December 12, 2024

By Electronic Submission to
Rulecomments@dcwp.nyc.gov

1050 Fulton Avenue, Suite 120
Sacramento, CA 95825

New York City Department of Consumer and Worker Protection
42 Broadway #5
New York, NY 10004

Re: Proposal to Amend Section 5-76 of Part 6 of Subchapter A of Chapter 5 of Title 6 of the Rules of the City of New York

To Whom It May Concern:

The Receivables Management Association International (RMAI) submits the following comments concerning the Department of Consumer and Worker Protection's (the "Department") proposed amendments to Section 5-76 of Part 6 of Subchapter A of Chapter 5 of Title 6 of the Rules of the City of New York. Our comments address the proposed amendments noticed by the Department on November 1, 2024. We believe the proposed amendments do not cure the unconstitutional restrictions on debt collection speech and violates the City Administrative Procedure Act.

I. INTRODUCTION

RMAI is a nonprofit trade association that represents over 600 companies that purchase or support the purchase of performing and nonperforming receivables on the secondary market. RMAI member companies include banks, credit unions, non-bank lenders, debt buying companies, collection agencies, law firms, brokers, and industry-related product and service providers. RMAI's Receivables Management Certification Program (also referred to as RMCP or Certification Program)[1] and its Code of Ethics[2] set the "gold standard" within the receivables management industry due to RMAI's rigorous uniform industry standards of best practice which focus on protecting consumers. Several of our standards have been adopted at the state level and were recently used as framework by the Uniform Law Commission in their Uniform Consumer Debt Default Judgment Act.[3]

[1] Receivables Management Association International, *Receivables Management Certification Program, Ver. 10* (Mar. 1, 2023), publicly available at https://perma.cc/7D8Q-KGVC.
[2] Receivables Management Association International, *Code of Ethics* (August 13, 2015), publicly available at https://perma.cc/BM6J-USG.
[3] Uniform Consumer Debt Default Judgment Act, Prefatory Note ("this act seeks to incorporate provisions from . . . . standards set by Receivables Management Association International, a debt collections trade organization.") archived at https://perma.cc/T5TZ-CRC5.

Rolled out in 2013, RMAI's Certification Program sets high and robust industry standards that seek to go above and beyond the requirements of state and federal law for the protection of consumers.[4] While the program was first designed to certify debt buying companies, it has expanded to include certifications for law firms, collection agencies, and vendors (e.g., brokers and process servers). Currently, over 500 businesses and individuals hold these internationally respected certifications. Additionally, all the largest debt buying companies in the United States are RMAI certified, and we estimate that approximately 80 to 90 percent of all charged-off receivables that have been sold on the secondary market are owned by an RMAI certified company.

RMCP-certified businesses are subject to vigorous and recurring independent, third-party audits to demonstrate their compliance with the Certification Program. This audit includes an onsite inspection of the certified companies to validate full integration of RMCP standards into their business operations. Following a company's initial pre-certification audit and first full-compliance audit, independent program review audits continue to be conducted every three years. The audits are reviewed by an Audit Committee which has consumer representation. Since March 1, 2024, BBB National Programs has administered RMAI's Remediation Committee which is the committee that handles unresolved audit deficiencies.

RMCP certification also requires RMAI-certified businesses to engage a chief compliance officer, with a direct or indirect reporting line to the president, chief executive officer, board of directors, or general counsel of the business. The chief compliance officer must maintain individual certification through the RMCP by completing 24 credit hours of continuing education every two years.

Most of our members are covered "debt collectors" under your rules. As mentioned, our certification standards go beyond the requirements of state and federal law for the protection of consumers. This includes measures for the frequency, method, and content of communications with consumers. Therefore, our members are well suited to provide the Department with comment concerning its proposed rule.

II. COMMENTS

A. The Proposed Amendments to section 5-76 of part 6 of subchapter A of chapter 5 of Title 6 of the Rules of the City of New York Unlawfully Restricts Speech.

As we noted in our comments to you dated December 19, 2022, the recently adopted restrictions on communications, particularly those contained in new section 5-77(b)(1)(iv) and (b)(5) are unconstitutional, content-based restrictions on our members' rights to freedom of speech guaranteed to them under the United States Constitution. *U.S. Const. amend. I.* The proposed amendments to section 5-76 do not cure the unlawful speech restrictions.

Proposed 5-76 continues to exempt certain persons from these restrictions, namely subsections (1) and (4) which exempt:

[4] RMCP's Mission Statement reads in part, the certification program "is an industry self-regulatory program administered by RMAI that is designed to provide enhanced consumer protections through rigorous and uniform industry standards of best practice."

(1) any officer or employee of the United States, any State or any political subdivision of any State to the extent that collecting or attempting to collect any debt owed is in the performance of their official duties;
(4) any individual employed by a utility regulated under the provisions of the Public Service Law, to the extent that New York Public Service Law or any regulation promulgated thereunder is inconsistent with this part.

