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NEW MEXICO OFFICE OF
ATTORNEY GENERAL
CONSUMER PROTECTION DIVISION
P.O. DRAWER 1508
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**COMMENTS OF ACA INTERNATIONAL
IN RESPONSE TO THE NEW MEXICO ATTORNEY GENERAL'S
REQUEST FOR COMMENT RE:**

**Proposed Rules and Regulations Concerning Collection
of Time-Barred Debts**

FILED February 27, 2009

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INTRODUCTION

The following comments are submitted on behalf of ACA International, *the Association of Credit and Collection Professionals* (“ACA”) in response to the Office of New Mexico Attorney General’s (“Office”) request for comments regarding proposed rules and regulations that would make it an unfair and deceptive trade practice under Title 12, Chapter 2 of the New Mexico Administrative Code (NMAC) to collect or attempt to collect a debt a debt collector knows or has reason to know is time-barred in any demand for payment to the consumer unless the demand provides certain disclosures informing the reader of information concerning the statute of limitations (“Rules”).

ACA understands the Rules were proposed as a result of litigation and a subsequent consent decree between the Office and a debt collector in the summer of 2008. Among other requirements and stipulations, the consent decree requires the debt collector to satisfy a number of requirements prior to, and during, collection of time-barred debt in New Mexico.

Moreover, the Preface to the proposed Rules suggests the Office has received numerous complaints from New Mexico consumers concerning collection of old debts, and an investigation by the Office revealed debt collectors do not disclose to consumers that debts are judicially unenforceable due to the expiration of the applicable statute of limitations and participate in allegedly deceptive behavior in obtaining acknowledgement of the debt from a consumer thus reviving the statute of limitations.

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

I. Statement on ACA

ACA International is an association of credit, collection, and debt purchasing professionals who provide a wide variety of accounts receivable management services. Founded in 1939 and headquartered in Minneapolis, Minnesota, ACA represents approximately 5,500 third party collection agencies, asset buyers, attorneys, credit grantors, and vendor affiliates. ACA members include sole proprietorships, partnerships, and corporations ranging from small businesses to firms employing thousands of workers. As of February 5, 2009, at least 11 New Mexico based debt collection agencies are members in good standing of ACA, with many more collectors lawfully operating in New Mexico albeit not located in the state.

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

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

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

II. Summary of Comments

ACA is committed to developing a dialogue with the Office to discuss the benefits of collecting time-barred debt as well as the consumer protections implications involved. However, the proposed Rules create substantial liability concerns for debt collectors. Compliance with the proposed Rules may constitute the unauthorized practice of law and subjects debt collectors to liability under the FDCPA. The proposed Rules also create greater consumer confusion over their rights and responsibilities pertaining to a particular debt.

III. Specific Comments to Rules

Although ACA appreciates the intent of the Office in proposing the Rules, ACA respectfully submits the proposed Rules pose significant and practical concerns for debt collectors and consumers alike for the following reasons.

1. Debt Collectors Should not Provide Consumers with a Legal Determination Regarding the Status of a Debt

The proposed Rules state it is an unfair or deceptive trade practice, and a violation of the New Mexico Unfair Practices Act (UPA), for any person to collect or attempt to collect a debt that the person knows or has reason to know is a time-barred debt in any written or verbal demand for payment unless the consumer is informed that while the debt is valid, the applicable statute of limitations has run and the debt cannot be enforced in a court of law.

The provisions of the UPA are premised on businesses participating in unfair or deceptive trade practices. Particularly in the context of debt collection, the Office has suggested informing a consumer whether a debt is time-barred is a material fact the consumer should be aware of when receiving communications from a debt collector. Whether a debt is time-barred, however, is a legal determination which requires consideration of a number of factors, including but not limited to, knowing which statute of limitation applies, knowing whether the consumer

revived the statute of limitations, and knowing whether any previous conduct between the consumer and creditor altered the underlying agreement creating the debt.

