EFFECTUATING THE TILA'S PURPOSE: INTERPRETING THE TRUTH IN LENDING ACT TO AVOID DESTRUCTION OF CONSUMERS' RIGHTS UNDER THE FLORIDA CONSUMER COLLECTION PRACTICES ACT

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Enters the hypothetical debtor, Jack. Jack is delinquent on a line of credit he maintains with his local bank. His bank sends his account to its collections department to begin its standard collection practices as it has done with so many other accounts during the recent Great Recession.[1] Jack then hires an attorney to represent him with regard to his general debts while he prepares to file for bankruptcy. Jack's attorney advises him that his bank will no longer be able to communicate directly with him about his delinquent line of credit, as Florida law prohibits creditors and debt collectors from communicating with debtors that are represented by counsel in an attempt to collect a

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1. The "Great Recession" refers to the recent recession stemming from December 2007 through June 2009. The term became popular at the end of 2008 and was officially added to the AP Stylebook Online in February 2010. Catherine Rampell, NYTimes.com: Economix Blog, *'Great Recession': A Brief Etymology*, http://economix.blogs.nytimes.com/2009/03/11/great-recession-a-brief-etymology/ (Mar. 11, 2009, 5:39 p.m.) (providing a table of articles using the term "Great Recession"); Courtney Schlisserman, *'Great Recession' Gets Recognition as Entry in AP Stylebook*, http://www.bloomberg.com/apps/news?pid=newsarchive&sid=ayojB2KWQG4k (posted Feb. 23, 2010, 00:00 EST). For more information on the official definition of the Great Recession's timeline—December 2007 through June 2009—see the National Bureau of Economic Research, *Business Cycle Dating Committee, National Bureau of Economic Research*, http://www.nber.org/cycles/sept2010.html (Sept. 20, 2010).

consumer debt.[2] Jack asks whether his bank can still send him letters, and his attorney confirms that it cannot.[3]

Despite all the stresses of bankruptcy, Jack begins to breathe a little easier. Not long after this conversation, however, Jack is shocked to find that he is still receiving monthly billing statements from his bank, despite having provided his bank with the necessary notice that he is represented by counsel and his counsel's contact information. Jack calls his bank and speaks with his bank's representative, who tells Jack that the bank will continue to send out the billing statements regardless of Jack being represented by an attorney. Jack begins to tell the bank representative that Florida law does not allow such conduct, but the representative informs Jack that federal law preempts Florida law, and a federal statute requires the bank to send the statements.[4]

Who is right? The truth is that Florida courts have not yet put this question to rest. And with such uncertainty lingering, creditors such as Jack's bank continue to send out statements to debtors in an attempt to collect debts, defying Florida's consumer-protection laws.[5]

I. INTRODUCTION

Still recovering from the Great Recession, Americans find themselves facing more than $11.23 trillion in aggregate consumer debt as of March 31, 2013.[6] Although this number has improved slightly from the $12.68 trillion reported in the third quarter of 2008,[7] the current United States consumer indebtedness is almost double that of slightly more than a decade

2. Fla. Stat. § 559.72(18) (2012).

3. *Id.* at § 559.55(5).

4. 15 U.S.C. §1637(b) (2012).

5. Fla. Stat. §§ 559.55–559.785.

6. Fed. Reserve Bank of N.Y., *Quarterly Report on Household Debt and Credit: May 2013* at 2, http://www.newyorkfed.org/research/national_economy/householdcredit/DistrictReport_Q12013.pdf (accessed Nov. 7, 2013) [hereinafter *Fed First Quarter Debt Report*].

7. Fed. Reserve Bank of N.Y., *Household Debt and Credit Report, HHD_C_Report _2013Q1* at column Z of tab "Page 3 Data," http://www.newyorkfed.org/householdcredit/2013-Q1/index.html; *click* "Download Data" in the lower-right column of the page (accessed Nov. 7, 2013).

ago.[8] Even worse, the percentage of consumer debt considered delinquent has more than doubled over the same period, increasing from approximately 4.71% in 2001[9] to roughly 9.8% at the end of 2011,[10] followed by a slight decrease to 8.1% during the first quarter of 2013.[11] The 2013 numbers indicate that at least $909 billion in consumer debt remains delinquent.[12] These statistics help shed light on the growth of the debt-collection market, which has turned "into a multi-billion dollar industry."[13] This market of delinquent consumer debts has drawn thousands of third-party debt collectors,[14] but many creditors attempt to collect these debts themselves to avoid charging off the debts, at least in the earlier stages of the delinquency.[15]

Regardless of whether the original creditor is attempting to collect a debt or a debt collector is brought in to do it, both entities are subject to an array of consumer-protection laws that restrict the methods by which they can go about collecting debts.[16] In Florida, both creditors and debt collectors are subject to the Florida consumer-protection statute, namely the Florida Consumer Collection Practices Act (FCCPA).[17] The FCCPA provides, among other things, a specific list of prohibited conduct

8. The aggregate consumer debt balance for the third quarter of 2001 was $5.89 trillion. Fed. Reserve Bank of N.Y., *DistrictReport_Q42011* at column N of tab "Page 3 Data," http://www.newyorkfed.org; *search phrase* "DistrictReport_Q42011," *select* "Table of Contents" with sub-text "Feb. 2012" (accessed Sept. 27, 2013).

9. *Id.* at column L of tab "Page 8 Data" (sum of cells L6–L10, which represent the 2001 third-quarter categories of delinquent debt).

10. Fed. Reserve Bank of N.Y., *Quarterly Report on Household Debt and Credit: February 2012* at 2, http://www.newyorkfed.org/research/national_economy/householdcredit/DistrictReport_Q42011.pdf (accessed Sept. 27, 2013).

11. *Fed First Quarter Debt Report*, *supra* n. 6, at 2.

12. *Id.*

13. Fed. Trade Comm'n, *Collecting Consumer Debts: The Challenges of Change* 12, http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf (Feb. 2009).

14. *Id.* at 12–13.

15. This was often the case with clients from the Author's prior firm, who faced both bankruptcy and creditor harassment issues.

16. The applicable laws often differ depending on the classification of the entities as a creditor or a debt collector. The Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692–1692p, for example, applies only to debt collectors and explicitly exempts creditors from its scope. *Id.* at §§ 1692(e), 1692a(6). In addition, many states have enacted their own consumer-protection laws, some of which apply to creditors, some to debt collectors, and some to both. For more information on a particular state's consumer-protection laws, visit the respective state government's official website for consumer-protection statutes and other ordinances.

17. Fla. Stat. §§ 559.55–559.785.

applicable to collectors of any kind that attempt to collect debts from consumers in Florida.[18] Included in this list is a provision prohibiting any communication—while attempting to collect a consumer debt—with a debtor represented by an attorney with regard to that debt.[19] This rule is structured to be unambiguous and avoid complexity (as one assumes most law is intended), and it has been applied broadly to govern all communications to a debtor with regard to collection of debt, such as phone calls,[20] collection letters, and billing statements.[21] A recently published opinion has even held that a creditor potentially violated Section 559.72(18) by turning a debt account over to a third-party debt collector for continuing collection after the creditor received notice that the debtor was represented by counsel.[22]

Despite the seeming simplicity of this rule against communication, the FCCPA has inadvertently become entangled in another body of law governing consumer protection, the Truth in Lending Act (TILA).[23] The TILA's main focus, similar to the

18. *Id.* at § 559.72.

19. *Id.* at § 559.72(18).

20. *E.g. Laughlin v. Household Bank, Ltd.*, 969 So. 2d 509, 512–514 (Fla. 1st Dist. App. 2007) (holding that evidence that the defendant creditor contacted the plaintiff debtor, after the creditor had received notice of that debtor's representation by counsel with regard to the debt owed to the creditor, was sufficient to survive summary judgment for a violation of Section 559.72(18) of the FCCPA).

21. *Patton v. Ocwen Loan Servicing, LLC*, 2011 WL 1706889 at **5–6 (M.D. Fla. May 5, 2011) (rejecting a defendant creditor's claim that a statement allegedly sent for informational purposes only was beyond the scope of the FCCPA and thus not subject to Section 559.72(18) and finding in part that the statement was not sent for informational purposes only but was instead an attempt to collect a debt).

22. *See Kelliher v. Target Nat'l Bank*, 826 F. Supp. 2d 1324, 1330 (M.D. Fla. 2011) (finding that the plaintiff's claim that his creditor had violated the FCCPA via *indirect* communication through a third-party debt collector, after receiving notice that the plaintiff was represented by counsel, survived a motion to dismiss).

