



July 24, 2012

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

Re: Proposed Rule: Procedural Rules to Establish Supervisory Authority over Certain  
Nonbank Covered Persons Based on Risk Determination  
Docket Number CFPB-2012-0021  
RIN 3170-AA24

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 *Procedural Rules to Establish Supervisory Authority over Certain Nonbank Covered Persons Based on Risk Determination*, 77 Fed. Reg. 31226 (May 25, 2012) (“Proposed Rule”).

## **I. Background**

Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”), which became law on July 21, 2010, established the Bureau of Consumer Financial Protection (“Bureau”). One of the Bureau’s responsibilities under the Dodd-Frank Act is the supervision of certain nonbank covered persons.

Under 12 U.S.C. 5514(a)(1)(C), the Bureau has the authority to supervise any nonbank covered person that “the Bureau has reasonable cause to determine, by order, after notice to the covered person and a reasonable opportunity for such covered person to respond, based on complaints collected through the system under section 5493(b)(3) of this title or information from other sources, that such covered person is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services.” This Proposed Rule describes the procedures for making a determination whether a nonbank covered person “is engaging, or has engaged, in conduct that poses risks to consumers” and should be subject to the Bureau’s supervision.

In the event a nonbank covered person is determined to be subject to the Bureau’s supervision based upon a risk-based assessment, 12 U.S.C. 5514(b)(1) provides that the Bureau shall require reports and conduct examinations on a periodic basis for purposes of assessing compliance with the requirements of Federal consumer financial law, obtaining information about the activities

and compliance systems or procedures of such person and detecting and assessing risks to consumers and to markets for consumer financial products and services.

NARCA is a nationwide trade association of over 700 skilled debt collection law firms and in-house counsel of creditors. NARCA's mission is to preserve and enhance the integrity and viability of legal collections, and members are required to adhere to NARCA's Code of Professional Conduct and Ethics. 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 looks forward to collaborating with the Bureau to ensure that no infirmity in the process set forth in the Proposed Rule will undermine the Bureau's important work on behalf of consumers.

## II. General Comments

As an association of law firms, NARCA members may be affected by the Proposed Rule should the Bureau assert jurisdiction over any of them by means of the administrative procedures set forth in Section 5514(a)(1)(C). NARCA is particularly concerned about due process under the Proposed Rule. The Bureau has characterized its proposed process as an informal proceeding, not an adjudicatory proceeding, for purposes of the Administrative Procedure Act (APA). Here, however, NARCA respectfully suggests the agency has overlooked the requirement of Congress to make its risk-based coverage determinations by "order." Instead, the Bureau states in the Proposed Rule, without citing affirmative legal authority, "[t]he proceedings under the Proposed Rule would be informal and would not constitute an adjudicatory proceeding under section 554 of the Administrative Procedure Act (APA)."

NARCA believes this should not be the case as Congress advisedly required the Bureau to reach its determinations by "order." This term is defined in APA Section 551(6) as "the whole or part of a final disposition, whether affirmative or negative, injunctive or declaratory in form, of an agency in a matter other than rulemaking . . ." Likewise by APA definition, an "adjudication" means "agency process for the formulation of an order." 5 U.S.C § 551(7). It follows that the Bureau lawfully should not be able to make the determinations by order, as permitted under Section 5514(a)(1)(C), without adjudicatory process. Though the Proposed Rule is not clear on the point, the language in Section 5514(a)(1)(C) stating "after notice to the covered person and a reasonable opportunity to respond" should not be read to limit basic APA due process protections. Rather, this language merely sets forth the basic framework for any APA adjudicatory proceeding.

NARCA respectfully urges the Bureau to withdraw the proposal and frame a proposed rule that gives appropriate regard to APA provisions. Without limiting its observations on this point, NARCA offers these general and specific comments on the Proposed Rule as a means of assisting the Bureau with its consumer protection mission. NARCA believes, even if the Bureau declines to withdraw the proposal, the Proposed Rule itself may be deficient in its regard for due process standards.

