for, or even rejects a request by the debt collector to send validation, the debt collector should not be compelled to respond to that dispute with a non-responsive, non-requested, and potentially unwanted verification.

Similarly, the enhanced verification requirements in § 5-77(f)(6)(i)(A) – (C) should be revised. Rather than requiring items like the underlying contract, evidence that an "account was active", prior settlement agreements, and a final account statement, these items should be identified as suggested documents, not required. In other words, the proposed rule should be revised to say that "Verification of the debt means providing information reasonably necessary to demonstrate that the consumer's obligation to the creditor of the amount claimed due. This demonstration can be made by, among other documentation…." followed by § (A) - § (C). This revision will equitably balance the challenges debt collectors may face in timely obtaining and providing the required documentation to the consumer while providing the consumer sufficient detail to substantiate the debt.

4. **The Contact Frequency Rules are Unclear and Should be Clarified to Apply "Per Person, Per Account" to Avoid Inconsistency with Federal Law**

Section 5-77(b)(1)(iv) of the proposed rule prohibits a debt collector from communicating with a consumer with "excessive frequency[.]" The rule describes "excessive frequency" as any communication (by any means) that is more than three times in a seven-day period or after having already interacted with the consumer within the seven-day period. The language of the proposed rule, however, is ambiguous.

First, it is unclear whether the proposed 3-in-7 rule applies on a "per consumer" or "per account" basis, or both. On the one hand, the preamble of the provision characterizes the prohibited conduct on a per-account basis ("A debt collector, in connection with the collection of **a debt**,

must not . . ."). On the other hand, the provision defining the frequency limitation characterizes the prohibited conduct as more than three communications "with **a consumer**" in a seven-day period or after already having had an interaction "with **the consumer**." In its current form, the rule is confusing and makes compliance difficult.

Due to this ambiguity, the rule should be clarified to expressly address whether the proposed 3-in-7 rule should be applied on a per account or per consumer basis or both. The CRC recommends that the 3-in-7 rule should be applied on a per account, per person basis, which is consistent with the application of the 7-in-7 rule under Regulation F. The 3-in-7 rule already significantly limits reasonable communications with consumers beyond what is defined under Regulation F as it includes all methods of communication (including electronic communications) and decreases the overall number of contact attempts by more than 50% of what is allowed by federal law. If it were to be construed as applying on a "per consumer" basis, it would unnecessarily limit communication attempts even further and unduly constrain agencies from making reasonable attempts to collect on unpaid accounts. Providing for collections on a per-account basis acknowledges the reality that consumers often have more than one unpaid account owed at any given time and recognizes that the definition of consumer (including parents of a minor, guardians, executors, and spouses) makes it difficult to determine contacts by "consumer."

Second, the proposed rule prohibits communications after a collector has already "interacted" with a consumer but fails to define what constitutes an "interaction." An "interaction" should be defined to avoid confusion. Specifically, the proposed rule should define an "interaction" as a conversation with the consumer regarding the debt and expressly exclude passive interactions such as "opened" or "viewed" electronic communications, Limited Content Messages, and/or disconnected calls to be consistent with Regulation F.

The contact frequency restrictions in the proposed rules severely restrict a debt collector's ability to communicate with consumers. The Department should consider the potential negative impact on consumers resulting from a debt collector's inability to communicate with consumers. Absent a detailed empirical study on the impact to consumers on a debt collector's ability to communicate with consumers, the Department risks imposing severe burdens on consumers as the result of a debt collector's inability to communicate with them. The longer it takes for a debt collector to reach a consumer, the longer a legitimate debt remains outstanding, remains on a consumer's credit report, remains unresolved, and inhibits the consumer's ability to secure future credit.