23. Title I of the Consumer Credit Protection Act, Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. §§ 1601–1666j (2009)). The TILA was originally enacted on May 29, 1968, and it became effective law on July 1, 1969. Bd. of Govs. of the Fed. Reserve Sys., *Regulation Z: Truth in Lending, Introduction* 1, http://federalreserve.gov/boarddocs/caletters/2008/0805/08-05_attachment1.pdf (Aug. 26, 2008) [hereinafter *Federal Reserve Board Letter*]. The TILA as it stands today, however, has undergone multiple extensive amendments throughout the years. Some of the more significant amendments stem from "the Fair Credit Billing Act of 1974, the Consumer Leasing Act of 1976, the Truth in Lending Simplification and Reform Act of 1980, the Fair Credit and Charge Card Disclosure Act of 1988, [and] the Home Equity Loan Consumer Protection Act of 1988," though several other amendments to the TILA were incorporated both before and after the enactment of these laws. *Id.* at 1–2. The modern-day TILA is commonly referred to as the "post-simplification" TILA. *E.g.* Elizabeth C. Yen, *Current Truth in*

FCCPA, is directed toward protecting consumers against unfair practices by informing them of their rights.[24] Among other things, the TILA requires creditors to include certain disclosures on periodic billing statements, which must be regularly sent to the consumer.[25] The potential conflict arises when the creditor is faced with the TILA's federal authority, requiring the statements to be sent with no exception,[26] and the state law of the FCCPA,

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Lending Issues, 52 Consumer Fin. L.Q. Rep. 25, 29 (1998). The Truth in Lending Simplification and Reform Act, for example, involved a sweeping reform of the TILA as it stood prior to 1980. Pub. L. No. 96-221, § 601, 94 Stat. 132, 168 (1980); *see* Elizabeth Renuart & Diane E. Thompson, *The Truth, the Whole Truth, and Nothing but the Truth: Fulfilling the Promise of Truth in Lending*, 25 Yale J. on Reg. 181, 201 (2008). TILA-related cases are sometimes bifurcated between use of pre- and post-simplification versions of the TILA. *See e.g.* Dee Pridgen & Richard M. Alderman, *Consumer Credit and the Law* § 4:3 (West 2012) (available at WL, CONCRED database). All references to the TILA in this Article refer to the most recently amended version of the Act as of the date of this Article, including the "simplification" amendments.

24. 15 U.S.C. § 1601(a); *see* Richard J. Link, *What Constitutes Violation of Requirements of Truth in Lending Act (15 U.S.C.A. §§ 1601 et seq.) Concerning Disclosure of Information in Credit Transactions—Civil Cases*, 113 A.L.R. Fed. 197, 197 (1993) (accessed on WL) (noting that the TILA was enacted in part "to protect consumers against inaccurate and unfair credit billing and credit card practices"). Link additionally describes how the TILA requires that creditors provide debtors with information so that debtors have the ability to protect themselves from "the uninformed use of credit." *Id.* at § 2(a).

25. 15 U.S.C. § 1637(b). Section 1637(a) provides required disclosures from the creditor as well, but the creditor only requires these disclosures before the consumer opens a new account. *Id.* at § 1637(a). This Article will only focus on the disclosures required by the TILA to be included in periodic statements that must be routinely sent out to already existing debtors. There are twelve such general disclosures, which are provided by the TILA in great detail. *Id.* at § 1637(b). The *Kelliher* opinion provides a great summary list of these twelve disclosures:

> (1) the outstanding balance, (2) charges, (3) credits, (4) finance charges, (5) applicable percentage rates, (6) the total finance charge expressed as an annual percentage rate, (7) the balance on which the finance charge was computed and how that balance was determined, (8) the outstanding balance at the end of the period, (9) the grace period, (10) an address for billing inquiries, (11) a "Minimum Payment Warning" along with repayment information applicable if the consumer makes only the minimum monthly payments, and (12) late payment deadlines and penalties.

826 F. Supp. 2d at 1328. Because the length alone of the disclosures' full language would likely distract from the rest of this Article, the full text from the United States Code will not be included. For more information on all of the requirements and the details of each, please see 15 U.S.C. § 1637(b).

26. *See* 15 U.S.C. § 1637(b) (dictating that the statements must be sent out "for each billing cycle at the end of which there is an outstanding balance in that account or with respect to which a finance charge is imposed"). Although technically exceptions do exist—having a zero balance for example—the Author's statement refers to the standard situation wherein the consumer receiving debt-collection letters owes the creditor some outstanding amount on the account, and no exception applies.

prohibiting communication with a debtor represented by counsel.[27] This relationship between the TILA and the FCCPA has been briefly discussed, but no definitive conclusions have been reached as to how, or even if, these two statutes can be harmonized with regard to the specific communication elements.[28] One court has suggested that creditors may be able to comply with the TILA without violating the FCCPA if creditors provide *only* the required informative language on the statements and no additional statements that may be construed as an attempt to collect the debt.[29] Numerous creditors have taken the position that Section 559.72(18) of the FCCPA directly conflicts with, and is therefore expressly preempted by, the TILA.[30]

This Article proposes that Section 1637(b) of the TILA can be fully harmonized with Section 559.72(18) of the FCCPA, thus avoiding the federal statute's preemption of Section 559.72(18). Rather than focusing on the language used in the billing statements,[31] this Article looks to the person or entity to whom or which the statements are sent. Language used in implementing the TILA suggests that an attorney can be considered the same

27. Fla. Stat. § 559.72(18). The FCCPA also contains language allowing for certain limited exceptions, such as when the debtor's attorney fails to respond after a period of thirty days. *Id.* As with the TILA disclosures, this Article is directed toward the typical situation in which no exception to this rule applies.

28. Though not directly on point, a select few recent Florida cases have addressed the broader issue of whether billing statements are subject to the FCCPA. *See Patton*, 2011 WL 1706889 at *5 (finding that the billing statement in question contained additional language intended to collect the debt, and thus no determination of whether solely informative statements are within the FCCPA's scope was necessary). The *Kelliher* opinion provided a more direct discussion of the relationship between the FCCPA and the TILA specifically, but the conclusion here was the same: the court found that the letters contained additional language specifically intended to collect the debt at issue, and therefore were subject to the FCCPA. 826 F. Supp. 2d at 1328–1329. These cases only begin to touch upon the issue of periodic billing statements, and they seem to be hesitant to truly tackle the ultimate question of the statements' inclusion within the FCCPA.

29. *See Kelliher*, 826 F. Supp. 2d at 1329 (stating that the defendant could have complied with the TILA without violating the FCCPA if it had not included the debt-collection language found in its billing statements).

30. *See id.* at 1328 (wherein the defendant argued that the FCCPA's relevant provision should be preempted by the TILA). This Author has seen this argument made on numerous occasions by various creditors, though most creditor harassment cases are ultimately quickly settled before trial, and thus court analysis on the matter is limited.

31. This notion refers to the recent discussion in *Kelliher*, wherein the court suggested that creditors can avoid a conflict between the FCCPA and the TILA by including only the necessary disclosures on billing statements and avoiding any additional language that could be construed as an attempt to collect the debt at issue. 826 F. Supp. 2d at 1329.

person as the consumer for purposes of the TILA requirements.[32] Creditors can thus send these periodic statements to the attorneys who represent debtors with regard to their debts, resulting in compliance with the TILA while simultaneously avoiding a violation of the FCCPA's prohibition on such communication.[33]

Part II of this Article explains the relationships of the authorities involved in implementing the TILA, as well as the TILA's preemption authority over state law. Part II then provides the specific statutes from each relevant authority helpful in interpreting the TILA's provision on periodic billing statements with mandatory disclosures. Part III of this Article offers a detailed analysis of the proposed interpretation of the TILA and its supporting law that would harmonize the federal statute with the FCCPA's prohibition on communication with debtors. Part III also addresses several anticipated counterarguments and explains why limited caselaw favoring an opposing interpretation in another jurisdiction is both in error and inapplicable to the TILA's relationship with the FCCPA.[34] Finally, the Article concludes in Part IV by briefly touching upon the importance of harmonizing these two statutes for the benefit of the public.

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32. 12 C.F.R. pt. 226, supp. I, § 226.2(a)(22) (2013).

33. It is important to note that this Article is not focused on soundness or benefits of the FCCPA itself, including the debate involving its potential disadvantages to creditors. Instead, the Article focuses on avoiding preemption of the FCCPA so that the consumer protections already provided by the law will continue to be effective and enforceable. Therefore, the potential economic consequences of limiting the creditor's ability to collect debts of consumers are beyond the scope of this Article. That being said, the Author does wish to note that the prohibition on direct communication with represented debtors does not leave creditors without any remedy to collect debts owed to them; creditors can still file a lawsuit against debtors seeking judgment at any time with only a few limited exceptions, such as if a debtor has filed for bankruptcy. *See* 11 U.S.C. § 362(a) (2012) (providing an "automatic stay" against commencement or continuation of a judicial action once bankruptcy has been filed). Additionally, while other state statutes might have the same issue if they possess a rule similar to that of Section 559.72(18), this Article focuses solely on the relationship between the TILA and Florida's consumer-protection statute. However, many of the arguments set forth in this Article may be helpful in analyzing other such state statutes.

