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April 10, 2012

***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: Defining Larger Participants in Certain Consumer Financial Products and Services Markets, CFPB Docket No. CFPB-2012-0005, RIN 3170-AA00

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 for identifying larger participants in the debt collection industry based on a one-size-fits all approach that would subject thousands of debt collection companies under the full scope of the CFPB's supervisory authority based on a formula that calls for regulation of companies with more than $10 million in annual receipts. *See* Proposed Rule Defining Participants in Certain Consumer Financial Product and Services Markets, 77 Fed. Reg. 9592 (Feb. 17, 2012) [hereinafter "Proposed Rule"].

As discussed below, the proposed rule exceeds the CFPB's delegated regulatory authority, it is fundamentally flawed, and it requires significant revision to comply with the authority delegated to the CFPB under Title X of the Dodd-

Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111-203, 12 U.S.C § 5301 *et seq.* The proposed rule regulates as "larger participants" entities that the United States government has long defined as small businesses. Moreover, it ignores the complexity of the debt collection market and sub-markets, and it results in the disparate treatment between industries regulated under the rule. The proposed rule also imposes an irrebuttable agency determination that a company is a larger participant if it refuses to produce privileged and confidential information. It goes so far as to jeopardize the inviolable rights of companies 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.

For these reasons, as outlined herein, ACA believes that the proposed rule is arbitrary and capricious, an abuse of discretion, and not otherwise in accordance with law. ACA strongly urges the CFPB to adopt a rule that relies on the appropriate factors, considers the issues raised herein in a manner consistent with the evidence before the Bureau and its delegated authority, and provides a workable solution to define larger participants in the debt collection industry. Specifically, ACA requests that the CFPB consider the following changes to the proposed rule:

First, the use of annual receipts to determine larger participant status has no application to the debt collection industry. It is inconsistent with the way in which the industry conducts business and is not an accurate measure of which companies are larger participants. The CFPB should adopt a formula based on "gross revenue," which is reported by most debt collectors. Whether under an "annual receipts" or "gross revenue" formula, the CFPB should exclude from the determination any non-retained income that is paid to credit grantors by debt collection companies.

Second, the proposed $10 million threshold to define larger participants is contrary to the facts before the CFPB, as well as the law. ACA reiterates its position that the CFPB should base its determination of larger participant status on

gross annual revenue in excess of $250 million. Moreover, the CFPB should make clear that medical debts, education-related debts, municipal debts, and those debts resulting from court judgments, which are not the result of consumer financial transactions, are not included in annual receipts. The CFPB also should provide a mechanism to index for inflation.

Third, insofar as debt collection companies are required to submit financial information to the CFPB annually, the CFPB should evaluate companies for larger participant status every year, instead of every two years.

Fourth, the CFPB must properly apportion annual receipts (or gross revenue) in determining larger participant status and make clear that the only annual receipts to be considered are those "resulting from" activities related to consumer debt collection.

Fifth, the CFPB cannot require disclosure of information protected by the attorney-client privilege, attorney work product, and other common law privileges, absent a clear directive from Congress that production of such information to the CFPB is not deemed to be a waiver of privilege.

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 traded 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 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.

[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).

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 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

[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.

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

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. The CFPB's Proposed Rule is Arbitrary, Capricious, an Abuse of Discretion, and Not Otherwise in Accordance with Law.

An agency promulgated rule is invalid if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency's rule is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). Such is the case here.

First, the CFPB's proposed use of "annual receipts" to determine whether an entity is a larger participant in the debt collection industry fails to consider the realities of the industry. The use of "annual receipts," *i.e.*, "total income" plus "cost of good sold," is based on a fundamental misunderstanding of the industry, in which nearly all payments made by consumers are made payable in trust to a debt collection agency and then distributed to the credit grantor, less a contingency fee. The debt collection industry does not operate based on "total income" because gross

[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.

collections would be considered "income" to the collector, even though much of it is passed on to the underlying creditor. Nor is there a "cost of goods sold" in the industry. Requiring debt collectors to calculate larger participant status based on "total income" would regulate small collection businesses that are not larger participants. This is inconsistent with the way in which the industry conducts business.

ACA strongly urges the CFPB to adopt a formula based on gross revenue, which has direct application to the industry's tax filings. The majority of third party debt collectors are S-corporations, which report gross revenue.

