April 17, 2012

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

Re: Defining Larger Participants in Certain Consumer Financial Product and Service Markets (Docket No. CFPB-2012-0005 or RIN 3170-AA00)

Dear Ms. Jackson,

The American Financial Services Association ("AFSA") welcomes the opportunity to respond to the Consumer Financial Protection Bureau's ("CFPB") proposed rule on defining larger nondepository participants in certain consumer financial product and service markets ("Proposed Rule"). AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. Its 350 members include consumer and commercial finance companies, auto finance/leasing companies, mortgage lenders, mortgage servicers, credit card issuers, industrial banks and industry suppliers.

Section 1024 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") grants the CFPB the authority to supervise nonbank covered persons of all sizes in the residential mortgage, private education lending, and payday lending markets. In addition, the CFPB has the authority to supervise nonbank "larger participant[s]" in markets for other consumer financial products or services. The Dodd-Frank Act directs the CFPB to issue its initial rule relating to the definition of such larger participants by not later than July 21, 2012. In the Proposed Rule, the CFPB defines larger participants only in the consumer debt collection and consumer reporting markets. The CFPB specifies that the Proposed Rule and subsequent initial rule will be followed by a series of rulemakings defining larger participants in additional markets for consumer financial products and services.

AFSA members are not specifically covered under the Proposed Rule, but sections of the Proposed Rule, specifically the definition of "consumer debt collection," affect them. Additionally, it is possible that sections of the Proposed Rule, such as the test and thresholds used to define larger participants, as well as the manner in which the CFPB determines a nonbank's status as a larger participant and the CFPB's procedure to dispute classification as a larger participant, might be carried over to future larger participant rulemakings in other consumer financial services markets. For those reasons, we take this opportunity to comment on the Proposed Rule. Lastly, we ask that the CFPB only designate as larger participants those nonbanks that the CFPB intends on supervising.

Definition of "Consumer Debt Collection"

AFSA is concerned with the breadth of the definition of "consumer debt collection," and the inconsistency of the proposed definition with the definition of "debt collector" in the Fair Debt Collection Practices Act ("FDCPA") due to the fact that the exclusions to the definition of "debt collector" contained in the FDCPA were not incorporated into the Proposed Rule. In § 1090.101(g) of the Proposed Rule, the CFPB defines consumer debt collection to mean:

> Collecting or attempting to collect, directly or indirectly, any debt owed or due or asserted to be owed or due to another and related to any consumer financial product or service. A person offers or provides consumer debt collection where the relevant debt is either: (1) Collected on behalf of another person; or (2) Collected on the person's own behalf, if the person purchased or otherwise obtained the debt while the debt was in default under the terms of the contract or other instrument governing the debt.

This broad definition could include (i) entities whose principal business is not the collection of debt, that service and collect their own debts and those of affiliated entities; and (ii) entities that originate their own debts, assign the debts to a third party, but retain servicing and collection of the debts. AFSA does not believe that the Proposed Rule intends to capture these categories of creditors. The description of participants in the debt collection market contained in the Market Overview of consumer debt collection in the Supplementary Information accompanying the Proposed Rule is limited to "participants in the debt collection market generally include third-party debt collectors, debt buyers, and collection attorneys and law firms."[1] Thus, it seems as though the CFPB intends to capture third-party debt collectors, debt buyers, and collection attorneys and law firms, not the categories described in (i) and (ii) above. Furthermore, the number of firms projected to fall under the CFPB's scope of supervision, estimated by the Supplementary Information to be only 175 of 4,500 firms, would have been much higher had the definition been intended to be as broad as written.[2]

We ask that the CFPB incorporate the exclusions to the definition of "debt collector" contained in the FDCPA. Specifically, the FDCPA excludes from the definition of debt collector:

> (A) Any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;
> (B) Any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;
> …
> (F) Any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity;
> (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement;
> (ii) concerns a debt which was originated by such person;
> (iii) concerns a debt which was not in default at the time it was obtained by such person; or
> (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor. [3]

[1] 77 FR 9597
[2] 76 FR 95999
[3] 15 USC 1692a § 803(6)(A) and (F)

With respect to interpretation of the definition of what activity does and does not constitute "debt collection" within the intended scope of the FDCPA, we respectfully ask that the CFPB look to the Federal Trade Commission's ("FTC") staff commentary on the FDCPA for useful and necessary guidance.[4]

We urge the CFPB to standardize the definition of "debt collector" in the Proposed Rule to be consistent with the definition in the FDCPA and consistently apply interpretations of what constitutes "debt collection" in accordance with the FTC staff commentary for the FDCPA for two reasons. First, definitions of the same term, even in different regulations, should be consistent. This is especially true for definitions of identical terms in different regulations that are enforced by the same agency. On July 21, 2011, the Dodd-Frank Act transferred to the CFPB rulemaking authority under federal consumer financial laws, including the FDCPA. As the CFPB notes in its proposed rule on streamlining regulations, "Differences between regulations, such as differences in definitions of key terms, may cause confusion, presenting an opportunity for standardization where underlying statutes permit."[5] We believe that it is important for the CFPB's definition to match the FDCPA's definition, especially in this instance since the CFPB will enforce both definitions that address issues that closely parallel each other. Second, it is important that the CFPB include the same exemptions in its definition that are included in the FDCPA's definition so that the Proposed Rule cannot be construed as encompassing creditors collecting their own debt.

Test and Threshold to Define Larger Participants

The CFPB proposes to use the Small Business Administration's ("SBA") definition of "annual receipts" as the criterion for defining larger participants in the markets for consumer debt collection and consumer reporting. Under the Proposed Rule, a nonbank covered person is a larger participant if its annual receipts meet a specified threshold – over $10 million for a participant in the market for consumer debt collection and over $7 million for a participant in the market for consumer reporting.