34. The counterarguments focus primarily on the technical interpretation and analysis of the relevant terms of the TILA addressed in this Article, with an opposing conclusion reached with regard to the meaning of these terms; namely, that attorneys may *not* be substituted for the obligor or consumer as the recipient of these mandatory disclosures. *Infra* pt. II(B).

II. THE TILA FAMILY DISSECTED: RELATIONSHIPS AND RELEVANT PROVISIONS OF THE FEDERAL ACT AND ITS MANY RELATED AUTHORITIES

When the TILA is viewed from a few steps back, the complete scene unravels into a complex web of numerous laws, rules, agencies, and other factors that work together to implement the goals that Congress sought to advance with the TILA. A general comprehension of the different entities and rules that play an active role in this process is necessary to understand both how the TILA is enforced and its effects on state laws, including the FCCPA. This Part first examines the relationship between the TILA and these other significant contributors, namely the Federal Reserve System, Regulation Z,[35] and the Official Staff Interpretations,[36] with a focus on how each play a role in the implementation and interpretation of periodic billing statements required under Title 15 U.S.C. Section 1637(b).[37] A discussion of the relationship between federal and state law follows, concentrated on the guidelines used in determining whether federal laws preempt state laws in any particular situation. Finally, this Part provides the specific and relevant authoritative language necessary to examine the TILA's periodic billing-statement requirement and its effect on the FCCPA's prohibition on communication.

A. The TILA Family: A Peek into the Complex Relationship between the TILA and the Federal Reserve System

At the creation of the TILA, Congress understood that continuous enforcement and oversight of consumer credit regulations

35. 12 C.F.R. at pt. 226.

36. For purposes of this Article, the Federal Reserve System is discussed as the agency implementing the TILA. The TILA's relationship to the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), and to the Bureau of Consumer Financial Protection, as the new organization in charge of implementing the TILA, is explained *infra* notes 52–53 and accompanying text.

37. Although the relationship between the TILA and these other organizations and bodies of law will be analyzed, the TILA itself will not be wholly examined. Only Section 1637(b) and a few related sections are within the scope of this Article. For a great reference discussing the TILA as a whole, see the entire text of Diane E. Thompson et al., *Truth in Lending* vol. 1, § 1.5.3.1, 18–19 (8th ed., Nat'l Consumer L. Ctr. 2012).

required more attention than the legislature could handle.[38] In order to enforce Section 1637(b), as well as the rest of the TILA, Congress delegated authority to the Board of Governors of the Federal Reserve System (Federal Reserve Board) to implement and oversee the Act.[39] To carry out this responsibility, the Federal Reserve Board promulgated Regulation Z.[40] Regulation Z can be described as the wind that powers the sails of the TILA. It does so by mirroring the federal statute's own language almost verbatim, with a few changes throughout that generally lead to a more thorough and specific statement of law.[41]

In addition to Regulation Z, the Federal Reserve Board staff issued official staff interpretations that are published in the Official Staff Commentary on Regulation Z.[42] If Regulation Z is the wind powering the sails, these staff interpretations are the rudder that guides both Regulation Z and the TILA. The TILA was amended[43] to provide protection from liability to creditors

38. *Id.* at § 1.5.3.1, 18.

39. 15 U.S.C. § 1604; Thompson et al., *supra* n. 37, at § 1.5.3.1, 18; *see* 15 U.S.C. § 1602(c) (defining "Board"—used in Section 1604—as referring to the Board of Governors of the Federal Reserve System). Scholars have questioned the depth of authority delegated to the Federal Reserve Board, and the issue has been significantly litigated. *E.g.* Thompson et al., *supra* n. 37, at § 1.5.3.2, 19. The Supreme Court has touched upon this issue a number of times throughout history, and has found the Federal Reserve Board's delegated authority to be legitimate. *See e.g. Mourning v. Fam. Publ'ns Serv., Inc.*, 411 U.S. 356, 371 (1973) (finding that the Federal Reserve Board had the proper authority to promulgate the "Four Installment Rule" found in Regulation Z). Regardless of whether disputes remain as to the legitimacy of the Federal Reserve Board's authority to interpret and oversee the TILA, this issue is beyond the scope of this Article. This Article will assume for all purposes that Regulation Z is a valid regulation and the Federal Reserve Board can continue to implement the TILA.

40. Although in effect since July 1, 1969, Regulation Z has been amended numerous times throughout history. *Federal Reserve Board Letter*, *supra* n. 23. All of the remaining references to Regulation Z in this Article refer to the most recently amended version of the regulation.

41. 15 U.S.C. § 1601–1666j; 12 C.F.R. at pt. 226; Thompson et al., *supra* n. 37, at § 1.5.3.1, 18.

42. 12 C.F.R. at pt. 226, supp. I (codified as "Official Staff Interpretations"). These interpretations have gone through many stages and levels of authority, just as Regulation Z and the TILA have seen many amendments. *See* Thompson et al., *supra* n. 37, at § 1.5.3.1, 18 (summarizing the path of the various interpretations published by the Board). Most of the variety came pre-simplification of the TILA. *Id.* This Article hereinafter refers to the staff interpretations published in the Official Staff Commentary. For more information on the topic of replacing the prior staff interpretations with the Official Staff Commentary, see the Federal Reserve Board's comments on the issue at 46 Fed. Reg. 50288-01, 50288 (Oct. 9, 1981).

43. Pub. L. No. 94-222, 90 Stat. 197 (1976) (amending TILA § 130(f), 15 U.S.C. § 1640(f)).

that complied with official staff interpretations from the Federal Reserve Board.[44] This Official Staff Commentary (Staff Commentary) reviews Regulation Z's clauses and language, providing clarification and offering examples when necessary and even creating additional rules to fill unintended voids.[45] Although the Staff Commentary is not technically considered binding law, it is considered dispositive of any issue unless found to be "demonstrably irrational" by the court.[46]

Determinations published by the Federal Reserve Board are also helpful in understanding the required periodic-disclosure-statement provision of the TILA.[47] Some of the information published in the Federal Register by the Federal Reserve Board includes explanations of revisions and Staff Commentary it has proposed or adopted.[48] The Federal Reserve Board has also published certain interpretations, clarifications, and determinations regarding Regulation Z to the Federal Register, some of which are generally applicable and some of which are specifically applicable to certain states or state statutes.[49] These interpreta-

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44. 15 U.S.C. § 1640(f).

45. Thompson et al., *supra* n. 37, at § 1.5.3.1, 19.

46. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565–566 (1980) (holding that unless the provision is shown to be "demonstrably irrational," it is good law). Courts should generally accept the Board's interpretations of Regulation Z as a rule. 17 Am. Jur. 2d *Consumer Protection* § 5 (WL current through May 2013) (citing *Anderson Bros. Ford v. Valencia*, 452 U.S. 205 (1981)). These opinions were both issued prior to the Truth in Lending Simplification and Reform Act of 1980—effective in 1982—which completely reformed Regulation Z as well as the TILA. Pub. L. No. 96-221, tit. VI, 94 Stat 132 (1980); 46 Fed. Reg. 20848-01, 20848 (Apr. 7, 1981) (providing the Federal Reserve Board's determination of the final effective date of April 1, 1982); Thompson et al., *supra* n. 37, at § 1.5.3.1, 18 (noting the post-simplification overhaul of Regulation Z). However, it has since been cited by the Court as still applicable and undiminished. *E.g. Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 238 (2004).

47. The Federal Register is published by the Office of the Federal Register, and is used broadly to publish various "rules, proposed rules, and notices of Federal agencies and organizations, as well as executive orders and other presidential documents." U.S. Gov't Printing Off., *GPO, About Federal Register*, http://www.gpo.gov/help/index.html#about_federal_register.htm (accessed Sept. 27, 2013). Notwithstanding its broad use, this Article will only discuss its purpose as relevant to the Federal Reserve Board and Regulation Z.

48. Thompson et al., *supra* n. 37, at § 1.5.3.1, 19. Certain descriptions of the Federal Reserve Board's actions are addressed in past tense, as this entity is no longer responsible for Regulation Z or its interpretations. For information regarding the new entity in charge of implementing the TILA and Regulation Z, as well as an explanation of its insignificance to this Article, see *infra* notes 52–53 and accompanying text.

49. *See e.g.* 48 Fed. Reg. 43672-01 (Sept. 26, 1983) (reflected in 12 C.F.R. at pt. 226) (determining whether respective state laws of the four named states are consistent with

tions and determinations by the Federal Reserve Board have also been given great deference by caselaw because of the Federal Reserve Board's expertise on its own regulations and interpretations.[50] The Federal Reserve Board, through its various interpretations and the promulgation of Regulation Z itself, played a significant role in implementing the periodic disclosure statement provision of the TILA.[51] The Federal Reserve Board is no longer responsible for implementing the TILA as of July 21, 2011,[52] but it is responsible for all of the historic language relevant to this Article, and thus the Federal Reserve Board will be the organization discussed and analyzed herein.[53]

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the TILA and Regulation Z). This published determination and rule are codified into the Code of Federal Regulations with the Staff Commentary, but much of the explanatory language is left out of the final text. For example, the previously cited preemptive determinations, *id.*, were codified into the Official Staff Commentary. 12 C.F.R. at pt. 226, supp. I, subpt. D, § 226.28(a)(11)–(12). Only the final order of preemption determinations were incorporated, however, and only state statutes that were found to be preempted were included in the order. *Id.*; 48 Fed. Reg. at 43672. No additional language, including language relating to state law that was *not* preempted, was included in the Staff Commentary with the other preempted state-law provisions. *Id.* For more information on this particular determination as it pertains to the issue addressed in this Article, see *infra* notes 85–86 and 112–121 and their respective accompanying text.

