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***via* Electronic Filing**

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protections Bureau
1700 G Street, N.W.
Washington, D.C. 20006

Re: Comments of ACA International: Confidential Treatment of Privileged Information, CFPB-2012-0010, RIN 3170-AA20

Dear Ms. Jackson:

ACA International ("ACA") files this comment in response to the Consumer Financial Protection Bureau's ("CFPB") request for comments on its proposed rule regarding the confidential treatment of privileged information. 77 Fed. Reg. 15286 (Mar. 15, 2012) [hereinafter "Proposed Rule"]. ACA's primary interest is in protecting the inviolable rights of its members to communicate with legal counsel regarding compliance with Federal and State statutory and regulatory laws without the risk of waiving any privilege or confidentiality with respect to those communications. Although the CFPB has provided some guidance as to the treatment of privileged communications produced to the CFPB, many uncertainties remain. For the reasons discussed below, ACA strongly urges the CFPB to take direction from Congress on this issue to provide clarity to regulated entities and protect the public policy interests behind the attorney-client privilege, the work product doctrine, and other statutory and common law privileges.

1. Background on ACA International.

ACA International is an international trade association originally formed in 1939 and composed of credit and collection companies that provide a wide variety of accounts receivable management services. Headquartered in Minneapolis, Minnesota, ACA represents approximately 5,500 company members, including credit grantors, collection agencies, attorneys, asset buyers and vendor affiliates.

The company-members of ACA comply with applicable federal and state laws and regulations regarding debt collection, as well as ethical standards and guidelines established by ACA. Specifically, the collection activities of ACA members are regulated primarily by the FTC under the Federal Trade Commission Act, 15 U.S.C. § 45 *et seq.*, the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 *et seq.*; the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* (as amended by the Fair and Accurate Credit Transactions Act); the Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 *et seq.*; in addition to numerous other federal and state laws. Indeed, the accounts receivable management industry is unique if only because it is one of the few industries in which Congress enacted a specific statute governing all manner of communications with consumers when recovering debts, including those created in the context of healthcare operations.[1] In so doing, Congress committed the primary regulation of the recovery of debts to the jurisdiction of the Federal Trade Commission. 15 U.S.C. § 16921.

ACA members range in size from small businesses with a few employees to large, publicly held corporations. Together, ACA members employ in excess of 150,000 workers. These members include the very smallest of businesses that operate within a limited geographic range of a single town, city or state, and the

[1] The FDCPA defines "communications" subject to statute broadly to include "the conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. § 1692a(2).

very largest of national corporations doing business in every state. The majority of ACA members, however, are small businesses. Approximately 2,000 of the company members maintain fewer than ten employees, and more than 2,500 of the members employ fewer than twenty persons.

ACA serves members and represents the industry by developing timely information based on sound research and disseminating it through innovative education, training, and communications. The Association also promotes professional and ethical conduct in the global marketplace; acts as the members' voice in critical business, legislative, legal, regulatory and public arenas; and provides quality products and services to its members.

To help members stay current on regulatory and business developments, as well as industry practices, ACA provides more than 130 educational and training workshops to its members each year, with nearly 1,000 industry professionals completing ACA's collector credentialing program annually. As discussed in detail herein, ACA is the industry leader in providing compliance information and education to its members,[2] and education to consumers to encourage financial literacy. ACA provides consumers with valuable information about their rights under the FDCPA and the Fair Credit Reporting Act.

ACA members are a crucial component in safeguarding the health of the economy. Uncollected consumer debt threatens America's economy. According to the Federal Reserve Board and United States Census Bureau, total consumer bad debt costs every adult in the United States $683 every year. This translates into a

[2] Through ACA's Campus ACA™, the Association provides a wide variety of training and educational opportunities such as professional development courses, certification opportunities under ACA's proprietary certification program entitled Professional Practices Management System™ (PPMS), local and in-house seminars, online seminars, teleseminars and Webcourses, as well as regularly scheduled conferences. *See* http://www.acainternational.org/?cid=321.

cost for the average non-supervisory worker of nearly 54 hours (before taxes) in annual salary that pays for the bad debt of other consumers. By itself, outstanding credit card debt has doubled in the past decade and now approaches three quarters of one trillion dollars. Total consumer debt, including home mortgages, exceeds $9 trillion.[3] Moreover, the greatest increases in consumer debt are traced to consumers with the least amount of disposable income to repay their obligations.

