



June 22, 2020

Carlos Ortiz
Director of Legislative Affairs
New York City Department of Consumer Affairs
42 Broadway
New York, NY 10004

Dear Mr. Ortiz:

We would like to express our sincere appreciation for the time you and your colleagues took to discuss the concerns the nonprofit trade associations representing the collection industry in New York State have with the new rule concerning foreign language services promulgated by the Department of Consumer Affairs (DCA). While we greatly appreciate DCA's indication that it will offer a 60-day enforcement grace period and publish a FAQ document to address many of the questions posed by us, we still respectfully request an extension of the effective date.

We are concerned that even if DCA is not going to enforce the rule for 60 days, it could still be used by a plaintiff's attorney against collectors who are unable to comply during a portion of the grace period or against collectors who try to comply. As an example, debt collectors and collection agencies who attempt to comply based upon their understanding of the rule today only to have their interpretation later be rendered noncompliant by DCA's forthcoming FAQs could face a UDAAP claim. Ideally, we would request an effective date three months after the FAQs are published for the reasons outlined in our June 11, 2020 letter.

Below please find the questions that were asked on our June 17, 2020 call along with what we understood DCA's responses to be as well as additional industry post-call thoughts related to the questions. We also added several additional questions that were identified based on our conversation.

QUESTIONS

1. **NEW QUESTION** Does the 60-day enforcement grace period prohibit the bringing of lawsuits by plaintiff's attorneys claiming that collection agencies and debt collectors are violating the rule?

DCA Response: New question.

Industry Follow-up: If DCA does not extend the effective date, the industry asks DCA to clearly state that the 60-day enforcement grace period prevents activities that take place during that time period that may violate the language access rule from resulting in an actionable claim by a plaintiff's attorney.

2. **If the consumer entered into a legally binding contract in English, can a debt collector infer that English is their preferred language?**

DCA Response: No.

Industry Follow-up: None.

3. **Can English be inferred to be a consumer's preferred language if the debt collector is able to have a conversation in English and the consumer is responding in English? There are already numerous notice requirements under state and federal laws and regulations and having to ask a question with an obvious answer based on the real time conversation taking place would not only be awkward but could potentially violate other state and federal notice requirements.**

DCA Response: English cannot be inferred as a preferred language based on the debt collector and consumer having a conversation in English (with a limited exception discussed in question #9). As for when the preferred language question must be asked, DCA indicated that the debt collector can proceed using the following order: (a) confirm the consumer's identity, (b) provide required state and federal notice requirements, and then (c) ask the consumer for their preferred language.

Industry Follow-up: Can DCA's response related to the timing of the preferred language question be formally incorporated into an FAQ – i.e. after the consumer's identity has been confirmed by the debt collector and the state/federal notices have been provided?

4. **Once the language preference has been asked and an answer has been recorded by the debt collector, do debt collectors need to continue asking the question in every subsequent communication?**

DCA Response: No, once recorded, debt collectors can stop asking the question. However, if the debt collector does not receive a response, DCA's expectation is that the debt collector will need to continue to inquire on all future communications until they get a response.

Industry Follow-up: The industry would like to know how the phrase "except where the debt collector is not aware of such preference despite reasonable attempts to obtain it" which is located in section 2-193(b)(5) aligns with DCA's expectation that the debt collector will need to continue to inquire on all future communications until they get a response?

5. If a debt collector provides foreign language access services through oral communication, does that require all future written and oral communications be in that language?

DCA Response: Yes, as it relates to oral communications, once it is identified that the consumer's preferred language is Mandarin and the debt collector provides language access services in Mandarin, then all future oral communications need to be in Mandarin. DCA needs to discuss if this also means that all future written communications need to be in Mandarin as well.

Industry Follow-up: The industry is very concerned that attempting to provide spoken language services would automatically result in a requirement all future communications be provided in oral and written form.

6. Are there any safe harbors? If we have employees who attempt to help translate on their own accord and not because the employer has asked them to do so, does that mean the employer offers foreign language access services? If yes, and there is no safe harbor, that might result in employers telling debt collector employees in no circumstance to translate.