50. *See Milhollin*, 444 U.S. at 566–569 (upholding the Supreme Court's prior determination that the Federal Reserve Board should rightly be given deference by the courts for its interpretations and applications of the TILA). The *Milhollin* Court focused on the expertise of the Federal Reserve Board as compared to courts, as well as the need for creditors to be able to rely on the agency's interpretations rather than facing the uncertainty of a court's own conclusions. *Id.*

51. *Id.*

52. With the recent passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act, a newly created organization called the Bureau of Consumer Financial Protection took over implementation of the TILA and Regulation Z from the Federal Reserve Board on July 21, 2011. 12 U.S.C. §§ 5411, 5581(b) (2011) (stating that "[a]ll consumer financial protection functions of the Board of Governors are transferred to the Bureau"); Pub. L. No. 111-203, §§ 1011, 1100H, 124 Stat. 1376, 1964, 2113 (2010) (forming the new Bureau and stating that the effective date shall be the designated transfer date).

53. Section 226.7 of Regulation Z, implementing Section 1637(b) of the TILA, was promulgated under the Federal Reserve Board. 12 C.F.R. at § 226.1(a). The Federal Reserve Board was also responsible for the relevant Staff Commentary discussed throughout this Article. *See* 48 Fed. Reg. at 43672 (published in 1983, prior to the transfer of authority in 2011); 46 Fed. Reg. at 50288 (providing the Federal Reserve Board's initial publication of the relevant provisions in the Staff Commentary in the Federal Reserve in 1981).

B. Potential Preemption of State Law

It is well understood that federal law can preempt state law under certain circumstances.[54] The TILA is no exception—Congress included an entire section of the Act specifically addressed to the TILA's effects on state laws.[55] In this section, Congress clarifies that the TILA does not expressly alter or preempt any state law by its enactment, with only one exception: state laws will be preempted "to the extent that those laws are inconsistent with the provisions of [the TILA] and then only to the extent of the inconsistency."[56] Other than this language limiting the TILA's impact on state laws, no other relationship is described with regard to preemption.[57] The statute makes no mention of specific preemption of any state law—the language expressly states the opposite effect—and no intent to wholly occupy the field is indicated.[58] Thus, for the TILA to preempt state laws, it must be determined that the federal statute directly conflicts with those laws.[59] Further, courts have a duty to harmonize the two statutes if at all possible.[60]

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54. *See* U.S. Const. art. VI, cl. 2 (stating that the "Laws of the United States . . . shall be the supreme Law of the Land"). The Supremacy Clause was fully addressed and affirmed by the Supreme Court in *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816), and this point has consistently been upheld by the Court since that founding precedent. *E.g. Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (confirming that state law can be preempted by a conflicting federal law or by a federal law that wholly occupies the relevant field); *Hillsborough Co., Fla. v. Automated Med. Laboratories, Inc.*, 471 U.S. 707, 713 (1985) (affirming Congress' ability and authority to preempt state law by express terms).

55. 15 U.S.C. § 1610. This section details Congress' specific intent and guidelines for the TILA's potential impacts on state laws. *Id.*

56. *Id.* at § 1610(a)(1). The section further placed responsibility for determining such inconsistent statutes with the Federal Reserve Board, which now would fall within the responsibilities of the Bureau of Consumer Financial Protection. *Id.*; 12 U.S.C. § 5581(b).

57. 15 U.S.C. § 1610.

58. *Id.*

59. This conclusion supports the Author's theory that an interpretation avoiding direct preemption would fully harmonize the TILA with the FCCPA, at least with respect to the respective provisions addressed in this Article.

60. "[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). The *Morton* opinion discussed two congressional statutes, but its conclusion that courts should strive to find a way for two statutes to co-exist applies just as well to a federal- and state-statute relationship. *Id.*; *see also PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2579–2580 (2011) (noting that, although they "should not distort federal law" in the attempt, courts have traditionally gone "to great lengths attempting to harmonize conflicting statutes, in order to avoid implied repeals").

C. Specific Statutory Provisions Involving the Periodic Disclosure Statements and the FCCPA

The following Section provides the relevant statutory and regulatory law from the TILA, Regulation Z, and Staff Commentary, as well as a determination published by the Federal Reserve Board, that together affect the interpretation of Section 1637(b) of the TILA. Each act, regulation, or interpretation is discussed in turn with the necessary explanation of its role in this Article's interpretation of the TILA's provision on periodic billing statements. All analysis of this law, favoring the interpretation allowing for harmonization between the TILA and FCCPA with regard to the periodic billing statements, is reserved for Part III of this Article.

The relevant language of Section 1637(b) of the TILA is subject to its own analysis and interpretation. The specific requirements of Section 1637(b) of the TILA, namely the specifics of the twelve mandatory disclosures, are not at issue in this Article.[61] The scope of this Article instead focuses on the initial paragraph of Section 1637(b):

> The creditor of any account under an open end consumer credit plan shall transmit to the ***obligor***, for each billing cycle at the end of which there is an outstanding balance in that account or with respect to which a finance charge is imposed, a statement setting forth each of the following items to the extent applicable[.][62]

"Obligor" is not defined in the TILA,[63] and no mention is made in this provision of attorneys or other agents.[64] "Consumer" is used

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The Supreme Court of Florida has also noted the importance of attempting to read potentially conflicting statutes harmoniously. *City of Clearwater v. Acker*, 755 So. 2d 597, 601 (Fla. 1999); *State v. Digman*, 294 So. 2d 325, 326 (Fla. 1974).

61. This Article does not focus on Section 1637(b)'s mandatory disclosures themselves. The issue being addressed is whether these disclosures can be made to a debtor's attorney. Thus, the specific language of each provision is not entirely relevant. Nevertheless, the full text of Section 1637(b) of the TILA can be found in Appendix A for reference. In addition, a short summary of each provision can be found *supra* at note 25.

62. 15 U.S.C. § 1637(b) (emphasis added).

63. *See id.* at § 1602 (listing the "[d]efinitions and rules of construction" for the TILA). "Obligor" is used both in Sections 1637(a) and (b), but the term is not defined in those provisions, either. *Id.* at § 1637.

64. *Id.* at § 1637(b).

throughout Section 1637(b) interchangeably with "obligor,"[65] and it is defined in Section 1602 of the TILA:

> (i) The adjective "consumer[,"] used with reference to a credit transaction, characterizes the transaction as one in which the party to whom credit is offered or extended is a natural person, and the money, property, or services which are the subject of the transaction are primarily for personal, family, or household purposes.[66]

Regulation Z's implementing provision of Section 1637(b) of the TILA provides a short and sweet introductory sentence: "The creditor shall furnish the consumer with a periodic statement that discloses the following items, to the extent applicable."[67] "Consumer" is used instead of "obligor," and Regulation Z also defines a "consumer" to be "a cardholder or natural person to whom consumer credit is offered or extended."[68] A "cardholder" is further defined as a *natural person* as well.[69] A "person" is defined as "a natural person or an organization, including a corporation, partnership, proprietorship, association, cooperative, estate, trust, or government unit."[70] Regulation Z does not specifically define a "natural person."[71] Just as with the corresponding section of the TILA, Section 226.7 of Regulation Z does not address the issue of attorneys representing consumers.[72] When clarification of both the TILA and Regulation Z is required, the Federal Reserve Board's Staff Commentary becomes useful.[73]

The Staff Commentary is structured so that the staff interpretations can be aligned with the codified sections of Regu-

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65. *Id.*

66. *Id.* at § 1602(i).

67. 12 C.F.R. at § 226.7. Here, just as with the TILA, the specific language of the disclosures themselves is not at issue in this Article.

68. *Id.* at § 226.2(a)(11). The definition of "cardholder" includes additional language for Sections 226.12(a) and (b) of Regulation Z, but that language is not relevant to this Article. *Id.* at § 226.2(a)(8).

69. *Id.*

70. *Id.* at § 226.2(a)(22).

71. *Id.* at § 226.2.