As part of the process of attempting to recover outstanding payments, ACA members are an extension of every community's businesses. They represent the local family doctor, hospital, or nursing home. ACA members work with these businesses, large and small, to obtain payment for the goods and services received by consumers. In years past, the combined effort of ACA members have resulted in the recovery of billions of dollars annually that are returned to business and reinvested. For example, ACA members recovered and returned over $40 billion in 2007 alone, a massive infusion of money into the national economy.[4] Without an effective collection process, the economic viability of these businesses, and by extension, the American economy in general, is threatened. At the very least, Americans are forced to pay higher prices to compensate for uncollected debt.

2. Background on the Proposed Rule.

The history of the CFPB's treatment of the attorney-client privilege in exercising its supervisory authority bears review as it relates to ACA's concerns about the current interpretation and statutory authority for the CFPB to promulgate and implement the proposed rule. The Dodd-Frank Act does not address whether

[3] William Branigan, *U.S. Consumer Debt Grows at an Alarming Rate*, Wash. Post, Jan. 12, 2004.

[4] PricewaterhouseCoopers, Value Of Third-Party Debt Collection To The U.S. Economy in 2007: Survey and Analysis, *available at* http://www.acainternational.org/files.aspx?p=/images/ 12546/pwc2007-final.pdf.

the submission of privileged information to the Consumer Financial Protection Bureau (CFPB) in the course of the Bureau's supervisory or regulatory processes will affect any privilege a supervised entity may claim with respect to such information. *See* Proposed Rule at 15287-88. On July 28, 2011, the CFPB issued a proposed rule in part addressing confidential information. The proposed rule stated that "[t]he provision by the CFPB of any confidential information pursuant to [12 CFR part 1070, subpart D] does not constitute a waiver, or otherwise affect, any privilege any agency or person may claim with respect to such information under federal law." *Id.* at 15288. Interested parties submitted comments expressing that this rule did not go far enough to provide assurances that the provision of privileged information to another federal or state agency does not waive any applicable privilege.

On January 4, 2012 the CFPB's General Counsel issued a letter, CFPB Bulletin 12-01, expressing the CFPB's view that the submission of privileged information to the CFPB in response to requests made pursuant to the bureau's supervisory authority does not result in the waiver of any applicable privilege a supervised entity may claim in response to a request or demand for the same information by a third party. *Id.* at 15289. In its letter, the CFPB argues that, like the prudential regulators, its supervisory authority encompasses the authority to compel supervised entities to provide privileged information and, therefore, a supervised entity's submission of privileged information to the CFPB in response to a request is not a voluntary. *Id.*

In addition, new legislation has been introduced in the House and Senate to address the CFPB's treatment of privileged communications. Two identical bills – H.R. 4014 and S. 2099 – propose amending the Federal Deposit Insurance Act to include the CFPB as "federal banking agency," which would clarify that no privilege is waived by producing privileged information to the CFPB. H.R. 4014 passed the House of Representatives on March 26, 2012 with overwhelming bipartisan support. A third bill – H.R. 3871 – proposes an amendment to the Dodd-Frank Act to clarify that "[t]he submission by any person of any information to the Bureau for any purpose in the

course of any supervisory or regulatory process of the Bureau 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 Bureau."