DCA Response: If an employee speaks to a consumer in Mandarin because she happens to know the language, but the debt collector does not offer language access services, the employee's actions will not obligate the debt collector to now offer foreign language services to that consumer or anyone else.

Industry Follow-up: The industry would ask that this scenario be stated in the FAQ.

7. For purposes of §2-193(b)(5), if the consumer has more than one language preference, which one should be recorded?

DCA Response: If the consumer responds with more than one language, then ask them what their "most" preferred language is.

Industry Follow-up: None.

8. **NEW QUESTION** The industry would like to know if this statement, or something substantially similar, is acceptable to DCA as an example the industry could use when asking a consumer for their preferred language: “The New York City Department of Consumer Affairs requires us to document your preferred language. But please note, that if we do not provide foreign language services in your preferred language, we will be communicating in [INSERT LANGUAGE]. Do you have a language preference?”

DCA Response: New question.

Industry Follow-up: The industry would like to use this or a substantially similar statement.

9. **For purposes of §2-193(5), if the consumer responds to the debt collector’s request for their language preference in a language the debt collector does not speak, and the debt collector therefore cannot understand the answer, is that sufficient to make the debt collector “unaware” of the consumer’s language preference? If not, how would a debt collector be able to record the language preference? What if we get a smart aleck response? Or what if they indicate a dialect of a language?**

DCA Response: DCA indicated that if you cannot understand the language to be able to know the spoken language then “it would not be a contact” as the debt collector would not be able to confirm the identity of the consumer. DCA indicated that if the debt collector received a smart aleck response such as “Klinton” or some other fictional language, that the debt collector could “infer” English as their preferred language if the conversation takes place in English.

Industry Follow-up: The industry would respectfully disagree with DCA that a consumer’s identity could not be confirmed even if the debt collector does not know what language is being spoken. Simple statements that require “yes” or “no” responses can often be understood by individuals in many languages – i.e. “Is this Jane Doe?” or “Do you live at 125 Main Street?” Therefore, it is possible to confirm an individual’s identity and still not understand their language to be able to record their preferred language.

The industry also would like to understand what DCA meant by “it would not be a contact” if we could not understand the person. Does that mean that the call would not count towards the DCA limitation of 2 calls per week?

10. **Will the collection agency’s completed annual report referenced in §2-193(c)(3) be made public on the Department’s website, or is it only a downloadable form that the collection agency can use to create its annual report that will be “made publicly available” upon request? What are you going to do with this data?**

DCA Response: The annual report needs to be maintained as a business record by the collection agency. There is no requirement to file the report with DCA. However, whenever

DCA requests to see the report, it needs to be furnished. DCA will not be publishing these reports on its website.

Industry Follow-up: None.

11. For purposes of §5-77(d)(18), what standard will be used to determine whether a translation is “false, inaccurate, or partial”?

DCA Response: It should be interpreted using existing case law as it relates to New York City’s collection law and FDCPA. It will not be limited to just incorrect translations that were intentional in nature but would include accidental errors in translating.

Industry Follow-up: The industry has serious concerns about this standard. How would an owner or someone in executive management at a business who does not speak Mandarin be able to confirm that their employee is correctly translating from English into Mandarin in both oral and written form? This exposes any debt collector who offers foreign language access services to immense liability.

12. Does the requirement in §5-77(d)(18) only apply to translations of communications that originally were made in English, or does it apply when communicating with the consumer in a language other than English in the first instance?

DCA Response: The language access requirement applies to all languages universally. If the contract was in Mandarin and the first communication was in Mandarin, the debt collector would still need to ask what the consumer for their preferred language.

Industry Follow-up: None.

13. What is meant by “clearly and conspicuously” in §5-77(h)?

DCA Response: “Clearly and conspicuously” means you cannot hide the language in fine print or otherwise hidden in a place where the consumer would not reasonably see it. DCA indicated that in the case of a website, having the notice on either the main page, one page from the main page, or on a page the consumer is likely to visit would seem reasonable.

Industry Follow-up: None.

