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Comment Intake
Bureau of Consumer Financial Protection
1700 G Street NW
Washington, DC 20552

Re: *Comments of ACA International on Policy on No-Action Letters and BCFP Product Sandbox*
Docket Number CFPB-2018-0042

Dear Sir/Madam:

ACA International (“ACA”), the Association of Credit and Collection Professionals, submits these comments in response to the Bureau of Consumer Financial Protection’s (“Bureau” or “CFPB”) Policy on No-Action Letters and BCFP Product Sandbox (collectively the “NAL and Sandbox Policy,” “NAL Policy” and “Sandbox Policy”), 83 Fed. Reg. 64,039 (December 13, 2018). ACA appreciates the opportunity to provide comment on this important initiative.

I. BACKGROUND ON ACA INTERNATIONAL

ACA International (ACA) is the leading trade association for credit and collection professionals. Founded in 1939, and with offices in Washington, D.C. and Minneapolis, Minnesota, ACA represents approximately 2,500 members, including credit grantors, third-party collection agencies, asset buyers, attorneys, and vendor affiliates in an industry that employs more than 230,000 employees worldwide. Given its longstanding history and broad membership, ACA is uniquely positioned to assist the Bureau with information gathering related to debt collection, as well as to collaborate with the Bureau on how its proposed policies and regulations will impact the credit and collection industry.

ACA members include the smallest of businesses that operate within a limited geographic range of a single state, and the largest of publicly held, multinational corporations that operate in every state. The majority of ACA-member debt collection companies, however, are small businesses. According to a recent survey, 44 percent of ACA member organizations (831 companies) have fewer than nine employees. Additionally, 85 percent of members (1,624 companies) have 49 or fewer employees and 93 percent of members (1,784) have 99 or fewer employees.

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As part of the process of attempting to recover outstanding payments, ACA members are an extension of every community's businesses. ACA members work with these businesses, large and small, to obtain payment for the goods and services already received by consumers. In years past, the combined effort of ACA members has resulted in the annual recovery of billions of dollars. This saving is returned to and reinvested by businesses. This allows small businesses and large employers, to limit losses on the financial statements of those businesses. Without an effective collection process, the economic viability of these businesses and, by extension, the American economy in general, is threatened. Recovering rightfully-owed consumer debt enables organizations to survive, helps prevent job losses, keeps credit, goods, and services available, and reduces the need for tax increases to cover governmental budget shortfalls.

Importantly, ACA members are committed to fair, reasonable, and respectful practices and take their obligations in collecting debt very seriously. As legitimate credit and collection professionals, ACA members play a key role in helping consumers fulfill their financial goals and responsibilities while facilitating broad access to the credit market.

II. COMMENTS OF ACA INTERNATIONAL

The Bureau seeks comment on the NAL and Sandbox Policy, which is intended to carry out the Bureau's statutory purpose and objectives more effectively.

A. ACA Supports the NAL and Sandbox Policy in General

ACA applauds the Bureau's new proposals and looks forward to working with the CFPB in developing and effectuating new ideas that advance the consumer experience in the financial services marketplace. In the last decade, innovation has been outpacing regulation and nowhere is this more prevalent than in the debt collections industry. Unfortunately, due to a lack of clarity around regulatory expectations and a clear interpretation of the law, members of the debt collections industry have been unable to take advantage of innovation for fear of liability. While the credit eco-system has benefited from technology in the lending space with, for example, systems to enhance underwriting, the debt collections industry has been unable to leverage that same relevant technology. Current federal consumer financial laws are outdated; written decades ago when the only avenues of communication were a rotary phone and letters sent by mail. Today consumers want and demand alternatives modes of communications on terms they dictate. Information to assist consumers in not only recognizing their debt obligations but providing methods to repay legitimate debts owed can be delivered in new and modern ways. However, the current regulatory environment lacks any guidance for willing participants who want to utilize this technology. Innovation is a stepping stone for best practices, but unless there is a partnership between the debt collections industry and regulators when it comes to innovation, there is no incentive for any entity to forge a path for others to follow.

ACA believes that the debt collections industry would benefit significantly from the NAL and Product Sandbox ("Product Sandbox") initiatives. This industry is ripe for testing new ideas and incorporating technologies into current processes in order to achieve industry wide standards that consumers want, and provide better protections for consumers by establishing clear cut

regulatory expectations. ACA appreciates the CFPB's willingness to improve on the NAL policies as well as establish new policies around the Product Sandbox.

