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THE CONSUMER FINANCIAL SERVICES BLOG

## UNDERSTANDING THE CFPB'S NOTICE OF PROPOSED RULEMAKING


Part 3: State Issues, Validation, Decedents, Attorneys, Time-Barred Debt and Sales



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May 22, 2019

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### Questions or Comments During the Presentation?



A First Look at the FDCA Proposed Rules

**UNDERSTANDING THE CFPB'S NOTICE OF PROPOSED RULEMAKING**

May 15, 2019

Post your questions or comments here!

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### NPRM Coverage

The NPRM is based on the CFPB's authority to issue rules to implement the FDCA.

FDCA-covered debt collectors would not violate the FDCA by complying with any such provisions adopted in a final rule. . .

But what about state law?

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### Potential State Law Issues

- Limited-Content Messages
- Email & Text Messages Safe Harbor
- Call Frequency

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### Potential State Law Issues

Limited-Content Message

If not adopted by states, a limited-content message could violate state debt collection laws requiring:

- Mini-Miranda
- Other State Disclosures
- Validation Notice w/i 5 Days of Initial Communication

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### Potential State Law Issues

Email & Text Messages Safe Harbor

If not adopted by states, an email or text message could violate state laws prohibiting third-party disclosure.

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### Potential State Law Issues

Call Frequency Limits

The frequency could violate state debt collection laws prohibiting harassment or other state consumer protection laws.

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### NPRM Relation to State Laws

Neither the FDCPA nor any adopted rules exempt anyone from complying with state laws with respect to debt collection practices except to the extent that those laws are inconsistent with any provision of the FDCPA or adopted rules, and then only to the extent of the inconsistency.

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### State Laws That Differ from FDCPA/NPRM

- Disclosures
- Contacting Consumer at POE
- Spousal Communications
- Call Frequency
- Validation Notices

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### Validation Notice – Model Form



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### Validation Notice – Mini-Miranda

North South Group P.O. Box 121212 Pasadena, CA 91111-2222 (800) 123-4567 from 8am to 8pm EST, Monday to Saturday www.example.com	To: Person A 2323 Park Street Apartment 342 Bethesda, MD 20815 Reference: 584-345
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**North South Group is a debt collector.** We are trying to collect a debt that you owe to Bank of Rockville. We will use any information you give us to help collect the debt.

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### Validation Notice – Amount Owed to Whom

**Our information shows:**

You had a **Main Street Department Store** credit card from **Bank of Rockville** with account number 123-456-789.

As of <b>January 2, 2017</b> , you owed:	\$ - 2,234.56
Between January 2, 2017 and today:	
You were charged this amount in interest:	+ \$ 75.00
You were charged this amount in fees:	+ \$ 25.00
You paid or were credited this amount toward the debt:	- \$ 50.00
<b>Total amount of the debt now:</b>	<b>\$ 2,284.56</b>

Merchant Brand

Creditor

Itemization Date

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### Validation Notice – Disputes

**How can you dispute the debt?**

- Call or write to us by **November 12, 2019**, to dispute all or part of the debt. If you do not, we will assume that our information is correct. If you write to us by November 12, 2019, we must stop collection on any amount you dispute until we send you information that shows you owe the debt.
- You may use the form below or you may write to us without the form. You may also include supporting documents. We accept disputes electronically at [www.example.com/dispute](http://www.example.com/dispute).

Validation Period End Date

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### Validation Notice – Additional Rights

**What else can you do?**

- Write to ask for the name and address of the original creditor. If you write by November 12, 2019, we will stop collection until we send you that information. You may use the form below or write to us without the form. We accept such requests electronically at [www.example.com/request](http://www.example.com/request).
- Learn more about your rights under federal law. For instance, you have the right to stop or limit how we contact you. Go to [www.consumerfinance.gov](http://www.consumerfinance.gov).
- Contact us about your payment options.
- Review state law disclosures on reverse side, if applicable.

• **Póngase en contacto con nosotros para solicitar una copia de este formulario en español.**

Spanish-Language Notice

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### Validation Notice – Tear-Off Portion

**Mail this form to:**  
North South Group  
P.O. Box 121212  
Pasadena, CA 91111-2222

Person A  
2323 Park Street  
Apartment 342  
Bethesda, MD 20815

**How do you want to respond?**

Check all that apply:

I want to dispute the debt because I think:

- This is not my debt.
- The amount is wrong.
- Other (please describe on reverse or attach additional information).

I want you to send me the name and address of the original creditor.

I enclosed this amount: \$

Make your check payable to North South Group. Include the reference number 504-345.

Quiero esta forma en español.

