Business Law Section
AMERICAN BAR ASSOCIATION

321 North Clark Street
Chicago, IL 60654
(312) 988-5588
Fax: (312)988-5578
www.ababusinesslaw.org
businesslaw@americanbar.org

April 11, 2012

Ms. Monica Jackson
Office of the Executive Secretary
Bureau of Consumer Financial Protection
1700 G Street NW
Washington, DC 20006

Re: Docket No. CFPB-2012-0005
Proposed Rule: Defining Larger Participants in Certain Consumer Financial Product and Service Markets, 77 Fed. Reg. 9592 (February 17, 2012) (the "Proposed Rule")

Dear Ms. Jackson:

This letter is submitted on behalf of the Committee on Consumer Financial Services (the "Committee") of the Section of Business Law (the "Section") of the American Bar Association ("ABA") in response to the Proposed Rule. The comments expressed in this letter represent the views of the Committee only and have not been approved by the ABA's House of Delegates or Board of Governors and therefore do not represent the official position of the ABA. In addition, this letter does not represent the official position of the Section. We appreciate the opportunity to provide these comments on the Proposed Rule to the Bureau of Consumer Financial Protection (the "Bureau").

Our interest in the Proposed Rule arises from the possible inclusion of lawyers engaged in the practice of law, but no other activity, within the definition of "larger participant." The Proposed Rule would impose "larger participant" status on two categories of "covered persons," namely, participants in credit reporting and debt collection markets, respectively. The Bureau acknowledges that it is carrying out its authority to designate "larger participants" under Section 1024(a)(1)(B) of the Act. The Bureau states in the Proposed Rule that this initial limited-scope rulemaking will be followed by "a series of rulemakings covering additional markets for consumer financial products and services." 77 Fed. Reg. 9593. Accordingly, we believe it important to provide appropriate comments to the Bureau at this stage, with the hope that the Bureau will see fit to consider our concerns in connection with the Propose Rule and in future rulemakings.

Our comments are summarized as follows:

1. The scope of the definition of "service providers" in the Proposal appears to cover attorneys engaged in the practice of law who are not involved in offering or providing a consumer financial product or service; and

2. The Proposed Rule also may include attorneys engaged in the practice of law, representing parties exclusively within the scope of the attorney-client relationship, within the definition of "larger participant".

I. Definition of "Service Provider"

We believe that "[o]ne of the Bureau's key responsibilities under the Act is the supervision of very large banks, thrifts, and credit unions, and their affiliates, and certain nonbank covered persons." 73 Fed. Reg. 9593. The Bureau published the Proposed Rule to establish, in part, "the scope of coverage of the Bureau's supervision authority for nonbank covered persons pursuant to Section 1024 of the Act." *Id*. The Bureau notes in the Proposed Rule that its supervision authority extends to service providers of bank and nonbank entities and that "[s]ervice providers to consumer debt collectors and consumer reporting agencies may include such firms as data aggregators, *law firms . . .*" (Emphasis supplied.) *Id.* at fn 4. We believe, however, that the Bureau's authority does not and should not extend to law firms or attorneys engaged in the practice of law representing these purported "larger participants" (or any other "covered persons" under the Act) in matters unrelated to the offering or provision of financial products or services to consumers.

For example, law firms often represent, in attorney-client relationships, credit reporting agencies and debt collection agencies in corporate, commercial, taxation, regulatory, compliance, legislative and non-consumer litigation matters. These activities may include representation of such companies in litigation initiated by consumers involving a consumer financial product or service. These activities, within ordinary and accepted norms of the practice of law, are not "delivered, offered or provided in connection with a consumer financial product or service" (*see* Section 1002(5) and 1002(15)(A) of the Act). It follows that attorneys acting within the ambit of the attorney-client relationship providing legal services unrelated to a client's offering or provision of a "consumer financial product or service" should not be considered "larger participants" under Title X of the Act. This holds true not only for the Proposed Rule, but also for "larger participant" rulemakings that the Bureau may later undertake.