5. <u>The Proposed Rule Harms Consumers by Eliminating Their Ability to Choose a Communication Preference</u>

Section 5-77(b)(i)(5) of the proposed rule states that a debt collector may communicate with a consumer by

> ". . .email address, text message number, social media account, or specific electronic medium of communication if:
>
> ***
>
> (B) the debt collector obtains revocable consent from the consumer in writing, given directly to the debt collector, to use such email address, text message number, social media account, or other electronic medium of communication to communicate about the debt, and the consumer has not since revoked the consent;"

This proposal contravenes consumer preference, imposes an undue and unreasonable burden on collection agencies, and effectively eliminates the ability to communicate with consumers in a way preferred by many consumers. The proposed rule should be modified for at least 3 reasons:

First, eliminating the concept of a "pass-through" consent for email interferes with the relationship between the consumer and the creditor. Federal law gives a debt collector "safe harbor" when a creditor passes an email address for a consumer to a debt collector. *See 12 C.F.R.*

1006.64(d)(4). A debt collector communicating with a consumer on behalf of a creditor should be permitted to communicate with that same consumer in the manner that the consumer elected, including email address supplied to the creditor. In fact, a consumer's expectations would be that the agency would honor the same preferred communication channel. Prohibiting a debt collector from communicating with a consumer at an email address that is supplied by a creditor starts the collection process off in an adversarial manner, as consumers are likely to be frustrated by the inability to communicate in their preferred manner, such as an email voluntarily provided to the creditor, and removes some consumer choice on how and when to engage with the debt collector.

Second, imposing an "in writing" obligation for obtaining direct consent is unnecessarily onerous – to consumers. Though the proposed rule contemplated obtaining an "electronic signature" (*see* § 5-77(b)(ii)), that electronic "written consent" requires first satisfying "all relevant state and federal laws and rules, including article three of the New York Technology Law…and Electronic Signatures in Global National Commerce Act" (E-SIGN Act). This proposed solution is too limited though, as often, consumers will request that debt collectors "send me an email" during a telephone call. Complying with state law and the E-SIGN Act, including providing required disclosures and system verification to satisfy the E-SIGN Act, cannot reasonably be done during the course of a telephone call. Further such a process is anachronistic as consumers expect to immediately receive responsive mail when requested and not need to go through an E-SIGN Act verification process to simply get details about their debt. The rule unnecessarily burdens consumers' ability to choose email as their preferred method of communication.

Third, consumers want to communicate in modern forms, like e-mail and text messages. In the Consumer Financial Protection Bureau's 2023 Consumer Credit Card Market Report, for example, the CFPB found, regarding email communications, that:

- creditors reported that consumers provided a valid email address and agreed to be contacted at that email address in 76 to 97 percent of cases; and
- the number of email eligible accounts rose from 68.3% in 2018 to 87.6% in 2022.

As it relates to text messages, the report noted that:

- text messaging as a "collection strategy has continued to increase since the CFPB began tracking this figure in 2017";
- "text engagement rates "showed a significant increase, with the engagement rate rising from 36.6 percent in 2020 to 57.7 percent in 2022";
- "the text opt-out rate is notably low, at 1.3%";
- There has been a shift in consumer behavior in the past few years, with more consumers engaging in collection communications via text."

Overall, the CFPB's report from this year shows that consumers prefer electronic communications and barriers to text and email communications should be removed, not added.

A consumer who agreed to be contacted by a creditor, and potentially a debt collector, is not without recourse. Federal law, like the proposed rule, gives consumers ultimate control over how debt collectors can communicate, requiring clear and conspicuous disclosure of a simple opt out process. *12 C.F.R. 1006.6(e).* Because of this, allowing consent to communicate by email to flow from creditor to debt collector maximizes consumer preferences. Additionally, other parts of the proposed rule, including contact frequency limits and opt-out rights, place sufficient guardrails that consumer preferences continue to be honored.