ACA generally supports the Bureau's overarching goals of the NAL and Sandbox Policy: (1) streamlining the application process; (2) streamlining the Bureau's processing of applications; (3) expanding the types of statutory and/or regulatory relief available; (4) specifying procedures for an extension where the relief initially provided is of limited duration; and (5) providing for coordination with existing or future programs offered by other regulators designed to facilitate innovation. These goals will lay the foundation for a better partnership with the Bureau among financial services entities, including members of the debt collections industry, but also create an innovative environment that will ultimately benefit consumers.

Specific comments about proposals for both the NAL and Product Sandbox are stated below.

B. ACA Supports the CFPB's Proposals which will Reduce Regulatory Burden, but Urges the Bureau to Consider Remedies that could be Utilized by the Debt Collections Industry

1. *NAL*

ACA applauds the CFPB for its decision to make the waiver and reduction in regulatory burden more robust and meaningful than the NAL Policy, including protections for unfair, deceptive and abusive acts and practices ("UDAAP"). The lack of protection from regulatory liability was clearly the predominant reason why many applicants did not seek a NAL. The CFPB's approval of a NAL would now be binding upon other divisions of the Bureau, including supervision and enforcement, as long as the applicant is in substantial compliance, provides the necessary protections applicants desire when considering a NAL.

In terms of UDAAP protections, the CFPB's decision to include a waiver of UDAAP liability under a NAL is an important change welcomed by ACA. Since UDAAP has been largely undefined, prior requests for a NAL provided no assurances that the product or service would not result in a UDAAP violation. Thus the 2016 Policy rendered any NAL superfluous. ACA recognizes that the CFPB is considering a rule to better define UDAAP and a NAL should include a waiver of any potential UDAAP violation until such time that applicants are aware of what constitutes such violation.

2. *Product Sandbox*

ACA supports the willingness of the CFPB to expand the Product Sandbox protections to include no-action relief and waiver of UDAAP. However, under the Sandbox Policy, entities in the debt collections industry would be limited in the types of other relief that could be afforded to them. For this reason, ACA makes the following recommendations:¹

¹ Exemptions from regulatory provisions are not applicable to members of the debt collections industry and ACA members until such time as final rules are promulgated by the CFPB pursuant to the FDCA.

Approval Relief (Safe Harbor Provisions) – The Sandbox Policy only provides approval relief under three statutory safe harbor provisions: (1) the Truth-in-Lending Act (“TILA”),² (2) the Equal Credit Opportunity Act (“ECOA”) ³ and (3) the Electronic Funds Transfer Act (“EFTA”) ⁴. Those statutory safe harbors allow an applicant full immunity from *private rights of action*.

For members of the debt collection industry, such relief is not afforded under TILA and ECOA, although there may be some very remote opportunities for relief under EFTA. The debt collection industry faces a constant barrage of frivolous and meritless lawsuits under the Fair Debt Collection Practices Act (“FDCPA”) § 1692k(c).⁵ However, under the current proposal the lack of approval relief for civil lawsuits under the Sandbox Policy is non-existent. A possible safe harbor may exist under the FDCPA,⁶ which provides for a bona fide error defense if the debt collector shows by a preponderance of the evidence that a violation was “not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonable adopted to avoid any such error.” ACA sees no reason why the CFPB could not craft approval relief that provides for a safe harbor for bona fide errors.

Frivolous lawsuits filed under the FDCPA have caused significant harm to ACA members, both large and small. As a result, they have been forced to defend and settle matters where liability was questionable but the cost of litigation warrants an early resolution. The Sandbox Policy suggests a willingness by the CFPB to expand the application pool especially for smaller entities. While members of the debt collections industry welcome a waiver of supervision and enforcement if a Product Sandbox application is approved, the exemption from a private lawsuit would be far more critical for ACA members participating. The approval relief as currently contemplated in the Sandbox Policy forecloses ACA members from considering this important initiative.

Statutory Exemption Relief – Under the Sandbox Policy, the CFPB notes only three statutes: (1) ECOA, (2) the Home Owners Equity Protection Act (“HOEPA”) and (3) the Federal Deposit Insurance Act (“FDIA”), which provide relief by exemption-by-order from not only supervision and enforcement but civil lawsuits as well. The Sandbox Policy is silent as to whether the CFPB will consider other consumer financial statutes. In order to encourage the debt collection industry to participate in the Product Sandbox, the CFPB must provide exemptions-by-order under the FDCPA. Pursuant to § 1692k(e) of the FDCPA, “liability shall [not] apply to any act done or omitted in good faith in

² 15 U.S.C. §1640(f)

³ 15 U.S.C. §1691e(e)

⁴ 15 U.S.C. §1693m(d)