Disclosing a legal determination to a consumer is problematic because making a legal determination over the judicial enforceability of a debt is not an easy task. First, various types of debt are subject to different statutes of limitation. The applicable statute of limitations in New Mexico for a debt depends on whether the underlying agreement creating the obligation is unwritten or written.² The statute of limitations for an unwritten agreement is four years and the statute of limitations for a written contract is six years.³

Consumers can agree to purchase goods and services on the Internet, by telephone, and even via text messaging and e-mail. Debt collectors, although possessing a substantial amount of information regarding the status of a debt, may not have access to or maintain records establishing whether the agreement is written or oral which prompt different statutes of limitation.

Second, the statute of limitations in New Mexico remains an affirmative defense that must be pled by a defendant to a civil action. According to the New Mexico Rules of Civil Procedure for the District Courts, Art. 3, Rule 1-008 provides a respondent to a pleading must assert the statute of limitations as an affirmative defense in the responsive pleading. The expiration of the statute of limitations is an affirmative defense for the very reason it may be appropriate for litigants in a civil action to undertake discovery to determine the applicable statute of limitations or to consider whether the statute of limitations was revived. Further, because the statute of limitations is an affirmative defense, there is a legal presumption a consumer owes an existing obligation.

² See N.M. Stat. §§ 37-1-4; 37-1-3(A).

³ *Id.*

More importantly, while debt collectors may make an internal decision as to the judicial enforceability of a debt for purposes of referring the accounts to a law firm for collection, debt collectors should not be required to reveal their internal determination over the judicial enforceability of a debt to third parties, including consumers.

ACA respectfully highlights the above concern by noting the FDCPA, which is the primary federal law governing debt collection practices, does not prohibit debt collectors from collecting or attempting to collect time-barred debt. Section 807(2)(A) of the FDCPA prohibits debt collectors from misrepresenting the character, amount, or legal status of any debt.

Case law has conclusively established the FDCPA permits debt collectors to collect or attempt to collect time-barred debt so long as the debt collector does not threaten the consumer with a lawsuit on a debt the debt collector knows or should have known is time-barred.⁴ Moreover, the Federal Trade Commission (FTC) issued a consumer alert concerning collection of time-barred debt underscoring the FDCPA “does not prohibit debt collectors from trying to collect time-barred debts, as long as they do not sue or threaten to sue you for the debt.”⁵

Importantly, court decisions have concluded the expiration of the statute of limitations does not eliminate a debt, but merely limits the judicial remedies available to enforce the debt.⁶ While two states have statutes that state the expiration of the statute of limitations eliminates the

⁴ See *Freyermuth v. Credit Bureau Servs., Inc.*, 248 F.3d 767, 771 (8th Cir. 2001); *Gervais v. Riddle & Assocs., P.C.*, 479 F. Supp. 2d 270, 273 (D. Conn. 2007); *Brewer v. Portfolio Recovery Assocs.*, Civ. A. No. 1:07CV-113-M, 2007 WL 3025077, at *2 (W.D. Ky. Oct. 15, 2007); *Walker v. Cash Flow Consultants, Inc.*, 200 F.R.D. 613, 616 (N.D. Ill. 2001); *Johnson v. Capital One Bank*, No. Civ.A. SA00CA315EP, 2000 WL 1279661, at *2 (W.D. Tex. May 19, 2000); *Shorty v. Capital One Bank*, 90 F. Supp. 2d 1330, 1332 (D.N.M. 2000); *Aronson v. Commercial Fin. Servs., Inc.*, No. Civ.A. 96-2113, 1997 WL 1038818, at **3-4 (W.D. Pa. Dec. 22, 1997). *But see Stepney v. Outsourcing Solutions, Inc.*, No. 97 C 5288, 1997 WL 722972 (N.D. Ill. Nov. 13, 1997); *Peretta v. Capital Acquisitions & Mgmt. Co.*, No. C-02-05561 RMW, 2003 WL 21383757 (N.D. Cal. May 5, 2003).

⁵ *Time-Barred Debts*, FTC Consumer Alert, October 2004.

