Comments of
National Consumer Law Center
On behalf of its low income clients
On
Defining Larger participants
in Certain Consumer Financial Product and Service Markets
(Debt Collection and Consumer Reporting)
12 CFR Part 1090
RIN 3170-AA00
77 Fed. Reg. 9592 (Feb. 17, 2012)
Submitted April 17, 2012

The National Consumer Law Center[1], on behalf of its low income clients, submits the following comments on the proposed rule defining the "larger" debt collectors and consumer reporting agencies (CRAs) subject to supervision by the CFPB.

I. Summary

The debt collection and consumer reporting industries both pose substantial risks to consumers and are well deserving of greater scrutiny. The debt collection industry is regularly the biggest source of complaints to the Federal Trade Commission, and consumer reports affect virtually every aspect of consumers' financial lives.

For both of these markets (as well as others that the CFPB will eventually examine), the CFPB should:

- Define the threshold for "larger" status broadly, encompassing a significant range of firms, so that the CFPB has the flexibility to examine a range of entities that may pose different risks or affect different consumers.

- Define "larger" to reach at least any entity above the $7 million small business threshold that has at least $3.5 million in receipts from consumer debt collection or consumer reporting.

- Consider joint enterprises and not merely companies that are affiliated by ownership, in defining the scope of a company.

- Examine all of an entity's consumer financial products and services, once the CFPB determines that an entity is subject to supervision.

[1] The National Consumer Law Center, Inc. (NCLC) is a non-profit corporation specializing in low-income consumer issues, with an emphasis on consumer financial issues. NCLC publishes a series of treatises on consumer laws and provides legal, policy and technical consulting and assistance on to legal services, government, and private attorneys and advocates working on behalf of consumers across the country. These comments were written by Lauren Saunders, Chi Chi Wu and Bob Hobbs.

- Enact an anti-evasion or anti-circumvention rule.

- Revisit the definition of "larger" after the CFPB has more experience.

With respect to debt collectors:

- The CFPB needs to reach beyond 4% of the nation's debt collectors. This industry is rife with problems and needs to be thoroughly examined.

- The definition of "consumer debt collection" should be understood to reach third party debt collectors, debt buyers, and law firms that collect medical, cell phone and other debts that result from goods or services that are provided first and billed later and thus involve credit.

- The CFPB should consider examining the larger debt collectors that are at the higher end of the small business definition, in a subsequent rulemaking with further input from small businesses if necessary.

With respect to consumer reporting agencies:

- Furnishing should not be excluded from the definition of "consumer reporting." In particular, medical debt collectors who have $3.5 million in receipts from consumer accounts that they report to a CRA should be considered larger consumer reporting furnishers (unless they are covered as debt collectors).

- Credit scoring developers should be explicitly included as larger participants or service providers

II. Comments on Supervision and Larger Participants in General

Examination of debt collectors and CRAs is essential to the CFPB's ability to protect consumers. Supervision is a necessary complement to the CFPB's rulemaking and enforcement powers and benefits both industry and consumers.

The ability to review a firm's operations, even absent any known problems, enables the CFPB to detect problems early and often work them out on a cooperative basis before they rise to the level of an adversarial enforcement action. The CFPB can ensure that firms have adequate compliance systems in place to prevent violations from occurring, protecting consumers from harm and firms from liability.

The knowledge that is gained from the supervision process also helps the CFPB to have a more complete understanding of the consumer products and services it regulates. Understanding the environment, challenges and constraints that industry faces, and the ways firms interact with consumers, informs the CFPB's rulemaking and enforcement activities as well as its supervision.

The CFPB pointed out that simply because a firm falls over the threshold to be deemed a "larger" participant does not automatically mean that it will be examined. The CFPB has limited resources and will be informed by the risks posed to consumers in determining who to examine, how often, and how thoroughly, even after the thresholds in this rule are finalized. Some "larger" participants may never be examined.

Consequently, we offer these general comments to ensure that the CFPB's supervision program is as effective as possible.

First, the CFPB should define the threshold for "larger" status broadly, encompassing a significant range of firms, so that the CFPB has the flexibility to examine a range of entities that may pose different risks or affect different consumers. The CFPB needs to examine not only the "largest" entities but also those that have a disproportionate impact in particular niche markets or on particular population, such as minority groups, military, students or seniors. Different entities may have different business models and pose different risks. Different consumers have different vulnerabilities. The CFPB should spot-check smaller, but still large, firms, and ones that operate in different markets or with different models, to see if there are different or greater risks of consumer protection problems that need more attention.[2] Flexibility in the supervision process is essential to using that process effectively to protect consumers.

