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ATTORNEY GENERAL
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**SUPPLEMENTAL COMMENTS OF ACA INTERNATIONAL
IN RESPONSE TO THE NEW MEXICO ATTORNEY GENERAL'S
REQUEST FOR COMMENT RE:**

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

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ACA International, *the Association of Credit and Collection Professionals* (“ACA”) thanks the New Mexico Attorney General’s Office (“Office”) for reviewing ACA’s comments dated February 27, 2009 with respect to the Office’s request for comments regarding a proposal 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 recipient of information concerning the statute of limitations.

ACA offers the following supplemental comments in response to the proposed revised Rules and corresponding memorandum prepared by Assistant Attorney General William S. Keller, submitted to ACA via e-mail on May 14, 2009.

1. The Failure to Disclose Whether a Debt is Time-Barred in Communications Attempting to Collect a Debt is Not a Material Fact

The Office states in its May 14, 2009 memorandum, “Once a fact is shown to be ‘material,’ the New Mexico Unfair Practices Act requires that it be disclosed to a person in a consumer transaction.” This statement appears to be the underlying rationale for the revised proposed Rules.

ACA respectfully disputes the Office’s contention that the fact a debt subject to collection efforts is time-barred is “material” under the New Mexico Unfair Practice Act. In its original comments, ACA clearly expressed concern with requiring debt collectors to inform consumers as to whether a debt is judicially enforceable given potential liability under the Fair Debt Collection Practices Act (FDCPA) as well as distorting consumer obligations for time-barred debt.

Section 57-12-2(D)(14), the provision of the New Mexico Unfair Practices Act relied upon by the Office in promoting the Rules, prohibits a person from “failing to state a material fact.” The Office also cites to the *Salermom* case for the proposition a misrepresentation or omission is material if a person would act differently had she been aware of an omission. ACA does not believe these propositions have applicability to the issue at hand.

First, as noted in ACA’s original comments, whether a debt is time-barred is not a fact, but a legal determination. Even assuming debt collectors have access to information to make an informed opinion as to whether a debt is enforceable, these determinations are made internally. By forcing debt collectors to express their internal determinations to consumers, collectors expose themselves to potential FDCPA liability. Although debt collectors have certain information at their disposal regarding the judicial enforceability of an existing financial obligation, they do not always have the most current information regarding a debt. As a result, a debt collector who informs a consumer his or her debt is time-barred risks misrepresenting the legal status of a debt under the Act.

The memorandum accompanying the revised proposed Rules suggests the information necessary to review whether a debt is time-barred is available and “may only require an expansion of what the creditor already provides to the debt buyer or third-party debt collector.” The Office, however, references only one point in time by which there is a transfer of information. Collection of a debt, however, is a fluid event. As stated in ACA’s original comments, if a consumer has revived an applicable statute of limitations without the debt collector’s knowledge, a debt collector would violate the FDCPA by suggesting a debt is time-barred when it is not.

Similarly, mere communication with a debt collector regarding a debt does not revive the statute of limitations. The revised proposed Rules suggest debt collectors must expressly inform the consumer admitting ownership of the debt may revive the applicable statute of limitations. While the revised language does alleviate some of ACA's concern, ACA continues to believe there is an overshadowing problem under the FDCPA by expressly informing a consumer admission of a debt may revive the statute of limitations when the debt collector under the FDCPA must provide certain information in the initial written communication with the consumer as to how the consumer can communicate with the debt collector. As stated in ACA's original comments, the suggestion communicating with the debt collector may revive the legal status of a debt overshadows the validation notice requirement that must be satisfied under the FDCPA that a consumer should communicate with the debt collector to dispute or seek verification of that debt. The revised proposed Rules continue to confuse the consumer because he or she would not know whether to dispute the debt and risk reviving the statute of limitations.

Second, the Office suggests the New Mexico Unfair Practices Act requires debt collectors to disclose whether a debt is time-barred because the Act requires a fact be disclosed to a person in a consumer transaction if a fact is material. Debt collection, however, is not part of the consumer transaction in which the consumer and original creditor participated. Debt collection is an activity existing outside of the originating credit transaction and the payment of a debt is not a credit transaction on its own. ACA acknowledges material facts must be disclosed in a consumer transaction because those facts assist a consumer in acting on approving, disapproving, or amending the transaction. This reasoning falls in the line with the *Salermom* case. In the context of debt collection, however, a consumer remains responsible for the financial

obligation notwithstanding its judicial enforceability as the credit transaction has already concluded.