⁶ *Freyermuth v. Credit Bureau Servs., Inc.*, 248 F.3d 767, 771 (8th Cir. 2001); *Jenkins v. Gen. Collection Co.*, No. 8:06CV743, 2008 WL 410677, at *5 n.3 (D. Neb. Aug. 28, 2008); *Wallace v. Capital One Bank*, 168 F. Supp. 2d 526, 528 (D. Md. 2001); *Shorty v. Capital One Bank*, 90 F. Supp. 2d 1330, 1332 (D.N.M. 2000).

right to collect and judicially enforce a debt, New Mexico's statute of limitations provisions do not.⁷ In New Mexico, the statute of limitations does not extinguish a consumer's obligation to pay a debt. Courts have concluded a debt collector is not in violation of the FDCPA by failing to inform a consumer a debt is time-barred.⁸

2. Providing a Legal Determination of the Judicial Enforceability of a Debt May Constitute the Unauthorized Practice of Law

Debt collectors certainly make determinations regarding the legal status of a debt, including considering whether to enter into a collection agreement with a creditor or when determining what collection efforts to pursue or when forwarding a debt to an attorney to pursue remedies in court. However, these determinations are made internally, and requiring debt collectors to explicitly state to consumers a debt is time-barred exposes the debt collector to a variety of adverse and unintended consequences.

Because the determination of whether a debt is time-barred is a legal determination, a debt collector who makes an internal determination of whether a debt is time-barred and explicitly informs a consumer of such a legal determination could subject the debt collector to liability for the unauthorized practice of law. The debt collector would be performing a review of the legal status of the consumer's debt and then advising the consumer as to that legal status. This would be no different than a non-attorney advising a consumer as to his or her legal obligations and the status of such obligations. This also supports why the unenforceability of a claim due to the expiration of the statute of limitations is considered an affirmative defense.

⁷ See Miss. Code Ann. § 15-1-3; Wis. Stat. § 893.05.

⁸ *Wallace v. Capital One Bank*, 168 F. Supp. 2d 526, 528 (D. Md. 2001); *Shorty v. Capital One Bank*, 90 F. Supp. 2d 1330, 1332 (D.N.M. 2000).

Indeed, these concerns in part underscore why debt collectors are not permitted to judicially enforce debt in New Mexico.⁹

3. The Proposed Rules Expose Debt Collectors to FDCPA Liability and Subject Consumers to Greater Confusion

Requiring debt collectors to inform consumers a debt is time-barred exposes debt collectors to a variety of potential FDCPA liability. The proposed Rules create compliance concerns with respect to the validation notice, overshadowing, and misrepresentation provisions of the FDCPA. As a result of the conflicting obligations between the FDCPA and proposed Rules, consumers will suffer from greater confusion and misunderstanding of the rights and obligations disclosed to them with respect to a particular debt.

First, the FDCPA prohibits debt collectors from misrepresenting the legal status of a debt.¹⁰ As previously stated, this provision prohibits debt collectors from threatening a consumer with litigation when the debt at issue is time-barred. Under the proposed Rules, a debt collector would be in violation of the FDCPA if the collector informs a consumer a debt is time-barred when in fact it is not.

For example, a consumer could revive the statute of limitations for a debt by affirming the debt with the creditor by making a payment on the debt. If the debt collector is not aware of this affirmation, the debt collector would send a New Mexico consumer a letter stating the debt is not judicially enforceable when in fact this statement would be a misrepresentation of the legal status of a debt as the statute of limitations had been revived. As a result, debt collectors would be in a precarious position whereby it is difficult to independently verify the legal status of a debt. This concern again underscores the difficulty inherent in making a legal determination as to

⁹ See *State ex rel. Norvell v. Credit Bureau of Albuquerque, Inc.*, 85 N.M. 521, 514 P. 2d 40 (1973).

¹⁰ 15 U.S.C. § 1692e(2)(A) (2006).

the judicial enforceability of a debt and as discussed below, while it is important for consumers to understand the statute of limitations for a debt, requiring debt collectors to inform the consumer a debt is judicially unenforceable exposes the collector to potential FDCPA liability.

Second, the disclosure prescribed by the proposed Rules overshadows the information required to be included by a debt collector in the first written communication to the consumer under the FDCPA.¹¹ Section 809 of the FDCPA requires a debt collector, within five days after the initial communication with the consumer in connection with the collection of any debt, send the consumer a written notice containing among other things: (1) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector; (2) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and (3) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor. Moreover, the FDCPA prohibits debt collectors from including language in the written communication which overshadows the validation notice requirements.¹²

The proposed Rules, however, require a debt collector, in the same written communication, to disclose certain information to the consumer which overshadows the validation notice. First, the proposed Rules require a debt collector inform a consumer "Although this debt is valid under New Mexico law, the applicable statute of limitation has run and the debt

¹¹ 15 U.S.C. § 1692g(a) (2006).