Second, once the CFPB has determined that an entity is subject to supervision, it should examine all of its consumer financial products and services. For example, the CFPB has broad authority over the debt collection and credit reporting activities of nonbank mortgage, student loan and payday lenders and servicers, so they should be fully subject to examination regardless whether the entity is "larger." Similarly, if a "larger" CRA also operates as a service provider to other entities, or if a "larger" debt collector also furnishes information to CRAs, those activities should be subject to examination. The CFPB must have a full picture of all of an entity's interrelated products, services and operations to understand the risks to consumers. Firms that offer more than one product or service may also pose different risks to consumers than mono-line firms.

Third, the CFPB should enact an anti-evasion or anti-circumvention rule. The CFPB cannot anticipate all of the ways that an entity may structure its operations to avoid being considered "larger" and evade examination. The CFPB should have the authority to ensure that both the spirit and the letter of its rules have force.

---

[2] Although the CFPB has the authority under § 1024(a)(1)(C) of Dodd-Frank to examine a firm that is not "larger" if it determines that the firm poses particular risks to consumers, the process of making that determination is cumbersome. It requires the CFPB to conduct a firm-by-firm notice and opportunity to respond and to have complaints or other information that indicates that the firm is engaging in conduct that poses risks. That process is not conducive to a more proactive identification of *whether* different types of firms pose greater risks.

Finally, the CFPB should revisit the definition of "larger" after it has more experience. The definition of "larger" is not a precise science. Wherever the CFPB sets the threshold, there will be some firms that fall below the line that should be examined. After the CFPB has a better idea of the problems and risks posed by the firms that it has examined, and has more experience collecting consumer complaints and bringing enforcement actions, it may find that examination of a different set of firms would help prevent widespread problems. A rule finding that certain entities are "larger" today is not a judgment that those that fall below the threshold are "smaller." The rule issued as a result of this rulemaking should not become set in stone.

III. Definitions Common to All Markets

"Affiliated company," § 1090.101(b).

It is essential that entities not be permitted to evade supervision by manipulating the way that they are structured. Regardless how it operates, an entity that has a significant impact on a large number of consumers should be examined. We therefore support the proposed definition of "affiliated company" and the proposal to count the receipts of all affiliated companies together in determining whether an entity is "larger." Any other rule would give entities incentives to split up their operations among different subsidiaries or affiliates despite their related control.

However, beyond companies related by ownership, the CFPB should examine larger joint enterprises whose relationship coordinated or contractual. For example, some debt collectors are debt buyers who outsource some or all or their telephone, mail, litigation and collections. Those debt buyers impact millions of consumers, and control or affect the collection activities of their outsourcing partners, but they and their partners might escape examination if they are counted individually. Similarly, many debt collectors outsource some of their collections work to law firms and others. The revenues that both companies receive from their common work should be counted as joint revenues of a joint enterprise to prevent evasions by outsourcing debt collection work.

Outsourcing may be a way to hide business operations that are harmful to consumers. The supervisory function may only see the part of the operation that is compliant if it does not include outsourced accounts in its examinations.

Another factor is that debt collectors are often niche operations specializing in collection letters, collection phone calls, litigation, pre-litigation, collecting dishonored bank checks, deceased debts, medical debt, local debt, cell phone bills, payday loans, credit cards, student loans, government debts (parking tickets, library fines, water bills, property taxes) district attorney check collection schemes, debtor location and contact services, mortgages and foreclosure, shoplifting claims, or child support. The aggregate of several companies may define a single enterprise.

One startling example may have been the National Arbitration Forum, Mann Bracken (a collection law form), and Axiant (a telephone debt collector) whose relationships were only revealed by investigative reporting by BusinessWeek and in lawsuits filed by the Minnesota Attorney General, Lori Swanson. While their relationship may have been more than contractual, it is not difficult to imagine that the next similar enterprise will stick to contractual relationships to avoid examination of the whole enterprise.

Consequently, we propose a second definition:

> "Joint Enterprise" means two or more companies that act with a common purpose, in coordination, or through a contractual relationship to provide consumer financial product or services.

