

TITLE 12 TRADE, COMMERCE, AND BANKING
CHAPTER 2 CONSUMER PROTECTION
PART 12 COLLECTION OF TIME-BARRED DEBT

12.2.12.1 ISSUING AGENCY: Office of the New Mexico Attorney General.
[12.2.12.1 NMAC - N, 12/15/10]

12.2.12.2 SCOPE: Disclosure of time-barred debt.
[12.2.12.2 NMAC - N, 12/15/10]

12.2.12.3 STATUTORY AUTHORITY: The New Mexico Unfair Practices Act, NMSA 1978, Section 57-12-1, et seq. (1967).
[12.2.12.3 NMAC - N, 12/15/10]

12.2.12.4 DURATION: Permanent.
[12.2.12.4 NMAC - N, 12/15/10]

12.2.12.5 EFFECTIVE DATE: December 15, 2010, unless a later date is cited at the end of a section.
[12.2.12.5 NMAC - N, 12/15/10]

12.2.12.6 OBJECTIVE: The purpose of this rule is to ensure a uniform understanding and practice within the debt collection industry regarding what information is required to be provided to consumers when a debt that the debt collector, acting in the regular course of his or her trade or commerce, is attempting to collect is unenforceable in judicial proceedings due to the running of the applicable statute of limitation. The implementation of the notices required in this rule will obviate an industry-wide practice that tends to or does mislead or deceive by failing to provide material information to consumers. NMSA 1978, Section 57-12-2(D)(14).
[12.2.12.6 NMAC - N, 12/15/10]

12.2.12.7 DEFINITIONS:

A. "Collection of debt" means any effort by any person acting in the regular course of his or her trade or commerce, including, but not limited to, the original lender or obligee, or any assignee of the original lender or obligee, or any assignee of any owner of the debt other than the original lender or obligee, or any third party attempting to collect the debt on behalf of the debt owner, to obtain payment of all or any part of the debt from the person who owes the debt.

B. "Clear and conspicuous" has the same meaning as the term "conspicuous" defined at NMSA 1978, Section 55-1-201(b)(10) (1961), of the New Mexico Commercial Code; EXCEPT that it shall exclude the requirement that all words be in capitalized lettering.

C. "Debt" means any obligation owed or alleged to be owed by one person to another.

D. "Debt collector" means any person who, in the regular course of the person's trade or commerce, collects or attempts to collect a debt owed or alleged to be owed by any person in New Mexico, including, but not limited to, the original lender or obligee, any assignee of the original owner, and third party collectors who are "debt collectors" as defined by the Fair Debt Collection Practices Act, 15 U.S.C. Section 1692a(6).

E. "Good faith" means an honest, fair and reasonable belief that rests on a reasonable assessment of those facts reasonably and fairly available, and not necessarily limited only to those facts actually in possession. "Good faith" may require a fair and reasonable inquiry of others in possession of information known or believed to be relevant to the matter at issue. See, in part, *State v. Sanchez*, 88 N.M. 378, 382, 540 P.2d 858 (Ct.App. 1975); rev.'d, other grds., 88 N.M. 402, 540 P.2d 1291 (1975); NMSA 1978, Section 55-1-201(b)(20) (1961).

F. "Least sophisticated consumer" means the standard for evaluating truth and deception under the federal Fair Debt Collection Practices Act, 15 U.S.C. Section 1692 et seq., as summarized in *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168 (11th Cir. 1985).

G. "Person" means natural persons, corporations, trusts, partnerships, associations, cooperative associations, clubs, companies, firms, joint ventures or syndicates.

H. "Statute of limitation" means the time period established by law in which an aggrieved party may bring a cause of action in judicial proceedings; e.g., NMSA 1978, Sections 37-1-3 (six years for written contracts), 37-1-4 (four years for unwritten contracts and accounts), or 55-2-725 (four years for breach of contract for sale of goods).