¹² See 15 U.S.C. § 1692g(a), (c) (2006).

cannot be enforced in a court of law.” This statement implies a debt has already been deemed valid, but the FDCPA validation notice states a debt collector will only assume the debt to be valid if the consumer does not dispute the validity of the debt. This is a violation of the FDCPA in that on the one hand the debt collector is informing the consumer of her rights to dispute the validity of the debt, but on the other, the debt collector is informing the consumer her debt is valid under New Mexico law.

A debt collector would also potentially violate the FDCPA because while the Act requires the debt collector to inform the consumer he or she may communicate with the collector to dispute the debt, the proposed Rules suggest a consumer who communicates with a debt collector may revive the statute of limitations.

Mere communication with a debt collector regarding a debt does not revive the statute of limitations. The suggestion that communicating with the debt collector may revive the legal status of a debt overshadows the validation notice requirement that a consumer should communicate with the debt collector to dispute or seek verification of that debt. The proposed Rules confuse the consumer because he or she would not know whether to dispute the debt and risk reviving the statute of limitations.

Lastly, the font, size, and location requirements of the disclosure prescribed by the proposed Rules overshadow the validation notice language required by the FDCPA. The proposed Rules require the disclosure be provided on the front page of any written demand, immediately following the statement demanding payment, be in capitalized lettering as large as or larger than the largest lettering used elsewhere in the communication, in boldface or italicized, or in a different color or in a reasonably different font as the demand. As discussed below, the validation notice requirement of the FDCPA is crucial to ensure consumers are aware of their

rights and obligations when contacted by a debt collector. The proposed Rules, however, in practice draw consumer attention away from reading important information regarding how to dispute a debt and seek verification of a debt.

All of the aforementioned concerns only support ACA's belief consumers will be confused by the proposed Rules. As mentioned, the disclosure required by the Rules overshadows the disclosure required under the FDCPA which informs consumers of their right to dispute the debt and/or request verification of the debt. ACA respectfully has prepared a sample letter attached as *Appendix A* which clearly shows how confusing a collection letter would be that includes the Rules language and the FDCPA's validation notice requirement.

Requiring the same disclosure in oral communications also poses practical concerns. A debt collector may contact a consumer telephonically for a number of reasons, whether to inform the consumer as to an existing debt, to obtain or verify location information, to return the consumer's phone call, or others. Stating the disclosure as drafted under the Rules in a telephonic communication unquestionably takes a significant amount of time – over 20 seconds when read at a reasonable and understandable pace. When combined with information regarding the debt, requiring such a message can be difficult for the consumer to understand.

4. The Proposed Rules Fail to Address the Issue of Credit Reporting

ACA believes is it important to underscore debt collectors who furnish information concerning debt to consumer reporting agencies, even if required to satisfy the proposed Rules, are permitted under the Fair Credit Reporting Act (FCRA) to report time-barred debt.¹³ The FCRA specifically states accounts that have been placed in collections may be reported for a period of seven years. As a result, a debt may continue to be reported by a debt collector after the

¹³ 15 U.S.C. §§ 1681c(a)(4); 1681c(c) (2006).

statute of limitations to judicially enforce the debt has expired. The FTC's consumer alert on time-barred debt also suggests time-barred debt can be reported to consumer reporting agencies, regardless of whether the debt is time-barred or not, so long as the debt is reported for the permissible time period.¹⁴

ACA raises this concern to highlight that although a debt may be time-barred, it remains an obligation of the consumer under the FCRA as well as the FDCPA as previously noted. The proposed Rules, however, have the practical and unintended consequence of significantly reducing the communication between debt collector and consumer, leaving the consumer owing the obligation and potentially having his or her consumer credit suffer because of the lack of communication. ACA believes debt collectors play a critical role in helping consumers to improve their credit by resolving unpaid obligations, and the proposed Rules mitigate the incentive for consumers to communicate and work with debt collectors.