Similarly, the definition of "annual receipts of affiliated companies," § 1090.101(c(4), should be amended to refer to the "annual receipts of affiliated companies *and joint enterprises*," with appropriate changes throughout the definition.

Thus, the receipts of a debt collector that outsources its automated dialing calls to another company would be counted together with the receipts of the auto-dialer as they constitute a single joint enterprise to collect consumer debt. But the receipts of a contractor who is not engaged in providing consumer financial products or services, such as one who handles employee payroll, would not be counted.

"Assistant director," § 1090.101(d).

We support the definition of "Assistant Director" and the ability of the Director to designate an alternative Bureau employee in the event that there is no Assistant Director. The required examination functions of the Bureau need to continue and should not cease due to such an absence.

"Consumer," § 1090.101(f).

We support the definition of a "consumer" as "an individual or an agent, trustee, or representative acting on behalf of an individual," which is identical to the statutory definition. The Bureau should not limit the definition chosen by Congress in order to conform it to and make it consistent with the definition of "consumer" in other statutes. As we have discussed more thoroughly in other comments,[3] those statutes have their own unique context and limitations, which do not apply to this rule.

IV. "Larger" Debt Collectors

A. The Benefits of Examining Debt Collectors

[3] For more discussion of this issue, see NCLC, COMMENTS to the CFPB regarding Streamlining Inherited Regulations, Docket No. CFPB -2011-0039 (filed March 5, 2012), available at http://www.nclc.org/images/pdf/legislation/cfpb-streamlining-comments.pdf

Year after year, debt collectors are the industry that generates the most consumer complaints to the Federal Trade Commission. Complaints about debt collectors have skyrocketed from 13,950 in 2000 to 142,743 in 2011, an astounding 923% increase.

There are few meaningful restraints on the abuses in this industry. As is evident from consumer complaints, many debt collectors believe they can make more money when they intimidate, threaten criminal prosecution, harass, and collect fees and charges far in excess of the real debt. Even more startling, debt buyers have learned to work the system to win judgments and coerce payments even when they have the wrong person or lack any evidence that the consumer owes the debt. Major banks sell off debt that may have been discharged in bankruptcy or already paid, and debt buyers continually recycle zombie debt. Even when a debt collector violates the law, the chances of being caught are minimal and the consequences are cheap.

As the CFPB explained in the request for comments, there are many benefits of examining debt collectors.[4] Supervision will promote compliance with the law and protect consumers from illegal and abusive practices. Many of these benefits are sometimes difficult to quantify but they are significant nonetheless. Harassment and threats cause a huge emotional toll, as do the fear and embarrassment when collectors reveal private information to third parties.

Compliance with debt collection laws also has monetary benefits. Some consumers pay debts they do not owe merely to get a collector off their back. A startling example is the FTC's temporary restraining order last week against a "fake" debt collector that collected $5.5 million in payday loans over two years when it had no relationship with the actual creditor. The distractions of dealing with collector harassment can impair worker productivity, causing harm to the employer and potentially costing the employee a job. Legitimate creditors may not be paid if the consumer feels compelled to put limited resources towards dealing with an abusive collector.

For example, in the student loan industry, the Department of Education has turned over almost all federal student loans it holds to private collection agencies. Student loan debt collection contacts, both by private collectors and guarantors, involve a remarkable amount of deceptive, unfair, and illegal conduct.

Collectors of government student loans have the authority not only to collect, but also to act as the front line "dispute resolution" entities for financially distressed borrowers. Unfortunately for borrowers, dispute resolution is not the primary mission of student loan collection agencies. Debt collectors are not adequately trained to understand and administer the complex borrower rights available under the Higher Education Act, and the Department of Education does not currently provide sufficient oversight of their

[4] Although the CFPB should consider the costs of the examination process in determining what size firms to examine, it does not need to engage in a mathematical weighing of costs and benefits or prove that the benefits outweigh the costs of setting the line in a particular place. The statue requires the CFPB to examine debt collectors and issue a rule identifying the "larger" ones. And as discussed above, just because an entity is deemed larger does not mean that it will be examined.

activities. Further, the government's financial incentives favor collecting the highest amounts possible even if there are more affordable options for borrowers. Supervision in these cases is critical not only to prevent harassment, but also to help ensure that agencies provide accurate information for borrowers seeking to get out of default on federal student loans.

In the private student loan industry, many violations occur due to collectors' inaccurate claims about their collection powers. It is particularly common for collectors of private student loans to claim that they can use collection tools unique to federal loans, such as Social Security offsets. These types of deceptive or false claims can be the basis of state or federal debt collection or other legal violations.