72. *Id.* at § 226.7. There is also no mention of dealing with situations in which communication with debtors is prohibited by state law. *Id.*

73. The Staff Commentary offers protection against liability under Regulation Z and the TILA to creditors and other entities that comply with its interpretations of the Acts. *Id.* at pt. 226, supp. I, cmt. I-1.

lation Z.[74] The aforementioned definitions found in Regulation Z[75] each have respective Staff Commentary.[76] The Staff Commentary on "cardholder" status does not provide any additional information relevant to the substitution of consumers' agents.[77] The "consumer" Staff Commentary notes that "[g]uarantors, endorsers, and sureties" are generally not considered the consumer for purposes of the TILA and Regulation Z, but no reference is made specifically to attorneys.[78] Attorneys are directly addressed in the Staff Commentary for a "person," however.[79] The provision states:

> 2. Attorneys. An attorney and his or her client are considered to be ***the same person*** for purposes of this regulation when the attorney is acting within the scope of the attorney-client relationship with regard to a particular transaction.[80]

This provision of the Staff Commentary specifically finds that attorneys can be considered exactly the same "person" for purposes of Regulation Z.[81] While the provision involving attorneys addresses the issue for a "person," it does not specifically distinguish or clarify whether this rule applies to both natural persons or organizations,[82] both of which are considered "persons" under the Act.[83]

The Federal Reserve Board has also considered an attorney-as-agent relationship in a different context, published in the Federal Register.[84] This determination reviewed, among other things, whether the TILA preempted a certain New Jersey

74. *Id.* at pt. 226, supp. I, cmt. I-4.

75. These definitions consist of "consumer," "cardholder," and "person." *Id.* at § 226.2.

76. *Id.* at pt. 226, supp. I, § 226.2(a).

77. The "cardholder" provision details some unrelated issues, such as nonapplication to authorized users of a card that was issued to another, and cards that have dual purposes. *Id.* at pt. 226, supp. I, § 226.2(a)(8).

78. *Id.* at pt. 226, supp. I, § 226.2(a)(11).

79. *Id.* at pt. 226, supp. I, § 226.2(a)(22).

80. *Id.* (original typeface altered and emphasis added).

81. *Id.*

82. *See id.* No language is used to clarify its meaning; only its general application to Regulation Z is discussed.

83. *Id.* at § 226.2(a)(22).

84. 48 Fed. Reg. at 43673.

statute.[85] The Federal Reserve Board concluded the following, in part:

> An attorney requested a determination of whether a New Jersey law relating to the use of agents in mortgage transactions is inconsistent with and therefore preempted by the Truth in Lending Act and Regulation Z. Under [Section] 46:6-1 of New Jersey Statutes Annotated, a consumer may empower an agent to act on his or her behalf in completing a mortgage transaction. The actions which the agent is authorized to take may include attending the closing, and signing and receiving documents such as the note, mortgage, Truth in Lending disclosures and notice of the right of rescission.
>
> Regulation Z requires that disclosures and notice of the right of rescission, if applicable, be given to the "consumer" in the transaction. However, the regulation does not prohibit the creditor from giving this material to an agent acting on behalf of the consumer under a valid state agency law. For this reason, the Board has determined that the New Jersey law permitting the use of an agent for receipt of loan documents, including the Truth in Lending disclosures and rescission notices, is not preempted by the Truth in Lending Act and Regulation Z, because creditors may comply with the federal act and regulation by providing the required disclosures and notices to an agent for the consumer.[86]

The Federal Reserve Board, through Regulation Z, its Staff Commentary, and published determinations, helps determine whether the TILA preempts the FCCPA. The FCCPA's specific provision prohibiting communication with represented consumers is as follows:

85. N.J. Stat. Ann. § 46:6-1 (WL current with laws effective through L.2011, c. 144, 147-148 and J.R. No. 8.).

86. 48 Fed. Reg. at 43673.

> **559.72 Prohibited practices generally.**—In collecting consumer debts, no person shall:
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> • • •
>
> (18) Communicate with a debtor if the person knows that the debtor is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the debtor's attorney fails to respond within 30 days to a communication from the person, unless the debtor's attorney consents to a direct communication with the debtor, or unless the debtor initiates the communication.[87]

The only explicit exceptions to a complete prohibition on communication with the debtor in Section 559.72(18) of the FCCPA involve a failure of the debtor's attorney to respond to direct communications and specific consent from the debtor or the debtor's attorney to communicate directly with the debtor.[88] No exception is stated for creditors complying with federal statutes, including the TILA.[89] Of course, if the state statute does not conflict with the TILA, then no exception is required.

III. LIVING IN HARMONY: REASONS WHY THE PROPOSED INTERPRETATION IS SOUND

In attempting to interpret or analyze a federal statute, the plain language of the statute generally prevails.[90] If the language

87. Fla. Stat. § 559.72(18). Although the provision's use of the word "person" is not expressly defined in the FCCPA, it has been held to apply broadly to include both debt collectors and creditors. *Schauer v. Gen. Motors Acceptance Corp.*, 819 So. 2d 809, 812 (Fla. 4th Dist. App. 2002); *see Morgan v. Wilkins*, 74 So. 3d 179, 181 (Fla. 1st Dist. App. 2011) (affirming that the FCCPA applies to more than just debt collectors). This is an important distinction from the FCCPA's federal counterpart, the FDCPA, which applies only to debt collectors and thus has no potential conflict with the TILA's regulation of creditors. 15 U.S.C. §§ 1692a(6), 1692e.

88. Fla. Stat. § 559.72(18). The debtor can consent to such communication by initiating the communications with the creditor or debt collector. *Id.*

89. *Id.*

90. *See e.g. United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240–241 (1989) (noting that analysis should begin with the plain language of the statute, and the language is generally conclusive if its meaning is clear); *Arnold, Matheny & Eagan, P.A. v. First Am. Holdings, Inc.*, 982 So. 2d 628, 633 (Fla. 2008) (holding that there is no need to go beyond the language of the statute if that language is clear and unambiguous).

is ambiguous, however, the legislative intent of the statute's drafters is often considered to help determine its intended meaning or rule.[91] The TILA is no exception. Fortunately, this specific federal Act provides its own layers of interpretive analysis,[92] and a curious reader might not need to look any further to find the answer to a difficult or complex question of the TILA's application. When all of these "layers" are examined, such is ultimately the case with the question of sending the TILA's mandatory periodic disclosure statements to consumers' attorneys.

A. Considering the Deeper Layers of the TILA with Respect to Attorney Representation

Both the original language of Section 1637(b) of the TILA and Section 226.7 of Regulation Z fail to directly address whether attorneys can be considered the same as the "obligor" or "consumer," respectively, for purposes of receiving the periodic billing statements.[93] Although a deeper search into the web of the TILA's implementation can help shed light on this issue, it is necessary to work through a word puzzle of sorts. In Part II, Section C of this Article, the statutory definitions of "obligor," "consumer," "person," and "natural person" were discussed.[94] These terms become important when the golden language found in the Federal Reserve Board's Staff Commentary for a "person" is addressed: "[a]n attorney and his or her client are considered to be the same person for purposes of this regulation . . . ."[95] The key issue is whether this interpretation applies to the "obligor" or

91. *See e.g. Ron Pair Enters.*, 489 U.S. at 242 (noting that if the literal application of a statute contravenes its drafters' intentions, the intentions must control); *Arnold, Matheny & Eagan, P.A.*, 982 So. 2d at 633 (noting that legislative intent must be ascertained if the statute is unclear or ambiguous).

92. These layers include the Federal Reserve Board's Regulation Z, Staff Commentary, and published determinations. For a discussion of how all of these relate to the TILA, see *supra* Part II.

93. *See* 15 U.S.C. § 1637(b) and 12 C.F.R. at § 226.7 (both lacking any discussion of attorneys).

94. "Cardholder" was also included as an explanatory link between "consumer" and a "natural person." 12 C.F.R. at § 226.2(a)(8); *supra* pt. II(C).

95. 12 C.F.R. at pt. 226, supp. I, § 226.2(a)(22).

"consumer" found in the provisions of the TILA and Regulation Z, respectively.[96]

The uncertainty surrounding this particular Staff Commentary's application stems from the statutory definition of "consumer" found in both the TILA and Regulation Z. Although this term is not used in the initial paragraph of Section 1637(b) of the TILA, it is used throughout the remainder of the provision,[97] and both the TILA and Regulation Z define a "consumer" to be a "natural person."[98] Though not specifically defined in either body of law, the legal definition of a "natural person" is defined elsewhere as a "living, breathing human being, as opposed to a legal entity such as a corporation."[99] This distinction is significant because, while an individual attorney meets the definition of a "natural person," a law firm does not.[100] This, however, is the point at which the specific choice of words becomes interesting. Unlike the Federal Reserve Board's choice of "consumer" for Regulation Z, Congress' term "obligor" defines the party to whom the periodic billing statements must be sent.[101] And, although Congress did not define this term in the TILA, the legal definition of "obligor" is a "person or entity that owes an obligation to another."[102] Thus, the original language used in Section 1637(b) of the TILA arguably could include both a natural person and an entity.

When the term "obligor" is used, the issue of defining "natural person" can be avoided, allowing for the attorney's status as the same "person"—as defined in the federal statute—to apply.

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96. This analysis quickly becomes highly technical, but it is quite normal for the specific words used by Congress to be dissected and analyzed in future years as federal statutes are applied to different and/or complex situations. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (stating that the meaning "of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole").