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### Decedent Debt

“Consumer” means any natural person, whether living or deceased.

With respect to collection communications, “consumer” includes the consumer’s executor, administrator of her or his estate or successor in interest.

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### Meaningful Attorney Involvement

Safe Harbor for attorneys with regard to “meaningful attorney involvement.”

Following the safe harbor provides that a debt collector that is a law firm or who is an attorney will be compliant with the statute when submitting a pleading, written motion, or other paper submitted to the Court during litigation

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### Meaningful Attorney Involvement

Requirements to fall within the Safe Harbor provision:

**An attorney must personally:**

1. Draft or review the filing; and
2. Review information supporting such filing and determines, to best of attorney’s knowledge, information, and belief, that, as applicable:
  - (A) The claims, defenses, and other legal contentions are warranted by existing law;
  - (B) The factual contentions have evidentiary support; and
  - (C) The denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or lack of information.

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### Meaningful Attorney Involvement

Model Rules of Professional Conduct  
Rule 3.1: Meritorious Claims & Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

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## Meaningful Attorney Involvement

Federal Rule of Civil Procedure-Rule 11

(b) REPRESENTATIONS TO THE COURT. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

- (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
- (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
- (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

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## Meaningful Attorney Involvement

Federal Rule of Civil Procedure-Rule 11 Con’t.

(c) Sanctions.

- (1) In General. If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.
- (2) Motion for Sanctions. A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney’s fees, incurred for the motion.

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## CFPB Regulation of Attorney Prof. Conduct

*Leis v. Flynt*, 439 U.S. 438, 442, 99 S. Ct. 698, 700 (1979)

“Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions.”

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### CFPB Regulation of Attorney Prof. Conduct

Defining Larger Participants in Certain Consumer Financial Product and Service Markets, (proposed Rule) 77 FR 9592, n.28 (2/17/12)

Bureau states it has “supervisory authority over collection attorneys” because they are providing a financial service to a consumer who is not receiving legal advice and *Heintz v. Jenkins*

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### Time-Barred Debt

Prohibits suit on time-barred debt if the collector *knows or should have known* the SOL expired.

Does not include proposed disclosures.

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### Overview – Sale, Transfer or Placement

An unfair act or practice, subject to certain exceptions, to sell, transfer or place a debt if it is known, or should be known, that:

1. The debt has been paid or settled;
2. The debt has been discharged in bankruptcy; or
3. An identity theft report was filed.

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### Debt Sales/Placements - § 1006.30(b)(1)

- Applies to “debt collectors”
- Cannot “sell, transfer or place for collection”
- “knows or should know”
- Paid or Settled
- Discharged in Bankruptcy
- “Identity Theft Report” filed

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### Debt Sales/Placements - § 1006.30(b)(1)

- Restrictions come from RMAI Certification (fn. 402)

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### Not Just Any Report

- “Identity Theft Report” - 15 U.S.C. 1681a(q)(4)
- “a copy of an official, valid report”
- “alleges an identity theft”
- “filed by a consumer”
- Criminal penalty for false filing
- with Federal, State or local “law enforcement agency”
- or other agency deemed by CFPB

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“Knows or should know” - p. 517

“A debt collector knows or should know that an identity theft report was filed if, for example, the debt collector has received a copy of the identity theft report.”

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Exceptions to Sale/Placement  
§ 1006.30(b)(2)

“may sell, transfer, or place for collection a debt”

To the Owner

To a previous Owner if authorized by  
“original contract” b/w previous  
owner and debt collector

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Exceptions to Sale/Placement  
§ 1006.30(b)(2)

If d/c “[s]ecuritizes the debt or pledges a pool of such debt as collateral in connection with a borrowing”

Transfers the debt as a result of a merger, acquisition, purchase and assumption transaction, or transfer of substantially all of the debt collector’s assets.

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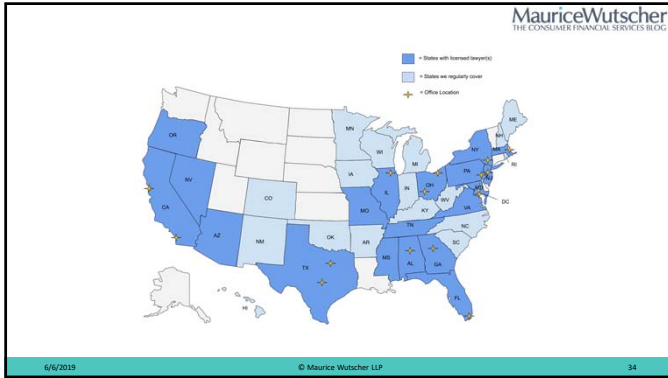
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### Questions?

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