



December 28, 2020

VIA ELECTRONIC DELIVERY TO REGULATIONS.GOV

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

***Re: ACA International, the Association of Credit & Collection Professionals,
("ACA") Comment to Docket No. CFPB–2020–0033, RIN 3710–AB02, Role of
Supervisory Guidance***

Dear CFPB Staff:

The Association of Credit and Collection Professionals (“ACA International” or “ACA”) appreciates the opportunity to provide our comments in response to Consumer Financial Protection Bureau’s (“CFPB” or “Bureau”) proposal for federal agencies’ use of supervisory guidance for regulated entities. ACA welcomes the Bureau’s acknowledgment that providing clear and useful guidance to regulated entities is an important aspect of facilitating markets that serve consumers. There should be clear distinctions, in line with the Administrative Procedures Act (APA), about the differences between regulations and supervisory guidance. Most important, regulations should not be created through enforcement actions, and new rules must be accompanied by the opportunity to provide public comment.

I. ABOUT ACA INTERNATIONAL

ACA International 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.

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 survey of the accounts receivable management (ARM) industry, approximately 44 percent of ACA member organizations have fewer than nine employees. Nearly 85 percent of members have 49 or fewer employees and 93 percent of members 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 efforts of ACA members have resulted in the annual recovery of billions of dollars – dollars that are returned to and reinvested by businesses and dollars that would otherwise constitute losses on the financial statements of those businesses. Without an effective collections 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 government budget shortfalls.

An academic study about the impact of debt collection confirms the basic economic reality that losses from uncollected debts are paid for by the consumers who meet their credit obligations:

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) influences 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.¹

In short, consumer harm can result in several ways when unpaid debt is not addressed, and ACA members work to help consumers understand their financial situation and what can be done to address it and improve it.

The debt collection market is extremely varied in the types of debt being collected and the nature and size of the ARM industry encompasses a broad scope. The client base served by industry members is highly diverse. From large corporations to local Main Street service providers—all clients have a vested interest in customer retention, particularly in the case of small-business creditors. From medical debt to student loan debt, mortgage debt to credit card debt, unpaid check to unpaid government fees, or a single bill from a local business, the differences between each type of debt require a thoughtful and nuanced regulatory approach.

As noted, ACA's membership is primarily made up of small businesses. Accordingly, it is critical to provide compliance resources and guidance for small entities. The Small Business Administration Office of Advocacy has on several occasions outlined concerns with compliance burdens for the ARM industry that should be considered and addressed through compliance resources. ACA members are committed to fair, reasonable, and respectful practices. 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.

¹ Todd J. Zywicki, The Law and Economics of Consumer Debt Collection and Its Regulation, MERCATUS WORKING PAPER, MERCATUS CTR AT GEORGE MASON UNIV., at 47 (Sep. 2015), available at <https://www.mercatus.org/system/files/Zywicki-Debt-Collection.pdf>.

II. SPECIFIC COMMENTS ON ONGOING AGENCY EFFORTS TO CLARIFY THE ROLE OF SUPERVISORY GUIDANCE

A. Background

The CFPB, under Sections 1012(a)(1) and 1022(b)(1) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), authorizes the Bureau to establish rules for conducting the general business of the Bureau, in a manner not inconsistent with Title X of the Dodd-Frank Act. Specifically, section 1022(b)(1) authorizes the Bureau to issue rules as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the federal consumer financial laws. As such, the CFPB issued the following clarity regarding the status of supervisory guidance in conjunction with other financial regulators regarding the Interagency Statement Clarifying the Role of Supervisory Guidance issued by the CFPB and other agencies on September 11, 2018 (2018 Statement):