Supervision also has benefits for collectors. Ensuring that proper systems and controls are in place will save collectors the expense of defending lawsuits and the liability of judgments. Supervision is also in a sense a free consulting service; companies do not need to pay for the CFPB's advice on how to improve their operations to comply with the law. In addition, collectors who work fairly with consumers may benefit by having greater success collecting than those who abuse consumers.

The costs to the debt collection industry of a supervision program are merely necessary costs of business needed to comply with the law. They are far outweighed by the benefits of an effective supervision program.

B. The Definition of "consumer debt collection," § 1090.101(g).

It is essential that the definition of "consumer debt collection" capture a range of debt collection activities and reach various parties including third-party collectors, law firms, attorneys, and debt buyers. Each plays a role in collecting debt, each has responsibilities under federal law, and each poses risks to consumers. Reaching attempts to collect debt "directly or indirectly" is especially important to prevent evasions and protect consumers from unfair, deceptive or abusive collection activities.

As defined in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank), "consumer debt collection" does not encompass creditors who collect debt that they originated. But that does not mean that their collection or servicing operations are not subject to CFPB supervision. Creditors such as mortgage, student and payday lenders, and banks over $10 billion, are subject to supervision by the CFPB in their own right. As discussed above, once an entity is subject to supervision, all of its operations that are governed by statutes that the CFPB administers should be examined.

We also note that the definition of "consumer debt collection" should be read to reach third party collectors who collect debt such as medical debt or cell phone bills even though medical providers and cell phone companies are not under CFPB jurisdiction. When consumers are provided goods and services first and billed after the fact, they are given credit, which is a consumer financial product or service. Although the CFPB will not be regulating medical providers or telecommunications providers, third party collectors are subject to the Fair Debt Collection Practices Act and CFPB authority regardless of the nature of the debt. The proposed definition of "consumer debt collection" excludes the original creditors but should be understood to ensure that all debt collectors and debt buyers are covered.

C. The Threshold for "Larger" Debt Collectors Should Be Lower

It is essential that the CFPB have the flexibility to examine a broad range of firms. Some of the worst abuses may occur at firms that do not have high annual receipts and lack adequate compliance systems or specialize in older, undocumented or disputed debt that sells for pennies on the dollar. Violations may impact large numbers of consumers but not be associated with significant revenues. Debt buyers who buy stale, disputed debts may hound millions of consumers and make millions of reports to credit bureaus without surpassing $10 million in receipts. Law firms that specialize in "spreadsheet justice" can collect default judgments against thousands of consumers in a single court appearance that earns the firm a minimal amount of revenue.[5]

The proposed rule does not explain why the figure of $10 million in annual receipts was chosen. The threshold for small businesses is $7 million and that is the figure used for consumer reporting agencies.

The proposed rule catches only 4% of the nation's debt collectors, far too few. Given the pervasiveness of problems in the debt collection area, the low receipts-to-accounts ratio for the most problematic debts that are bought for pennies on the dollar, and the likelihood of greater problems among collectors of less substantial size, the threshold should be much lower.

To the extent that the definition of "consumer debt collection" excludes medical and other nonfinancial debts – and does not count the receipts for those debts – the definition is even more problematic.[6] Third party collectors and debt buyers who collect medical debt are covered by the Fair Debt Collection Practices Act (FDCPA) and are within the CFPB's authority. Many collectors have multiple collection lines and have interwoven operations. As discussed below in Section V(B), medical debt collection possibly constitutes 40 to 50% of the debt collection market. Excluding those debts entirely from the calculation of a firm's receipts could mean that that some firms with substantially more receipts than $10 million will be missed despite posing profound risks to consumers that are within the CFPB's jurisdiction to address.

We suggest that, in this rulemaking, the CFPB define as a "larger" debt collector any collector who (1) is not a small business, and thus has at least $7 million in annual receipts from any source, and (2) has at least half of that amount, $3.5 million, in receipts

---

[5] The abuses rampant in debt collection litigation are discussed in Federal Trade Commission, Repairing A Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration (July 12, 2010, available at http://www.ftc.gov/opa/2010/07/debtcollect.shtm.