Based on this, the proposed rule should be amended to remove an obligation to obtain any type of consent from the consumer prior to communicating electronically. Alternatively, the proposed rule should be revised to harmonize the New York City rules with the Fair Debt Collection Practices Act and the Telephone Consumer Protection Act in the following ways:

i. Allow a debt collector to obtain consent to communicate with a consumer in their preferred channel by stating in (B) that "the debt collector obtains revocable consent from the consumer when an email address, text message number, social media account, or other electronic medium of communication to communicate about the debt is passed to the debt collector by the creditor;"

ii. Allow a debt collector to obtain consent from a consumer either in writing, electronically or verbally.

6. **The Proposed Rules Regarding Medical Debt are Unnecessarily Onerous, Overbroad, and Place Unreasonable Burdens on Debt Collectors.**

There are several added requirements pertaining to medical debt collection efforts. In general, the proposed rule contains requirements that are onerous, overly broad, and improperly places unreasonable burdens on third-party collectors.

First, the proposed rule broadly defines "medical debts" as any "health care services or medical products or devices." As drafted, the rule applies to all medical debts - whether medically necessary or elective. The disclosure and verification requirements are onerous and appear to be focused on providing consumers with information regarding financial aid. Purely elective procedures, products, and services should not be encompassed in the proposed rule. The CRC recommends revising the definition of "medical debts" under § 5-77(f)(10) and § 5-77(j)(1) to limit application to "**medically necessary** health care services, or medical products or devices."

Second, the proposed rule should provide a proscribed time limit for the verification period under § 5-77(f)(10)(i). (See comments regarding verification above, Section 3.)

Third, § 5-77(f)(10)(iii)(A) of the proposed rule requires "all unverified accounts related to a discrete hospitalization or treatment" within a 6-month period to be treated as disputed (whether or not the account was ever actually disputed). The language is vague and unclear

regarding what constitutes a "discrete" or "related" treatment. A patient's medical care from a given provider is generally continuous, and treatments are often related. It is unclear what it means here to be "related." Do physical therapy appointments relate to the underlying surgery? Is a prescription for a pain medication related to the surgery? Is a flu shot related to later treatment for a sore throat? The current definition leaves these questions unanswered. CRC recommends striking this provision to require consideration of the application of an "unverified" dispute on a per account basis.

Fourth, the proposed rule places an unreasonable and undue burden on the collection agency to determine and assess the legal obligations of a provider and the financial aid status of a consumer. § 5-77(f)(10)(ii) requires the collection agency to verify any consumer dispute regarding a medical debt "by responding to the specific issue disputed by the consumer" including any information "available to the debt collector required to be disclosed by federal, state, or local law, including the relevant financial assistance policy" (§ 5-77(f)(6)(i)). The language is ambiguous and lacks clarity as to what would be adequate to address the "specific" issue and what might be required under applicable law. Typically, medical debts are verified by providing a comprehensive "Explanation of Benefits" and, if applicable, directing the consumer to the creditor to apply for financial assistance. Accordingly, the language should be modified to state that collector may verify the dispute by providing an explanation of benefits addressing the disputed account and providing information to the consumer regarding how to contact the creditor to apply for financial assistance.

Likewise, the rule places an undue burden on the collector to verify information uniquely within the provider's possession. § 5-77(f)(10)(iv) and § 5-77(j) prohibit a debt collector from attempting to collect a medical debt if the collectors "knows or **should** know" that the medical provider failed to provide certain financial assistance information or rights to the consumer,

violated the law, made a misrepresentation to the consumer regarding financial assistance, or that a financial assistance application is pending. If the collector "obtains information" regarding any of the above failures, it must complete various "corrective measures" including notifying the provider within **one day**[1]; documenting all account notes; mailing the consumer a written notice; and providing information to any transferring entity. The collector is also prohibited from resuming collection efforts until it has "verified" that the provider has "met its obligations" under all applicable law and its financial assistance policy.