97. 15 U.S.C. § 1637(b).

98. *Id.* at § 1602(i); 12 C.F.R. at § 226.2(a)(11).

99. NOLO, *Nolo's Plain-English Law Dictionary*, http://www.nolo.com/dictionary/natural-person-term.html (accessed Sept. 27, 2013); *see also Black's Law Dictionary* 1257 (Bryan A. Garner ed., 9th ed., West 2009) (defining "natural person" as "a human being").

100. A law firm as an organization is not a "living, breathing human," and therefore it fails to constitute a "natural person." NOLO, *supra* n. 99.

101. 15 U.S.C. § 1637(b).

102. NOLO, *supra* n. 99, at http://www.nolo.com/dictionary/obligor-term.html; *see also Black's Law Dictionary* at 1181 (defining "obligor" as "one who has undertaken an obligation; a promisor or debtor").

Further, both the TILA and Regulation Z are in complete agreement in their definitions of a "person" to include both a natural person and an organization,[103] supporting the argument for the inclusion of law firms in addition to individual attorneys. This description of the "person" would then be applied to the provision on periodic disclosure statements.[104] These connections alone are not made of steel, and they are potentially vulnerable to attack from those with an opposing view of the definitions of the terms used in the TILA and Regulation Z. This uncertainty, however, emphasizes the Author's point. Because this string of connections is both plausible and reasonable, the plain language of both statutory provisions is at least ambiguous.[105] Thus a more thorough review of the specific Staff Commentary involving attorneys, as well as other persuasive and interpretive factors, is necessary.

When more attention is placed on the attorney provision in the Staff Commentary to Regulation Z, its application to the periodic disclosure statements makes sense. The language is clear and straightforward, and its application should be as well. The provision would be meaningless if an attorney was ***not*** the same person as his or her client, given that the provision states that "[a]n attorney and his or her client are considered to be the same person for purposes of this regulation when the attorney is acting within the scope of the attorney-client relationship with regard to a particular transaction."[106] This specific application fits well since the attorney would be acting within the scope of the attorney-client relationship by representing the consumer with regard to that consumer's debt.[107] The Staff Commentary does not say that an attorney is *sometimes* the same person and sometimes

103. 15 U.S.C. § 1602(e); 12 C.F.R. at § 226.2(a)(22).

104. Once the "person" description can be applied to the periodic disclosure statements, the Staff Commentary should also apply. 12 C.F.R. at pt. 226, supp. I, § 226.2(a).

105. The language is ambiguous because an argument can be made that Section 1637(b) of the TILA allows disclosures to be sent to organizations, and another legitimate argument exists that the plain language of the statute requires the disclosures be sent only to natural persons.

106. 12 C.F.R. at pt. 226, supp. I, § 226.2(a)(22).

107. Section 559.72(18) of the FCCPA specifically refers to communication with clients "represented by an attorney with respect to such debt." Fla. Stat. § 559.72(18).

not.[108] With such clear language in the Staff Commentary, concluding that an attorney can be considered the same "person" as the "obligor" or "consumer" for purposes of the TILA and Regulation Z's provision on the periodic disclosure statements is not only a reasonable interpretation but also a correct one.[109] Further, this interpretation does not run afoul of any other provision within the TILA or Regulation Z.[110]

The Federal Reserve Board determination addressed in this Article[111] also greatly supports this interpretive theory. Although this determination was concerned with preemption of a New Jersey statute and not the FCCPA,[112] the discussed situation addresses the same overall issue with mandatory disclosures pursuant to the TILA and Regulation Z.[113] Even though the New Jersey statute involves mortgage transactions, the conclusions reached by the Federal Reserve Board can apply directly to the FCCPA's prohibition on communication with represented debtors. The conclusion was direct and straightforward. The Federal Reserve Board specifically found that Regulation Z "does not prohibit the creditor from giving this material to an agent acting on behalf of the consumer under a valid state agency law."[114] Included within this scope are attorneys representing consumers

108. 12 C.F.R. at pt. 226, supp. I, § 226.2(a)(22). The provision does not include *any* exceptions to this interpretation. *Id.*

109. It is reasonable to assume that the Federal Reserve Board was knowledgeable about Regulation Z as a whole—having created and promulgated the regulation itself—and therefore if the attorney provision in the Staff Commentary was not meant to apply to Regulation Z in its entirety, exceptions would have been included for elements such as the periodic billing statements in Section 226.7.

110. *See generally* 15 U.S.C. §§ 1601–1666j and 12 C.F.R. at pt. 226 (both lacking any explicit, conflicting interpretation of the attorney provision).

111. *Supra* pt. II(C). For reference, the determination is titled "Truth in Lending; Determinations of Effect on Mississippi, New Jersey, Oklahoma, and South Carolina State Laws." 48 Fed. Reg. at 43672.

112. The determination also addressed potential issues with Mississippi, Oklahoma, and South Carolina state laws, but only the New Jersey statute is relevant to this Article. 48 Fed. Reg. at 43672.

113. *See id.* at 43673 (addressing whether disclosures may be sent to attorneys acting as agents of consumers with regard to mortgage transactions). The determination does not specify which disclosures it is referring to—i.e., periodic statements, disclosures prior to a contractual agreement, or other mandatory disclosures—but the analysis involving the disclosures is the same regardless of this distinction. *Id.*

114. *Id.*

with regard to the consumers' respective debts.[115] The Federal Reserve Board goes on to expressly state that the TILA and Regulation Z do *not* preempt a state statute that allows the use of attorneys for receipt of the disclosures and that creditors may fully comply with both statutes by sending the periodic disclosures directly to the consumer's attorney.[116]

The New Jersey opinion by the Federal Reserve Board provides very helpful clarification to the agency issue for lawyers, but it is understandable that this opinion has not been more heavily relied on in Florida, if cited at all.[117] Despite the Federal Reserve Board resolving the issue presented by the New Jersey statute—creditors can comply with the TILA by sending the disclosure statements to consumers' attorneys—this portion of the determination was not incorporated into the Staff Commentary.[118] This omission resulted from the Federal Reserve Board's conclusion that Regulation Z did *not* preempt the New Jersey statute.[119] Because the Staff Commentary lacked any mention of this acceptance of the use of agents,[120] it would be difficult for a party in Florida to come across the New Jersey determination.[121] Whether or not this opinion has slipped through the cracks in Florida, its conclusion remains sound. If the Federal Reserve Board were to address the FCCPA in this same context, it would come to the same conclusion. No substantively independent

115. Although the New Jersey statute specifically related to transactions involving mortgages, mortgages constitute consumer debts and nothing in this determination gave any indication that its rule applied only to mortgage transactions. *Id.*; *see e.g. In re Dickerson*, 193 B.R. 67, 70 (Bankr. M.D. Fla. 1996) (stating that the majority of courts find that debt secured by real property, such as a mortgage, constitutes consumer debt).

116. 48 Fed. Reg. at 43673. The provision refers to "agents" rather than attorneys specifically, but it was an attorney that requested this interpretation, and the published determination was intended for that attorney. *Id.*

117. No relevant Florida caselaw discusses the Federal Reserve Board's New Jersey opinion.

118. *See* 12 C.F.R. at pt. 226, supp. I, § 226.28(a) (providing other determinations in 48 Fed. Reg. 43672-01).

119. *See* 48 Fed. Reg. at 43674 (providing a final order of the various state statutes that *were* preempted by Regulation Z). The opinion further noted that the preemptions determined in the opinion and listed in the final order would "also be reflected in the Official Staff Commentary." *Id.*

120. This notion of course excludes the attorney provision found in the Staff Commentary for the definition of a "person," but that interpretation was not a part of this independent New Jersey determination.

121. This determination did not surface during the research conducted for this Article until several months into the project.

analysis is truly needed beyond the Federal Reserve Board's previous principle: the federal statute does not preempt state statutes that use agents, such as attorneys, for receipt of mandatory disclosures.[122] Therefore, if the Federal Reserve Board were to consider the effect of Regulation Z on the FCCPA's prohibition on represented debtors, it would support this Article's proposition to allow creditors to send the periodic billing statements to consumers' attorneys.

Yet creditors have continued to use the TILA as an excuse to violate Section 559.72(18) of the FCCPA. Counterarguments have been made attacking the conclusions drawn in this Article, and some have even been successful in another jurisdiction.[123] That jurisdiction's opinion and additional counterarguments are addressed in the following Section.

B. Acknowledging and Discrediting Counterarguments

A recent California court in *Marcotte v. General Electric Capital Services, Inc.*[124] concluded that the mandatory periodic disclosure statements under the TILA and Regulation Z must be sent to the consumer and *not* the consumer's attorney.[125] The opinion was focused on the State's own consumer-protection statute and the analysis of the TILA and Regulation Z was purely dicta,[126] but its analysis could still be used to examine the

122. *Id.* at 43673.