The SBA uses $7 million in annual receipts as the small business size standard for retail and trade services.[6] In other words, the SBA defines businesses in the retail and trade services as "small" if they have under $7 million in annual receipts. This is the same threshold that the CFPB uses to define larger participants in the market for consumer reporting and close to the threshold that the CFPB uses to define larger participants in the market for consumer debt collection.

AFSA believes that the proposed criterion does not accurately capture the true "larger participants" in the consumer debt collection and consumer reporting markets. Instead of capturing *only* the *larger* participants, the proposed criterion captures all the market participants who are *not small* businesses. The threshold for larger participants in a market should be significantly higher than the threshold for smaller participants. Currently, it seems as though the

[4] 53 FR 50097-50110
[5] 76 FR 75826
[6] "SBA Size Standards Methodology," available at http://www.sba.gov/sites/default/files/size_standards_methodology.pdf.

CFPB has divided the markets for debt collection and consumer reporting into "small businesses" and "larger participants." The market, however, is more complicated. There are small businesses, medium businesses, large businesses, and then within the large businesses, are the larger participants. The CFPB should raise the threshold above the current small business standard to capture the true larger participants in a market.

Not only does the proposed criterion capture all but the small participants in a market, but the criterion the CFPB uses in the Proposed Rule is not what the Dodd-Frank Act directs the CFPB to take into consideration when defining larger participants. The Dodd-Frank Act directs the CFPB to take into consideration:

> (A) the asset size of the covered person; (B) the volume of transactions involving consumer financial products or services in which the covered person engages; (C) the risks to consumer created by the provision of such consumer financial products or services; (D) the extent to which such institutions are subject to oversight by State authorities for consumer protection; and (E) any other factors that the Bureau determines to be relevant to a class of covered persons.

We do not view the word "and" before the (E) as being disjunctive, and urge the CFPB to use the criteria outlined in the Dodd-Frank Act when determining larger participants in these markets. Section 1024(b)(2) of the Dodd-Frank Act requires that the Bureau consider "relevant product markets and geographic markets" in exercising its supervisory authority over larger participants. AFSA believes that if the Bureau uses annual receipts as the sole criteria for defining larger participants it will ignore the Congressional directive for supervising larger participants in geographic markets.

If the CFPB uses "annual receipts" as the criterion for defining larger participants in other markets, specifically the market for consumer credit and related activities, we ask that the CFPB use a much higher threshold for identifying larger participants. While only four percent of all collection firms have annual receipts that exceed $10 million, a threshold that low will capture almost all of the market for institutions engaged in other consumer credit and related activities.

Determination of Status as a Larger Participant

AFSA is concerned with the manner in which the CFPB proposes to gather the data to determine the larger participants in the consumer debt collection and consumer reporting markets. The CFPB states, "Prior to its implementation of a registration program, the Bureau expects to use various data sources, including publicly available data, to identify which nonbank covered persons appear to qualify as larger participants."[7] AFSA respectfully requests that the CFPB clarify what it means by "various data sources." Since these data sources are crucial to the determination of larger participants, AFSA believes it is critical that the sources provide correct data, not estimates.

AFSA is also concerned with the CFPB's assertion that, "The Proposed Rule only pertains to defining larger participants in certain markets for purposes of the Bureau's nonbank supervision authority and would not impose new substantive consumer protection requirements

[7] 77 FR 9603

on any nonbank entity."[8] AFSA respectfully disagrees. A designation as a larger participant will add significant compliance costs to designated companies, even if those designated are not supervised.

Dispute of Status as a Larger Participant

Proposed § 1090.104 sets forth a procedure for a designated-nonbank to dispute its classification as a larger participant. In order to dispute its classification, the nonbank must, within only 30 days, provide the Assistant Director for Nonbank Supervision of the CFPB an affidavit setting forth an explanation of the basis for the nonbank's assertion that it does not meet the definition of larger participant. The nonbank is permitted to include copies of any records, documents, or other information supporting that assertion. After reviewing the affidavit and other information provided, the Assistant Director sends the nonbank its conclusion as to whether the nonbank meets the definition of a larger participant or not.

Section 1090.104 does not include any mention of any right for a designated-nonbank to judicial review after exhausting the administrative remedy described. AFSA believes that right exists even though it is not specified, and we ask that the CFPB recognize it in this regulation nonetheless.

Additionally, the administrative procedure described in § 1090.104 provides that the designated-nonbank may not, "rely on any argument, records, documents, or other information that it fails to submit to the Assistant Director," with the affidavit. We believe that this exclusionary rule is too strict and that nonbanks designated as larger participants should be able to provide additional arguments, records, documents, or other information to the Assistant Director as needed, particularly since the initial 30 day period is a narrow window and there is no deadline for a decision by the Assistant Director.

Supervision of Larger Participants

The CFPB states in the Proposed Rule that although it is authorized to supervise those designated as larger participants, that does not necessarily mean that the CFPB would in fact undertake such supervision.[9] We believe that the Dodd-Frank Act does not support this distinction. The Dodd-Frank Act directs the CFPB to supervise larger participants, not to designate larger participants, and then choose which ones to supervise.

[8] 77 FR 9593
[9] 77 FR 9604

Conclusion

We look forward to working with the CFPB to resolve the concerns expressed in our letter. Please contact me by phone, 202-466-8616, or e-mail, bhimpler@afsamail.org, with any questions.

Sincerely,

Bill Himpler
Executive Vice President
American Financial Services Association