The above requirements improperly place the legal obligations of the provider to comply with applicable law and its own financial aid policy onto the debt collector. Even more troubling, the obligations placed on the debt collector are based on vague descriptions such as what the collector "should know," what "information was obtained" from the consumer, and "verifying" that the provider "met all appliable legal obligations." These expectations are vague, ambiguous, and logically unrealistic and suggest that a collection agency make legal determinations on the compliance efforts of its client. The information needed to assess a provider's compliance with applicable law and a consumer's financial status uniquely rests with the providers – not the collectors, which generally do not even have legal departments. As such, CRC recommends the following:

- § 5-77(f)(10)(iv) should be stricken. It is improper to place the provider's legal obligations on the collector. A collector should not be required to make a legal determination regarding whether a provider has complied with **all** applicable law or the provider's **own** financial aid policy – that is the provider's (and its counsel's) responsibility.

[1] Even if the other CRC recommendations are not incorporated into the final rule, the CRC requests that the time period for notifying the provider be extended to 10 business days. Only providing a single day for the debt collector to assess the information obtained, make a determination, and notify the provider is unrealistic and unduly burdensome.

- § 5-77(j)(1) should be revised to omit the words "should know" and read as follows: "if the debt collector has **actual knowledge** that:". This limits the onerous requirements under the "corrective measures" subdivision (j)(2) to the debt collector's actual knowledge of the provider's unlawful conduct under (j)(1).
- The "corrective measures" detailed under § 5-77(j)(2) should be revised to limit the collector's obligations. Specifically, the language should be limited to provide that if the consumer raises concerns regarding financial assistance, the collector will provide the consumer with contact information for the provider to inquire about financial assistance offerings. To place any additional burdens on the collector is misplaced and unrealistic. The information described is uniquely in the provider's possession – not the collector's and a consumer will likely be more comfortable providing such information to the provider – not the collector.

7. The Proposed Credit Reporting Notice Imposes Tremendous Cost on the Debt Collection Industry with Little Countervailing Benefit to Consumers.

The Department proposes to amend Title 6 of the Rules of the City of New York §5-77(e) to make unlawful the reporting of a consumer debt to a consumer reporting agency by a debt collector without first providing consumers notice that the debt will be reported to a consumer reporting agency. The relevant portion of the proposed rule states:

> **"§5-77. Unconscionable and Deceptive Trade Practices**
> It is an unconscionable and deceptive trade practice for a debt collector to attempt to collect a debt owed, due, or asserted to be owed or due except in accordance with the following rules:
> ***
> (10) furnishing to a consumer reporting agency, as defined in section 603(f) of the Fair Credit Reporting Act (15 U.S.C. § 1681a(f)), information about a debt unless the debt collector has sent the consumer a validation notice pursuant to section 5-77(f) that states,

in a clear and conspicuous manner, that the debt will be reported to a consumer reporting agency and waited 14 consecutive days. During the waiting period, the debt collector must permit receipt of, and monitor for, notifications of undeliverability from communications providers. If the debt collector receives such notification during the waiting period, the debt collector must not furnish information about the debt to a consumer reporting agency until the debt collector satisfies this subdivision. If the debt collector previously furnished information to a consumer reporting agency, between January 1, 2021 and the effective date of the rule, and if the debt collector still has a right to collect on such debt, they must disclose in a validation notice to the consumer, by mail or delivery service within 5 days of the effective date of this rule, that the debt was furnished to a consumer reporting agency, unless such information was already disclosed, clearly and conspicuously, in a validation notice mailed by the debt collector to the consumer."

a. Consumers Benefit from Being Made Aware of Their Unpaid Debts

Lawmakers and regulators have recognized the benefits associated with notifying consumers of the existence of their debts prior to those debts being reported to a consumer reporting agency. *See*, *Cal. Civ. Code § 1785.26, Utah Code Ann. § 70C-7-107(2),* 15 U.S.C.S. § 1681s-2(a)(7), 12 CFR PART 1022 APPENDIX B. Recently, the Consumer Financial Protection Bureau promulgated Regulation F to implement the Fair Debt Collection Practices Act and addressed the need for consumers to be aware of their debts prior to a debt collector's reporting of that debt to a consumer reporting agency. *12 CFR 1006.30(a)(1)*. Since November 30, 2021, all debt collectors have been required to communicate with consumers about their debt(s) *prior* to furnishing information about that debt to a consumer reporting agency. *Id.*