IV. Suggested Alternatives to Proposed Rules

Understanding the concerns the Office has outlined regarding the collection of time-barred debt, ACA respectfully offers two potential alternatives to the proposed Rules. These suggested alternatives ensure consumers are informed as to the judicial enforceability of the particular debt at issue and simultaneously reduce any potential FDCPA liability for debt collectors or potential liability under New Mexico law and regulation. Specifically, ACA believes any regulatory proposal should not require debt collectors to: (1) explicitly inform a consumer a debt is time-barred; (2) inform a consumer a debt is valid; or (3) use language which otherwise provides a disincentive for a consumer to communicate with a debt collector to resolve an existing debt.

¹⁴ *Time-Barred Debts*, FTC Consumer Alert, October 2004.

First, ACA respectfully submits that addressing the Office's concern over debt collectors deceptively obtaining an affirmation of a debt which may revive the statute of limitations may be an important step toward protecting consumers. ACA suggests this could be accomplished by making it an unfair or deceptive trade practice for a debt collector to seek or obtain from the consumer any acknowledgement containing an affirmation of any debt barred by the statute of limitations or a waiver of any legal rights of the consumer without disclosing the nature and consequences of such affirmation or waiver and the fact the consumer is not legally obligated to make such affirmation or waiver. This suggested alternative will not have the unintended consequence of prohibiting collection of time-barred debt, does not subject debt collectors to FDCPA liability or allegations regarding the unauthorized practice of law, but simultaneously requires debt collectors to inform consumers about the revival of the statute of limitations for the debt.

Second, ACA suggests debt collectors could provide the following disclaimer in the initial written communication to the consumer for any debt regardless of whether the debt is time-barred: "If the statute of limitations has expired you cannot be sued on this debt." This disclosure informs the consumer as to what the statute of limitations means, and alerts the consumer to appreciate whether the particular debt at issue is time-barred, which encourages the consumer to find out more information about this important legal issue.

ACA welcomes the opportunity to work with the Office in promulgating reasonable rules that balance consumer and debt collector rights and responsibilities. For additional information or if the Office has any questions about this filing, please contact David D. Cherner at cherner@acainternational.org or (952) 928-8000, ext. 112.

APPENDIX A

[DATE]

John W. Smith
123 ABC Street
Apartment No. 1
Orangeburg, SC 29115

Re: The DVD Co. \$ 150.00

Dear Mr. Smith:

This account has been listed with our office for collection.

ALTHOUGH THIS DEBT IS VALID UNDER NEW MEXICO LAW, THE APPLICABLE STATUTE OF LIMITATION HAS RUN AND THE DEBT CANNOT BE ENFORCED IN A COURT OF LAW. IN OTHER WORDS, YOU CANNOT BE REQUIRED TO PAY THE DEBT THROUGH LEGAL ACTION. YOU MAY, HOWEVER, PAY VOLUNTARILY. ANY ADMISSION OR OTHER ACKNOWLEDGEMENT OF THE DEBT BY YOU, INCLUDING BY ANY ORAL OR WRITTEN STATEMENT OR BY MAKING A PARTIAL PAYMENT, MAY RESULT IN THE STATUTE OF LIMITATION STARTING OVER AGAIN (BEING REVIVED).

This communication is from a debt collector. This is an attempt to collect a debt and any information obtained will be used for that purpose.

Unless you notify this office within 30 days after receiving this notice that you dispute the validity of this debt or any portion thereof, this office will assume this debt is valid. If you notify this office in writing within 30 days from receiving this notice that you dispute the validity of this debt this office will obtain verification of the debt or obtain a copy of a judgment and mail you a copy of such judgment or verification. If you request of this office in writing within 30 days after receiving this notice this office will provide you with the name and address of the original creditor, if different from the current creditor.

Very truly yours,

[INSERT NAME]

<u>Creditor</u>	<u>Amount</u>	<u>Interest</u>	<u>Fees</u>	<u>Total</u>
The DVD Co.	\$ 150.00	0.00	0.00	\$ 150.00

Total Amount Due: \$ 150.00