November 12, 2024

Commissioner of Banks Mary L. Gallagher
Massachusetts Division of Banks
Office of Consumer Affairs and Business Regulation
1000 Washington Street
Boston, MA 02118
dob.comments@mass.gov
VIA E-mail

RE: Proposed amendments to 209 CMR 18.00 and 209 CMR 48.00

Dear Commissioner Gallagher:

My name is April Kuehnhoff, and I am a Senior Attorney at the National Consumer Law Center ("NCLC"),[1] where my work focuses on federal and state advocacy related to fair debt collection. My colleague, Andrea Bopp Stark, is also a Senior Attorney whose work focuses on mortgage servicing and debt collection.

The comments below are in response to the Massachusetts Division of Banks Proposed amendments to 209 CMR 18.00 and 209 CMR 48.00.[2] Section 1 of the comments addresses debt collection and Section 2 addresses mortgage servicing.

1. Debt Collection Comments

1.1 Federal Debt Collection Regulations Fall Short in Providing Needed Protections for Consumers.

[1] The National Consumer Law Center ("NCLC") is a national research and advocacy organization focusing on the legal needs of consumers, especially low income and elderly consumers. For over 50 years NCLC has been the consumer law resource center to which legal services and private lawyers, state and federal consumer protection officials, public policy makers, consumer and business reporters, and consumer and low-income community organizations across the nation have turned for legal answers, policy analysis, and technical and legal support. Fair debt collection has been a major focus of the work of NCLC, which publishes Fair Debt Collection (10th ed. 2022), a comprehensive treatise to assist attorneys and debt collectors to comply with the law; Collection Actions (6th ed. 2024), detailing defenses to consumer debts; and Mortgage Servicing and Loan Modifications (2d ed. 2023), a treatise about loan modification programs and mortgage servicing requirements.

[2] A redlined version of proposed amendments is available at https://www.mass.gov/doc/209-cmr-1800-conduct-of-the-business-of-debt-collectors-student-loan-servicers-and-third-party-loan-servicers-redlined-version/download (209 CMR 18.00) and https://www.mass.gov/doc/209-cmr-4800-licensee-record-keeping-redlined-version-0/download (209 CMR 48.00).

NCLC has written extensively about the shortcomings of the Consumer Financial Protection Bureau's debt collection regulations (Regulation F),[3] including:

- Allowing debt collectors to harass consumers by making up to seven attempted calls per week *per debt*;
- Allowing debt collectors to provide validation information orally instead of providing a written validation notice;
- Allowing debt collectors to provide a validation notice electronically in an initial electronic communication, making it likely that consumers will miss critical communications about their rights;
- Failing to prohibit abusive practices related to time-barred debt collection, including treating a consumer's partial payment as revival of a time-barred debt and then suing the consumer; and
- Failing to mandate any language access provisions for consumers with limited English proficiency.

In short, federal debt collection regulations fall significantly short when it comes to protecting consumers.

1.2 Federal Law Does Not Preempt State Debt Collection Laws that Provide Consumers with Stronger Protections.

The Fair Debt Collection Practices (FDCPA) does not preempt state debt collection regulations that provide stronger consumer protections:

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[3] *See, e.g.,* NCLC, CFPB Changes Needed to Prevent New Debt Collection Rules from Hurting Consumers (Jan. 2021), available at: https://www.nclc.org/resources/issue-brief-cfpb-changes-needed-to-prevent-new-debt-collection-rules-from-hurting-consumers/; NCLC, Comments to the Consumer Financial Protection Bureau on its Supplemental Notice of Proposed Rulemaking Docket No. CFPB-2020-0010 (Aug. 4, 2020), available at: https://www.nclc.org/resources/comments-to-the-cfpb-on-its-supplemental-notice-of-proposed-rulemaking-docket-no-cfpb-2020-0010/; NCLC, et al, Comments on Debt Collection Practices (Regulation F), Supplemental Proposal on Time-Barred Debt, 85 Fed. Reg. 12676, CFPB Docket CFPB-2020-0010, RIN 3170AA41 (Aug. 3, 2020), available at: https://www.nclc.org/resources/comments-on-debt-collection-practices-regulation-f-supplemental-proposal-on-time-barred-debt/; NCLC, et al, Group Comments to the CFPB Regarding Debt Collection Practices (Sept. 18, 2019), available at: https://www.nclc.org/resources/group-comments-to-the-cfpb-regarding-debt-collection-practices/; NCLC, et al, Joint Comments to the CFPB Regarding Privacy Concerns in Proposed Debt Collection Rule (Sept. 18, 2019), available at: NCLC, CFPB Debt Collection Rule Must Protect Consumers, Not Abusive Collectors (May 2019), available at: https://www.nclc.org/resources/cfpb-debt-collection-rule-must-protect-consumers-not-abusive-collectors/.