Debts covered by the proposed rule are not subject to speech restrictions if they are being collected by exempted persons. However, if these exempted persons retained a covered debt collector to collect the same debts, the covered debt collector would be subject to the speech restrictions. Content-based restrictions on speech are those that favor some speakers over others or "singles out specific subject matter for differential treatment." *Barr v. Am. Ass'n of Political Consultants*, 591 U.S. 610, 619, 140 S. Ct. 2335 (2020). Such restrictions are presumptively unconstitutional. *Reed v. Town of Gilbert*, 576 U.S. 155, 163, 135 S. Ct. 2218, 2226 (2015). Courts will evaluate such content-based speech restrictions under the "strict scrutiny" test. Under strict scrutiny a court presumes the restriction is unconstitutional and it is the Department's burden to demonstrate a compelling state interest that supports the restriction. As we pointed out in our December 19, 2022, comment letter, the Department has not provided any data to demonstrate a compelling state interest to restrict a covered debt collector's debt collection speech.

The Department's commentary in support of the amendment fails to cite any data demonstrating that communications made by debt collectors and creditors somehow poses a greater risk of harm than communications made by "any officer or employee of the United States, any State or any political subdivision of any State," or "any individual employed by a utility regulated under the provisions of the Public Service Law." The Department provides no data demonstrating that calls made by a government entity to collect taxes or fees, or by a public utility to collect gas, electric or water bills do not present the same harms of "excessive frequency" allegedly posed by debt collectors and creditors.

As we noted in our comment letter of December 19, 2022, data publicly available from the Consumer Financial Protection Bureau (CFPB), the primary federal regulator of debt collectors, identified that over a two-year period from December 19, 2020, to December 19, 2022, only 126 complaints were made by New York City residents concerning the frequency of debt collection calls. This accounted for a statistically insignificant number of the debt collection complaints for the City of New York and equated to approximately one complaint every six days or approximately one complaint for every 67,206 residents of New York City. And these are just allegations of frequent calls and not a finding that the calls themselves were made by a debt collector or made with the alleged frequency.

Likewise, we analyzed data from the CFPB for the period January 1, 2023, to December 31, 2023, and found that that only 50 complaints of excessive calls by debt collectors were made by New York City residents. In a city of over 8 million people, this number is statistically insignificant. If anything, the lack of complaints demonstrates there is no risk of consumer harm from debt collector communications.

After a decade-long inquiry into debt collection practices, including the frequency of communications, the CFPB found that "[c]ommunicating with a debt collector may benefit a consumer by helping the consumer to either resolve a debt the consumer owes, or identify and

inform the debt collector if the debt is one that the consumer does not owe." 12 C.F.R. Part 1006, Debt Collection Practices (Reg. F), Proposed rule with request for public comment (May 6, 2019), at p.6.[5] The Department's restrictions contained in 5-77(b)(1)(iv) make it *unlawful* to contact a consumer more than three times in a seven day period, even though such communications "may benefit a consumer."

To be sure, even under the lesser standard of intermediate scrutiny, the speech restrictions fail because they are not "narrowly tailored to serve a significant governmental interest." *Ward v. Rock Against Racism*, 491 U. S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989) (internal quotation marks omitted). As Justice Sotomayor explained in her concurring opinion in *Barr "*the Government has not explained how a debt-collection robocall about a government-backed debt is any less intrusive or could be any less harassing than a debt-collection robocall about a privately backed debt." *Barr*, 591 U.S. at 636-37.

Consequently, there is no compelling state interest to restrict communications by debt collectors when collecting consumer debt. Because the proposed amendment to section 5-76 continues to exclude certain persons from the speech restrictions, the speech restrictions are unconstitutional.

B. The Proposed Amendments to section 5-76 of part 6 of subchapter A of chapter 5 of Title 6 of the Rules of the City of New York Violate the City Administrative Procedure Act.

The Department's commentary states that since "August 2024" it became "aware of stakeholder confusion regarding whether the revised definition of 'debt collector' continues to apply to those collecting on their own debts." This statement is inconsistent with comments made by stakeholders in December 2022, where industry clearly stated the amended rules would not apply to creditors. For example, in written comments from the American Financial Services Association (AFSA) dated December 19, 2022, AFSA states:

> We applaud the proposed amendments that would bring the definition of debt collector more in line with the FDCPA and the New York State Department of Financial Services' ("DFS") regulations and believe several additional revisions could make this renewed scope even clearer. Specific clarification related to creditors' employees and to persons collecting debt that was not in default at the time it was obtained, both of which are present in the federal and state requirements, are missing from DCWP's proposed amended rules. **Such clarification is necessary for the rules to clearly exclude creditors' employees from scope—as it would not make sense for creditors to be excluded from scope but not their employees—and to ensure that the rules reflect DCWP's intent.**
> (emphasis added).

[5] Available at https://files.consumerfinance.gov/f/documents/cfpb_debt-collection-NPRM.pdf.

