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BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1090

[Docket No. CFPB-2012-0040]

RIN: 3170-AA30

Defining Larger Participants of the Consumer Debt Collection Market

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Final rule.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) amends the regulation defining larger participants of certain consumer financial product and service markets by adding a new section to define larger participants of a market for consumer debt collection. The final rule thereby facilitates the supervision of nonbank covered persons active in that market. The Bureau is issuing the final rule pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act. That law grants the Bureau authority to supervise certain nonbank covered persons for compliance with Federal consumer financial law and for other purposes. The Bureau has the authority to supervise nonbank covered persons of all sizes in the residential mortgage, private education lending, and payday lending markets. In addition, the Bureau has the authority to supervise nonbank "larger participant[s]" of markets for other consumer financial products or services, as the Bureau defines by rule. An initial rule defining larger participants of a market for consumer reporting was published in the Federal Register on July 20, 2012 (Consumer Reporting Rule).

DATES: Effective January 2, 2013.

FOR FURTHER INFORMATION CONTACT: Kali Bracey, Senior Counsel, (202) 435-7141, or Susan Torzilli, Attorney-Advisor, (202) 435-7464, Office of Nonbank Supervision, Bureau of Consumer Financial Protection, 1700 G Street, NW, Washington, DC 20552.

SUPPLEMENTARY INFORMATION: On February 17, 2012, the Bureau published a notice of proposed rulemaking proposing to define larger participants of two markets identified by the Bureau: consumer reporting and consumer debt collection.[1] On July 20, 2012, the Bureau published the Consumer Reporting Rule.[2] The Bureau is issuing this final rule to define larger participants of a market for consumer debt collection (Final Consumer Debt Collection Rule). This Final Consumer Debt Collection Rule is the second in a series of rulemakings to define larger participants of markets for consumer financial products and services for purposes of 12 U.S.C. 5514(a)(1).

I. Overview

Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act)[3] established the Bureau on July 21, 2010. One of the Bureau's responsibilities under the Dodd-Frank Act is the supervision of certain nonbank covered persons,[4] and very large banks, thrifts, and credit unions and their affiliates.[5]

[1] 77 FR 9592 (Feb. 17, 2012).
[2] 77 FR 42874 (July 20, 2012).
[3] Public Law No. 111-203 (codified at 12 U.S.C. 5301 *et seq.*).
[4] The provisions of 12 U.S.C. 5514 apply to certain categories of covered persons, described in subsection (a)(1), and expressly exclude from coverage persons described in 12 U.S.C. 5515(a) or 5516(a). A "covered person" means "(A) any person that engages in offering or providing a consumer financial product or service; and (B) any affiliate of a person described [in (A)] if such affiliate acts as a service provider to such person." 12 U.S.C. 5481(6); *see also* 12 U.S.C. 5481(5) (defining "consumer financial product or service"). Under 12 U.S.C. 5514(d), subject to certain exceptions, "to the extent that Federal law authorizes the Bureau and another Federal agency to . . . conduct examinations, or require reports from a person described in subsection (a)(1) under such law for purposes of assuring compliance with Federal consumer financial law and any regulations thereunder, the Bureau shall have the exclusive authority to . . . conduct examinations [and] require reports . . . with regard to a person described in (a)(1), subject to those provisions of law."
[5] *See* 12 U.S.C. 5515(a). The Bureau also has certain authorities relating to the supervision of other banks, thrifts, and credit unions. *See* 12 U.S.C. 5516(c)(1), (e). The Bureau notes that one of the objectives of the Dodd-Frank

Under 12 U.S.C. 5514, the Bureau has supervisory authority over all nonbank covered persons offering or providing three enumerated types of consumer financial products or services: (1) origination, brokerage, or servicing of residential mortgage loans secured by real estate, and related mortgage loan modification or foreclosure relief services; (2) private education loans; and (3) payday loans.[6] The Bureau also has supervisory authority over "larger participant[s] of a market for other consumer financial products or services," as the Bureau defines by rule.[7] On July 20, 2012, the Bureau published in the Federal Register the Consumer Reporting Rule, which defined larger participants of a market for consumer reporting.[8] The Consumer Reporting Rule also established various procedures and standards that will apply with respect to all larger participants defined by rule, including those in the market for consumer debt collection that is defined in this Final Consumer Debt Collection Rule.

