June 10, 2021

Consumer Financial Protection Bureau
1700 G Street, N.W.
Washington, D.C. 20552

Sent via E-Mail: : advisoryopinion@cfpb.gov

Re: Advisory Opinion Program Request regarding disclosure of interest and fees in Model Validation Notice (MVN)

Dear Acting Director Uejio:

We submit this Advisory Opinion Request on behalf of the National Creditors Bar Association ("NCBA") to provide clear and useful guidance to our members and similarly situated regulated entities.

The NCBA is the only bar association in the country dedicated to promoting and protecting all creditors' rights attorneys, including attorneys who collect consumer debt. NCBA member firms practice law in a manner consistent with their responsibilities as officers of the court and must adhere to rules of state civil procedure, state bar association licensing, certification requirements, and the rules of professional conduct of each state in which they practice. NCBA's values are: Professional, Ethical, Responsible.

Important facts about NCBA member firms are as follows:

- Over 2,500 creditors rights attorneys in over 400 law firms and other creditors' rights practices in all 50 states, Canada, and Puerto Rico;
- The majority of NCBA law firms are considered small businesses pursuant to the Small Business Administration classification;
- 45% practice creditors rights law across multiple state jurisdictions;
- NCBA member law firms are subject to audits on a regular basis by their clients, many of whom are national banks, and devote significant time and resources on compliance and preparing for those audits; and
- NCBA member firms practice various subsets of creditors' rights law.

Creditors rights attorneys, like lenders and consumers, are a necessary part of the "credit ecosystem." More than half of NCBA members represent local, small businesses including retail establishments, small or regional banks, credit unions, and small medical providers. These are long-term attorney-client relationships that have existed, on average, for over two decades. These small business clients do not have vast legal departments or even in-house attorneys and rely on their local attorneys to ensure that outstanding receivables are paid so that their businesses can continue to operate.

Attorneys who are members of NCBA law firms understand that they are officers of the court and work diligently to ensure that consumers, especially those that appear *pro se* in court, are treated

fairly and with dignity and respect. Although our legal system is complex, NCBA attorneys make every effort to work with consumers throughout the legal process including efforts to help resolve their debts in a reasonable manner.

Question Ripe for Advisory Opinion:

Can a debt collector add to the Model Validation Notice a statement about accruing interest or other charges that may increase the amount of the debt, without losing the safe-harbor protection of 12 C.F.R. § 1006.34?

Specifics about the issue on which the advisory opinion is sought:

Under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), 12 U.S.C. § 5301, *et seq.*, the Consumer Financial Protection Bureau's ("CFPB" or "Bureau") "primary functions" include issuing regulations implementing Federal consumer financial laws, including the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, *et seq*. *See* 15 U.S.C. § 1692l(d); 12 U.S.C. § 5511(a). The CFPB issued a final rule in December 2020 and a supplemental final rule in January 2021 concerning the validation notice a debt collector must provide a consumer pursuant to 15 U.S.C. § 1692g(a) ("Final Rule"). Specifically, section 1006.34 in the Final Rule addresses the validation notice, and the Final Rule includes a Model Validation Notice ("MVN" in Appendix B to Part 1006—Model Forms.)

This request seeks clarification of the current uncertainty regarding appropriate disclosures a debt collector may include in the MVN when interest or other fees and charges continue to accrue on a consumer account.

Several Courts of Appeals have held that 15 U.S.C. § 1692e requires a debt collector to inform a consumer when the consumer should expect ongoing interest or charges to be added to the amount due on the consumer's debt. *See Avila v. Riexinger & Assocs.*, 817 F.3d 72 (2d Cir. 2016); *Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, & Clark, LLC,* 214 F.3d 872 (7th Cir. 2000).

The MVN includes an itemization requirement where a debt collector must input interest and charges since the itemization date, but does not include a statement regarding any interest and charges that may continue to accrue after the date of the MVN (depending on the terms and conditions of the debt). The Final Rule is silent on this issue.

The safe harbor for the MVN is only applicable to claims arising under 12 C.F.R. §§ 1006.34(c) and (d)(1), and does not appear to extend to potential claims under 15 U.S.C. § 1692e.

Factors For Consideration:

We will address each of the initial factors CFPB weighs, when considering the appropriateness of an advisory opinion on a specific issue:

1. The interpretive issue has been noted during prior Bureau examinations as one that might benefit from additional regulatory clarity.

Response: The CFPB has not noted this issue during prior examinations.