A copy of AFSA's comments is available from the Department's website.[6] AFSA also repeated its appreciation for the Department's exclusion of creditors during testimony to the Department at the December 19, 2022, public hearing on the amended rules. AFSA "is the primary trade association for the consumer credit industry, protecting access to credit and consumer choice."[7]

RMAI's December 19, 2022, comments also pointed this out.[8] The definition of "debt collector" adopted by the Department in its August 2024 amendment is nearly identical to that of the federal Fair Debt Collection Practices Act (15 U.S.C. 1692a(6)) which, for over half a century has been consistently interpreted as excluding creditors when collecting their own debt. "And by its plain terms this language seems to focus our attention on third party collection agents working for a debt owner—not on a debt owner seeking to collect debts for itself." *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 83, 137 S. Ct. 1718, 1721 (2017).

Further, pursuant to section 1043 of the City Administrative Procedure Act, the Department identified only "debt collection agencies" as the "[t]ypes of individuals and entities likely to be affected" by the amended Rules in its Regulatory Agendas for FY 2023 and FY 2024.[9]

Therefore, the exclusion of creditors from the amended Rule was known to the consumer credit industry and should have been known by the Department (had it considered any of the commentary or its Regulatory Agenda), nearly two years before the amended rule was published on August 12, 2024. That the Department was aware of its exclusion of creditors is clearly stated in its August 12, 2024, Notice of Adoption: "On November 4, 2022, the Department proposed amendments to adopt similar protections as those provided to consumers at the federal and state levels . . ." Both New York State[10] and federal debt collection laws are applicable only to third-party debt collectors, with limited exceptions.

All consumer creditors are proposed to be covered by the City's debt collection rules. This would include small businesses that provide goods and services by invoicing a consumer and later seek payment, such as plumbers, electricians, carpenters, cleaning and home-care services, to name a few. "Small businesses—those with fewer than 50 employees—are the backbone of New York City's economy."[11] The amendments to section 5-76 would capture small business that collect their

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[6] https://rules.cityofnewyork.us/wp-content/uploads/2022/11/AFSA-comment-letter-NYC-debt-collection-regs.pdf, archived at https://perma.cc/A6CF-KKZX

[7] https://afsaonline.org/about-afsa/, archived at https://perma.cc/6NQS-8R9R

[8] "The commentary provided by the DCWP does not cite any data demonstrating that communications made by debt collectors somehow pose a greater risk of harm than communications made by creditors. Nor does the DCWP provide any data demonstrating that calls made to collect taxes, fines, or penalties owed to the City of New York do not present the same harms the restriction purportedly seeks to product consumers against. However, in the case of debt collectors, existing consumer protections are already in place. See, e.g., 15 U.S.C. §§ 1692c(a), 1692d, 1692d(5)."

[9] https://rules.cityofnewyork.us/wp-content/uploads/2022/05/DCWP-FY-2023-Regulatory-Agenda-Final-2.pdf, archived at https://perma.cc/C66V-7MZ4.

[10] See, 23 NYCRR 1.1(e), "Debt collector means any person engaged in a business the principal purpose of which is the collection of any debts, or any person who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another."

[11] Matt Hutton, Assistant Vice President, New York City Economic Development Corporation, *NYC's Small Business Recovery: Patterns of Growth in a Changing Economy*, p. 1 (May 2024), available at https://edc.nyc/sites/default/files/2024-05/NYC-Small-Business-Recovery-May-2024.pdf, archived at https://perma.cc/W9GY-8XAB.

own debt. The majority of these businesses employ five or less persons.[12] "Compliance with CAPA gives the public an opportunity to comment on a proposal before it becomes effective, which is consistent with the legislative desire to give the citizenry a voice in the operation of government." *Ousmane v. City of N.Y.*, 2005 NY Slip Op 50634(U), ¶ 4, 7 Misc. 3d 1016(A), 1016A, 801 N.Y.S.2d 238 (Sup. Ct.). Creditors have been denied this opportunity. We believe the Department has failed to comply with CAPA by intentionally excluding creditors from the amendments adopted in August 2024 only to propose their inclusion now, with no notice or opportunity to be heard on the substance of the amended rules.

III. CONCLUSION

Based on the foregoing analysis, RMAI believes that the Department needs to retract its adopted rule, address the issues of constitutionality, clean up the rule's conflicts with state and federal laws and regulations, properly notice creditors of their intended inclusion within the rule, and republish for public comment before readopting the rule. RMAI appreciates the opportunity to submit its comments concerning the proposed rule. RMAI looks forward to assisting the Department in any capacity we can. Please do not hesitate to contact RMAI's General Counsel, David Reid, at dreid@rmaintl.org or (916) 482-2462 if you need further clarification on RMAI's comments or if we can be of further assistance.

Sincerely,

Michael E. Becker

Michael Becker
Executive Director
Receivables Management Association International

cc: RMAI Board of Directors

[12] *Id.*, p. 3.