Second, the CFPB's proposed threshold of over $10 million in annual receipts to define larger participants in the debt collection industry is inconsistent with the facts and law, fails to account for the appropriate factors relied upon by the United States government, ignores the disparate impact on the industry when compared to other industries regulated by this rule, and is simply implausible.

The term "annual receipts" as used by the CFPB is wholly inconsistent with the term as it is used by the Small Business Administration (SBA), from whom the CFPB borrowed the term for this proposed rule. The purpose of the SBA size standards is to prevent small businesses from having to compete with larger entities, and the same rationale applies here. SBA categorizes debt collection businesses with $7 million in annual receipts as a "small business" under existing federal standards, but the CFPB's proposed rule inexplicably compresses mid-size and large firms into a range of annual receipts from $7.1 to $10 million.[5]

The CFPB's characterization of debt collection companies with over $10 million in annual receipts as larger participants effectively results in a binary system in which debt collection businesses are either small or larger (and subject to

[5] *See* http://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf.

burdensome regulations) without any explanation or recognition that there are many companies in the middle that will be grouped into the larger participant category. The proposed rule fails to identify and assess basic information about the industry structure that SBA takes into consideration for small business status, including, but not limited to, average firm size, average assets size as a measure for start-up costs and barriers to entry, industry concentration, and size distribution of firms.[6]

Importantly, the proposed threshold results in disparate treatment amongst industries regulated under the same rule. The CFPB believes that the proposed threshold "would likely bring within the Bureau's scope of supervision approximately 175 entities . . . or approximately 4 percent of all collection firms," which garner 63 percent of annual receipts from debt collection activities. *See* Proposed Rule at 9599. The $10 million threshold for debt collection agencies is inconsistent with the CFPB's regulation of other industries under this rule. For example, the CFPB's threshold for larger participants in the credit union market is $10 ***billion***, which brings within the scope of the CFPB's supervision a total of three ***entities***. *See* Proposed Rule at 9597 ("Section 1024 of the Act relates to 'covered persons' as defined in section 1002(6) of the Act that are not insured depository institutions or credit unions, or, in the case of such entities with assets of more than $10 billion, their affiliates, as set forth in sections 1025(a) and 1026(a) of the Act.").

In effect, the proposed formula is an effort to over-regulate the debt collection industry, including entities that have long been classified as small businesses by SBA, simply because the Bureau has inexplicably decided to label them as such. This directly contradicts its Congressional authority under the statute to extend supervisory authority to only the larger participants in each industry.[7]

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6 *See* http://web.sba.gov/faqs/faqindex.cfm?areaID=15.

7 The CFPB's belief that the threshold may be lowered to $5 million is manifestly inconsistent with the facts and law before the agency, and would be an abuse of discretion.

The CFPB's explanation for the proposed formula is contrary to both the facts and law. The CFPB states that "[o]ne of the Bureau's key responsibilities under the Act is the supervision of ***very large*** banks, thrifts, and credit unions, and their affiliates, and certain nonbank covered persons." *See* Proposed Rule at 9593 (emphasis added). But it rejects ACA's proposed $250 million threshold on the grounds that the statute extends the CFPB supervisory authority for "larger" collection agencies, not just the largest, and that it would regulate only 7 debt collection companies. This is mere semantics. The law was intended to regulate ***very large*** nonbank covered persons as reflected by the statute; the CFPB's characterization of its key responsibilities; and its formula for regulating credit unions ($10 billion in assets), which brings only three credit unions under its supervisory authority. The law was not intended to impose supervision and examination regulations on small businesses that are essentially "mom-and-pop" operations lacking the resources of multi-billion dollar financial institutions, many of which are exempt from the rule.

The CFPB's contention that the proposed rule would authorize it to supervise a small business as a larger participant only in rare circumstances is contrary to the facts before the agency. Approximately 2,000 of the businesses that are ACA members maintain fewer than 10 employees; and more than 2,500 of the members employ fewer than 20 persons. The proposed formula would bring these businesses under the CFPB's supervisory authority by conflating gross collections brought in by these businesses and designating an arbitrary threshold of $10 million meant to bring in a disproportionate number of debt collectors under its burdensome supervisory authority. This is contrary to both law and reason.

Moreover, the proposed rule correctly states that certain types of debt incurred by individuals are excluded from the definition of consumer financial products or services for the purpose of calculating annual receipts. *See* Proposed Rule at 9597. The proposed rule specifies "medical debt" as one such example, but fails to include the other types of debt that are excluded under this rule. ACA urges the CFPB to clarify that education-related debts, municipal debts, and those debts

resulting from court judgments, which are not the result of consumer financial transactions, also are not included in annual receipts.