I. "Time-barred debt" means any debt that is not enforceable in a judicial proceeding because the applicable statute of limitation has run.
[12.2.12.7 NMAC - N, 12/15/10]

12.2.12.8 DUTY TO DETERMINE IF DEBT IS TIME-BARRED: Every 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.
[12.2.12.8 NMAC - N, 12/15/10]

12.2.12.9 UNFAIR OR DECEPTIVE PRACTICES; REQUIRED DISCLOSURES:

A. It is an unfair or deceptive trade practice for any debt collector acting in the regular course of his or her trade or commerce, whether directly or indirectly, by letter, telephone, electronically or by any other means, to collect or to attempt to collect from any person any payment of any debt that the debt collector knows or has reason to know is a time-barred debt, or to seek or obtain from any person any payment, admission, affirmation, acknowledgement of a debt, or new promise to pay, or any waiver of legal rights or defenses with regard to any debt, that the debt collector knows or has reason to know is a time-barred debt unless the debt collector discloses the following information:

(1) the disclosure is prefaced with the following statement: "We are required by New Mexico Attorney General rule to notify you of the following information. This information is not legal advice.";

(2) either that the debt is unenforceable through a lawsuit because the time for filing has expired, or that it may be unenforceable through a lawsuit because the time for filing may have expired;

(3) if the debt is time-barred, the person cannot be required to pay the debt through a lawsuit;

(4) the person is not required by the law: to sign any admission, affirmation or acknowledgement of, or new promise to pay the debt; or to make any payment on the debt; or to waive any of his or her rights with regard to the effect of the running of the applicable statute of limitation;

(5) an explanation of the consequences pursuant to NMSA 1978, Section 37-1-16, with regard to the revival of the statute of limitation resulting from: any payment on the debt; any signed admission, affirmation or acknowledgement of the debt; any signed new promise to pay the debt; any waiver of the debtor's legal rights resulting from the unenforceability of the debt due to the running of the applicable statute of limitation.

B. A debt collector who makes the following disclosure shall be deemed to have complied with the requirements of Subsection A of 12.2.12.9 NMAC: "We are required by New Mexico Attorney General rule to notify you of the following information. This information is not legal advice: This debt may be too old for you to be sued on it in court. If it is too old, you can't be required to pay it through a lawsuit. You can renew the debt and start the time for the filing of a lawsuit against you to collect the debt if you do any of the following: make any payment of the debt; sign a paper in which you admit that you owe the debt or in which you make a new promise to pay; sign a paper in which you give up ("waive") your right to stop the debt collector from suing you in court to collect the debt."

C. The disclosures required by Subsection A of 12.2.12.9 NMAC shall be in plain language, and shall be designed to reasonably and fairly inform the least sophisticated consumer.

D. If the demand for payment is in a language other than English, the debt collector shall give the disclosures required by Subsection A of 12.2.12.9 NMAC in that language.

E. In the case of written communications, the disclosures required by Subsection A of 12.2.12.9 NMAC or Subsection B of 12.2.12.9 NMAC shall be clear and conspicuous and shall be placed on the front page.

F. In the case of oral communications, the disclosures required by Subsection A of 12.2.12.9 NMAC or Subsection B of 12.2.12.9 NMAC shall be made immediately before or immediately after the first statement requesting payment, or, if no request for payment is made, no later than immediately after reference to the debt is first made.

G. The disclosures required by Subsection A of 12.2.12.9 NMAC shall be given only to those debtors whom the debt collector reasonably and in good faith determines owes a debt that is time-barred.

H. It is a defense to the requirements of Subsection A of 12.2.12.9 NMAC, Subsection B of 12.2.12.9 NMAC, and Subsection G of 12.2.12.9 NMAC if, in making the erroneous determination, the debt collector exercised reasonable efforts to determine whether the debt was time-barred or not and made the error in good faith, as supported by the debt collector's documentation. The absence of any documentation creates a rebuttable presumption of the lack of reasonable efforts and good faith.
[12.2.12.9 NMAC - N, 12/15/10]

12.2.12.10 VIOLATION OF THE UNFAIR PRACTICES ACT: Violation of this rule constitutes a violation of the New Mexico Unfair Practices Act, NMSA 1978, Section 57-12-1 et seq.
[12.2.12.10 NMAC - N, 12/15/10]

12.2.12.11 SEVERABILITY: If any portion of this rule is held invalid, the remainder of the rule and the applications thereof shall remain unaffected.
[12.2.12.11 NMAC - N, 12/15/10]

HISTORY OF 12.2.12 NMAC: [RESERVED]