3. Comments of ACA International.

One of the hallmarks of the American legal system is the right of individuals and entities to seek legal counsel, and to have their communications with counsel remain confidential under the attorney-client privilege, work product doctrine, and other statutory and common law privileges. The United States Supreme Court has recognized that the attorney-client privilege is "one of the oldest recognized privileges for confidential communications." *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998). The privilege is intended to encourage "full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

The sanctity of privileged and confidential communications is particularly important in the corporate setting in an industry, such as debt collection, with complex Federal and State statutes and regulations that periodically conflict. The Supreme Court has commented that "[i]n light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, constantly go to lawyers to find out how to obey the law, particularly since compliance with the law in this area is hardly an instinctive matter." *Id.* Few industries have as many laws requiring interpretation and legal guidance. Depending on the type of accounts subject to collection, debt collectors and/or the credit grantors also may have compliance obligations under the following illustrative list of Federal laws in addition to the FDCPA:

- The Higher Education Act of 1971, Pub. L. No. 89-329;
- The Bank Holding Company Act, 12 U.S.C. §§ 1841 *et seq.*;
- The Consumer Leasing Act ,15 U.S.C. §§ 1667 *et seq.*;
- The Electronic Fund Transfer Act, 12 U.S.C. §§ 222 *et seq.*;
- The Equal Credit Opportunity Act,15 U.S.C. §§ 1691 *et seq.*;
- The Fair Credit Billing Act, 15 U.S.C. §§ 1666 *et seq.*;
- The Fair Credit and Charge Card Disclosure Act, 15 U.S.C. §§ 1601 *et seq.*;
- The Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq.*;
- The Federal Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.*;
- The Graham-Leach-Bliley Act, 15 U.S.C. § 6801 *et seq.*;
- The Health Insurance Portability and Accountability Act, 42 U.S.C. § 1320d-2 *et seq.*, including the Security Rule, Privacy Rule, and Transaction and Code Set Standards promulgated by the Department of Health and Human Services;

- The Home Equity Loan Consumer Protection Act, 15 U.S.C. §§ 1637 *et seq.*;
- The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism , P.L. 107-56, 115 Stat. 272;
- The Right to Financial Privacy Act, 12 U.S.C. §§ 3401 *et seq.*;
- Telemarketing Sales Rule, 16 C.F.R. §§ 310.1 *et seq.*;
- Truth in Lending Act, 15 U.S.C. §§ 1601 *et seq.*;
- Regulation E, 12 C.F.R. § 205.1 *et seq.*;
- Regulation J, 12 C.F.R. § 210.1 *et seq.*;
- Regulation M, 12 C.F.R. §§ 213 *et seq.*; and
- Regulation Z, 12 C.F.R. § 226 *et seq.*

Each state has enacted laws and regulations supplementing the FDCPA, including licensing and registration requirements.[5] There is little uniformity in these laws. Indeed, ACA publishes a 1,000 page survey of state law requirements

[5] The FDCPA pre-empts state laws to the extent that those laws are inconsistent with any Federal provision, and then only to the extent of the inconsistency. A state law is not inconsistent if it gives consumers greater protection than the FDCPA.

entitled *Guide to State Collection Laws & Practices* covering different topics for each state (state consumer collection requirements, garnishment exemptions, FDCPA compliance, licensing fees, statutes of limitation, "Mini–Miranda" and validation notice information, bond requirements, trust accounts, resident office requirements, exemptions for out-of-state entities, and penalties for collecting without a license, among other topics).[6]

Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) established the CFPB to regulate the offering and provision of consumer financial products and services under the Federal consumer financial laws. In exercising its authority, the CFPB claims that it may compel regulated companies to produce information protected by the attorney-client privilege, the attorney work product doctrine, or other privilege. However, Dodd-Frank does not authorize the CFPB to invade the attorney-client and other privileges held by companies. Moreover, even if the CFPB was authorized to compel production of privileged information, Dodd-Frank does not enumerate protections for privileged communications. Nor does it address whether the submission of such information will affect any privilege that a company may assert in the future. Likewise, there is no case law to explain how courts will treat privileged information produced to the CFPB.