> This subchapter does not annul, alter, or affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency. For purposes of this section, a State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection provided by this subchapter.[4]

Regulation F contains similar language, and also clarifies that provisions in Regulation F - like FDCPA provisions - do not preempt stronger state consumer protections.[5]

1.3 Adopting Regulation F Would *Weaken* DOB's Regulations in Some Cases.

In some places, the DOB's proposed regulations would adopt sections of Regulation F that provide weaker protections to consumers than the DOB regulations that they would replace.

For example, the DOB proposes to delete 209 CMR 18.16(c), which currently prohibits debt collectors from engaging in:

> communication via telephone or via text messaging, initiated by the debt collector, in excess of two such communications in each seven-day period to a consumer's residence or cellular telephone and two such communications in each 30-day period other than at a consumer's residence or cellular telephone for each debt[6]

Instead, DOB would adopt Regulation F 12 CFR 1006.14(b), which allows up to seven attempted calls in a seven-day period instead of two and only applies to calls and not text messages.

1.4 Portions of the DOB's Proposed Rule that are *Less* Protective of Consumers than Regulation F Are Preempted by Federal Law.

While the FDCPA and Regulation F do not preempt state laws that provide more protections to consumers, they do preempt state laws that provide less protection to consumers.[7]

The DOB proposes to exempt so-called "passive debt buyers" from the definition of a debt collector. However, Regulation F 12 CFR 1006.2(i) creates no such exemption from the

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[4] 15 U.S.C. § 1692n.
[5] 12 C.F.R. § 1006.104.
[6] Emphasis added.
[7] 15 U.S.C. § 1692n; 12 C.F.R. § 1006.104.

definition of debt collector and courts interpreting the FDCPA's definition have found liability for debt collectors meeting the DOB's definition of "passive debt buyer."[8]

Thus, the DOB's regulation would be preempted to the extent that it purports to exempt "passive debt buyers" from the definition of debt collector for the portion of its regulations that adopt Regulation F's provisions. This could create confusion for consumers and for the debt collectors that DOB regulates. We therefore urge the DOB to delete the "passive debt buyer" exemption.

1.5 Exempting "Passive Debt Buyers" from Licensure Also Harms Consumers.

Currently, the DOB exempts "passive debt buyers" from licensure as debt collectors.[9] As noted above, we urge the DOB to withdraw the portion of the proposed rule that would exempt "passive debt buyers" from the definition of debt collector. In addition, we urge the DOB to include *all* debt buyers in the provisions of the proposed rule that require licensure, a topic not addressed in Regulation F.

Even when debt buyers use other licensed debt collection companies to collect on their behalf, the names of the debt buyers still appear on the lawsuits, credit reports, and collection communications. Two of the three largest filers of collection lawsuits in Massachusetts courts - Midland Funding (16,402 lawsuits filed in 2023) and LVNV Funding (11,511 lawsuits filed in 2023)[10] - are not licensed in Massachusetts according to a search of the Nationwide Multistate Licensing System.[11]

This means that consumers who are sued by these entities are not able to confirm that they are legally collecting in Massachusetts. Consumers may be confused or even believe that the court notice is a scam. By exempting these companies from licensure, DOB also fails to collect data about the Massachusetts collection activities of two of the largest debt buyers in the country.

1.6 DOB's Proposed Regulations Would Not Replace Other Regulations for Debt Collectors Under Massachusetts Law.

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[8] *See,* National Consumer Law Center, Fair Debt Collection, § 4.7.2.2 (10th ed. 2022), updated at www.nclc.org/library.
[9] *See Dorrian v. LVNV Funding, L.L.C.*, 479 Mass. 265 (2018).
[10] Massachusetts Trial Court, Department of Research and Planning, Small Claims and Civil Consumer Debt Actions: Selected Statistics on Cases Filed and Disposed in the Boston Municipal and District Courts (July 2024), available at: https://www.mass.gov/doc/review-of-consumer-debt-cases-filed-and-disposed-2024/download.
[11] Available at: https://www.nmlsconsumeraccess.org/.

The Massachusetts Attorney General's Office ("AG") has authority to issue regulations interpreting Massachusetts law governing unfair and deceptive acts and practices ("93A").[12] The AG's Office has used this authority to issue debt collection regulations.[13]

To the extent that the DOB's proposed regulations conflict with the AG's debt collection regulations, this may cause confusion for consumers and debt collectors who may not understand that they are regulated under the AG's regulations.

1.7 Adopting Federal Regulations by Reference Leaves Massachusetts Consumers Vulnerable if Future Amendments Weaken or Eliminate Those Federal Regulations.