⁵ The prevalence of frivolous lawsuits was noted in the case of Jacobson v. Healthcare Financial Services, Inc., 434 F. Supp. 2d 133, 138 (E.D.N.Y. 2006) (“The cottage industry that has emerged does not bring suits to remedy the ‘widespread and serious national problem’ of abuse that the Senate observed in adopting the legislation, . . . nor to ferret out collection abuse in the form of ‘obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentation of a consumer’s legal rights, disclosing a consumer’s personal affairs to friends, neighbors, or an employer, obtaining information about a consumer through false pretense, impersonating public officials and attorneys, and simulating legal process. Rather, the inescapable inference is that the judicially developed standards have enabled a class of professional plaintiffs.”)

⁶ 15 U.S.C. §1692 *et seq.*

conformity of an advisory opinion of the [CFPB].” ACA members would be eager to participate in the Product Sandbox if given this relief in the event there was approval of a relevant application that met the CFPB’s criteria. If the CFPB cannot provide this relief, it would be unlikely that ACA members would consider a Product Sandbox application.

C. ACA has Concerns Regarding the Publication of Denials of Applications

1. NAL

The CFPB has indicated in the NAL Policy that it may publish denials of NAL applications on its website, including an explanation of why the application was denied, particularly if the CFPB feels it would be in the public interest. Prior ACA Comments expressed serious concerns about this policy, if the decision is made to publish such a denial. As noted above, the debt collections industry is subject to numerous lawsuits, many of which are frivolous. Plaintiff’s lawyers are known to review the CFPB’s website looking for opportunities to bring causes of actions against ACA members and others in the debt collections industry. A denial of a NAL may be an additional resource for these attorneys and subject applicants to litigation for simply applying for a NAL. ACA sees no utility in the publishing of a denial of a NAL. However, if the CFPB declines to adopt this recommendation, then at a minimum a denial should not include the name or any identifying information of the company.

2. Product Sandbox

Unlike the NAL Policy, the Sandbox Policy mandates that all denials will be published. ACA concerns regarding this policy are noted above. ACA will have significant reservations about encouraging its members to apply to the Product Sandbox if their company information along with the reasons for denial is published. This puts a bulls-eye on the backs of companies looking to innovate, while also hurting the overall debt collection industry and consumers in attempts to bring the process into the 21st Century.

D. ACA Supports the Revised Application Process and the Time Table for Approval

1. NAL

ACA commends the Bureau for streamlining the NAL application and providing a better timetable for approvals. As evidenced by the lack of participation in the prior CFPB NAL policy (“2016 Policy”), the onerous nature of the application made it unattractive to many entities. As noted in ACA’s comments submitted December 15, 2014 (“prior ACA Comments”), the “narrow criteria” for eligibility, the “high cost and threshold to obtain a letter and the significant limitations of a letter if obtained” made the 2016 Policy of little utility.⁷ In those prior comments, ACA urged the CFPB to modify its proposals to encourage greater participation in order to make the initiative more meaningful and “widely applicable,” advancing the goals of

⁷ ACA Comments on Proposed Policy on No-Action Letters, Docket CFPB-2014-0025 (December 14, 2014), <https://www.regulations.gov/document?D=CFPB-2014-0025-0020>

reduced regulatory uncertainty and promoting new products and services for the benefit of consumers.⁸

The CFPB's current proposal for a more streamlined NAL application and approval process is a welcome change to this process. The prior application for the 2016 Policy was only appropriate for a limited subset of financial products and services. The requirement that the offering provide a "substantial consumer benefit," with "substantial" not defined, created much uncertainty and skepticism, not to mention a significant up-front cost investment for any applicant. ACA knows of no member who considered applying for a NAL under the 2016 Policy.

The ACA supports the current NAL application proposal and agrees that the requirement that an applicant identify the "uncertainty, ambiguity or barrier" that the NAL would address is a more appropriate determination for NAL approval than the previous, subjective test. In addition, by requiring an applicant to identify the "potential consumer benefits," the relief will result in a wider array of potential applicants, allowing companies and financial services entities a better opportunity to collaborate with the CFPB in a cost-effective way. Further, the 60-day time period for disposition of a NAL application is a more appropriate time frame. The open-ended nature of a disposition in the 2016 Policy was clearly a deterrent for prior applicants. There was simply no reasonable basis to prolong a determination of a NAL for months at a time. Now, any entity can come into the NAL process with an understanding of the resources that may be necessary for the application process and allocate those resources as necessary.

