NARCA
NATIONAL ASSOCIATION OF RETAIL COLLECTION ATTORNEYS

May 28, 2013

Ms. Monica Jackson
Office of the Executive Secretary
Bureau of Consumer Financial Protection
1700 G Street NW
Washington, DC 20006

Re: Proposed Rule: Defining Larger Participants of the Student Loan Servicing Market
78 Fed. Reg. 18902 (March 28, 2013)
Docket Number CFPB-2013-0005
RIN 3170-AA35

Dear Ms. Jackson:

The National Association of Retail Collection Attorneys ("NARCA") appreciates this opportunity to submit the following comments in response to the Consumer Financial Protection Bureau's proposed rule entitled *Defining Larger Participants of the Student Loan Servicing Market* ("Proposed Rule").

I. Background

Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act)[1] established the Bureau on July 21, 2010. Under 12 U.S.C. 5514, the Bureau has supervisory authority over all nonbank covered persons[2] offering or providing three enumerated types of consumer financial products or services: (1) origination, brokerage, or servicing of consumer loans secured by real estate, and related mortgage loan modification or foreclosure relief services; (2) private education loans; and (3) payday loans.[3] The Bureau also has supervisory authority over "larger participant[s] of a market for other consumer financial products or services," as the Bureau defines by rule.[4]

This Proposed Rule, if adopted, would be the third in a series of rulemakings to define larger participants of markets for other consumer financial products or services for purposes of 12 U.S.C. 5514(a)(1)(B).[5] The Proposed Rule would establish the Bureau's supervisory authority over certain nonbank covered persons participating in the student loan servicing market.

[1] Public Law No. 111-203 (codified at 12 U.S.C. 5301 *et seq*.).
[2] 12 U.S.C. 5514(a)(1). "Covered persons" include "(A) any person that engages in offering or providing a consumer financial product or service; and (B) any affiliate of a person described [in (A)] if such affiliate acts as a service provider to such person." 12 U.S.C. 5481(6).
[3] 12 U.S.C. 5514(a)(1)(A), (D), (E).
[4] 12 U.S.C. 5514(a)(1)(B), (a)(2); *see also* 12 U.S.C. 5481(5) (defining "consumer financial product or service").
[5] The first two rules defined larger participants of markets for consumer reporting, 77 Fed. Reg. 42874 (July 20, 2012), and for consumer debt collection, 77 Fed. Reg. 65775 (Oct. 31, 2012).

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The Bureau's supervision authority also extends to service providers of those covered persons that are subject to supervision under 12 U.S.C. 5514.[6] In this Proposed Rule, the Bureau provides clarification to its definition of "student loan servicing" by noting "[i]nteractions to facilitate the collection of payment from a borrower who has defaulted on a post-secondary education loan would also constitute student loan servicing."[7] Service providers to larger participants in the student loan servicing market may include entities defined as "debt collectors" under the FDCPA.[8] The Bureau has previously recognized that law firms may be service providers.[9]

The National Association of Retail Collection Attorneys ("NARCA") is a nationwide, not-for-profit trade association comprised of attorneys and law firms engaged in the practice of debt collection law. NARCA members include more than 700 law firms located in all 50 states, all of whom must meet association standards designed to ensure experience and professionalism. Attorneys employed by NARCA member law firms are committed to the fair and ethical treatment of all participants in the debt collection process. They are required to practice law in a manner consistent with their responsibilities as officers of the court and must adhere to applicable state and federal laws, rules of civil procedure, state bar association licensing and certification requirements and their respective rules of professional conduct. NARCA has adopted a Code of Professional Conduct and Ethics which imposes professional standards beyond the requirements of state codes of ethics and regulations that govern attorneys.

NARCA members are regularly retained by creditors to lawfully collect delinquent debts. As the only national trade association dedicated solely to the needs of attorneys engaged in debt collection, NARCA has a significant interest in ensuring that the Bureau's rulemaking is consistent with its members' professional responsibilities to their clients, the courts, their adversaries and the general public.

NARCA is interested in the Proposed Rule to the extent collection attorneys may be subject to supervision and examination as service providers to entities identified as larger participants in the student loan servicing market.