The CFPB proposes to add a new section governing the treatment of privileged and confidential information. The proposed rule states that "[t]he submission by any person of any information to the CFPB for any purpose in the course of any supervisory or regulatory process of the Bureau shall not be construed as waiving, destroying, or otherwise affecting any privilege such person may claim

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[6] ACA International, *Guide to State Collection Laws & Practices*, *available at* http://www.acainternational.org/default.aspx?cid=866&ref=http://products.acainternational.org/eSeries2005/source/Orders/index.cfm^task=3*category=COMPLIANCE*product_type=sales*sku=21170*findspec=Compliance*continue=1*search_type=find.

with respect to such information under Federal or State law as to any person or entity other than the CFPB" and that "[t]he CFPB shall not be deemed to have waived any privilege applicable to any information by transferring that information to, or permitting that information to be used by, any Federal or State agency." Proposed Rule at 15291.

ACA's primary concern is that its members be able to seek candid, full, and frank legal advice regarding compliance with the myriad of consumer protection statutes and laws governing the debt collection and credit industries without fear of waiving any of their privileges. Although the CFPB has attempted to provide guidance through proposed rules and Bulletin 12-01, ACA has a number of concerns:

First, the Dodd-Frank Act does not authorize the CFPB to invade the attorney-client privilege by compelling companies to produce privileged information. The primary statutory section upon which the CFPB relies – which gives the CFPB authority to "prescribe rules regarding the confidential treatment of information obtained from persons in connection with the exercise of its authority under Federal consumer financial laws" – does not authorize the CFPB to require the production of privileged information. Rather, this section authorizes the CFPB merely to promulgate rules regarding its treatment of confidential information, such as proprietary data, trade secrets, and customer financial information, and other similar confidential information typically held by financial services companies – not the mandatory production by companies of information protected by the attorney-client privilege. The CFPB's interpretation of its statutory authority is not a permissible interpretation of the Dodd-Frank Act.

Second, although the CFPB has taken steps to provide guidance on this issue, there are no such protections found in any statute, including the Dodd-Frank Act, and there is no case law to predict how courts will view the issue of waiver when a company submits privileged information to the CFPB, which then produces the information to a state agency. Even the slightest ambiguity in this area will impact

the legal rights of ACA members to provide full and frank disclosure to legal counsel and receive informed advice about compliance with consumer financial protection laws.

For example, the procedure for sharing information with attorneys general is unclear. While Bulletin 12-01 states that it will not release privileged information on a regular basis and only in "very limited circumstances" or when required by law, ACA seeks clarification as to what constitutes the "very limited circumstances" in which the CFPB will produce such information to the states. ACA also seeks clarification as to how the General Counsel of the CFPB will assess when privileged information will be released. Eliminating uncertainties regarding the production of privileged information to third party agencies is especially important to protect the sanctity of the attorney-client privilege – to encourage full and frank communications between attorneys and their clients and promote broader public interests in the observance of law and the administration of justice.

Moreover, the uncertainties surrounding the treatment of privileged information to the CFPB will cause conflicts between companies and their legal counsel. Under the American Bar Association's Model Rule providing guidance about the treatment of privileged information, which is mirrored in many state rules on professional responsibility, companies will need to provide informed consent to produce privileged information or legal counsel must produce such information "to comply with other law or court order." ABA Model Rule 1.6(a)(6). Therefore, clarification and established law is necessary to guide legal counsel in complying with their duties to their clients, the rule of professional responsibility, and the CFPB.

When combined with the proposed rule defining larger participants, this proposed rule provides the CFPB with unfettered supervisory authority over non-bank debt collection companies, the majority of which are small business as defined by the Small Business Administration, to forfeit the right of a company to challenge the CFPB's larger participant determination if the company refuses to produce

information protected by the attorney-client privilege. The problem is further compounded by requiring the production of privileged information absent statutory authority or protections. As such, ACA strongly urges CFPB to defer to Congress, which is currently in the process of examining the CFPB's authority to require the production of privileged information and "gap-filling" to provide statutory-mandated protections for such information.

ACA appreciates the opportunity to comment on these highly sensitive and significant issues. If you have any questions, please contact Andrew M. Beato or Jed Wulfekotte at (202) 737-7777.

Respectfully submitted,
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