The federal Consumer Financial Protection Bureau (CFPB) has authority to issue regulations interpreting the FDCPA.[14] The CFPB could use that authority to amend or eliminate all or part of Regulation F.

By adopting the federal regulations by reference instead of adopting the relevant text, the DOB's regulations will also change in response to any federal regulations - weakening or even eliminating the DOB's regulations if the corresponding regulation is weakened or eliminated.

2. Mortgage Servicing

It is our understanding that sections 18.40 through 18.41 of the proposed regulations do not include any new language, but were moved in their entirety from sections 18.23 through 18.24. With that understanding, we have reviewed and proposed edits to the current language.

2.1 The regulations for Unfair Servicing Practices at 18.40 provide a strong list of practices that would be considered unfair but there is room for improvement.

Section 18.40(1) prohibits a third party loan servicers and student loan servicers from:
1. Knowingly misapplying or recklessly applying loan payments to the outstanding balance of a loan. and
2. Knowingly misapplying or recklessly applying payments to escrow accounts.

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[12] Mass. Gen. Laws ch. 93A, § 2.
[13] 940 CMR 7.
[14] 15 USC § 1692*l*(d).

We suggest combining these two prohibitions into a single, broader prohibition: 1. Knowingly misapplying or recklessly applying loan payments ~~to the outstanding balance of a loan. and 2. Knowingly misapplying or recklessly applying payments to escrow accounts.~~

The rule currently limits the misapplication of payments to the outstanding balance of the loan or to an escrow account. However, many times the servicer will misapply the payment to the wrong borrower's account, to a suspense account, to late charges or other fees, or to the escrow account when it should be applied to principal and interest per the terms of the mortgage. All of these constitute unfair practices. By removing "to the outstanding balance of a loan," the rule will encompass all of these scenarios where the payment is misapplied or recklessly applied. This change will also make it unnecessary to have a separate prohibition against misapplying payments to escrow accounts.

Section 18.40(1)(3): The regulation prohibits third party loan services and student loan servicers from "Requiring the unnecessary forced placement of insurance, when adequate insurance is currently in place." We suggest replacing this language with: ~~Requiring the unnecessary~~ "Obtaining force-placed insurance, when adequate insurance is currently in place."

Generally, a mortgage servicer will not require a *borrower* to obtain force-placed insurance; instead, the *servicer* will purchase the insurance, place it on the property, and charge the cost to the consumer. You might also incorporate the language from the current Regulation X, 12 CFR § 1024.37, which provides very specific requirements for mortgage servicers who obtain force-placed insurance on behalf of a borrower. Or, see our suggestion below regarding incorporating the entirety of Subpart C of Regulation X at 12 CFR §§ 1024.30-1024.41.

Section 18.40(1)(4) and (5): These sections would prohibit mortgage and student loan servicers from failing to provide loan payoff information within five business days of a receipt of a written request, or charging excessive or unreasonable fees to provide loan payoff information. For mortgage loan servicers, we suggest cross-referencing to MGL ch. 183, sec. 54D for mortgage loans as the regulation does in sec. 18.41(1)(e).

2.2 The regulations for Mortgage Loan Servicing Practices at 18.41 provide a strong list of practices that would be considered unfair or unconscionable but there is room for improvement.

In sections 18.41(1) (e) through (j), the rule discusses certain sections of Regulation X that, if violated, would constitute unfair conduct. The provisions limit this conduct to only certain narrow aspects of the process of evaluating borrowers for loss mitigation prior to foreclosure.

It would provide greater protection for borrowers to incorporate the entirety of the language of Subpart C of Regulation X, 12 CFR §§ 1024.30-1024.41, which specifically addresses mortgage

servicing. It would then be a violation of the regulations for a loan servicer to fail to comply with the specific duties currently delineated in Subpart C when servicing borrowers' loans. Such requirements include providing notifications regarding the transfer of servicing, a common occurrence over which the borrower has no control; the proper treatment of escrow accounts; providing crucial loan information to borrowers and investigating and correcting errors; providing early intervention services to avoid foreclosure; enhanced communications with borrowers in default; and specific loss mitigation procedures. All of these protections are essential to help borrowers avoid foreclosure. Any violation of one of the requirements outlined in Subpart C should be a violation of these regulations, not just a select few that deal with the narrow process of evaluating a borrower for a loan modification.

Thank you for your time and attention to these comments. Please feel free to contact us at the email addresses below if you have any questions.

Sincerely,

April Kuehnhoff
Senior Attorney
akuehnhoff@nclc.org

Andrea Bopp Stark
Senior Attorney
astark@nclc.org