14. In the case of a transfer of accounts based on a vendor relationship (originator/debt buyer to agency or law firm), are both collection agencies to report the same data in the annual report? If yes, wouldn’t that result in duplicate reporting?

DCA Response: Yes. However, in the case of a passive debt buyer that has no contact with the consumer either in writing or orally, the debt buyer can record it as unknown.

Industry Follow-up: None.

15. **NEW QUESTION** The industry would like to know if these statements, or something substantially similar, is acceptable to DCA for debt collectors to use in letters and/or on their websites if the debt collector does or does not provide foreign language access services:

- (a) “[INSERT BUSINESS NAME] conducts its business in English and does not offer any foreign language access services.”
- (b) “[INSERT BUSINESS NAME] conducts its business in English, however, we are able to provide limited foreign language access services in [INSERT LANGUAGE] but cannot guarantee such services will be available at all times during the workday.”
- (c) “[INSERT BUSINESS NAME] conducts its business in English, however, we offer foreign language access services in [INSERT LANGUAGE]. If you inform us that [INSERT LANGUAGE] is your preferred language, we will communicate with you in that language.”

DCA Response: New question.

Industry Follow-up: The industry would like to use these or substantially similar statements.

16. **NEW QUESTION** Are there any similar language requirements with other industries? Do they have any small business exemptions? Are there thresholds regarding volume of contacts made with NYC consumers that would exclude licensees that overwhelmingly contact consumers not in NYC?

DCA Response: New question.

Industry Follow-up: The industry would like to know if there are other industries we can approach for practical implementation guidance because they have already implemented similar provisions.

17. **What is the scope of language access services? For example, in the CPLR the courts require all documents to be made in English. Would correspondence related to litigation be an exception?**

DCA Response: Yes, the CPLR controls; all court filings would have to be in English. DCA indicated that they would have to get back to us as to whether all correspondence related to litigation would be an exception to the rule.

Industry Follow-up: The industry would ask that DCA clarify that all matters related to ongoing litigation be in English. Since the courts will only accept filings and papers in English, it would require that law firms that provide language access services in Mandarin to simultaneously produce the correspondence in Mandarin and English.

- 18. If an upstream or downstream client has already asked the consumer their preferred language and their response has been transmitted by the client to the debt collector, does the debt collector need to ask the language question again?**

DCA Response: DCA responded yes.

Industry Follow-up: None.

- 19. ^{NEW QUESTION} Can a business be penalized by DCA in any manner for either actions or inactions taken related to foreign language access during the 60-day enforcement grace period?**

DCA Response: New question.

Industry Follow-up: The industry wants to be certain that there will be no enforcement proceedings with a lookback.

- 20. Can we set up a quarterly roundtable conversation with DCA?**

DCA Response: We can explore.

Industry Follow-up: The industry would greatly value the opportunity for the five trade associations representing the collection industry in New York to be able to maintain ongoing discussions with DCA. We believe that this would help ensure greater compliance with DCA regulations.

- 21. ^{NEW QUESTION} When will the FAQ be published? If DCA extends the effective date on the rule, will the new effective date be a specified time period from the publication of the FAQ so they industry can make the necessary operational changes to comply with DCA's guidance?**

DCA Response: New question.

Industry Follow-up: The industry would appreciate having three months from the issuance of the FAQ to address all operational changes required. The required changes by every licensed debt collector would include: system changes, policy changes, website changes, employee training, and discussions with both upstream and downstream vendors.

22. If a validation notice was sent to a consumer prior to June 27, 2020, does a new validation notice with the new language access language need to be transmitted on or after June 27, 2020?

DCA Response: No. Only when transmitting a validation notice for the first time on or after June 27, 2020 will the new requirements be required.

Industry Follow-up: None.

CONCLUSION

As is evident from our conversation on June 17, 2020, as well as from the included requests for clarification, there is still substantial clarification needed on the Preferred Language Rule to make it workable for our industry and to avoid unintended consequences that are detrimental to consumers. We therefore respectfully request that DCA extend the effective date and reopen the rule's comment period so that we can more fully engage with DCA on this important issue.