This stems from a number of features in the Proposed Rule. For example, there is no imposition on the Bureau to review and validate factual information upon which it is relying to issue a “Notice of Reasonable Cause” before issuance of the Notice. Unverified consumer complaints, negative remarks about a company in the “blogosphere” and even negative rumors initiated by competitor firms could form the basis for Bureau action. Yet, the agency can set forth these “facts” in a written agency notice as the basis of “reasonable cause” to believe that consumers are being harmed. These unsubstantiated assertions of consumer abuse could be devastating to targeted companies, particularly small firms with limited resources to respond to federal agency actions, when only later in the process can the target “prove its innocence.”

Also, considering that there is no stated limit on the content, accuracy and length of Notice of Reasonable Cause, a mandatory 20-day response time is manifestly unreasonable. Again, targeted entities, particularly small firms, that do not consider themselves subject to overarching federal financial services regulation ordinarily would not have ready resources to respond effectively to any such Notice within a short period of days. Simply put, the deadline for responding must be long enough to allow the targeted person or entity time to examine carefully and seriously and, if appropriate, contest, the “reasonable cause” basis asserted by the Bureau. Moreover, the penalty for failing to file a timely response not later than 45 days after service of the Notice appears to result in the real possibility of a default judgment against the target. These compressed timeframes would appear to unduly disadvantage persons or entities that least expect to be subject to federal financial services regulation. While a notice of reasonable cause is not a charge that any law has been violated, the burden associated with supervision is sufficiently high that we urge the Bureau to give appropriate regard to procedural fairness.

In addition, the Bureau appears to be short-cutting the procedures established by Congress in Section 5514(a)(1)(C). That is, the Bureau states in the Proposed Rule that it is appropriate to include in a notice of charges commencing an adversarial adjudicatory proceeding a Notice of Reasonable Cause as set forth in the Proposed Rule. This means that target persons or entities could be subjected to full-blown legal proceedings in a contested case even before the Bureau has established its supervisory jurisdiction under Title X. Certainly the Bureau has the authority to initiate proceedings against bad actors that are violating consumer financial protection laws, but these powers should not be conflated with the Congressionally-mandated statutory determination of whether the otherwise-lawful conduct of a targeted person or entity poses risks to consumers in the first place.

### **III. Specific Comments**

#### **A. Section 1091.102 Issuance of Notice of Reasonable Cause**

Proposed § 1091.102 relates to the issuance of a Notice of Reasonable Cause, which initiates the proceedings that culminate in a determination by the Director or a respondent’s voluntary consent to supervision by the Bureau.

1. Proposed § 1091.102(a) provides that the Bureau is authorized to issue a Notice of Reasonable Cause stating it “may have reasonable cause to determine that the nonbank covered person is engaging, or has engaged, in conduct that poses risks to consumers...” NARCA encourages the Bureau to define “reasonable cause.”

2. Proposed § 1091.102(b) states that the Notice of Reasonable Cause shall be based on complaints and information from “other sources.” NARCA suggests the Bureau provide more detail as to the types of complaints that may constitute “reasonable cause” and explain whether such complaints will be verified for accuracy prior to issuance of the Notice of Reasonable Cause. It is important to note that complaints of rude or aggressive behavior are typically subjective in nature and rest upon issues of fact, and many complaints, such as those regarding statutes of limitation or the content of communications, may involve questions of law. NARCA also recommends the Bureau provide examples of “other sources” upon which an assertion of reasonable cause may rest.

### **B. Section 1091.103 Contents of Notice**

Proposed § 1091.103 details the required content of a Notice of Reasonable Cause. It provides that a Notice of Reasonable Cause must set forth, among other things, the basis for the assertion that the Bureau may have reasonable cause to determine that a respondent is a nonbank covered person that is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services.

