



December 6, 2018

The Honorable Kathleen Kraninger
Director
Bureau of Consumer Financial Protection
1700 G St. N.W.
Washington, D.C. 20552

Dear Director Kraninger:

On behalf of ACA International (ACA), the Association of Credit and Collection Professionals, I am writing to congratulate you on your confirmation as the Bureau of Consumer Financial Protection (BCFP or Bureau) Director. ACA International is the leading trade association for credit and collection professionals representing approximately 3,000 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.

Without an effective collection process, the economic viability of 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. Furthermore, without the information that ACA members provide to consumers, they cannot make informed decisions that help preserve their ability to access credit, medical care, and a host of other goods and services. ACA members play a key role in helping consumers fulfill their financial goals and responsibilities, while facilitating broad access to the credit market.¹ Consumers need the information that ACA members provide them to maintain their financial health, and open communication can often lead to the most favorable outcome for them.

As BCFP Acting Deputy Director Brian Johnson recently noted in remarks, “Contrary to common mythology, consumer credit—the process of lending money to consumers—increases opportunity and wealth in the economy. A consumer borrows money today and spends more in the present, with the intent on paying back the loan in the future. Put differently, rather than save over a period of time and forgo the benefits of a particular product, consumer credit changes the timing of the purchase. Yet government regulators often ignore the basic purpose behind consumer use of credit. They can fail to recognize that market transactions are a positive-sum game. And they can also ignore the economic reality undergirding the pricing and types of

¹ In 2016, third-party collection agencies recovered approximately \$78.5 billion in total debt and returned \$67.6 billion to creditors. This return to creditors represents an average savings of \$579 per household, as businesses were not compelled to compensate for lost capital through increased prices.

services offered by businesses.”² The ability to collect on unpaid debt is an important part of this process, and the work of the debt collection industry has proven to keep the price of credit more affordable for consumers.³

Additionally, in his recent remarks Mr. Johnson notes, “...the Bureau has to engage in light-touch, consumer-first regulatory policy. Not heavy-handed, outdated regulation that is ill-equipped to deal with the technological demands of the 21st century. The lessons of the past must guide us into the future.” ACA appreciates this recognition that operating under outdated laws and regulations that have not kept up with new technologies and consumer preferences, does not benefit consumers. Going forward, we look forward to continue working with the Bureau in pursuit of clarity surrounding outdated laws for our industry, most pertinently the Fair Debt Collection Practices Act (FDCPA), which currently does not account for several modern methods of communication.

Since the inception of the Bureau, there have been many instances when it has failed to fulfill its statutory mission and obligations, which require it to make markets for consumer financial products and services work in a fair, transparent, and competitive manner. As the Bureau moves forward in working to determine how to better serve consumers and create transparent and workable rules for the financial services industry, which also impact the millions of financial services industry employees in the United States, outlined are areas we would like to see further consideration given to.

I. ACA Urges the Bureau to Take into Account the Feedback Provided During its Extensive Request for Information Process

Good policymaking does not result when those writing and enforcing the rules have pre-conceived notions, lack transparency, and are agenda driven. While the consumer perspective is critically important, it is also essential to consider diverse perspectives and real-world in house experience of those working to actually provide products and services to consumers. This benefits both consumers and those serving them when the Bureau can craft more informed rules and policies, which take into account the actual impact of new compliance and regulatory burdens, and the unique needs of different consumers throughout the country. We appreciate the steps the Bureau has recently taken in the ongoing robust effort to seek and compile feedback through Requests for Information (RFI). The comprehensive RFI responses should be used to improve upon previous practices.

As a young agency, it is understandable that the Bureau is learning as it goes. As only the second permanent director of the Bureau, you have the unique opportunity to take stock of what has gone well over the past several years, what has not gone well, and can make any necessary improvements. ACA continues to participate extensively in the RFI process, and to date has filed

² Johnson, Brian, “Toward a 21st century approach to consumer protection,” available at <https://www.consumerfinance.gov/about-us/newsroom/toward-21st-century-approach-consumer-protection/> (Nov. 15, 2018).