Given the complexity of the identified issues and conflict with existing law, we feel that we can offer DCA additional insight regarding better ways to implement these changes and address concerns regarding consumers with limited English proficiency. For example, there is a distinction between preferring a language versus understanding one, as noted in the comments above. Failing to account for this distinction could lead to a scenario where a consumer who has handled her financial transactions for decades in English, with a full understanding, can now make a plausible UDAAP argument in court that she doesn't understand the language or that the collector did something inappropriate by speaking to her in English.

Absent clarification, these rules could also produce the exact opposite outcome sought by DCA. It is entirely plausible and potentially likely that debt collectors will adopt rigid workplace procedures that prohibit employees to speak in any language other than English, even if they have the ability to speak in that language, because they do not want to risk increased liability.

The industry respectfully requests that DCA reopen the comment period to allow the industry to partner with DCA to determine alternatives to achieve DCA's goal without exposing the industry to liability or resulting in detrimental consequences to consumers. One such alternative may be a requirement that has debt collectors notifying the consumer of the languages they offer translation services in rather than the adopted process requiring debt collectors to make disclosures that are destined to give the false impression that debt collectors are going to communicate with them in their preferred language.

If DCA is unwilling to reopen the rule for comment, the industry feels it is absolutely imperative that DCA issue the following clarification statements (in addition to those above) to protect collectors when following DCA's Preferred Language Rule.

Proposed FAQs

Q: Must a debt collector cease debt collection if upon request a consumer indicates that their Preferred Language is a language for which the collector does not offer translation services?

A: No. The debt collector is required to record the consumer's preferred language, but the Rule does not mandate that the collector offer any translation services. If the debt collector does not offer translation services for that language in the applicable method (i.e. written or oral), the debt collector may continue collections in English.

Q: If a debt collector continues to collect a debt in English after a consumer indicates that their Preferred Language is a language for which the debt collector does not offer translation services, would the use of English instead of the Preferred Language, in and of itself, constitute a violation of city, state, or federal law?

A: No. The debt collector is required to record the consumer's preferred language, but the Rule does not mandate that the debt collector offer any translation services. If the debt collector does not offer translation services for that language in the applicable method (i.e. written or oral), the debt collector may continue collections in English.

Q: Regarding the effective date of the rule, where a consumer is on a monthly payment plan established prior to the rule's effective date, must a debt collector request the preferred language before continuing to accept monthly payments, as agreed?

A: No. The Rule does not obligate debt collectors to contact consumers with whom they would not otherwise be contacting for the sole purpose of determining the consumer's preference in order to continue collections. The Rule applies to outbound communications. In other words, after the effective date of the Rule, the debt collector must begin requesting the consumer's preferred language in the debt collector's next attempt to contact the consumer. If the debt collector does not attempt to contact the consumer, the debt collector need not request the consumer's preferred language. If the consumer is on a monthly payment plan established before the effective date of the Rule, the debt collector may continue accepting payments and sending related correspondence (payment reminder letters, payment confirmation letters, etc.) in English without first requesting and recording the consumer's preferred language.

We again appreciate the dialogue with DCA staff and look forward to continue working with you in finding mutually agreeable solutions that ensure that when our members offer language

services it is being brought to the consumer's attention. We would like to again formally request an opportunity to have a joint call with the commissioner or senior executive staff to discuss this matter before June 27, 2020, if the intention remains to not extend the effective date. We appreciate your time and attention to this issue.

Sincerely,

David Reid, **Receivables Management Association International**, dreid@rmaintl.org

Nathan Willner, **National Creditors Bar Association**, nathan@creditorsbar.org

Frank Rothman, **New York State Creditors Bar Association**, frothman@rubinrothman.com

Andrew Madden, **ACA International**, madden@acainternational.org

Anita Manghisi, **New York State Collectors Association**, amanghisi@irrcollect.com

CC: Kenny Minaya, NYC DCA Chief of Staff
Tamala T. Boyd, NYC DCA General Counsel
Adam Blumenkrantz, NYC DCA Associate General Counsel
Steven Ettannani, NYC DCA Executive Director, External Affairs