The proposed rule is not inconsistent with similar laws and regulations throughout the country which require debt collectors to make consumers aware of their debts prior to credit reporting. Notifying consumers about their unpaid debts helps consumers make informed decisions about how best to address their financial obligations.

b. A 14 Day Waiting Period Is Consistent with Federal Law

The proposed rule imposes a 14-day waiting period following a debt collector's notice to a consumer before the collector may report the debt to a consumer reporting agency. This

requirement is consistent with federal law wherein Regulation F requires a debt collector to wait a "reasonable period of time" after providing notice to a consumer of the existence of their debt before a debt collector may communicate with a consumer reporting agency about the debt. *12 C.F.R. 1006.30(a)(1).* The Consumer Financial Protection Bureau has provided official commentary on the meaning of "reasonable period" to mean 14 days or more. *12 CFR Part 1006 Supplement I, Section 1006.30 Note 2. ("A period of 14 consecutive days after the date that the debt collector places a letter in the mail or sends an electronic message is a reasonable period of time.")* The proposed rule also obligates collectors to permit receipt of and monitor for notifications of undeliverability of their communications to consumers about their debts. Regulation F contains a similar requirement. 12 C.F.R. 1006.30(a)(1)(ii). The purpose of the waiting period and the post-notice undeliverability monitoring is to give assurance to a debt collector that the consumer received the collector's notification about the debt. These assurances have been in place, by rule, since November 30, 2021.

c. The Proposed Rule Imposes Costly Redisclosure Requirements on Debt Collectors

Without considering the disclosures already provided to consumers pursuant to Regulation F, the proposed rule would require debt collectors to unconditionally re-disclose to consumers certain information about the debt and provide *new* disclosures to consumers not previously required. Specifically, the proposed rule imposes an absolute prohibition on reporting any information to a consumer reporting agency unless:

> ". . .the debt collector has sent the consumer a validation notice pursuant to section 5-77(f) that states, in a clear and conspicuous manner, that the debt will be reported to a consumer reporting agency and waited 14 consecutive days."

The validation notice requirements in proposed section 5-77(f) contain all of the same requirements imposed on debt collectors under Regulation F, 12 C.F.R. 1006.34(c), plus new

disclosures. As proposed, the rule would require debt collectors to unnecessarily duplicate the Regulation F Validation Information previously sent to consumers. Importantly, the information contained in the duplicate disclosure will not be identical to the information contained in the consumer's original validation notice. Among other information, dispute deadlines will be different and the itemization table will be different (to reflect payments and credits since the previous correspondence). This duplicate – but substantively different – validation notice will lead to consumer confusion because the two validation notices received by the consumer will not contain identical information.

Proposed Section 5-77(f) also contains *additional* disclosure requirements not previously required. This means no debt collector will have satisfied the requirement to have provided notice pursuant to 5-77(f) prior to any future credit reporting. The impact of this proposal is to require all debt collectors to resend *duplicate* Regulation F disclosures to all consumers via a new validation notice along with the new disclosures required by proposed 5-77(f). Such a notice would restart the dispute period, rejuvenate dispute and verification rights, and effectively re-start the entire collection process - much to the confusion and detriment of consumers.

The cost associated with requiring all debt collectors to send a new written notice to all consumers far outweighs the benefit of providing duplicate (and inconsistent) disclosures to consumers. Today, it costs more than $0.60 (postage plus paper) to send a single piece of 1 oz correspondence through the U.S. Postal Service system. Debt collectors who are reporting tens (or hundreds) of thousands of debts to the consumer reporting agencies would be required by this proposed rule to spend hundreds of thousands (potentially *millions*) of dollars to re-send the written disclosures required by this proposal. For the reasons explained below, the rule does not allow debt collectors to satisfy these requirements electronically.

d. The Marginal Benefit of A New Validation Notice is Small Considering Its Similarity to the Validation Information Required by Regulation F.