[6] As discussed above, medical debt can be understood to be credit and to fall within the definition of "consumer financial product or service."

related to the collection of debt related to consumer financial products and services. Setting the initial threshold at $7 million receipts excludes all small business and is well justified as a measure of "larger."[7] If a firm with $7 million in receipts has half or more related to consumer financial products and services, then the CFPB has good reason to examine the collector.

This two-tiered definition is especially important for multi-line collectors who collect a significant amount of medical debt. A large third-party debt collector should not escape supervision merely because a portion of its receipts are related to medical debt. An entity's procedures, training and policies are likely to be similar and related no matter what type of debt an agent is working on. And of course the CFPB has enforcement authority over third party debt collectors no matter what type of debt they are collecting.

These lower thresholds will still catch only a very small percentage of the nation's debt collectors, well within the definition of "larger." The CFPB will not necessarily examine every collector at the lower end of the threshold, but at least it will have the flexibility to see where the problems lie. The widespread problems in this industry demand an adequate supervision program.

Alternatively, the CFPB could set a single lower threshold in this rulemaking below the $7 million receipt level, without conducting a regulatory flexibility analysis, if it finds that there are not a "substantial" number of debt collectors above that number or if the rule does not have a significant economic impact on them. The CFPB asked for comment on whether a level such as $5 million should be considered. Given the problems in this industry, we support the flexibility to go beyond the largest 4% of debt collectors, and even a lower number such as $3.5 million in total receipts might be appropriate. The CFPB should go as low as it can in this rulemaking and, as discussed below, then open a subsequent rulemaking to go farther if it needs to comply with the Regulatory Flexibility Act.

C. The CFPB Should Open a Subsequent Rulemaking, With Input from Small Businesses if Necessary, to Explore a Lower Threshold That Encompasses Larger Collectors that are Technically Small Businesses

As discussed above, some of the biggest risks to consumers are posed by debt collectors who do not have the compliance operations of the largest firms. In addition, collectors who specialize in a particular type of debt or a particular market may pose significant risks to certain communities. The CFPB should have the flexibility to spot check smaller firms that are still of significant size. The definition of a "small business" debt collector is one that has fewer than $7 million in annual receipts, which is still a significant size and larger than many debt collectors.

[7] As discussed below, a debt collector could be considered "larger" even if its receipts are below $7 million. A collector is "larger" in relation to other collectors; the definition of "larger" is not tied to the small business definition.

The CFPB cannot issue a rule that could have a significant economic impact on a substantial number of small entities without first conducting a regulatory flexibility analysis.[8] Therefore, the CFPB should finalize the current rule as described above, and then do a subsequent rulemaking, if necessary, to consider a lower threshold to permit examination of the larger debt collectors that are technically small businesses.

A lower threshold does not necessarily mean that all firms above that threshold would be examined. It would merely give the CFPB flexibility to understand the risks poses by mid-sized collectors and whether they warrant different protections. Moreover, the CFPB may consider measures to minimize the economic impact of examinations on smaller entities, such as an initial, less extensive spot-checking examination, to be followed by a more in-depth examination only if warranted.

The CFPB should also consider a definition that is tied to the number of accounts, not the firm's revenues. A firm that attempts to collect millions of accounts poses substantial risks to millions of consumers even if it never collects a dime from many of those accounts and only gets pennies on the dollar when it does collect.

Indeed, a significant gap in FDCPA enforcement is enforcement against debt collectors that do not have significant capital. The FDCPA's primary enforcement mechanism is private litigation, but attorneys are unlikely to pursue claims that cannot be collected from undercapitalized debt collectors. The FTC has prioritized its enforcement among the largest debt collectors. Attorney General offices often cannot fill the gap because of their very broad responsibilities. There would be merit in the CFPB performing spot check examinations of some the debt collectors that impact large numbers of consumers but are not among the largest in terms of revenue.

E. The CFPB Should Examine All of a Debt Collector's Operations, Including those Related to Medical or Other Nonfinancial Products

Once a firm falls within the definition of "larger" debt collector, the CFPB should examine all of its activities related to consumer financial products and services. For example, if a debt collector furnishes information to credit bureaus about any type of debt (including medical debt), the activity of furnishing is well within the CFPB's authority to supervise. The CFPB has enforcement authority under the FDCPA for violations related to medical debt, and it should examine for full FDCPA compliance and refer any violations to its enforcement division. The CFPB can only get a clear picture of the consumer protection risks posed by a firm if the agency sees the entire picture of the firm's operations.