Finally, the proposed rule fails to account for inflation, which would lead to more small businesses being subject to regulation as inflation increases their "annual receipts" each year, even though their gains are due to inflation and not a true increase in income. As such, ACA strongly urges the CFPB to add a mechanism to index for inflation.

Third, the proposed rule seeks to impose larger participant status on debt collection companies for a period of two years from the first day of the tax year in which the company meets the CFPB's formula as a lager participant. Nonetheless, debt collection companies are required to submit data to the CFPB on an annual basis. Since the proposed rule requires companies to submit data annually, ACA submits that the proposed rule should be amended so that companies are evaluated for larger participant status on an annual basis.

Fourth, the CFPB must properly apportion annual receipts (or gross revenue) in determining larger participant status. Because many debt collection companies are small businesses, they generally do not limit their services to the market covered by this rule, *i.e.*, consumer debt collection. For example, debt collection companies often perform both consumer and commercial debt collection services, and in many cases, most of their income results from non-consumer debt collection services. It is therefore imperative that the CFPB makes clear that the only annual receipts to be considered are those "resulting from" activities related to consumer debt collection.

ACA proposes a simple form worksheet to be completed by debt collection companies and submitted to the CFPB annually to disaggregate qualifying income and non-qualifying income. This would promote consistency and uniformity in applying this rule, and would be non-burdensome on companies and the CFPB.

3. Regulation of Law Firms and Legal Counsel is Outside the Scope of the CFPB's Authority.

ACA is concerned that its members in the debt collection industry be able to seek full, frank, and candid legal advice regarding the applicable consumer protection laws without fear that they will be required to produce privileged and confidential information to the CFPB and other regulators or agencies.

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). This is particularly important in the corporate setting. 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.* The importance of maintaining confidentiality extends also to other privileges, including the attorney work product doctrine. *Id.*

Here, the CFPB's determination of larger participant status interferes with the right of debt collection companies to seek legal counsel, and have their communications with counsel be kept confidential under the attorney-client privilege, work product doctrine, and other common law privileges. The proposed rule demands that any debt collection company seeking to challenge the CFPB's determination of larger participant status produce information protected by the attorney-client privilege, the attorney work product doctrine, and common law privileges. *See* Proposed Rule at 9608 (quoting 12 C.F.R. § 1090.104, which requires the production of all records, documents, or other information to the CFPB, including confidential and privileged materials). Refusal to produce privileged or

confidential information would result in an irrebutable agency determination that the company is a larger participant subject to the CFPB's draconian supervisory authority. *See* Proposed Rule at 9608 (stating that the penalty under 12 C.F.R. § 1090.104(b) for refusing to produce privileged and confidential communications is a mandatory waiver of the right to challenge the CFPB's determination).

Without statutory mandated protections for privileged information, this requirement is beyond the scope of the CFPB's authority under the law. Although CFPB has taken steps to protect privileged communications through a proposed rulemaking and Bulletin 12-01, no statute (including the Dodd-Frank Act) or regulation addresses the treatment of privileged or confidential information produced to CFPB while exercising its supervisory and regulatory authority over companies deemed to be larger participants. Moreover, no Court has held whether producing such information will constitute a waiver of privilege.

Requiring companies to produce privileged and confidential information to CFPB, especially where that information may be shared with third party regulators, agencies, and attorneys general in different states, jeopardizes the legal rights of debt collection companies to seek legal advice on the myriad of consumer protection laws that govern the industry. As such, ACA strongly urges CFPB to take direction from Congress on this issue, as the CFPB cannot predict how privileged information will be used or whether the privilege will be waived when third-party regulators and agencies obtain privileged information, and clarify the procedures for sharing information with attorneys general.

* * *

This formula for determining larger participants in the debt collection market is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law. In many respects, it exceeds the CFPB's delegated authority. ACA strongly urges the CFPB to adopt a test based on gross revenue over $250 million, which takes into account the realities of the debt collection industry, is consistent with the CFPB's Congressional mandate, and is applied consistently across

industries. If you have any questions, please contact Andrew M. Beato or Jed Wulfekotte at (202) 737-7777.

Respectfully submitted,
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Dated: April 10, 2011