II. Practice of Law

In the Proposed Rule, it appears that the Bureau may believe that any legal action that an attorney undertakes that is adverse to a consumer in any way related to a consumer financial product or service results in that the attorney becoming a "larger participant." *See* 77 Fed. Reg. 9597, fn. 28. There are many instances in which an attorney may bring or assert a claim against a consumer for nonperformance of an obligation related to a consumer financial product or service. Yet the attorney is by no means engaged in "collecting debt" within any accepted definition of the term under state or federal law[1] or otherwise "offering or providing a consumer financial product or service." Such an attorney is not a "participant" in "the consumer debt collection market." *See* 77 Fed. Reg. 9597. For example, a high-net worth individual could default on a "jumbo" loan securing his or her residence, in which case the creditor would call on its ordinary litigation counsel to handle the matter in an ordinary attorney-client arrangement. That counsel, not regularly engaged in the collection of consumer obligations, could be considered a "larger participant" under the Proposed Rule. The Proposed Rule similarly leaves open the possibility that an attorney asserting counterclaims against a consumer (or a purported class of consumers) in a lawsuit involving a consumer financial product or service would be considered a "larger participant."

---

[1] We recognize that attorneys may be "debt collectors" within the meaning of 15 U.S.C. §1692a(6) of the Fair Debt Collection Practices Act. *See* Section 1027(e)(3) of the Act (preservation of existing authority).

We are concerned that the Proposed Rule's coverage of the scenarios discussed above would be in contravention of the exclusion of the practice of law from Title X of the Act (Section 1027(e) of the Act). Under this subsection, the Bureau is prevented from exercising supervisory or enforcement authority "*with respect to any activity engaged in by an attorney as part of the practice of law under the laws of the State in which the attorney is licensed to practice law.*" (Emphasis supplied.) There are only three exceptions to this rule: the offering or provision of a consumer financial product or service (1) not offered or provided as part of or incidental to the practice of law occurring within the attorney-client relationship, (2) that is otherwise offered or provided by the attorney *with respect to a consumer who is not receiving legal advice or services from the attorney in connection with the consumer financial product or service* (emphasis supplied), or (3) in a manner that would subject the attorney to consumer financial laws under existing authority. Only the first two exclusions are relevant to this discussion.[2]

The first exclusion seems relatively simple, that is, if an attorney offers or provides consumer financial products or services outside of the practice of law and not within an attorney-client relationship, the attorney may be subject to Bureau supervision. This presumably would include an attorney offering or providing such consumer-oriented products and services as debt management consulting, fee-for-service loan modifications and pre-paid foreclosure avoidance plans. The second exception perhaps is not as plain as the first exception, but its meaning is quite similar. That is, attorneys who are engaged in offering or providing a consumer financial product or service (such as collection of consumer debt) but do not represent consumers in such activities may be subject to Bureau supervision.[3] In the consideration of Section 1027(e), Congress crafted these exclusions with special concern that attorneys could continue to practice law, representing parties (including consumers) without undue interference from a primary federal regulator. As is clear from the legislative history of the Act, Congress took pains to exclude attorneys engaged in the practice of law and not offering or providing consumer financial products or services from the coverage of Title X. To this end, Representative Conyers stated before the House of Representatives regarding the exclusion for the practice of law in Title X of the Act:

> . . . [O]ur Committee was determined to avoid any possible overlap between the Bureau's authority and the practice of law. At the same time, our Committee recognized that attorneys can be involved in activities outside the practice of law, and might even hold a law license as a sort of badge of trustworthiness. Although State supreme courts would have some authority to respond to abuses in even these outside activities, as reflecting on the attorney's unfitness to hold a law license (see Model Rule 8.4 of the American Bar Association Model Rules of Professional Conduct, adopted in virtually all of the States), their disciplinary authority is not as

[2] We note that Section 1027(e)(3) is a "savings clause" for consumer protection laws existing prior to the enactment of the Act, referred to in the Act as "enumerated consumer laws."