³ Zywicki, Todd, “The Law and Economics of Consumer Debt Collection and Its Regulation,” available at <https://www.mercatus.org/system/files/Zywicki-Debt-Collection.pdf> (Sep. 2015). “In a competitive market, losses from uncollected debts are passed on to other consumers in the form of higher prices and restricted access to credit; thus, excessive forbearance from collecting debts is economically inefficient. Again, as noted, collection activity has an effect on both the supply and the demand of consumer credit. Although lax collection efforts will increase the demand for credit by consumers, the higher losses associated with lax collection efforts will increase the costs of lending and thus raise the price and reduce the supply of lending to all consumers, especially higher-risk borrowers.”

nearly a dozen comments just within the past eight months. We ask that as the Bureau moves ahead into a new era of leadership, that it carefully considers the input collected from ACA's members and compiled as part of this process. ACA members take their obligations to consumers when collecting debts very seriously, and the input provided throughout the RFI process is a roadmap to how the BCFP can best work with industry in the shared pursuit of improving consumer outcomes.

II. ACA Urges the Bureau to Continue to Host Industry Roundtable Discussions

Under the leadership of Acting Director Mick Mulvaney, as part of the Bureau's initiative to engage stakeholders' dialogue about key issues, the Bureau over the past year held roundtables to gather feedback about the RFIs and other matters. These have allowed industry and representatives of community and consumer groups to provide valuable feedback and input to the Bureau about what they are hearing from their constituencies throughout the country. In its early years, the Bureau solicited feedback only from certain consumer advocacy groups and did not take a holistic approach to working to understand the consumer financial services marketplace. ACA has been appreciative of more recent opportunities for open dialogue, and we would urge the Bureau to continue to hold industry and consumer group roundtables to facilitate transparent discussions with all stakeholders.

More recently under Acting Director Mulvaney's tenure, all advisory board and council meetings have been made public. In general we support the concept of advisory councils because we believe it is beneficial for Bureau staff to have more information about industries, particularly if they do not have any specific industry experience. However, ACA also recommends that the Bureau consider having a nonbank advisory board since the debt collection industry often only has one, or as is currently the case zero, seats on the Consumer Advisory Board (CAB). Meanwhile, other industries have significant representation in councils and on the CAB, even when the FDCPA Notice of Proposed Rulemaking is one of the main items currently on the BCFP rulemaking agenda. Nonbank participants in the financial services industry should not be overlooked in their ability to provide important feedback and should be given equal opportunity to participate.

III. ACA Supports Clarifying the Fair Debt Collection Practices Act

The accounts receivable management industry has been looking for clear regulatory guidance on the FDCPA, 15 U.S.C. § 1682 et seq., since its enactment in 1977. Congress did not provide the Federal Trade Commission (FTC), who previously was the primary agency with jurisdiction over the debt collection industry, with any rulemaking authority under the FDCPA, which is a strict liability statute. The failure of Congress to act has resulted in a patchwork of interpretations of the FDCPA by the courts, as well as a cottage industry of plaintiffs' attorneys who have done little to protect consumers, while creating profit centers for lawyers. It is important for the BCFP to carefully consider its proposals from the perspectives of both the consumer and the debt collector and find the reasonable balance that ensures the full intent of the FDCPA.

A. Recommended Proposals

ACA recommends the following proposals for consideration by the BCFP:

- A clearly defined "date of default";

- Defining a dispute and developing a formal dispute process;
- Standardization of information that is transferred between first and third parties;
- A clear and concise model Validation Notice;
- Clear guidance on the use of modern methods to communicate with consumers including email messages and text messages;
- A clear and concise safe harbor for leaving voicemail messages; and
- Avoidance of a “one size fits all approach” in developing rules.

a. A Clearly Defined “date of default”

An acceptable definition must be applicable to all ACA members: third party debt collectors and also those members who provide first party business process outsourcing (BPO services). The definition must take into account the various ways accounts are placed with agencies, as well as the contractual differences that may be present with different debt types. At the same time, it is critical that the definition is as straightforward as possible, so that FDCPA and statute of limitations triggers can be clearly identified.

Recommendation: If not defined by a contract which formed the basis of the debt, then the default date shall be the date the debt was placed or assigned to a third party debt collector.

b. Defining a Dispute and Developing a Formal Dispute Process.

The FDCPA does not define the term “dispute.” The BCFP’s prior recommendation of sorting the definition of a dispute into specific categories was problematic, especially because it included a “generic” dispute option which would allow a dispute to be denominated without identifying a specific reason for the claim. As a result, any rule must include a clear definition of what constitutes a dispute so that a debt collector can: (1) easily know when the dispute process is triggered, and (2) adequately respond to the consumer. The goal of any dispute process must be resolution of the dispute and therefore any definition of the term must require the consumer to fully and completely articulate the issue being raised about the account being collected.