1. Proposed § 1091.103(a)(1), provides that the Notice of Reasonable Cause shall contain a “description of the basis for the assertion that the Bureau may have reasonable cause...” NARCA suggests that the Notice should “state with specificity” the basis for Bureau’s assertions and should include an inventory of any complaints and other information relied upon by the Bureau. Such a showing is crucial to a respondent’s ability to adequately prepare its response and assemble “documents, records or other evidence” in support of its position as required by Proposed § 1091.105.
2. Proposed § 1091.103(c) states that “[n]othing in this section shall be construed as requiring the Bureau to produce any documents or information to a respondent other items [sic] than as set forth in this section.” NARCA suggests that the quoted sentence should conclude with the statement “or as otherwise relevant, material and necessary for respondent to prepare its response to the Notice.” NARCA encourages the Bureau to include in its Proposed Rule a process by which a respondent, upon receiving a Notice of Reasonable Cause, may request additional relevant information from the Bureau and the establishment of a reasonable timeframe in which the Bureau must provide such additional information or, conversely, state with specificity the reason for its denial of the request.

### **C. Section 1091.105 Response**

Proposed § 1091.105 sets forth the requirements for responding to a Notice of Reasonable Cause.

1. Proposed § 1091.105(a) provides a respondent 20 days to respond to the Bureau’s Notice of Reasonable Cause. NARCA suggests this timeframe, consistent with common rules of procedure, to be expanded to at least 30 days with an optional period of time for

requested extensions of 30 days or longer for good cause shown. NARCA believes this would provide greater flexibility for responding to Notices of Reasonable Cause which will vary, perhaps markedly, in scope and depth. This is also a more reasonable, respectful approach that recognizes businesses and law firms typically will not have pre-existing, dedicated resources for responding to any Notice of Reasonable Cause.

2. Proposed §1091.105(d) states that a “respondent shall be deemed to have waived the right, at any future stage of the Assistant Director’s or the Director’s consideration of the matter and in any petition for judicial review, to rely on any argument, record, document or other information that the respondent does not raise or include in its response.” NARCA asserts that if a respondent requests additional information from the Bureau for preparation of a response to the Notice of Reasonable Cause and such request is denied, any objection made by respondent with regard to that denial should be preserved on the record for judicial review, as well as any objections tendered regarding the provision of confidential or privileged information or attorney work product.

#### **D. Section 1091.106 Supplemental Oral Response**

Proposed § 1091.106 provides that a respondent may request the opportunity present a supplemental oral response and sets forth the procedures for the conduct of a supplemental oral response.

1. Proposed § 1091.106(a) states that any supplemental oral response will be presented to the Assistant Director, but fails to clarify whether this will be in the form of a monologue or dialog. NARCA encourages the Bureau to provide greater guidance in its Proposed Rule as to whether the Assistant Director, or Deputy Assistant Director as provided in Proposed §1091.106(c), may question a respondent and whether a respondent will have an opportunity to question either the Assistant Director or Deputy Assistant Director.
2. Proposed § 1091.106(b)(1) states that supplemental oral responses will generally be held telephonically. NARCA commends the Bureau for seeking a more flexible and less burdensome method for receiving supplemental oral responses. However, NARCA believes that since the Bureau’s goal is to accommodate the respondent, the respondent should have the option of deciding whether the supplemental oral response is provided in-person or telephonically.
3. Proposed § 1091.106(b)(2) provides that the Assistant Director may impose time limitations on the supplemental oral response. NARCA respectfully asserts that time limitations are unnecessary given the Bureau’s additional proposal to limit the subjects that may be addressed. NARCA encourages the Bureau to rephrase Proposed §1091.106(b)(2) to clarify that the subjects to be addressed in the Supplemental Oral Response will be limited to those which are relevant in relation to the Notice of Reasonable Cause.
4. Proposed § 1091.106(b)(3) prohibits discovery and testimony from witnesses “given the informal nature of the procedures” and for the purpose of saving both the Bureau and respondents the time and expenses typically expended on discovery. NARCA

respectfully disagrees with this proposal and believes every respondent should have the opportunity to seek discovery and call witnesses, provided the discovery requests and the testimony of the witnesses are relevant in relation to the Notice of Reasonable Cause.