V. Larger Participants for Consumer Reporting

[8] Just because a threshold is set below $7 million in receipts does not automatically mean that the rule would have a significant economic impact on a substantial number of small entities, as required to trigger the Regulatory Flexibility Act. A threshold of $5 million, as suggested in the proposed rule, might not reach a substantial number of small businesses who collect consumer debts, and the examination process does not necessarily impose a significant economic impact on collectors.

A. The Threshold for "Larger Participant" CRAs Should Be Lower

First, we commend the CFPB for addressing credit reporting in its first round of proposals defining "larger participants." The sooner that the CFPB begins supervising credit reporting, the better. We also applaud the CFPB for setting a threshold that will include the four nationwide consumer reporting agencies (CRAs) – Equifax, Experian, and TransUnion, often referred to as the "Big Three," as well as CoreLogic and others. There is little doubt that these nationwide CRAs are "larger participants" in a market for consumer financial services or products. The Big Three nationwide CRAs literally control the access to credit, as well as other basic life necessities such as insurance and employment, for nearly every single American. Supervision of these nationwide CRAs is essential to fulfill the Dodd-Frank Act's mission of protecting consumers.

However, a rule that only includes the Big Three will not go far enough. While we appreciate the fact that the CFPB's proposed threshold of $7 million in receipts from consumer reporting will cover 30 CRAs, that is only 7% of the nation's CRAs. As with debt collection, the threshold should be expanded to include any firm that has annual receipts of $7 million or more from any source of income (thus excluding small businesses), as long as at least $3.5 million of receipts are from the provision of consumer reports. This threshold excludes small businesses, but covers larger businesses that have a significant component selling consumer reports.

B. Furnishers of Information Must Not Be Excluded from the Definition of "Consumer Reporting"

We strongly oppose the exception for furnishers of information to CRAs from the definition of consumer reporting in proposed § 1090.101(i), as well as the explicit exemption at § 1090.101(i) (3). The definition of consumer financial product or service clearly includes furnishers, because they are engaged in:

> *providing* consumer report information or other account information, including information relating to the credit history of consumers, used or expected to be used in connection with any decision regarding the offering or provision of a consumer financial product or services,…

Dodd-Frank § 1002(15)(A)(ix)(emphasis added).

We note that Section 1002(15)(A)(ix)(I)(aa) of Dodd-Frank sets forth an exemption for first-hand experience information, but only for *collecting*, *analyzing* or *maintaining* such information, not for *providing* it to a third party, *i.e.*, a consumer reporting agency. Thus, Congress deliberately and carefully crafted this exemption narrowly to ensure that furnishing information to CRAs is *included* as a consumer financial product or service. When Congress has taken such care to draft a limited exemption, the CFPB should not expand that exemption to exclude the very activities that Congress sought to ensure would be covered.

The CFPB notes that many furnishers of information are covered persons because of the business in which they are engaged, *e.g.*, large banks, mortgage originators/brokers/servicers, private student lenders, and payday lenders. 77 Fed. Reg. at 9596, n. 23. However, there are some important categories of furnishers who are not otherwise included as covered persons.

One critical category of furnishers not included in these other categories is debt collectors who exclusively engage in the collection of medical debt. The CFPB has noted that medical debt collection is not generally a covered activity under the "consumer debt collection" category.[9] 77 Fed. Reg. at 9597. Yet medical debt collectors have a significant effect on the financial lives of consumers because of their status as furnishers to the Big Three nationwide CRAs.

Indeed, medical collectors may have one of the largest impacts on consumers' credit reports and credit scores. A 2003 study by Federal Reserve researchers found that 52% of all collection agency tradelines on credit reports consisted of medical debt.[10] A 2010 news report indicated that medical debt constitutes 42% of the collections market, and that health care providers (not financial institutions) are the biggest customers of third party debt collectors.[11] Thus, leaving out supervision of medical debt collectors as either debt collectors or consumer report furnishers misses a category of actors that have an enormous effect on whether a consumer can obtain credit, afford insurance, or even get a job.

Since furnishers of information do not earn revenues from consumer reporting, there would be a question of what measure to use to determine whether they are a larger participant. We suggest that the threshold be $3.5 million in receipts from consumer accounts that are reported to a larger participant CRA. This would be consistent with our suggested thresholds for both debt collection and consumer reporting.