The Bureau is authorized to supervise nonbank entities subject to 12 U.S.C. 5514 of the Dodd-Frank Act by requiring the submission of reports and conducting examinations to: (1) assess compliance with Federal consumer financial law; (2) obtain information about such persons' activities and compliance systems or procedures; and (3) detect and assess risks to consumers and consumer financial markets.[9] While the specifics of an examination may vary by market and entity, the supervision process generally proceeds as follows. Typically, Bureau examiners initiate an on-site examination by contacting the entity for an initial conference with

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Act is to ensure that "Federal consumer financial law is enforced consistently without regard to the status of a person as a depository institution, in order to promote fair competition." 12 U.S.C. 5511(b)(4).

[6] 12 U.S.C. 5514(a)(1)(A), (D), (E).

[7] 12 U.S.C. 5514(a)(1)(B), (a)(2). The Bureau also has the authority to supervise any nonbank covered person that it "has reasonable cause to determine, by order, after notice to the covered person and a reasonable opportunity . . . to respond . . . is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services." 12 U.S.C. 5514(a)(1)(C). The Bureau has published a notice of proposed rulemaking to establish procedures relating to this provision of the Dodd-Frank Act. 77 FR 31226 (May 25, 2012).

[8] 77 FR 42874.

[9] 12 U.S.C. 5514(b)(1).

management, and often by also requesting records and information. Bureau examiners also will review the components of the supervised entity's compliance management system. Based on these discussions and a preliminary review of the information received, examiners determine the scope of an on-site examination, and then coordinate with the entity to initiate the on-site portion of the examination. While on-site, examiners spend a period of time holding discussions with management about the company's processes and procedures; reviewing documents, records, and accounts for compliance; and evaluating the entity's compliance management systems. As with the Bureau's bank examinations, examinations of nonbanks involve issuing confidential examination reports, supervisory letters, and compliance ratings.

The Bureau has published a general examination manual describing the Bureau's supervisory approach and processes. This manual is available on the Bureau's website.[10] As explained in the examination manual, reports of examination will be structured to address various factors related to a supervised entity's compliance with Federal consumer financial law and other relevant considerations. On September 5, 2012, prior to beginning examinations of consumer reporting entities, the Bureau released examination procedures specific to consumer reporting.[11] In connection with this Final Debt Collection Rule, the Bureau is releasing examination procedures related to debt collection. This Final Consumer Debt Collection Rule establishes a category of covered persons that are subject to the Bureau's supervisory authority[12] under 12 U.S.C. 5514, by defining "larger participants" of a market for consumer debt

[10] *Available at* http://www.consumerfinance.gov/guidance/supervision/manual/.
[11] *See* Consumer Financial Protection Bureau, *Consumer Reporting Examination Procedures* (Sept. 5, 2012) *available at* http://files.consumerfinance.gov/f/201209_cfpb_Consumer_Reporting_Examination_Procedures.pdf. These procedures are an extension of the CFPB's general Supervisory and Examination Manual and provide guidance on how the Bureau will be conducting its monitoring in the consumer reporting market.
[12] The Bureau's supervision authority also extends to service providers of those covered persons that are subject to supervision under 12 U.S.C. 5514. 12 U.S.C. 5514(e); *see also* 12 U.S.C. 5481(26) (defining "service provider").