The differences between the new validation notice required by proposed 5-77(f) and the Validation Information required by 12 C.F.R. 1006.34(c) are small. As proposed, the new validation notice required by 5-77(f) would contain all information required by Regulation F. *See, proposed 5-77(f)(1)(i).* In addition to the Validation Information required by Regulation F, the proposal would require debt collectors to provide consumers new disclosures of the following information:

- a license number, if applicable (proposed 5-77(f)(1)(ii))
- the name and telephone number of a natural person (proposed 5-77(f)(1)(iii) and (iv))
- a consumer disclosure (which is confusingly inconsistent with 12 C.F.R. 1006.34(c)(3)(i)) (proposed 5-77(f)(1)(v))
- a new itemization table (which is again confusingly inconsistent with 12 C.F.R 1006.34(c)(ii)(viii) (proposed 5-77(f)(viii))

The marginal benefit to consumers would merely be the difference between the disclosures they already received from a debt collector pursuant to Regulation F and the new disclosures required by the proposal. Based on the new content required by the proposal, consumers would benefit very little from this additional information on accounts for which they have already received the Validation Information under Regulation F. Relative to the tremendous cost of re-sending a new validation notice to consumers, the benefit to consumers remains small.

Before imposing the tremendous cost of re-disclosure on debt collectors, the Department should conduct a consumer focus group study to measure the impact of these additional disclosures on consumers. The combination of Regulation F disclosures, existing New York City disclosures, and now the additional disclosures required by this proposal may very well have the opposite impact on consumers – that they do not read any of them at all, or worse, that they read them but

end up confused because of the inconsistent information contained the original and subsequent validation notices.

e. The January 1, 2021 Condition in The Proposal Does Not Eliminate the Requirement to Duplicate the Validation Notice but Instead, Compounds the Burden

No debt collector will have satisfied the requirements of the first sentence of proposed 5-77(e)(10) upon the effective date of the rule because it requires debt collectors to provide new disclosures not previously required. For all debt collectors reporting to a consumer reporting agency after January 1, 2021, they too will be required to provide a new validation notice to consumers because no New York City rule previously required a debt collector to include in its validation notice a statement that "the debt was furnished to a consumer reporting agency." Thus, validation notices before and after January 2, 2021, did not contain such disclosure, and the proposal would impose this requirement. Instead of reducing the burden on debt collectors who reported after January 1, 2021 (all of which were required effective November 30, 2021 to provide all consumers with federally defined Validation Information), the proposal multiplies the burden by requiring the new disclosure to be provided to the consumer within 5 days of the effective date of the rule.

In addition to the tremendous cost associated with sending another piece of mail correspondence to consumers, the 5 day rule is not workable for debt collectors who may not have accurate contact information for consumers and whose credit reporting cycle falls within the 5 day period. The proposal also fails to acknowledge that some consumers may be represented by counsel and others may already be involved in civil litigation, yet the proposal compels direct communication with the consumer by a debt collector. This obligation conflicts with the federal law prohibition on communicating with a consumer known to be represented by counsel.

f. CRC Proposes Alternative Language Which Achieves the Department's Goal Without Imposing Tremendous Burden on Debt Collectors

It is possible to achieve the Department's goal of protecting consumers while at the same time avoiding unnecessary cost on debt collectors. The CRC proposes the following alternative language to proposed section 5-77(e)(10):