Recommendation: The BCFP should clearly define what constitutes a dispute. We recommend a challenge to the amount of the debt or the identity of the debtor to trigger the dispute process. Once a valid dispute is made, then a three-step process must commence: intake, investigation and resolution. For the intake phase, the BCFP should develop a standardized set of questions that a consumer must respond to regardless of whether a dispute is made orally or in writing. These questions must, at a minimum, require the consumer to identify which specific account he or she is disputing and to provide a specific reason in support of why the balance or identity is incorrect. A consumer may answer these questions by any appropriate means, (i.e. letter, telephone call, email, or through a secure portal of the debt collector). However, if the consumer does not provide the required responses, then the dispute would not be considered valid and the debt collector would have no further obligations. For a valid dispute, during the investigation phase, the debt collector would be required to review and obtain as much information as possible in response to the dispute. During the resolution phase, the debt collector would relay the information to the consumer and take appropriate action.

c. Developing a Universal Standardization of Information that is Transferred between First and Third Parties

This proposal will require collaboration with first parties since no existing process exists. However, for small businesses that use debt collectors, broad requirements of information transfer may be problematic, including the challenge of costly technology requirements. Original creditors and lenders will need to come to a consensus on the particular information that should be transferred to a debt collector (whether in a first or third party capacity) as well as the universal method for transmission of the information. Just as important will be what information gets returned to the creditor.

Recommendation: The BCFP should require first parties to have the necessary information to ensure the debt is for the right amount and is owed by the right person before transferring an account to a third party debt collectors and/or a debt buyer if the account is sold. In addition, the BCFP should conduct one rulemaking relating to both first and third party debt collection issues simultaneously.

d. A Clear and Concise Validation Notice

The BCFP put forth a sample Validation Notice in its Outline of Proposals for Debt Collection. Issues that ACA addressed in regard to that sample notice included the failure to take into account applicable state laws that govern disclosures collectors must provide, the failure to promote electronic alternatives to the “tear off” form, and the failure of the notice to invite consumers to state the nature of their dispute on a website or portal (or to request a mailed form). There were also objections that the notice did not promote a way for the consumer to resolve the debt.

Recommendation: ACA has provided the Bureau with suggestions for a validation notice.

e. Clear guidance on the use of modern methods to communicate with consumers

Two-way communication is the key to a resolution of debt. As a result, modern methods of communication must be: (1) encouraged and, (2) coupled with requisite safe harbors. Newer, alternative communication methods, not addressed in the FDCPA, are typically the way consumers prefer to be contacted; they are less intrusive and provide consumers with more control.

Recommendation: The BCFP should provide much-needed clarity around how debt collectors can lawfully communicate with consumers using modern technology, including through email and text message by:

- Confirming that it is permissible to email and text required notices (as long as otherwise legally permissible).

- Clarifying that those who otherwise are complying with FDCPA requirements and rules, qualify for an exemption from the E-Sign Act requirements for validation notice, pursuant to 15 U.S.C. § 7004(d)(1).
 - Providing that the consent to email or send text messages transfers from the creditor to the debt collector; and
 - Affirming that a notice or disclosure is presumed to be received when the correspondence is sent, as long as there is no bounce-back.
- f. The Bureau should provide a clear and concise safe harbor for leaving voicemail messages

The Bureau should provide a clear and concise safe harbor for leaving voicemail messages. The limited-content message would not qualify as a “communication” under the FDCPA and thus not trigger debt collector disclosure requirements, like the mini-Miranda. Using this message, therefore, reduces or altogether eliminates the risk of a third-party disclosure because the message does not state that the call is regarding a debt, is from a debt collector, or is an attempt to collect a debt.

Recommendation: ACA suggests the following limited content message: “This is John Smith calling for David Jones. David, please contact me at 1-800-555-1212”.

- g. When considering rules, the Bureau must avoid a “one size fits all approach”

The BCFP must recognize the fact that a “one size fits all” regulatory approach does not address the diversity of businesses that use third party debt collectors or the types of debts collected. The concept of a “default date” is not the same for a medical debt as it is for a credit card or an auto loans. Information for particular debt types varies, especially when it comes to verifying the debt. Finally, requirements for model validation notices must reflect the fact that different debt types have different fees associated with them and that the accrual of interest, if any, can vary.