collection.[13] The Final Consumer Debt Collection Rule pertains only to that purpose and does not impose new substantive consumer protection requirements. Nor does the Final Consumer Debt Collection Rule delineate the scope of the Fair Debt Collection Practices Act (FDCPA),[14] provisions of the Dodd-Frank Act related to consumer debt collection activities, or any other Federal consumer financial law. Activities that the Bureau has chosen to exclude from the defined consumer debt collection market may nonetheless qualify as "collecting debt" within the meaning of the Dodd-Frank Act and may constitute consumer financial products or services. Activities that the Bureau has excluded from this market may also be subject to the FDCPA. Nonbank covered persons generally are subject to the Bureau's regulatory and enforcement authority, and any applicable Federal consumer financial law, regardless of whether they are subject to the Bureau's supervisory authority.[15]

II. Background

On June 29, 2011, through a notice and request for comment (Notice), the Bureau solicited public comment on developing an initial proposed larger participant rule.[16] The Bureau also held a series of roundtable discussions with industry, consumer and civil rights groups, and State regulatory agencies and associations.[17] The Bureau considered the comments it received in

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[13] The Final Consumer Debt Collection Rule describes one market for consumer financial products or services, which the rule labels "consumer debt collection." The definition in the rule does not encompass all activities that could be considered consumer debt collection. Any reference herein to "the consumer debt collection market" means only the particular market for consumer debt collection identified by the Final Consumer Debt Collection Rule.

[14] The FDCPA is codified at 15 U.S.C. 1692 *et seq*.

[15] As the Bureau explained in the Consumer Reporting Rule, the Bureau may examine a covered person's consumer financial products and services, as well as any of its activities that are subject to Federal consumer financial law, beyond the particular activities that rendered the person subject to supervision. Thus, the Bureau may examine activities of a larger participant of the consumer debt collection market that might not fall within the rule's definition of consumer debt collection.

[16] 76 FR 38059 (June 29, 2011).

[17] In July 2011, the Bureau held four roundtable discussions on the Notice. More than 70 stakeholders participated, representing a diverse mix of nonbank and bank trade associations and consumer advocacy and civil rights groups. The roundtables focused on key issues regarding how to define larger participants, including what criteria to

connection with the Notice in developing a proposed rule to define larger participants of two markets for consumer financial products or services: consumer debt collection and consumer reporting. The Bureau published a notice of proposed rulemaking on February 17, 2012 (Proposed Rule or Proposal), that proposed definitions for larger participants of consumer reporting and consumer debt collection markets, as well as procedures and definitions that would be applicable for all current and future markets in which the Bureau will define larger participants.[18] The Bureau requested and received public comment on the Proposed Rule. The Bureau received 83 comments on the Proposed Rule from, among others, consumer groups, industry trade associations, companies, State financial services agencies, and individuals.[19] The comments pertaining to consumer debt collection are discussed in more detail below in the section-by-section analysis of the final rule.

On July 20, 2012, the Bureau published the Consumer Reporting Rule defining larger participants of a consumer reporting market.[20] The Consumer Reporting Rule established subpart A of 12 CFR Part 1090 (12 CFR 1090.100-103), including general definitions, concepts, protocols, and procedures applicable to all larger participants of markets for consumer financial products or services. Section 1090.100 sets forth the scope and purpose of part 1090 as defining larger participants of certain markets for consumer financial products or services that are subject to supervision by the Bureau. Section 1090.101 defines terms that are generally applicable to Part 1090. Unless otherwise specified, the definitions in § 1090.101 should be used when

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measure, where to set thresholds, available data sources, and which markets to cover. Also in July 2011, the Bureau held a multistate regulator and regulatory association conference call that had more than 40 participants.

[18] 77 FR 9592.

[19] Comments solely relating to Subpart A of 12 CFR Part 1090, such as those relating to general definitions, concepts, protocols, and procedures relating to the Bureau's supervision of larger participants and assessments of whether entities are larger participants were addressed in the Consumer Reporting Rule and are not discussed again here.