> **"§5-77. Unconscionable and Deceptive Trade Practices**
>
> It is an unconscionable and deceptive trade practice for a debt collector to attempt to collect a debt owed, due, or asserted to be owed or due except in accordance with the following rules:
> ***
>
> (10) furnishing to a consumer reporting agency, as defined in section 603(f) of the Fair Credit Reporting Act (15 U.S.C. § 1681a(f)), information about a debt <u>not previously furnished by the debt collector</u> unless the debt collector has sent the consumer a validation notice pursuant to section 5-77(f) that states, in a clear and conspicuous manner, that the debt will be reported to a consumer reporting agency and waited 14 consecutive days. During the waiting period, the debt collector must permit receipt of, and monitor for, notifications of undeliverability from communications providers. If the debt collector receives such notification during the waiting period, the debt collector must not furnish information about the debt to a consumer reporting agency until the debt collector satisfies this subdivision. ~~If the debt collector previously furnished information to a consumer reporting agency, between January 1, 2021 and the effective date of the rule, and if the debt collector still has a right to collect on such debt, they must disclose in a validation notice to the consumer, by mail or delivery service within 5 days of the effective date of this rule, that the debt was furnished to a consumer reporting agency, unless such information was already disclosed, clearly and conspicuously, in a validation notice mailed by the debt collector to the consumer~~."

This proposal imposes the new disclosure requirements prospectively, protecting all consumers about which a debt collector may communicate with a consumer reporting agency while simultaneously avoiding the unnecessary and costly expense to duplicating confusing consumer disclosures.

8. <u>The Proposal's Use of Clarifying Language Creates Unintended Negative Consequences</u>

a. The Proposal Rule Now Distinguishes Between "Consumer" And "New York City Consumer" Without Defining the Latter

For the first time in its rules for debt collectors, the Department uses the phrase "New York City" to modify the term "consumer" in several places throughout the proposal. Yet, the proposal

does not define the new term "New York City consumer" and does not explain how that term means something different than the defined term, "consumer." *See, 6 RCNY 5-76.* Although it may seem intuitive, the use of modifying language "New York City" to describe consumers effectively changes the definition of the unmodified term "consumer" throughout the City's rules. These terms cannot mean the same thing; else it would be superfluous to modify the term "consumer" with the phrase "New York City." *See 6 RCNY 5-76.* The Department's introduction of the phrase "New York City" to modify the term "consumer" may appear to serve as an attempt at linguistic precision, but could lead to unintended or confused interpretations of the rules if not used consistently (or otherwise specifically defined).

The proposal uses both terms "New York City consumer" and "consumer" throughout, but not interchangeably. For example, under proposed section 5-77(e)(6) a debt collector may not, after the institution of debt collection procedures, communicate with a New York City consumer without disclosing the debt collector's name. Does this mean debt collectors are not required to disclose their name *unless* they are communicating with a New York City consumer? What if the debt collector is communication only with a "consumer" and not a "New York City consumer?" Is disclosure of the collector's name required by the proposal when communicating only with a "consumer?"

A second example of how inconsistent use of these two terms leads to anomalous results can be found in proposed section 5-77(f)(2)(i) Delivery of Validation Notices. This section requires a debt collector to:

> ". . .deliver written disclosures under (f)(1) of this section in the following manner:
> (i) a debt collector must deliver to consumers validation notices and the itemization of the debt by U.S. Mail or delivery service."

However, the disclosure requirements described in the newly proposed section (f)(1) do not apply to *all consumers* but instead apply only to "New York City consumers," to wit:

> *"Validation Notice*. Within five days after the initial communication with a *New York City consumer* in connection with the collection of any debt, a debt collector must send the consumer a written notice. . . "

(Emphasis added.) The difference in these two terms creates an internal inconsistency in the rule resulting in confusion about which consumers should be receiving disclosures – all consumers, or only New York City consumers? If these terms mean the same thing, then the proposal should not use different language. Again, in proposed rule 5-77(f)(6), this section requires debt collectors to provide verification only to "New York City consumers" in the first sentence, but refers only to "the consumer" throughout the remainder of the paragraph.

b. CRC Proposes to Edit The Definition Of "Consumer" to Include A Reference To "New York City" And Then Eliminate All References to "New York City" Throughout The Proposal.