Should the Office continue to consider the revised proposed Rules under its original rationale, then ACA suggests there are other “material facts” the consumer may need to know to make an informed decision as to whether to pay the debt. In particular, and discussed later in these supplemental comments, a time-barred debt can continue to be reported on a consumer’s credit report, and consumers should be aware of this consequence before deciding whether to decline acknowledging or paying a debt.

With these comments in mind, ACA respectfully offers the following additional comments on the revised proposed Rules.

2. The Revised Proposed Rules Continues to Create Concerns Over the Unauthorized Practice of Law and Consumer Confusion

ACA believes concerns over the unauthorized practice of law continue to persist under the revised proposed Rules because the Rules still require a debt collector to state a debt is time-barred. Specifically, the revised proposed Rules require a debt collector disclose a debt “is or may be unenforceable through a lawsuit because of the time for filing has or may have expired.” Debt collectors, in complying with this provision, still must provide legal advice to the consumer by stating a debt is time-barred.

Moreover, consumers will be confused when receiving a disclosure that a debt “is or may be” time-barred. The debt collector would be sending the consumer two different and distinct messages as to the legal status of a consumer’s existing financial obligation – one statement saying the debt is time-barred and another statement suggesting the debt may not be time-barred. ACA urges the Office to revise the current draft of the proposed Rules to only require debt collectors inform consumers the debt *may be* time-barred. By requiring debt collectors to inform

a consumer *may be* time-barred, the exposure to FDCPA liability for misrepresenting the legal status of a debt is mitigated.

3. The Good Faith Provision Should be Clarified to Permit Reliance Upon Information Given to a Debt Collector or Asset Buyer

Section 12.2.11.9 of the revised proposed Rules states “[e]very debt collector attempting to collect a debt in the State of New Mexico has a duty to determine, in good faith, whether each debt it is attempting to collect is or is not time-barred.” ACA respectfully requests the Office amend the good faith provision to clarify a debt collector has a duty to determine in good faith *based upon information provided to the debt collector* whether a debt is time-barred.

The current provision does not indicate how a debt collector is to make a good faith determination, and the above suggestion clarifies a debt collector is to make a good faith determination based upon information it has received from another party.

In addition, ACA supports a reading of the good faith provision to potentially insulate a debt collector for failing to satisfy the requirements of § 12.2.11.10(A) and (B). For example, if a debt collector makes a good faith inquiry into whether a debt is time-barred, concludes the debt does not fall outside the statute of limitations and as a result does not disclose to a consumer the requirements under subsections (A) and (B), but the debt turns out to be time-barred, the debt collector’s good faith determination shields the debt collector from liability under subsections (A) and (B).

4. The Disclosure Provisions Should be Limited Strictly to the Initial Written or Verbal Communication with the Consumer

The revised proposed Rules require compliance with subsections (A) and (B) in any written or verbal communication. ACA urges the Office, however, to amend the revised proposed Rules to require compliance with the Rules only in the initial written or verbal

communication with the consumer because the legal status of the debt may change over time which creates extremely complicated compliance concerns for debt collectors when considering whether a debt is time-barred. By requiring compliance with the revised proposed Rules in the initial written or verbal communication, debt collectors can rely on information at a particular point in time without risk of violating the revised proposed Rules or the FDCPA.

For example, a debt collector may send out an initial validation notice with the language prescribed by the revised proposed Rules because the collector's records reflect a debt is time-barred. Subsequently, and unbeknownst to the debt collector, the consumer makes a payment to the original creditor thus reviving the applicable statute of limitations. The debt collector then communicates with the consumer and provides the disclosure under the revised proposed Rules. In this example, the debt collector is in violation of 15 U.S.C. § 1692e(2) of the Fair Debt Collection Practices Act (FDCPA) by falsely representing the legal status of the debt.

5. Section 12.2.11.10(A)(2) is Ambiguous Because it Does not Identify Who Can Force or Require a Person to Pay a Debt

Section 12.2.11.10(A)(2) of the revised proposed Rules requires the debt collector disclose to the consumer "If the debt is time-barred, the person cannot be forced or required to pay the debt." ACA believes requiring debt collectors to provide this statement is deceiving to consumers for two reasons. First, ACA submits the statement in and of itself is inaccurate. Second, the provision does not identify *who* can force or require a person to pay a debt.