5. Proposed § 1091.106(b)(6) requires the Bureau to record all supplemental oral responses and provide respondents the opportunity to purchase a copy of the transcript. NARCA suggests the Proposed Rule should likewise afford respondents the opportunity to record the supplemental oral response.

#### **E. Section 1091.108 Recommended Determination**

Proposed § 1091.108 describes the process by which the Assistant Director shall make a recommended determination.

Proposed § 1091.108(d)(2) provides that a proposed decision and order issued by the Assistant Director shall set forth the basis for the determination. NARCA suggests any proposed decision and order should set forth specific findings of fact and conclusions of law that form the basis of the determination.

#### **F. Section 1091.109 Determination by the Director**

Proposed § 1091.109 describes the process by which the Director shall make a final determination.

1. Proposed § 1091.109(b)(3) provides that a decision and order issued by the Director shall set forth the basis for the determination. NARCA suggests any decision and order should set forth specific findings of fact and conclusions of law that form the basis of the determination.
2. Proposed § 1091.109(c) states that “[a] decision and order issued pursuant to paragraph (a)(1) of this section shall constitute final agency action under 5 U.S.C. 704.” NARCA notes that this is a significant provision and suggests that a separate section be created delineating a respondent’s opportunities for review of a decision and order issued by the Director. There also appears to be tension in the Proposed Rules as to whether it is appropriate for the agency to enter an order as final agency action when the action is said to be informal.

#### **G. Section 1091.110 Petition for Termination of Order**

Proposed § 1091.110 provides that a respondent may petition the Director for the termination of an order bringing a respondent within the Bureau’s supervisory authority.

Proposed § 1091.110(a) states that “[a]ny person subject to an order issued pursuant to § 1091.109(a)(1) may, no sooner than two years after issuance of such an order and no more frequently than annually thereafter, petition the Director for termination of the order.” NARCA respectfully disagrees with this approach. NARCA recommends that the order should automatically terminate after one year unless the Bureau demonstrates good cause for continuation. Further, a respondent should have the opportunity at any time to petition for termination of the order. NARCA believes this approach is reasonable inasmuch as many

compliance defects or other shortcomings giving rise to “risks to consumers” identified by the Bureau should be capable of cure, for the benefit both of the Bureau and consumers. If such matters are cured and remain so, there does not appear to be cause to continue Bureau supervision authority.

#### **H. Section 1091.112 Change of Time Limits and Effect of Deadlines**

Proposed § 1091.112 provides that requests for the extension of time may be granted in the limited circumstances in which the extension is necessary to prevent substantial prejudice.

Proposed § 1091.112(b) states that with regard to requests for extension of time, the Bureau will “adhere to a policy of strongly disfavoring such requests.” NARCA respectfully disagrees with this proposed policy inasmuch as it represents an administrative policy more extreme than the approach taken by most administrative and judicial bodies. NARCA recommends that requests for extension of time should be granted for “good cause shown” and not limited to a “strong showing that the denial of the request would substantially prejudice its case.” Important, preexisting conflicts of representatives of targeted persons or entities should be given consideration.

#### **I. Section 1091.114 Notice and Response Included in Adjudication Proceeding Otherwise Brought by the Bureau**

Proposed § 1091.114 provides that if the Bureau issues a notice of charges against a person under 12 CFR 1081.200,12 the Bureau may also provide the notice and opportunity to respond in the notice of charges.

NARCA’s comments on this provision are set forth above.

### **IV. Conclusion**

NARCA commends the Bureau for its focus on developing an “efficient, expeditious, and fair process” by which to exercise its supervisory authority. However, NARCA is concerned that the Proposed Rule’s “informal” approach fails to adhere to the plain language of the APA. Even if this is overcome, NARCA urges the Bureau to balance the goal of streamlining consumer protection against the gravity of a determination and order for supervision. For this reason and those stated above, NARCA respectfully encourages the Bureau to adopt NARCA’s recommendations and thanks the Bureau for its time and consideration of these issues.

Respectfully Submitted,

Louis S. Freedman, President