If the terms "consumer" and "New York City consumer" mean the same thing throughout the proposal, then clarity can be achieved by editing the definition of "consumer" to include "New York City consumer" instead of using the modifying language "New York City" ad hoc throughout the proposal. The current definition of "consumer" under the rules is:

> "Consumer. The term "consumer" means any natural person obligated or allegedly obligated to pay any debt." *6 RCNY 5-76.*

CRC proposes to edit this definition as follows:

"Consumer. The term "consumer" means any natural person, residing in New York City, obligated or allegedly obligated to pay any debt.

By adding the language, "residing in New York City," to the definition of "consumer," the rules make clear that each time the word "consumer" is used throughout the rules, it means a New York City consumer. This language solves the problem of inconsistent use of the two terms and eliminates the possibility that those terms might have different meanings.

c. The Proposed Rule Now Prohibits Electronic Communications From Being "Writings"

Proposed section 5-77(b)(4)(i) now removes the possibility that an electronic communication may satisfy the obligation to do something "in writing." The proposed section states in part:

> "(b) **Communication in connection with debt collection.** A debt collector, in connection with the collection of a debt, must not:
>
> ***
> (4) Communicate with a consumer with respect to a debt if the consumer has notified the debt collector that the consumer wishes the debt collector to cease further communication with the consumer with respect to that debt. . . .The debt collector may, however:
>
> (i) Communicate with the consumer once in writing or by electronic means:
> 1. to advise the consumer that . . ."

(Emphasis added.) This section effectively, albeit unintentionally, changes the meaning of "in writing" throughout the entirety of section 5-77 by adding the language "or by electronic means" after the phrase "in writing." The language creates *two* methods of communicating with consumers under this section, the first method is "in writing" and the second "by electronic means." Communicating with a consumer "in writing" must necessarily exclude communicating with the consumer "by electronic means" else there would be no need to add this language i.e. the added language would be superfluous. Under the proposed language, "writings" necessarily exclude electronic communications.

The impact of this language is to change the meaning of "in writing" *everywhere else* the phrase "in writing" is used to exclude the possibility that "in writing" could also be electronic. If the phrase "in writing" is to bear the same meaning throughout the rules, then anything that must be done "in writing" elsewhere in the rules may not be done electronically. For example, consistent interpretation of "in writing" would prohibit a consumer from providing revocable consent via email, or through a web site, or via a text message under proposed section 5-77(b)(5)(i)(B) ("the

debt collector obtains revocable consent from the consumer *in writing. . .").* This result is hardly consistent with the subject matter of proposed sections 5-77(b)(5)(i)(B) and (C) which specifically contemplate a consumer's use of electronic mail, text messaging, and social media to communicate with a debt collector.

A more significant example of the unintended impact of excluding electronic communications from the meaning of "in writing" is found in section 5-77(f)(1)(iii) wherein the rule describes how a consumer may exercise their rights to dispute a debt by notifying "the debt collector *in writing* within the thirty-day period . . ." If "in writing" excludes electronic communications, then consumers cannot exercise their rights under 5-77(f)(1)(iii) via email, text message, social media, or any other form of communication fairly considered to be "electronic" in nature. This is not how the rules operated prior to this proposal and not likely the intended consequence of adding the otherwise benign "or by electronic means" to the end of section 5-77(b)(4)(i).

d. CRC Proposes to Eliminate The Words "or by electronic means" to Proposed Section 5-77(b)(4)(i) To Avoid Confusion About The Meaning of "in writing."

Elimination of the words "or by electronic means" in proposed section 5-77(b)(4)(i) avoids confusion about the meaning of the phrase "in writing." CRC proposes to remove that language from the proposal as follows:

> (i) Communicate with the consumer once in writing ~~or by electronic means~~:
> 2. to advise the consumer that . . ."