RECEIVABLES MANAGEMENT ASSOC.
SETTING THE GLOBAL STANDARD

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By Electronic Submission

Ms. Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552
www.regulations.gov

Re: Request for Information Regarding Bureau Enforcement Processes (Docket No. CFPB-2018-0003)

Dear Ms. Jackson:

This letter is submitted on behalf of the Receivables Management Association International ("RMA") in response to the referenced Request for Information Regarding Bureau Enforcement Processes ("Enforcement Process").

We appreciate the opportunity to provide comments and information on the Enforcement Process to the Consumer Financial Protection Bureau ("Bureau"). RMA membership is composed of originating creditors, purchasers of defaulted and performing loans, and businesses and professionals that provide services to these entities. Each of these classes of members has participated in the Enforcement process. Our comments and information are therefore reflective of this range of entities.

I. INTRODUCTION

RMA is the nonprofit trade association that represents more than 500 companies that purchase or support the purchase of performing and non-performing receivables on the secondary market. Members of RMA include passive and active debt buying companies, third party collection agencies, collection law firms, and financial institutions.

RMA is a national leader in promoting strong and ethical business practices within the receivables management industry. RMA requires all its member companies who are purchasing receivables on the secondary market to become certified through RMA's Receivables Management Certification Program ("RMCP") as a requisite for membership (publicly available at https://rmassociation.org/certification/).

The RMCP is a comprehensive and uniform source of industry standards that has been recognized by the collection industry's federal regulator, the Consumer Financial Protection Bureau, as "best practices."[1]

In addition to requiring that certified companies comply with local, state, and federal laws and regulations concerning collection activity, the RMCP goes above and beyond the requirements of local, state, and federal laws and regulations by requiring its member companies to comply with additional requirements not addressed by existing laws and regulations. The debt buying companies certified by the Program hold approximately 80 percent of all purchased receivables in the country, by RMA's estimates.

RMCP-certified companies are subject to vigorous and recurring independent, third-party, audits to demonstrate to RMA their compliance with the RMA Certification Program. This audit includes an onsite inspection of the certified companies to validate full integration of RMCP standards into the company's operations. Following a company's initial certification, review audits continue to be conducted every three years.

Program certification also requires RMA member companies to engage, at the minimum, a chief compliance officer, with a direct or indirect reporting line to the president, chief executive officer, board of directors, or general counsel of the company. The chief compliance officer must maintain individual certification through the Program by completing 24 credit hours of continuing education every two years.

II. COMMENTS

Our comments and information reflect the experiences of large, publicly-traded companies as well as small businesses who have engaged in the Enforcement Process with the Bureau over the past several years. These experiences indicate that changes in the Bureau's Enforcement Process are sorely needed because the Bureau's Enforcement Process has caused significant disruption to RMA members and the consumers they serve.

Our comments are summarized as follows:

A. Enforcement orders issued by the Bureau have created tremendous challenges for the receivables management industry, including debt buyers, originating creditors and service providers, because the Enforcement Process does not set clear guidelines and regulations for legal compliance, leaving the industry without clarity on the performance standards that the Bureau expects.

In 2015, there were three CFPB enforcement actions that addressed the secondary resale market despite there being no federal laws or regulations prohibiting the sale or resale of consumer receivables. A Consent Order with Chase Bank[2] provided, among other things, that while Chase

[1] Consumer Financial Protection Bureau, Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking, Outline of Proposals Under Consideration, July 28, 2016, p. 38 (publicly available at http://files.consumerfinance.gov/f/documents/20160727_cfpb_Outline_of_proposals.pdf).
[2] File No. 2015-CFPB-0013

could continue to sell consumer accounts, they must contractually prohibit the resale of such accounts to another entity. The Chase consent order was quickly followed by two Consent Orders with large national debt buyers, Encore Capital Group[3] (Encore) and Portfolio Recovery Associates[4] (PRA). Despite the fact that neither company sold debt on the secondary market, the CFPB choose to prohibit them from doing so. As a result of these consent orders, many national banks have now adopted "no resale" as a safe-harbor contractual term.

These consent orders had a cratering effect on available secondary market transactions, which resulted in approximately half of U.S. debt buying companies closing operations in the last six years. This dynamic can be evidenced by the rapid decline in the RMA membership within the debt buying member category. Based on calendar year 2011 membership numbers (which have been previously stable), the RMA experienced a 4.5% percent decline in debt buying companies by 2013, a 19.4% decline by 2014 and a 54.7% decline by 2017.

As a consequence of these enforcement actions against these large industry participants, Chase can still continue to sell consumer accounts, and Encore and PRA can still continue to buy consumer accounts, but those small businesses that purchase consumer accounts on the secondary market are effectively prohibited from participating regardless of the absence of findings of wrong doing by these small businesses.

B. The Bureau has issued enforcement orders that have created ambiguous legal compliance standards for the receivables management industry without prior notice and comment from industry participants affected by the guidance.

Because the Bureau has attempted to regulate through enforcement unfairly, and without due process, the Enforcement Process has resulted in industry participants being held accountable for unknown and vague standards, even if they were not the subject of any enforcement action. As a result, the Bureau's Enforcement Process has created an extraordinary cost burden on companies in the receivables management industry by forcing industry participants to design costly and inefficient compliance programs in response to continuously changing guidelines that have emerged out of the Enforcement Process.