[3] In this regard, the Act defines "consumer financial product or service" to include "collecting debt related to any consumer financial product or service." Section 1002(15)(A)(x). The general definition of "consumer financial product or service" qualifies the definition of "collecting debt" by saying the activity is "delivered, offered or provided in connection with" another consumer financial product or service. *See* Section 1002(5)(B).

> extensive in these outside areas. The Committee was equally determined that these outside activities not escape effective regulations simply because the person engaging in them is an attorney or is working for an attorney. . . .
>
> Accordingly, our Committee worked to make clear that the new Consumer Financial Protection Bureau established in the bill is not being given authority to regulate the practice of law, which is regulated by the State or States in which the attorney in question is licensed to practice. At the same time, the Committee worked to clarify that this protection for practice of law is not intended to preclude the new Bureau from other conduct engaged in by individuals who happen to be attorneys or to be acting under their direction, if the conduct is not part of the practice of law or incidental to the practice of law.
>
> Section 1027(e) of the final bill incorporates this protection. It excludes from Bureau supervisory and enforcement authority all activities engaged in as part of the practice of law under the laws of the State in which the attorney in question is licensed to practice law. To the extent a paralegal, investigator, or law student intern is performing activities under the supervision of an attorney, and in a manner recognized under the laws of the relevant State as with the scope of the attorney's practice of law – and only to that extent – those activities also fall within this protection. . . . Extending the protection to cover to these legal assistants, under these conditions, is consistent with ensuring that the protection fully covers the practice of law as it is conventionally engaged in, while foreclosing any opportunity for an attorney to shield other commercial activities by engaging in them through surrogates.

Speech of Hon. John Conyers, Jr. of Michigan in the House of Representatives Wednesday, June 30, 2010, *Congressional Record* E1347, E1349 (July 15, 2010).

Finally, there is ample jurisprudence directing federal consumer protection regulators to give great deference to laws of Congress and of the states that may regulate the practice of law. Nowhere in the Act did Congress state that it intended to regulate lawyers engaged in the practice of law in attorney-client relationships. In fact, Congress carved this out of the Bureau's authority. Moreover, the application of the Bureau's supervisory authority with respect to the practice of law is analogous to the effort of the Federal Trade Commission to apply the financial privacy provisions of the Gramm-Leach-Bliley Act ("GLBA") to lawyers engaged in the practice of law. In that case, the U.S. Court of Appeals for the District of Columbia Circuit concluded that "[i]t is undisputed that the regulation of the practice of law is traditionally the province of the states,"[4] and "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'"[5] Indeed, the U.S. Supreme Court has held that "[s]ince the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions."[6] The federal appeals court, in deciding

[4] *Am. Bar Ass'n v. Federal Trade Commission*, 430 F.3d 457, 471 (D.C. Cir. 2005)

[5] *Id.* (citing *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)).

[6] *Leis v. Flynt*, 439 U.S. 438 (1979).

the GLBA case, ruled that "[Congress] does not . . . hide elephants in mouseholes"; to regulate lawyers based only on the very general grant of authority in GLBA over "financial institutions" would require the court "to conclude that Congress not only had hidden a rather large elephant in a rather obscure mousehole, but had buried the ambiguity in which the pachyderm lurks beneath an incredibly deep mound of specificity, none of which bears the footprints of the beast or any indication that Congress even suspected its presence."[7]

The Committee appreciates the opportunity to comment on the Proposed Rule, and we respectfully request that the Bureau consider the comments and recommendations set forth above.

Sincerely,

/s/ Therese G. Franzén

Therese G. Franzen

Chair, Consumer Financial Services Committee

Drafting Committee:

Andrew Smith, Vice Chair, Consumer Financial Services Committee

Nicole Munro, Vice Chair, Consumer Financial Services Committee

Donald C. Lampe, Former Chair, Consumer Financial Services Committee

Richard P. Eckman

Tomio Narita

Donald Maurice

BH01\1525386.4
ID\DCL - 019956/0999

[7] *Am. Bar Ass'n*, 430 F.3d 457 at 467.