C. The CFPB Should Establish a Wide Scope of Supervision for Larger Participant CRAs

One of the most critical issues not addressed in the proposed rule is, once a firm is considered to be a larger participant, what aspects of that firm can be supervised. We urge the CFPB to establish a wide scope of supervision once a CRA is determined to be a larger participant.

If a company is considered a larger participant under the relevant threshold, the CFPB should have the ability to supervise all parts of that company, or at least those

[9] As discussed above, the proposed definition of "consumer debt collection" can and should be read to include third parties who collect medical debt.
[10] Robert Avery, Paul Calem, Glenn Canner & Raphael Bostic, *An Overview of Consumer Data and Credit Reporting*, Fed. Reserve Bull., at 69 (Feb. 2003).
[11] Our View on Bill Collectors: Firms Employ Questionable Techniques to Collect Debts, USA Today, Sept. 13, 2010 (sidebar).

divisions that deal with consumer information. Consumer information products are often intermingled and used by both covered persons (creditors, banks) and other businesses (employers, insurers) for screening purposes. For example, LexisNexis offers a number of different products. Some of them, such as Accurint for Collections, are consumer financial products. Others, such as Accurint for Insurance, are not. Yet the same data or a subset of that data is probably used for both products. Thus, both consumer reporting databases should be examined by the CFPB.

At a minimum, the CFPB should be able to examine the use of data *collected* for consumer financial products or services even if the *use* is for a non-financial purpose. For example, many employers are now using credit reports from the Big Three nationwide CRAs in screening job applicants. These reports are "consumer financial products" because they are intended or "expected to be used" for credit decisions. The fact that they are also used for employment decisions does not take them out of the scope of supervision. Indeed, the exception for employment/government licensing/tenant screening reports in both the Dodd-Frank Act and the proposed rule is limited to reports *solely* used for such a purpose. See Dodd-Frank § 1002(15)(A)(ix)(I)(cc); proposed § 1090.101(i)(4). Thus, the CFPB should be able to supervise "mixed use" reports when one of the uses is for consumer financial products or services, and should have the ability examine the systems and policies of larger participant CRAs when issuing credit reports for employment purposes.

D. Credit Scoring Developers Should be Explicitly Included as Larger Participants or Service Providers

We urge the CFPB to be more explicit in covering credit scoring developers such as FICO. The CFPB has acknowledged in the Supplementary Information to the proposed rule that it can supervise these entities as service providers to larger participants. 77 Fed. Reg. at 9593, n. 4. Media reports indicate that the proposed rule is meant to extend supervision to FICO.[12] However, the proposed rule itself does not mention the term "service provider" in its text, nor does it mention the term "credit scoring developer."

We believe that the CFPB can supervise larger credit scoring developers as either service providers, or as themselves being larger participant CRAs, because they engage in "…analyzing… consumer report information…" Dodd-Frank § 1002(15)(A)(ix). The CFPB itself noted this possible avenue of supervision. 77 Fed. Reg. at 9596, n. 24.

We urge the CFPB to define credit scoring developers directly as larger participants, even though supervision might also be possible because of their role as service providers, because supervision as a larger participant may have a broader scope than supervision as a service provider. The Dodd-Frank Act provides that the scope of supervision as a service provider is the same as Section 7(c) of the Bank Service Company Act, 12 U.S.C. § 1867(c). In turn, Section 7(c)(1) provides that a service provider "shall be subject to regulation and examination by such agency to the same extent as if such services were

[12] Carter Dougherty, Consumer Bureau to Supervise Debt Collectors, Credit Bureaus, Bloomberg News, Feb. 16, 2012.

being performed by the bank itself on its own premises." Thus, a service provider for a larger participant CRA can be examined for those activities that the larger participant CRA itself would perform. Arguably, this could mean the CFPB would not be able to examine or supervise development of scoring algorithms, since larger participants CRAs themselves do not develop scoring algorithms.

Of course, we would argue that such an interpretation is a cramped and overly narrow view of Section 1024(e) of the Dodd-Frank Act. But it may be prudent for the CFPB to cover scoring developers as larger participant CRAs directly. In any event, whether the CFPB covers scoring developers as service providers or as larger participants, the most critical step is that the CFPB should explicitly state in the proposed rule that credit scoring developers are covered.

VI. Conclusion

Thank you for considering these comments and for protecting consumers in the areas of debt collection and credit reporting. Please feel free to contact us if you have any questions.

Yours very truly,

National Consumer Law Center
On behalf of its low income clients