Recommendation: For any proposed rule, the BCFP must take into consideration the various debt types and provide alternative methods of compliance, whether by using an alternative disclosure or process, in order to achieve the intent and purpose of the rule.

IV. Pre-Rule Actions Surrounding Debt Collection Need to be Improved Upon

ACA member companies support fair, objective, and well-supported Bureau rulemaking that is focused on clarifying legal obligations for debt collectors and solving problems for consumers and regulated entities. Too often, however, the Bureau’s rulemaking processes have been agenda-driven, lacking in objective evidentiary support, dismissive of both the Small Business Regulatory Enforcement Fairness Act (SBREFA) small entity representative (SER) input and the need for rigorous cost-benefit analysis, and poorly conceived to solve real problems. The following pre-rule actions by the Bureau need to be improved upon: a flawed and non-transparent consumer survey; failure to conduct effective consumer disclosure testing; and a misconceived SBREFA panel process that failed to include critical participants. With respect to SBREFA, many industries and small businesses have observed that the Bureau has treated this

important process as an empty, formalistic exercise, obligatorily tacked on the end of the Bureau's pre-rulemaking schedule, well past the point when the Bureau's course was set.

ACA's members face a barrage of legal obligations imposed by an array of federal and state authorities. As noted, they welcome sensible regulation to resolve conflicting and ambiguous requirements that currently foster costly, often frivolous litigation, and remain ready to work with the Bureau toward achievement of this goal. ACA has urged the Bureau to work collaboratively with regulated entities to develop workable, effective regulation, and to revamp the Bureau's approach toward SBREFA, in a way that fulfills the statute's intended purpose, reducing unnecessary burden while achieving appropriate regulatory objectives.

V. The BCFP's Complaint Database Paints an Inaccurate Portrait of the Debt Collection Industry

The Bureau has on numerous occasions reported that the debt collection industry receives the highest number of complaints. However, in this reporting the Bureau fails to contextualize the number of complaints as compared to the number of contacts the debt collection industry makes to consumers over a given year, which the Philadelphia Federal Reserve estimates to be well over one billion.⁴ Providing better understanding of, and perspective, on the debt collection marketplace would better serve the Bureau – and consumers – in the Bureau's analysis of the debt collection industry. The Bureau should focus its resources on actual consumer harm rather than raw numbers of complaints provided without context. In doing so, the Bureau would realize that debt collection complaints account for only 0.005% of all consumer contacts made in a given year by debt collectors.

Ironically, the Bureau also reports that the debt collection industry has a response rate of 94.4% in 2017, one of the highest rates of any industry that receives Bureau complaints.⁵ What the Bureau fails to publicize is that 84% of debt collection complaints are closed “with explanation,” meaning the consumer's issue was specifically addressed and/or resolved.⁶

A. Complaints are Defined Too Broadly and Not Otherwise Verified.

The most troubling aspect of the complaint database for ACA members is the Bureau's treatment of complaints including: (1) the Bureau's broad definition of a complaint as “submissions that express dissatisfaction with, or communicate suspicion of wrongful conduct by, an identifiable entity related to a consumer's personal experience with a financial product or service,”⁷ and (2) the Bureau's failure to verify the accuracy of the complaints it receives. The Bureau's approach to consumer complaints in this fashion results in complaints being counted

⁴ Robert M. Hunt, PhD, Vice President and Director, Payment Cards Center Federal Reserve Bank of Philadelphia. Understanding the Model: The Life Cycle of a Debt. Presented at “Life of a Debt: Data Integrity in Debt Collection,” FTC-CFPB Roundtable (June 6, 2013) available at <https://www.ftc.gov/news-events/events-calendar/2013/06/life-debt-data-integrity-debt-collection>.

⁵ CFPB, Consumer Complaint Database, as of December 2017 available at <https://www.consumerfinance.gov/data-research/consumer-complaints/>.

⁶ Josh Adams, PhD, Director of Research, ACA International, *A Review of Debt Collection Complaints Submitted to the Consumer Financial Protection Bureau's Complaint Database in 2017*, ACA International White Paper (January 2018), available at <https://www.acainternational.org/assets/research-statistics/aca-wp-complaints-review-2017.pdf>.