123. A California court—resolving an issue involving California's own consumer-protection statute—held that the mandatory disclosures under the TILA and Regulation Z must be sent to the consumer and *not* the consumer's attorney. *Marcotte v. Gen. Elec. Capital Servs., Inc.*, 709 F. Supp. 2d 994, 1000–1001 (S.D. Cal. 2010). This conclusion clearly goes against the interpretation proposed in this Article, and the following section argues that this court erred in its interpretation of the federal statute.

124. 709 F. Supp. 2d 994.

125. *Id.* at 1000–1002. The case involved allegations of a violation of the California Rosenthal Fair Debt Collection Practices Act (CFDCPA) by the defendant creditor. *Id.* at 996. Much like the FCCPA, the CFDCPA drew a significant portion of its structure from the FDCPA, including the prohibition on certain communications with debtors represented by counsel with regard to the debt at issue. Cal. Civ. Code § 1788.17 (2001); *see* Fla. Stat. § 559.77(5); *Marcotte*, 709 F. Supp. 2d at 997. The creditor in this case sent the debtor two billing statements after being notified of debtor's counsel. *Marcotte*, 709 F. Supp. 2d at 996. In its defense, the creditor argued both that it was required to send the statements pursuant to the TILA's mandatory periodic billing statements provision and that the CFDCPA carved out an exception for billing statements. *Id.* at 997–998.

126. The court noted that the CFDCPA included a specific carve-out for "'statements of account,'" which were exempt from the CFDCPA's prohibition on communication with

relationship between the federal statute and the FCCPA. The analysis used in *Marcotte*, however, was both incomplete and flawed. Similar to the review in this Article,[127] the court performed a technical analysis of the definitions of some of the words included in the statute, but with a different conclusion.[128] Unlike this Article, the court did not seriously consider the Federal Reserve Board's Staff Commentary or determinations on the issue.[129] One significant and arguably controlling factor not acknowledged or considered by the court is the aforementioned determination involving the similar New Jersey statute.[130] This might easily have been out of the court's control, as this authority was not likely presented to it,[131] but it does not change the fact that the court's opinion conflicts with the Federal Reserve Board's interpretation of its own Regulation Z.[132] Because the Supreme Court has made it clear that the Federal Reserve Board is better suited for interpreting its own regulation and the TILA than any court,[133] the *Marcotte* court erred in its interpretation of the provision governing periodic disclosure statements.

At least one Florida court has also recently rejected the general conclusions reached in *Marcotte*, as well as its appli-

represented debtors. *Id.* at 997. Once it was found that the CFDCPA did not prohibit creditors from sending periodic billing statements, no analysis of the potential preemption of the CFDCPA by the TILA was required. *Id.* at 998.

127. *Supra* pt. II(C).

128. The first argument involved the distinction between a "person" and a "natural person." *Marcotte*, 709 F. Supp. 2d at 1001. The court then distinguished between a "particular transaction" and a situation such as an open-ended credit plan, which might involve repeated transactions, despite the fact that these repeated transactions are simply multiple "particular transactions." *Id.*

129. *See id.* (noting that it did not matter whether the Staff Commentary meant to apply the attorney provision broadly to include natural persons because of the court's technical argument involving the "particular transaction" language).

130. 48 Fed. Reg. at 43672.

131. The New Jersey interpretation would not likely have been discovered during the research performed by the California plaintiff on the issue.

132. As mentioned *supra* in the text accompanying notes 86 and 114, the determination published by the Federal Reserve Board specifically states that Regulation Z allows creditors to send periodic billing statements to consumers' agents. 48 Fed. Reg. at 43672. This rule directly opposes the court's belief that Regulation Z completely prohibits such action. *Marcotte*, 709 F. Supp. 2d at 1000–1001.

133. *See Milhollin*, 444 U.S. at 565–566 (finding the TILA "is best construed by those who gave it substance in promulgating regulations thereunder," i.e. the Federal Reserve Board); *see also Anderson Bros. Ford*, 452 U.S. at 219 (reiterating *Milhollin*'s conclusion that the Federal Reserve Board's interpretations of its own regulation should be accepted by the courts).

cability to the FCCPA.[134] This Florida case, *Kelliher v. Target National Bank*, touched upon the relationship between the TILA and the FCCPA,[135] and despite not addressing the Federal Reserve Board's conclusion with regard to attorney agents in the published determination, the court still rejected the analysis used in *Marcotte*. In holding that the plaintiff's cause of action survived a motion to dismiss, the *Kelliher* court reiterated the plaintiff's arguments: (1) the TILA does not expressly preempt the FCCPA; and (2) the two statutes do not conflict on their faces.[136] This opinion does not directly discuss the possibility of sending the statements to the plaintiff's attorney, but it is supportive in its position that the two statutes could be harmonized.[137]

This opinion, considered together with the Federal Reserve Board's published determination on the New Jersey statute, leaves little room for the opposing interpretation of the language of the TILA to stand. Even if the language of the periodic billing statement provision of the TILA and Regulation Z taken alone leans in favor of a finding that only the actual consumer may receive such statements, the Federal Reserve Board itself has made this issue clear.[138]

A final anticipated point of opposition consists of the argument that attorneys would simply forward the billing statements straight to their clients, making the point of sending the statements to the attorneys rather unnecessary and a waste of time. The irony of this point is that its potential truth—the

134. *See Kelliher*, 826 F. Supp. 2d at 1329 (pointing out that the California statute's "'carve-out'" allowing creditors to send periodic billing statements distinguishes it from the FCCPA).

135. The defendant in this case argued, inter alia, that it was required to send the periodic statements to the consumer pursuant to the TILA and thus should not be held liable under the FCCPA. *Id.* at 1328.

136. *Id.* at 1329. The court arguably relied on Kelliher's assertion that the TILA does not preempt the FCCPA because the creditor could comply with the FCCPA and TILA by sending the consumer the mandatory disclosures without any additional debt-collection language. *Id.* The idea is that if the creditor is not attempting to collect the debt via the letter, then it is not within the scope of the FCCPA, and therefore no preemption issue exists. *See* Fla. Stat. § 559.72 (noting that the prohibited conducts applies when the party is "collecting consumer debts").

137. *Kelliher*, 826 F. Supp. 2d at 1329.

138. The language used in the determination addresses both the periodic billing statement provision specifically and the use of attorneys as agents to receive such statements. 48 Fed. Reg. at 43673.

attorney forwarding the statements right on to the consumer—is actually the ideal situation for consumers. Hopefully this process will cause creditors to refrain from including any additional abusive communications, or simply any additional collection-type language beyond the requisite disclosures.[139] Once attorneys are satisfied that the statements contain no language or other factor that might constitute an attempt to harass or abuse the debtors, the statements can then be forwarded to the consumers, and the consumer protection afforded by both statutes has been effectuated.[140] This argument touches upon public policy considerations for the proposed interpretation. A thorough discussion of the public policy benefits enhanced by this interpretation follows.

C. Policy Considerations

The Supreme Court has long upheld the importance of considering a law's impact on public policy.[141] Several such public policy considerations follow; each offers strong support in favor of an interpretation of the TILA, which results in complete harmony with the FCCPA's prohibition of communication with represented consumers.

Assuming, arguendo, that promulgated consumer-protection laws are valid and public policy is best served by enforcing such laws,[142] the next significant and practical public policy consideration of harmonization is harmonization itself. Both the TILA

139. The purpose of this result would again be to fully comply with both federal and Florida law.

140. This illustrates how sending periodic billing statements to a consumer's attorney would not be meaningless, even in cases where the attorney subsequently forwards the statements to the consumer. If abusive or otherwise illegal language is included in the letter, the attorney would be in the best position to protect the consumer—his or her client—from such wrongful conduct.

141. *See Markham v. Cabell*, 326 U.S. 404, 409 (1945) (noting the importance of including policy considerations as "a guide to [a] decision"); *see also Cox v. Roth*, 348 U.S. 207, 209 (1955) (quoting the same from *Markham*, 326 U.S. at 409).

142. This Article admittedly favors greater protection of consumers, but it does so by supporting state law that has already been enacted for that purpose. This Article therefore focuses on the benefits of avoiding preemption of the FCCPA for consumers. Other issues, including the statute's impacts on creditors and whether such protection of debtors is a good policy, are beyond the scope of this Article. Although this Article does not dispute or ignore the concern that these consumer-protection statutes might tend to "coddle" consumers, this issue is best saved for articles focusing on the general value or benefit of the consumer-protection laws.

and the FCCPA are consumer-protection statutes,[143] and, as such, neither should be intended to limit the protections provided by the other.[144] Consequently, an interpretation avoiding this result—namely, avoiding preemption of a state consumer-protection statute by a federal one—furthers this policy.[145] Because both statutes seek to provide protection for consumers, the purpose of each statute is best served by affording the full protection of both the TILA and the FCCPA.[146]

The Supreme Court has also supported this notion, stating that "'[t]he process of interpretation also misses its high function if a strict reading of a law results in the emasculation or deletion of a provision which a less literal reading would preserve.'"[147] This ideal can be directly applied to the technical issue identified in this Article involving the specific words used in the TILA, Regulation Z, and the Staff Commentary, provided in Part II.[148] Stepping back for a moment from the technical analysis of the specific definitions of the particular words used by each organization, applying the Federal Reserve Board's attorney provision to the periodic disclosures provision makes sense from a policy perspective. Continuing to effectuate the purpose of both statutes is an important public policy that should weigh heavily in favor of an interpretation harmonizing the periodic statements provision with the prohibition on communication with represented consumers.