- The agencies intend to limit the use of numerical thresholds or other “bright lines” in describing expectations in supervisory guidance. Where numerical thresholds are used, the agencies intend to clarify that the thresholds are exemplary only and not suggestive of requirements. The agencies will continue to use numerical thresholds to tailor, and otherwise make clear, the applicability of supervisory guidance or programs to supervised institutions, and as required by statute.
- Examiners will not criticize (through the issuance of matters requiring attention, matters requiring immediate attention, matters requiring board attention, documents of resolution, and supervisory recommendations) a supervised financial institution for, and agencies will not issue an enforcement action based on, a “violation” of or “non-compliance” with supervisory guidance. In some situations, examiners may reference (including in writing) supervisory guidance to provide examples of safe and sound conduct, appropriate consumer protection and risk management practices and other actions for addressing compliance with laws or regulations.
- Supervisory criticisms should continue to be specific as to practices, operations, financial conditions, or other matters that could have a negative effect on the safety and soundness of the financial institution, could cause consumer harm, or could cause violations of laws, regulations, final agency orders or other legally enforceable conditions.
- The agencies also have at times sought, and may continue to seek, public comment on supervisory guidance. Seeking public comment on supervisory guidance does not mean that the guidance is intended to be a regulation or have the force and effect of law. The comment process helps the agencies to improve their understanding of an issue, to gather information on institutions' risk management practices, or to seek ways to achieve a supervisory objective most effectively and with the least burden on institutions.

- The agencies will aim to reduce the issuance of multiple supervisory guidance documents on the same topic and will generally limit such multiple issuances going forward.

B. ACA's Comments

ACA members are committed to robust compliance with state and federal consumer protection laws including the Fair Debt Collections Practices Act, which the Bureau recently issued implementing regulations for. However, in the past the Bureau has at times conflated regulations and supervisory guidance, and the legal requirements and parameters surrounding their use. The 2018 Statement helps clarify the administrative law requirements surrounding guidance. ACA supports codification of the 2018 Statement.

Clear rules are pertinent for ACA members and consumers, and ACA supports the Bureau's clarification that supervisory criticisms should continue to be specific as to practices, operations, financial conditions, or other matters that could have a negative effect on the safety and soundness of the financial institution, could cause consumer harm, or could cause violations of laws, regulations, final agency orders, or other legally enforceable conditions. While ACA supports the ability to provide compliance clarifications through supervisory guidance, it should not be used as a tool to create new requirements or create a path for rulemaking through enforcement actions. Alternatively, all rulemaking should, and must, be done in compliance with the APA and the Small Business Regulatory Enforcement Fairness Act ("SBREFA").

While supervisory guidance cannot and should not rewrite regulations, ACA does support the Bureau's ability to provide compliance materials through various guidance mediums so that ACA members have the resources to understand and implement regulations. Accordingly, ACA strongly encourages the Bureau to issue frequent and possibly quarterly FAQs to help explain regulatory expectations. Creating clear expectations for compliance ultimately benefits consumers, while also providing much needed transparency about expectations to industry.

ACA has also supported the use of formal advisory opinions in addition to FAQs, including the Advisory Opinion Program. Entities often seek an opinion from a regulatory agency because a critical issue arises that requires explanation. This may be within the course of litigation or pending litigation or necessary for ongoing compliance, and time is of the essence. Furthermore, courts often give deference to advisory opinions, which provides further support for their utility. Scenarios that arise for regulated entities are sometimes overlooked in the consideration of a rule. Industries change, and in the case of the debt collection market, technologies may provide enhancements to standard procedures. Advisory opinions may assist in the development of best practices. ACA fully understands and agrees that advisory opinions cannot rewrite rules. However, these opinions should be used to address difficulties in understanding compliance expectations. We appreciate that the CFPB recently finalized the Advisory Opinion program.

ACA also reminds the Bureau that, under Section 212 of the SBREFA, small entity compliance guides are required to be published under the Regulatory Flexibility Act. These and other compliance guides should not include a disclaimer, and any entity that may be subject to the guides should feel that by relying on the guide, it is complying with the law.

III. CONCLUSION

ACA appreciates the opportunity to provide comments. If you have any questions concerning our letter, please contact me using the information below.

Sincerely,

A handwritten signature in black ink that reads "Leah Dempsey". The signature is written in a cursive, flowing style.

Leah Dempsey
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