⁷ CFPB, *Consumer Response: A Snapshot of Complaints Received* (July 2014), available at https://files.consumerfinance.gov/f/201407_cfpb_report_consumer-complaint-snapshot.pdf.

against debt collectors for conduct, which even if true, is not otherwise unlawful, but more importantly is often factually inaccurate. For example, a consumer may submit a complaint that his or her insurance company should have paid a medical bill. In this instance, the debt collector did not engage in any unlawful conduct, yet the complaint is counted against it even though the debt collector had the right to contact the consumer. In the same scenario, if the consumer makes the same complaint against the owner of the debt, the medical provider, the complaint is also counted against the debt collector, and thus two complaints are recorded for the one debt. The Bureau simply accumulates all complaints submitted by consumers without considering the nature of the complaint and without regard to its accuracy or legitimate characterization as a complaint against a debt collector. The result is an artificially inflated amount of complaints against the debt collection industry.⁸

B. The Lack of Statutory Authority to Publish Consumer Complaint Data

Although two provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act require the Bureau to report annually to Congress about the number of consumer complaints in general,⁹ and to report semi-annually to the President and designated congressional committees, certain analyses of the complaints the Bureau has received and collected in its databases from the prior year.¹⁰ However, nothing in either section of the statute authorizes the Bureau to make the consumer complaint database public. The publishing of inaccurate and unverified information about any debt collector results in reputational harm that cannot otherwise be reversed. It also misleads consumers, which could lead to unfounded concerns about engaging with the collections industry, despite that this engagement is often essential to preserve credit options and avoid other problems that result from unpaid debt. One academic called the complaint database a “government sponsored Yelp.”¹¹

Analyzing complaint data on a broad scale and highlighting trends appears to fulfill the Bureau’s statutory mandate; public shaming does not. As the complaint database and its utility is reevaluated going forward, we ask that the Bureau focuses on ensuring that it is being used in way in which true concerns are collected and addressed, not as a public relations tool to punish disfavored industries. The credit and collection industry is deeply interested in identifying true complaints and problem actors to weed out any bad practices, but the current process and reporting for the complaint database is not effectively doing that.

VI. More Transparency and Due Process Should be Included in BCFP Enforcement Processes

⁸ Josh Adams, PhD, Director of Research, ACA International, *A Review of Debt Collection Complaints Submitted to the Consumer Financial Protection Bureau’s Complaint Database in 2017*, ACA International White Paper (January 2018), available at <https://www.acainternational.org/assets/research-statistics/aca-wp-complaints-review-2017.pdf>.

⁹ 12 U.S.C. 5493(b)(3)(C).

¹⁰ 12 U.S.C. 5496(c)(4).

¹¹ *Assessing the Effects of Consumer Financial Information, Before the S. Comm. On Banking, Housing, and Urban Affairs*, (April 5, 2016) (Statement of Todd Zywicki, George Mason University Foundation Professor of Law Antonin Scalia School of Law at George Mason University, Executive Director, Law and Economics Center), available at, <https://www.banking.senate.gov/imo/media/doc/Zywicki%20Testimony%204-5-16.pdf>.

To fulfill its statutory mission and obligations properly, the Bureau must strictly adhere to fair, clear, and transparent enforcement processes and practices. Too often in the past, the Bureau's actions have fallen short of these standards. Many who have been the subject of enforcement actions view the experience as a one-sided imposition of the Bureau's interpretation of the law, with firms lacking effective recourse to put forward a contrary view and, more often than not, pressured into settling to avoid the high cost of contesting the allegations. This sense of pressure is particularly strong for small businesses that lack the resources for dealing with an opaque, protracted, and unresponsive process.

Concerns are widespread about the Bureau's practice of characterizing conduct as an unfair, deceptive, or abusive act or practice (UDAAP) without prior notice, and then holding other businesses accountable under this retroactive interpretation of legally required or proscribed behavior. Moreover, it remains unclear how the Bureau defines UDAAP, with the "abusive" prong continuing to be a particularly subjective matter for individual enforcement attorneys and examiners. Objections on fairness grounds to an enforcement action that faults a business for conduct in the past that was legal at the time have fallen on deaf ears. An agenda-driven rulemaking through enforcement approach causes businesses to suffer from a lack of knowing what is expected and required of them and waste resources that could otherwise be put towards improving consumer outcomes.

Thank you for your attention to these important matters. We look forward to continuing our engagement with the BCFP. Once again, congratulations on your successful confirmation and the tremendous opportunity before you to lead an important agency, with the important mission of protecting consumers.

Sincerely,

A handwritten signature in black ink, appearing to read 'Mark Neeb', with a stylized flourish at the end.

Mark Neeb
Chief Executive Officer
ACA International