ACA acknowledges a debt collector may not seek to judicially enforce a time-barred debt unless the consumer has revived the debt. While ACA believes the Office interprets the terms "forced" or "required" to have particular application as to suing on a time-barred debt, the practical meaning of these terms extend beyond the judicial sphere. In other words, consumers

may be forced or required to pay a time-barred debt by pressures other than from a debt collector.

To highlight the above concern, a time-barred debt can continue to be reported on a consumer's credit report for up to seven years. As a result, the consumer's credit history will still show the consumer owes an outstanding obligation even if a debt collector cannot enforce the obligation in a court of law. Nevertheless, if a consumer applies for a loan, the potential lender will obtain a copy of the consumer's credit report to verify credit worthiness and will see the outstanding obligation. The lender, in turn, may require the consumer to satisfy the existing obligation to provide the consumer credit – the lender in this instance has “required” the consumer to pay the debt.

The above concern underscores why ACA in its original comments suggested the Office amend the Rules to require debt collectors 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 statement clarifies the consumer's rights without creating ambiguity as to the consumer's potential obligation to pay a debt for reasons outside the debt collection context.

In the alternative, ACA recommends the Office amend § 12.2.11.10(A)(2) to state “If the debt is or may be time-barred, **you cannot be sued on this debt** ~~the person cannot be forced or required to pay the debt.~~” These amendments remove the ambiguity in informing a consumer that a debt is or may be time-barred and informs the consumer the debt collector cannot sue on the debt.

6. The Safe Harbor Language in § 12.2.11.10(B) is Ambiguous and Will Cause Greater Consumer Confusion as to their Rights

ACA believes the safe harbor language provided in § 12.2.11.10(B) of the revised proposed Rules, which allegedly offers a safe harbor for debt collectors, is confusing for consumers to understand and is ambiguous.

The first sentence of the safe harbor language, particularly the language stating the debt collector has a right to ask the consumer to pay the debt, is unnecessary to the extent the debt collector has already obtained the right to attempt to collect the obligation from the consumer. ACA does not believe this language is necessary to accurately and succinctly inform the consumer a debt may be time-barred as the issue of whether a debt collector has the right to collect a debt is not relevant to the consequences of the judicial enforceability of a debt.

With respect to the second sentence, ACA expressed its concern with this sentence previously in these supplemental comments. In particular, the language fails to consider a time-barred debt may still be reported to consumer reporting agencies and a third party (*e.g.*, lender) may require a consumer to satisfy the obligation before issuing credit to the consumer.

The last three sentences of the safe harbor language attempt to alert consumers their actions may revive the applicable statute of limitations for an existing financial obligation. These three sentences will be confusing to the least sophisticated consumer because they juxtapose possibilities for an applicable statute of limitations to be renewed.

ACA offers the following alternative safe harbor language to replace the current language included in the revised proposed Rules. This suggested alternative clarifies how a debt collector came to the determination a debt is time-barred, accurately conveys the consumer's rights and obligations, and does not confuse the consumer as to the potential for reviving the applicable statute of limitations for a debt.

Based upon our records, this debt may be too old to enforce in a lawsuit, but please remember the debt may still affect your ability to obtain credit or

employment. If you acknowledge you owe the debt or make a voluntary payment, then the statute of limitations may be waived or renewed.

7. The Effective Date for the Rules Should be Extended

The revised proposed Rules have an effective date as of the date of final publication in the New Mexico Register. Should a version of the Rules be promulgated, ACA urges the Office to extend the effective date for at least ninety (90) days after the regulation is published in the New Mexico Register to permit the credit, collection, and asset buying industries to properly implement policies and procedures to ensure compliance with the Rules. The revised proposed Rules will undoubtedly require creditors, debt collectors, and asset buyers alike to redraft and reformat correspondence and communication procedures to comply with the requirements. To appropriately allow these businesses to comply with the Rules, a period of ninety (90) days at minimum is necessary.

CONCLUSION

ACA thanks this Office for continuing the discussion regarding developing reasonable rules that balance consumer and debt collector rights and responsibilities.

Sincerely,



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