The CFPB has used the Enforcement Process to create new and ambiguous *de facto* regulations which implicate the Fair Debt Collection Practices Act (FDCPA)[5] and could potentially implicate other highly litigated statutes regulating the receivables management industry.[6] The

[3] File No. 2015-CFPB-0022
[4] File No. 2015-CFPB-0023
[5] The FDCPA, 15 USC §§1692 *et seq*, provides for statutory damages in the amount of up to $1,000. 15 USC §1692k(a)(2)(A) (2010). Any class action brought under the FDCPA is capped at one percent of a company's net worth or five hundred thousand dollars, whichever is less. 15 USC §1692k(a)(2)(B).
[6] The Telephone Consumer Protection Act (TCPA), 47 USC § 227, and the Fair Credit Reporting Act (FCRA), 15 USC §§ 1681 *et seq.* are the additional statutes that could potentially be implicated under rulemaking by enforcement. In the case of a willful violation of the FCRA, a furnisher can be liable for between $100 to $1,000 in statutory damages, actual damages, attorney's fees and costs, plus punitive damages. 15 USC § 1681n(a)(1). Unlike the FDCPA, neither the TCPA nor the FCRA provide any cap upon statutory damages. The TCPA provides for statutory damages i of $500 for each offending telephone call. 47 USC § 227(b)(3). A court may treble these damages if it finds the violation was willful or knowing. *Id.*

statutory schemes of the three main federal statutes that regulate the debt collection industry allow for consumer recovery so that even a technical violation can result in the ruin of a small business. One class action lawsuit filed under any of these statutes can put a small business in the receivables management industry out of business.

Any time a regulation fails to define key terms or leaves room for different interpretations, entities subject to the regulation are at risk. Small businesses are more heavily burdened with the cost of defending civil litigation due to the uncertainty and ambiguity of regulatory requirements.

C. Because the Bureau initiated Enforcement Processes prior to rulemaking, the length and scope of the Bureau's investigations were unreasonable and overbroad, which only served to compound business disruptions and costs.

The Bureau's Office of Enforcement used Civil Investigative Demands ("CIDs") as a tool to search for wrongdoing prior to determining that any misconduct had occurred. The process should have been that the Bureau established rules, supervised for compliance, and used the Enforcement Process for companies that were not compliant with the established rules.

RMA members that have been through an Enforcement Process describe the process as very results-driven – (i.e., Bureau is using "regulation by enforcement" in order to secure a monetary settlement, looking to find something wrong in order to secure a settlement). The data and document requests with unreasonable timelines created large disruptions to businesses as teams of people had to respond to each request from the Bureau. The Bureau should have weighed the harm done to businesses with the benefits of beginning an Enforcement Process prior to any finding of wrongdoing.

D. The Bureau used enforcement actions and consent orders to fundamentally establish new polices in the field of debt buying and debt collection. The approach has led to unnecessary confusion, regulatory duplication, and uncertainty, which in turn has minimized opportunities for consumers and increased the cost of capital.

In March 2016, former Director of the Bureau Richard Cordray referred to consent orders as a guide "to all participants in the marketplace to avoid similar violations and make an immediate effort to correct any such improper practices," despite the fact that consent orders do not announce rules of general applicability, but instead are based upon unique fact scenarios with specific actors.

Additionally, consent orders primarily represent the CFPB's view of the law and oftentimes are not based upon judicial precedence. The mere fact that a company agreed to a consent order does not mean it would be found liable in a court of law. The Bureaus enforcement tactics combined with a company's general reluctance to litigate made it extremely common for companies to agree to settle the matter.

Simply stated, Consent Orders do not provide any 'real' guidance to industry stakeholders when they do not identify how a targeted company 'should have known' its conduct was violating the law when the law, especially when the law did not address the issues contained in the consent order.

The CFPB has relied upon its broad and vague Unfair, Deceptive and Abusive Acts or Practices (UDAAP) authority in the majority of these actions. Over 20 enforcement matters that the CFPB has made public have had alleged violations of UDAAP. However, the boundaries of what actually constitutes a UDAAP violation remain largely unknown. Because the UDAAP language is so broad and vague, the CFPB has been able – and is willing to use UDAAP authority to challenge conduct it subjectively finds troubling, even if not in violation of any legal requirement.

As a result, companies must try to determine how to avoid violations by examining the applicable standards for UDAAP found in the Dodd-Frank Act or by analyzing the large list of enforcement actions based on UDAAP alleged violations.

This lack of clarity is extremely challenging for an industry seeking further clarification and guidance and has no assurance that other stakeholders might be the subject of an enforcement action for activity that unbeknownst to them has been deemed by the CFPB to be a UDAAP violation.

Dodd-Frank states that the "Bureau may prescribe rules applicable to a covered person or service provider identifying as unlawful unfair, deceptive or abusive acts or practices…" To date, the CFPB has not adapted any rules implementing its UDAAP authority. It has chosen instead to bring actions based upon UDAAP as it sees fit, with no regulatory guidance as to what type of actions would constitute UDAAP. Often times there is no finding of consumer harm as a result of the actions taken by those named in Consent Orders.

With no regulatory guidance the debt collection and debt buying industry is left with little choice but to invest a disproportionate amount of resources to ensure that all their operations, policies and procedures are, at all times, not unfair deceptive or abusive, which is a standard that is not defined and exist only the minds of CFPB enforcers.

III. CONCLUSION

RMA appreciates the opportunity to comment on the RFI that is part of the Bureau's continuing efforts to ensure strong consumer protections in an environment conducive to the lawful collection of consumer debt. Please do not hesitate to contact me if RMA can provide further assistance. We look forward to working together to create a consumer credit market with fair and transparent collection practices.

Sincerely,

Jan Stieger

Jan Stieger,
Executive Director