II. Regulation of Attorneys Under the Dodd-Frank Act

In drafting the Dodd-Frank Act, Congress intended to "make clear that the new Consumer Financial Protection Bureau established in the bill is not being given authority to regulate the practice of law, which is regulated by the State or States in which the attorney in question is

[6] 12 U.S.C. 5514(e); *see also* 12 U.S.C. 5481(26) (defining ''service provider'').
[7] Defining Larger Participants of the Student Loan Servicing Market, 78 Fed. Reg. 18902, 18907 fn.41 (March 28, 2013).
[8] "For lenders utilizing service providers for collection activity, determine whether the lender has policies and procedures in place to monitor the service provider for compliance with Federal consumer financial laws. . . Determine whether the lender has policies and controls in place to ensure the accuracy of information used to collect delinquent accounts through legal action." CFPB Education Loan Examination Procedures, p.24 (December 17, 2012). http://files.consumerfinance.gov/f/201212_cfpb_educationloanexamprocedures.pdf
[9] Defining Larger Participants in Certain Consumer Financial Product and Service Markets, 77 Fed. Reg. 9592, 9593 (February 17, 2012).

licensed to practice."[10] Given that general rule, Congress sought to define what does, and does not, constitute the practice of law. As Representative Conyers explained in his remarks concerning the Conference Report on the Dodd-Frank Act:

> *The provision in the final bill includes indicia for determining whether an activity that constitutes the offering or provision of a financial product or service within the terms of the bill is part of or incidental to the practice of law, and therefore excluded from the Bureau's authority. First and foremost, the activity must be among those activities considered part of the practice of law by the State supreme court or other governing body that is regulating the practice of law in the State in question, or be incidental to those practices. As further protection against abuse, the activity must be engaged in exclusively within the scope of the attorney-client relationship; and the product or service must not be offered by or under direction of the attorney in question with respect to any consumer who is not receiving legal advice or services from the attorney in connection with it.*[11]

A. General Rule

12 U.S.C. § 5517(e) is the codification of the intent explained by Representative Conyers above. Paragraph (e)(1) ("the general rule") is the provision which he described as "[f]irst and foremost":

> (1) In general
> Except as provided under paragraph (2), the Bureau may not exercise any supervisory or enforcement authority with respect to an activity engaged in by an attorney as part of the practice of law under the laws of a State in which the attorney is licensed to practice law.

In its final rule *Defining Larger Participants in Certain Consumer Financial Product and Service Markets* ("Consumer Debt Collection Rule"),[12] the Bureau did not dispute that collection attorneys are engaged in the practice of law and fall within the scope of the "general rule" described in 12 U.S.C. § 5517(e)(1). Instead, the Bureau focused on "[t]wo related provisions [that] preserve the Bureau's authority despite that restriction." [13]

The first "related provision" is 12 U.S.C. § 5517(e)(2) which provides two exceptions to the general rule, and the second is 12 U.S.C. § 5517(e)(3) which acts as a "savings clause" for consumer protection laws that existed prior to the enactment of the Dodd-Frank Act and for which certain authority was transferred to the Bureau.

[10] Representative Conyers (MI). "Conference Report on H.R. 4173, Dodd-Frank Wall Street Reform and Consumer Protection Act." *Congressional Record* 156:105 (July 15, 2010) p. E1349.
[11] *Id.*
[12] 77 Fed. Reg. 65775 (Oct. 31, 2012)
[13] *Id*. at 65784

B. Exceptions to General Rule

The Bureau noted in the Consumer Debt Collection Rule that a number of commenters argued that collection attorneys should be excluded from that rule based upon certain remarks by Representative Conyers which suggested Congress intended a broad reading of the phrase "practice of law."[14] The Bureau disagreed and provided the following explanation:

> Representative Conyers focused his remarks on attorneys who provide legal services to consumers, such as the consumer clients of bankruptcy lawyers, consumer lawyers, and real estate lawyers. He did not discuss legal services in which lawyers act on behalf of commercial clients with interests adverse to those of consumers, such as by collecting consumer debts.[15]

Unfortunately, the Bureau took its argument only half-way, and NARCA respectfully urges the Bureau to carry the argument to its logical conclusion: the exclusions to the general rule likewise apply only to "attorneys who provide legal services to consumers" and have no applicability to collection attorneys who, instead, provide legal services and representation to their creditor clients. There is no reasonable basis to assume that Congress, in generally defining what is, or in this instance, what is not the practice of law, reached beyond that context.

The wording of the Dodd-Frank Act supports such a conclusion. 12 U.S.C. § 5517(e)(2) provides that the general rule, quoted above, "shall not be construed so as to limit the exercise by the Bureau of any supervisory, enforcement, or other authority regarding the *offering or provision* of a consumer financial product or service described in any subparagraph of section 5481(5) of this title—

> (A) that is not *offered or provided* as part of, or incidental to, the practice of law, occurring exclusively within the scope of the attorney-client relationship; or
>
> (B) that is otherwise *offered or provided* by the attorney in question *with respect to any consumer* who is not receiving legal advice or services from the attorney in connection with such financial product or service.