The NAL Policy proposes that applicants can request confidential treatment under the Freedom of Information Act ("FOIA") of certain information submitted under separate cover with the application. While the CFPB did not consider FOIA treatment in the request for confidentiality under the 2016 Policy, ACA still has concerns regarding these confidential protections. As noted in prior ACA Comments, it seems impractical that an entity would submit any information to the Bureau prior to an assurance that the information would be kept confidential. Therefore ACA reiterates its prior recommendation that requests for confidentiality be granted prior to the submission of any sensitive or proprietary information.

2. *Product Sandbox*

As with the NAL Policy, ACA fully supports the CFPB's recommendations for the application process for the Product Sandbox. The proposed application requirements are not onerous and are similar in scope to the information sought in the NAL application. ACA recognizes that additional and more specific information about a particular product or service must be provided in order to be considered for inclusion in the Product Sandbox. The CFPB's desire for this information, including but not limited to the duration of participation, transactional limits, subset of consumers who would be targeted, and geographical scope is reasonable and suggest the CFPB's willingness to consider a variety of information during the Product Sandbox application process. Finally, like the NAL application, a 60-day disposition period appears appropriate, but ACA cautions the Bureau that Product Sandbox applications may be more complex than those submitted pursuant to the NAL Policy. Therefore, ACA recommends that in the event more time is needed to consider a Product Sandbox application, reasonable, specific

⁸ *Id.*

extensions be articulated to applicants with a clear cut response date. Finally, ACA reiterates its concerns regarding the treatment of confidential information noted in Section II.B.1 of this comment.

E. ACA is Encouraged by the CFPB's Proposal Regarding Data Sharing

1. *NAL*

ACA supports the elimination of the data sharing requirement from the NAL. The CFPB was the only federal agency which required data sharing for a NAL. The CFPB's decision to align itself better with other financial regulators is an important one since, as will be described below, the CFPB is seeking mutual recognition from other regulators in regard to its NAL and Sandbox policy.

2. *Product Sandbox*

ACA recognizes that the Product Sandbox is different in nature and scope from the NAL and in that vein data sharing may be appropriate especially as it relates to consumer benefits. However, to the extent that the product or service approved for the Product Sandbox results in no benefit to consumers, it appears that such data would be provided to the CFPB as well. The Sandbox Policy makes no mention of what the CFPB intends to do with negative results (i.e. no consumer benefits were derived). Certainly an entity should not be penalized for not achieving its objectives despite a good faith effort to do so. CFPB must address this scenario in its final proposal and state whether negative results will be treated as confidential pursuant to the Bureau's Disclosure of Records and Information Policy.

F. ACA Supports the CFPB's Efforts to Coordinate with Other Regulators

ACA commends the CFPB for its comment to coordinate with other state and federal regulators in existing and future programs to facilitate innovation for both the NAL and the Product Sandbox. This is not a novel concept and the CFPB has entered into prior Memoranda of Understanding ("MOU") with State Attorneys General in the past. Furthermore, other financial services regulators like the Securities and Exchange Commission (SEC) and the Federal Deposit Insurance Corporation ("FDIC") have similar no-action policies and both either have or are considering the creation of an Office of Innovation.

ACA supports the Bureau's efforts to work with states and encourages the CFPB to ensure that any waiver, approval relief or exemption relief will be sufficient to preempt state enforcement and supervision in certain circumstances. The CFPB must work with states to diffuse any concerns they may have regarding the grant of immunity to applicable entities. It would be unfortunate if the CFPB's effort to foster innovative through the NAL and Sandbox Policy were limited by state opposition and a refusal to collaborate, especially when it comes to UDAAP. Under those circumstances, the NAL and Sandbox will be unable to succeed. For ACA members this is perhaps the most critical factor, to ensure that they are not exposed to frivolous litigation or enforcement actions at the state level when participating.

G. ACA Supports the Improvements in the Revocation and Modification Procedures

The requirements for the revocation and/or modification of a NAL or Product Sandbox are a significant improvement from the 2016 Policy, which provided no prior notice to the entity during the no-action period and no basis for revoking or modifying a NAL. ACA supports the current proposal in that it provides more due process to the entity and encourages the entity to cure deficiencies identified by the CFPB. Although “substantial compliance” is not otherwise defined in the NAL and Product Sandbox, ACA is encouraged by the Bureau’s statement in the NAL and Sandbox Policy that it “anticipates revocation to be quite rare” based upon similar programs implemented by other federal agencies.

ACA appreciates the opportunity to provide comments to the CFPB’s No Action Letter and Product Sandbox Policy.

Sincerely,

A handwritten signature in cursive script that reads "Leah Dempsey".

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