2. The issue is one of significant importance or one whose clarification would provide significant benefit.

Response: The issue is one of significant importance and whose clarification would provide a significant benefit to consumers and collectors. Neither the Final Rule nor the MVN address the issue mentioned by courts such as Avila and Miller, nor do they make a definitive statement regarding whether interest or other charges are accruing. Indeed, in its present form, the MVN is ambiguous on the question presented. A CFPB-approved statement about such matters would assist consumers in understanding their debts by avoiding ambiguity and would provide a benefit to debt collectors who want to comply with the FDCPA, the Final Rule, and current case law.

3. The issue concerns an ambiguity that the Bureau has not previously addressed through an interpretive rule or other authoritative source.

Response: The issue concerns an ambiguity not clearly addressed by the Final Rule.The narrow scope of the safe harbor provided by the Final Rule and the MVN indicates that the CFPB has not addressed the issue of a false or misleading statement of the type recognized by the courts in cases like *Avila* and *Miller*. As mentioned above, the safe harbor extends only to 12 C.F.R. §§ 1006.34(c) and (d)(1), which relate directly to 15 U.S.C. § 1692g, but not § 1692e.

A. The ambiguity arises from the MVN itself. The MVN provides spaces for interest and other charges, and thus would not confuse a consumer if the spaces are filled in with "0" or "none" as indicated in the Final Rule, Supplement to Part 1006—Official Interpretations, ***and*** no interest or other charges are accruing. The MVN could confuse a consumer, however, if interest or other charges continue to accrue after the itemization date and there is no statement in the MVN about such continued accrual. For example, with respect to debt incurred from health-care services, those charges will not not start accruing interest until after the itemization date, due to IRS regulations. The uncertainty of the amount due, and the difficulty of calculating interest when the balance may well change after a health insurer pays its share, is not addressed by the MVN. Neither filling those items in with "0" or "none", nor filling them in with a dollar amount, necessarily provides consumer transparency and clarity. Thus, it would benefit and reduce uncertainty for both consumers and debt collectors, if CFPB were to interpret the Final Rule (1) to allow a debt collector to add to the MVN a statement that the balance may change due to ongoing interest or other charges, and (2) so that a letter with this added disclosure would remain within the safe harbor under 12 C.F.R. § 1006.34.

B. The CFPB specifically mentioned *Avila* and *Miller* in its analysis of the Final Rule, in the preamble, 86 Fed. Reg. 5766, 5828 n. 354, but only in connection with "disclosures that provide safe harbors under applicable law without losing the safe harbor for compliance under § 1006.34(d)(2)." 86 Fed. Reg. at 5828. The Bureau specifically declined to permit "disclosures on the validation notice that are merely permitted by other applicable law and still retain the safe harbor." *Id.* The CFPB reasoned that "such disclosures may be irrelevant to consumers, and their inclusion on the validation notice may overwhelm consumers or overshadow more relevant disclosures." *Id.* This reasoning presents challenges for those attorneys who practice outside the Second and Seventh Circuits, because they ***do not know*** whether applicable law requires such language, and they will not know with certainty until either their Circuit Court of Appeals or the Supreme Court weigh in on the issue. Additionally, the Supreme Court has held that a mistake about the application of the FDCPA cannot be the basis for a *bona fide* error defense under 15 U.S.C. § 1692k(c). *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA,* 559 U.S. 573 (2010). Thus, if the debt collector chooses an option less favorable to the consumer and it turns out that a court rules that option violates the law, the debt collector can be held liable. *Id.* This places debt collectors in a catch-22: The debt collector can provide the appropriate disclosure under the case law (and lose the Final Rule's safe harbor) or the debt collector can forego the appropriate disclosure and be subject to an FDCPA claim under 15 U.S.C.§ 1692e. The Bureau has the authority to cut through this Gordian knot, since a debt collector shall not be liable "to any act done or omitted in good faith in conformity with any advisory opinion of the Bureau." 15 U.S.C. § 1692k(e).

Conclusion

The subject matter of this request is well within the CFPB's purview and authority, not the subject of an ongoing Federal or State agency investigation or litigation, and is not the subject of ongoing or planned rulemaking. Accordingly, an Advisory Opinion in this matter would effectively address an ambiguity in the Final Rule and allow debt collectors to include information disclosing ongoing interest and other charges, while at the same time maintaining a safe harbor for complying with the MVN. The additional clarity provided by the CFPB on this issue would benefit consumers and collectors alike.

Thank you for the opportunity to submit this request for an advisory opinion. If you have any questions regarding this request, please contact NCBA Government Affairs Officer, Nathan Willner, Esq. at (410) 382-7588 or nathan@creditorsbar.org

Sincerely,

Liz Terry
Executive Director
National Creditors Bar Association