(emphasis added).

These provisions have clear meaning if the "product or service" is being "offered or provided" to a consumer. In particular, paragraph (B) is susceptible only to that reading, since collection attorneys "offer or provide" financial services only "with respect to" their creditor clients, not "with respect to any consumer." Under this interpretation, this exception would apply to attorneys providing non-legal financial products or services directly to consumers which, for example, might include debt settlement attorneys, attorneys providing certain financial advisory services or attorneys providing payday loans through businesses separate from their law

[14] *Id*.
[15] *Id*. (citations and internal quotation marks omitted).

practices. This interpretation is supported by Representative Conyers' statement that "our Committee recognized that attorneys can be involved in activities outside the practice of law, and might even hold out their law license as a sort of badge of trustworthiness. . ."[16] Attorneys with creditor's rights law practices who provide legal services to their creditor clients cannot be described as being "involved in activities outside the practice of law." Nor do they "hold out their law license as a sort of badge of trustworthiness" as their law license is precisely what enables them to provide legal services.

C. Enumerated Consumer Laws

12 U.S.C. § 5517(e)(3) provides that the general rule. . .

> shall not be construed so as to limit the authority of the Bureau with respect to any attorney, to the extent that such attorney is otherwise subject to any of the enumerated consumer laws or the authorities transferred under subtitle F or H.

One of the "enumerated consumer laws" is the Fair Debt Collection Practices Act.[17] Citing *Heintz v. Jenkins*, 514 U.S. 291 (1995), the Bureau has asserted that regardless of the aforementioned general rule, collection attorneys who regularly engage in consumer debt collection activity are subject to the FDCPA "even when that activity consists of litigation."[18] However, NARCA respectfully submits to the Bureau that rather than providing blanket FDCPA coverage over the conduct of attorneys, *Heintz* instead clarified that there are situations in which the FDCPA is inapplicable to attorney conduct.

The Court in *Heintz* was the first to recognize the difficulties created by the application of the FDCPA to certain attorney conduct. In *Heintz*, a law firm sent a letter to a consumer's attorney in an effort to settle a pending lawsuit arising from an unpaid automobile loan. The letter included a statement of the amount owed which included an amount allegedly not authorized in the consumer's automobile loan. The consumer filed suit against the law firm claiming FDCPA violations consisting of attempting to collect and unauthorized amount[19] and falsely representing the amount of the debt.[20] The District Court dismissed the claim upon a finding that the FDCPA did not apply to lawyers engaged in litigation, but the Seventh Circuit reversed, finding that under the plain language of the FDCPA, attorneys who use litigation to collect debts can fall within the definition of a "debt collector" under § 1692a(6).[21]

In affirming the Seventh Circuit, the Supreme Court rejected the argument that although Congress repealed the attorney exemption, the FDCPA contained an implied exception for litigation conduct.[22] However, it did recognize that because the FDCPA originally exempted attorneys, when the exemption was subsequently removed Congress "did not revisit the

[16] *Congressional Record* 156:105 (July 15, 2010) p. E1349.
[17] 12 U.S.C § 5481(12)(H).
[18] 77 Fed. Reg. 65784 fn.77.
[19] 15 U.S.C. § 1692f(1).
[20] 15 U.S.C. § 1692(e)(2)(A).
[21] *Jenkins v. Heintz*, 25 F.3d 536, 539 (7th Cir. 1994).
[22] *Heintz v. Jenkins,* 514 U.S. 291, 295 (1995).

wording of these substantive provisions [of the Act]."[23] Because of its legislative history, when applying the FDCPA to attorney conduct, "some awkwardness is understandable."[24]

In Heintz, the "awkwardness" did not warrant a broad exemption because it was possible to harmonize the conduct-regulating provisions of the FDCPA with litigation activities.[25] The Court accomplished this by recognizing the FDCPA contains "implied exceptions" to certain attorney conduct.[26] As an example, the Court considered, in dicta, § 1692c(c), which requires a debt collector to cease further debt collection communications if the debtor provides it with a written notice that he "refuses to pay" or wishes the debt collector to "cease further communication."[27] In the context of litigation, this could mean that a debtor who invokes § 1692c(c) could stop all further pleadings being directed at him. However, the Court found it unnecessary to read § 1692c(c) in such an absurd way. Rather, it reasoned that the section can be read to imply that court-related documents can be communicated to the debtor, even though the section expressly allows only a communication concerning remedies the debt collector "may invoke" or "intends to invoke."[28] As the Court explained:

> We need not authoritatively interpret the Act's conduct-regulating provisions now, however. Rather, we rest our conclusions upon the fact that it is easier to read § 1692c(c) as containing some such additional, implicit, exception than to believe that Congress intended, silently and implicitly, to create a far broader exception, for all litigating attorneys, from the Act itself.[29]

Additional clarification was subsequently provided by the Court in *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 176 L. Ed. 2d 519 (2010). *Jerman* concerned a lawyer's mistaken understanding of the content of a disclosure required to be provided to a consumer under 15 U.S.C. § 1692g(a).[30] The *Jerman* Court held that the bona fide error exception to liability under § 1692k(c) does not extend to a lawyer's mistake of law in interpreting § 1692g(a). Although the bona fide error defense was not available to the attorney for his mistake of law, the Court recognized that the defense was not an attorney's "sole recourse to avoid potential liability."[31] Concurring with *Heintz* on this issue, the court stated "we need not authoritatively interpret the Act's conduct-regulating provisions to observe that those provisions should not be assumed to compel absurd results when applied to debt collecting attorneys."[32]

In *Beler v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, 480 F.3d 470 (7th Cir. Ill. 2007), the Court addressed the issue whether the contents of pleadings in a state court collection action

[23] *Id.* at 294-295.
[24] *Id*. at 295.
[25] *Id.* at 296-297.
[26] *Id.*
[27] *Id.* at 296.
[28] *Id.*
[29] *Id*. at 296-297.
[30] *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1609, 176 L. Ed. 2d 519 (2010).
[31] *Id.*, at 1621-1622.
[32] *Id.* at 1622.

are subject to the provisions of the FDCPA prohibiting false or misleading representations.[33] The debtor filed suit in federal court against a law firm alleging, in part, that the complaint and affidavit the law firm had filed in state court violated § 1692e because the descriptions of the contracts with the creditors were "not clear enough to enable an unsophisticated consumer to understand the relation among merchant, transaction processor, and creditor."[34] The court stated:

> This theory assumes that the federal Act regulates the contents of complaints, affidavits, and other papers filed in state court. The Law Firm is a debt collector, to be sure, and we held in *Thomas v. Simpson & Cybak*, 392 F.3d 914 (7th Cir. 2004) (en banc), that the statutory verification notice must precede or accompany a complaint when the creditor's law firm satisfies the definition of a debt collector. But *Thomas* did not imply that the FDCPA dictates the complaint's contents; to the contrary, we suggested (though we did not have an occasion to hold) that the state's rules of procedure, not federal law, determine which facts, and how much detail, must be included in documents filed with a clerk of court for presentation to a judge. A recent amendment nullified the holding of *Thomas*: legal pleadings no longer need be preceded or accompanied by verification notices. *Given this amendment and the limited rationale of Thomas itself, it is far from clear that the FDCPA controls the contents of pleadings filed in state court.*[35]

In Hemmingsen v. Messerli & Kramer, P.A., 674 F.3d 814 (8th Cir. 2012), the Court cautioned, citing *Heintz*, that "careful crafting may be required in applying the statute's prohibitions to attorneys engaged in litigation, counsel against anything other than a case-by-case approach. . ."[36] That case dealt with the allegation a law firm violated multiple provisions of the FDCPA by making false statements and misrepresentations in a memorandum filed in the state court action. In analyzing the application of the FDCPA to attorney representations, the court reviewed the decisions in *Heintz* and *Jerman* and noted:

> *Heintz* answered the question whether the FDCPA applies to a lawyer who regularly collects consumer debts through litigation. But the circuit courts have struggled to define the extent to which a debt collection lawyer's representations to the consumer's attorney or in court filings during the course of debt collection litigation can violate §§ 1692d-f. The difficulties are not surprising because, as the Supreme Court explained in *Heintz*, Congress in repealing the lawyer exemption did not modify the FDCPA's conduct-regulating provisions, which may create anomalies demonstrating a need for additional, implicit, exception[s] to implement the statute's apparent objective of preserving creditors' judicial remedies. . . those

[33] 15 U.S.C. § 1692(e).
[34] *Beler v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, 480 F.3d 470, 472 (7th Cir. Ill. 2007).
[35] *Id*., 472-473 (citations omitted)(emphasis added).
[36] *Hemmingsen v. Messerli & Kramer, P.A.,* 674 F.3d 814, 819 (8th Cir. 2012).