Continuing with the notion of complete protection for consumers, this interpretation would successfully prohibit creditors from being able to send harassing debt-collection letters to

143. The TILA is codified under Chapter 41 of Title 15 of the United States Code, titled "Consumer Credit Protection," and the FCCPA is titled "Florida Consumer Collection Practices Act." 15 U.S.C. ch. 41; Fla. Stat. § 559.551.

144. Such a result does not reasonably fit within the purpose of a consumer-protection statute.

145. This idea is supported by the TILA's own provision on its effects on other state laws, essentially that it has no effect unless absolutely necessary. 15 U.S.C. § 1610(a)(1) (discussing the TILA's goal of avoiding impacting other laws).

146. The federal and state statutes offer different protections for consumers, and thus more protection is available when both statutes are applied. *See* 15 U.S.C. § 1601(a) (focusing on informing consumers of their rights); Fla. Stat. § 559.72(18) (focusing on restricting the type of conduct available to creditors that are attempting to collect debts from consumers).

147. *Cox*, 348 U.S. at 209 (quoting *Markham*, 326 U.S. at 409).

148. *Supra* pt. II(C) (discussing the obligor, consumer, person, etc.).

consumers under the guise of mandatory periodic billing statements pursuant to the TILA. If creditors were allowed to send such statements, then allegations of harassing debt-collection language on the billing statements would be extremely fact- and case-specific, requiring an in-depth analysis of the language used and its purpose for each independent cause of action. The alternative proposed in this Article allows for the use of a simple, sweeping rule that would be relatively easy and cost-effective to enforce.[149] Further, a policy influencing creditors to avoid breaking the law is a sound economic policy.[150]

Harmonization of the statutory provisions also serves public policy surrounding enforcement of other provisions of the FCCPA. While sending billing statements to consumers in an attempt to collect debts generally qualifies as a violation of Section 559.72(18),[151] other sections might also apply depending on the facts of the case. For example, the language included in the periodic billing statements might constitute harassment of the consumer under Section 559.72(7).[152] If the TILA preempts Section 559.72(18) of the FCCPA, then Section 559.72(7) could potentially be preempted as well.[153] Could a line be drawn? Would all harassment be allowed under the guise of the TILA, or would Section 559.72(7) sometimes be preempted and other times not?

149. A complete ban on communication would allow for a simple showing that such communication occurred, and no in-depth analysis would be needed other than a confirmation that the communication involved an attempt to collect a debt. *See* Fla. Stat. § 559.72 (noting that the provision applies to persons attempting to collect a debt from the consumer).

150. The benefit of this process is significant to both consumers and creditors. Consumers are afforded the rights granted to them under Florida law, and creditors are able to confidently send statements to the consumers' attorneys without fear of legal consequence stemming from a violation of federal law.

151. A letter sent directly to the represented debtor, when it is shown that the letter is attempting to collect a relevant debt and the creditor knows the debtor is represented by counsel, violates Section 559.72(18). *See Kelliher*, 826 F. Supp. 2d at 1329 (finding debt-collection language in a statement sent to a represented debtor is sufficient to survive a motion to dismiss for a Section 559.72(18) allegation).

152. Section 559.72(7) of the FCCPA prohibits a creditor from engaging in conduct that "can reasonably be expected to abuse or harass the debtor." Fla. Stat. 559.72(7). Abusive language, either itself or perhaps combined with the notion of the creditor knowingly violating the prohibition on communicating with the debtor, could fit within this provision. *See id.* (focusing on the abuse or harassment element of the statute).

153. If the TILA were interpreted to require the periodic billing statements to be sent only to the consumer, then the question of whether these statements could ever constitute harassment under the FCCPA would be irrelevant.

An extreme example illustrates the significance of this issue: consider a creditor sending a periodic billing statement with the outline of a gun covering the entire statement. If the TILA preempts both Sections 559.72(18) and (7), the debtor might not have any remedy available under the FCCPA.[154] Harmonizing the TILA with the FCCPA would completely avoid all of this potential confusion and uncertainty, as well as the possible loophole created as a result of the preemption.[155]

Another significant policy consideration involves the economic advantages to all parties associated with this proposal. Section 559.72(18) requires that the creditor have "knowledge of, or can readily ascertain" the debtor's attorney's contact information before the creditor can violate Section 559.72(18).[156] Thus, this section only applies to creditors that have easy access to the debtor's counsel's contact information.[157] From a routine business standpoint, it is arguably efficient and cost-effective for a creditor to simply direct all of its communications, including its billing statements, to the debtor's counsel. Conversely, it could be quite costly for a creditor to monitor each statement it sends to the consumer for any language that extends beyond the mandatory disclosures,[158] as well as to alternatively seek potential litigation over whether the TILA preempts the FCCPA and to what extent.[159] The ability to send the periodic billing statements to the debtor's counsel provides the creditor with a beneficial choice.

154. This example does not include any other miscellaneous laws that might have standing here; only the relationship between the TILA and the FCCPA is considered.

155. While the question would remain whether abusive language in statements sent to the consumer's attorney could still constitute harassment of the consumer, preemption would not be a constant issue.

156. Fla. Stat. § 559.72(18).

157. It is assumed that an attorney's firm's address is easily ascertainable if any contact information is provided, if the address is not provided or available initially.

158. This refers to the theory suggested by the *Kelliher* court involving the potential harmonization between the state and federal statute by including only the mandatory disclosures on billing statements and excluding any additional collection language. 826 F. Supp. 2d at 1329. Under this theory, a creditor would arguably have to monitor each document it sends to the consumer to make sure that *every* document complies with this rule. The costs of such supervision could be extensive.

159. It is commonly understood that litigation is much more costly than most other possible avenues. *See e.g.* Steven Shavell, *The Level of Litigation: Private versus Social Optimality of Suit and of Settlement*, 19 Intl. Rev. L. & Econ. 99 (1999) (discussing in detail the costs of litigation). This potential litigation could involve not only the main issue of preemption but also the issue of whether the documents sent to the consumer constitute a billing statement under the TILA.

If the creditor wishes for the debtor to receive the billing statements, it could choose to ensure that the statements did not include any additional collection language or other abusive language in violation of the FCCPA. On the other hand, if the creditor wishes simply to comply with the TILA—such as when a debtor is about to file for bankruptcy and the creditor does not believe it has any real chance of collecting the debt—it could send the statements to the debtor's attorney without any concern over whether the language constitutes additional collection lan guage beyond that required under Section 1637(b).[160] From the viewpoint of the debtor's counsel, more communications from creditors might potentially seem to be more of a hassle. The final costs of such activity may still prove to be less for both the debtor *and* the attorney, however, than the costs associated with continuously communicating with each other over the latest statements sent by the creditor.[161]

Although these policy issues are important, it is a simple—and in the Author's opinion, correct—idea that public policy is always best served when active laws protecting the American consumer continue to be enforced, unhampered by preemption of federal laws with the same protective goals and purpose, which explicitly intend to avoid such preemption. The interpretation proffered in this Article thus furthers the public policy considerations surrounding the enactment of both the TILA and the FCCPA.

IV. CONCLUSION

The problematic use of the TILA is an easily foreseeable possibility. The TILA, a federal statute intended to shield consumers from being harmed by informing them of their rights, could instead be used by creditors as a sword to strike down another consumer-protection statute at the state level. Our hypothetical debtor Jack, introduced at the beginning of this

160. This point actually hints at another potential question, namely to what extent a creditor could violate the FCCPA by language it uses in a billing statement that it sent to the debtor's attorney rather than the debtor. This is an interesting issue, but one that is beyond the scope of this Article.

161. If the debtor were to receive the statements directly, the attorney representing the debtor still has an obligation to ensure the debtor's rights remain protected.

Article, deserves the protections available to him by law under both the state and federal statutes.

Public policy supports avoiding preemption of state laws by federal law when harmonization of these statutes is possible, and this is no exception. The Federal Reserve Board has made it quite clear that an attorney can receive the required periodic billing statements on behalf of his client: the consumer.[162] The uncertainty surrounding the relationship between the TILA's mandatory periodic disclosure statements and the FCCPA's prohibition on communication with represented debtors should be resolved and put to rest. Creditors should be able to comply with the TILA *and* the FCCPA by sending the mandatory periodic billing statements to consumers' attorneys, thus avoiding any preemption of Florida's consumer-protection statute and continuing to protect the rights of the average consumer.

162. 48 Fed. Reg. at 43673.