> [conduct-regulating] provisions should not be assumed to compel absurd results when applied to debt collecting attorneys.[37]

Addressing the debtor's arguments, the Court found:

> The rule Ms. Hemmingsen urges -- that a debt collector's fact allegations are false and misleading for purposes of *§ 1692e* when rejected as not adequately supported in the collection suit -- would be contrary to the FDCPA's apparent objective of preserving creditors' judicial remedies. . . If judicial proceedings are to accurately resolve factual disputes, a lawyer must be permitted to call witnesses without fear of being sued if the witness is disbelieved and it is alleged that the lawyer knew or should have known that the witness' testimony was false. Judges have ample power to award attorney's fees to a party injured by a lawyer's fraudulent or vexatious litigation tactics. There is no need for follow-on [FDCPA] litigation that increases the cost of resolving bona fide debtor-creditor disputes.[38]

Similarly, in *Gabriele v. Am. Home Mortg. Servicing*, 2012 U.S. App. LEXIS 24478 (2d Cir. Nov. 27, 2012), in addressing allegations that a law firms' state court filings were false, deceptive, unfair, or harassing in violation of the FDCPA, the court stated:

> Although statements made and actions taken in furtherance of a legal action are not, in and of themselves, exempt from liability under the FDCPA, the false statements of which Gabriele complains do not amount to the kind of misleading and deceptive practices that fall within the ambit of the FDCPA. . .Where an attorney is interposed as an intermediary between a debt collector and a consumer, we assume the attorney, rather than the FDCPA, will protect the consumer from a debt collector's fraudulent or harassing behavior. . . Within the context of an adversary proceeding in state court between two represented parties, these allegations simply do not state plausible claims under the FDCPA. . . As we have recognized in past decisions, the protective purposes of the FDCPA typically are not implicated when a debtor is instead protected by the court system and its officers. . . When that is the case, the state court's authority to discipline will usually be sufficient to protect putative-debtors like Gabriele from legitimately abusive or harassing litigation conduct.[39]

D. Attorney-Client Relationship

The Bureau, in its final rule *Confidential Treatment of Privileged Information*,[40] states that it "continues to adhere to the position that it can compel privileged information pursuant to its

[37] *Id. at* 818 (citations and internal quotation marks omitted).
[38] *Id*. at 819-820 (citations and internal quotation marks omitted).
[39] *Gabriele v. Am. Home Mortg. Servicing*, 2012 U.S. App. LEXIS 24478, 8, 12-14 (2d Cir. Nov. 27, 2012).
[40] Confidential Treatment of Privileged Information, 77 Fed. Reg. 39617 (July 5, 2012)

supervisory authority" and notes that, pursuant to the rule, "submission by any person of any information to the CFPB for any purpose in the course of any supervisory or regulatory process of the CFPB shall not be construed as waiving, destroying, or otherwise affecting any privilege such person may claim with respect to such information under Federal or State law as to any person or entity other than the CFPB.."[41]

NARCA applauds the Bureau for its efforts to protect the confidentiality of privileged information, but remains concerned that regardless of the limited protection provided by the Bureau, the demand for such information nevertheless has the potential to chill communications between attorney and client. This potential chilling effect is precisely why the attorney-client privilege has historically been considered of paramount importance, and is "one of the oldest recognized privileges for confidential communications and [is] traditionally deemed worthy of maximum legal protection."[42] Indeed, "[i]f the purpose of the attorney-client privilege is to be served, the attorney and the client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege . . . is little better than no privilege at all."[43]

NARCA notes that legislation in the 112th Congress[44] also addressed the issue by providing anti-waiver protection to privileged information provided to the bureau. However, it provides no anti-waiver protection for privileged information the Bureau shares with state attorneys general or other state agencies. Most significantly, the legislation does not address the fundamental issue of whether the Bureau has the right to compel production of privileged documents in examinations. In that regard, the intent of Congress is compelling: *"In particular, the Committee wishes to emphasize that this bill [the Dodd-Frank Act] in no way authorizes government officials or courts to demand that anyone furnish information that is protected by legal privilege."*[45]

III. Conclusion

NARCA appreciates this opportunity to provide the Bureau with its comments, and respectfully encourages the Bureau to consider, in the exercise of its authority, the unique role of attorneys in the consumer debt collection process and the importance of confidentiality in their relationships with clients.

Respectfully Submitted,

Louis S. Freedman, President

[41] Id. at 39623.
[42] *In re Public Defender Serv.*, 831 A.2d 890, 900 (D.C. 2003); *see also Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).
[43] *Upjohn*, 449 U.S. at 393.
[44] Public Law 112-215 (126 Stat. 1589; December 20, 2012; enacted H.R. 4014).
[45] *Congressional Record* 156:105 (July 15, 2010) p. E1349 (emphasis added).