[20] 77 FR 42874.

interpreting terms in this Final Consumer Debt Collection Rule. Section 1090.102 establishes that once a nonbank covered person meets the larger-participant test for a particular market, the person retains larger-participant status for a period of at least two years. Section 1090.103 sets forth a procedure for a person to challenge an assertion by the Bureau that the person qualifies as a larger participant of a covered market and a mechanism by which the Bureau may request information to assess whether a person is a larger participant. The Consumer Reporting Rule also established subpart B of Part 1090 (12 CFR 1090.104), identifying a market for consumer reporting, defining terms applicable to that market, and establishing a test for assessing which entities are larger participants of that market. As the Bureau identifies additional markets of which to supervise larger participants, the Bureau will include relevant market descriptions and larger-participant tests in subpart B.

In addition to the provisions that were adopted in the Consumer Reporting Rule, the Proposed Rule included a test to assess whether a nonbank covered person is a larger participant of the consumer debt collection market. Under this test, a nonbank covered person with more than $10 million in annual receipts resulting from consumer debt collection, as described in the Proposed Rule, would be a larger participant of the consumer debt collection market. As defined in the Proposed Rule, “annual receipts” would generally be derived from a three-year average of receipts.

III. Summary of the Final Rule

The Final Consumer Debt Collection Rule amends part 1090 by adding § 105 to subpart B, to define larger participants of the consumer debt collection market. Section 105 identifies a market for consumer debt collection, defines the term “annual receipts” for purposes of measuring participation in that market, and sets forth the test for assessing which entities are larger participants of the market. In the Proposal, the Bureau explained that the consumer debt collection market encompasses the collection, or attempted collection, of debt related to the consumer financial products or services described in 12 U.S.C. 5481(5) and (15). As discussed below, the Final Consumer Debt Collection Rule adopts a definition of "consumer debt collection" that is similar in scope but has been restructured in response to comments.

Participants of the consumer debt collection market identified in the Final Consumer Debt Collection Rule generally include different types of consumer debt collection entities such as third-party debt collectors, debt buyers, and collection attorneys (collectively referred to as consumer debt collectors). Third-party debt collectors primarily collect debt on behalf of originating creditors or their assignees and typically are compensated through contingency fees calculated as a percentage of the debt they recover.[21] Creditors' practices vary in how they use third-party debt collectors. In some cases, creditors use third-party debt collectors in the early stages of delinquency prior to charge off.[22] In other cases, creditors use third-party debt collectors after the creditors have written off the debts.

Debt buying is another important component of the consumer debt collection market. As the name indicates, debt buyers purchase debt, either from the original creditors or from other debt buyers, usually for a fraction of the balance owed.[23] They profit when their recoveries exceed the direct and indirect costs of collection, including the costs of acquiring the debt and of collecting from consumers. Debt buyers sometimes use third-party debt collectors or collection

[21]ACA International, *2012 Agency Benchmarking Survey,* at 21 (2012). According to ACA International's 2012 Benchmarking Survey, collection agency commission rates averaged 28.4% in 2011, with a median of 25.5%.
[22] Charge off usually occurs 120 or 180 days after delinquency, depending on the type of debt. For example, the Federal Financial Institutions Examination Council, in its Uniform Retail Credit Classification and Account Management Policy, establishes a charge-off policy for open-end credit at 180 days delinquency and for closed-end credit at 120 days delinquency. *See* 65 FR 36903 (June 12, 2000).
[23] Federal Trade Commission, *Collecting Consumer Debts: The Challenges of Change*, at 4 (Feb. 2009), *available at* http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf (citing Kaulkin Ginsberg, The Kaulkin Report: The Future of Receivables Management at 50 (7th ed. 2007)).

attorneys to collect their debts, but many also undertake their own collection efforts. Finally, debt buyers also may decide to sell purchased debt to other debt buyers.

Additionally, collection attorneys play a role in the consumer debt collection market. Collection attorneys undertake traditional collection efforts, such as contacting consumers by telephone or written communication. Attorneys also file lawsuits against consumers to collect debts or may buy debt and collect in their own names.[24]

Debt collection is a multi-billion-dollar industry that directly affects a large number of consumers. In 2012, approximately 30 million individuals, or 14 percent of American adults who have credit reports, had debt that was subject to the collections process (averaging approximately $1,500 per consumer).[25] Consumer debt collection is important to the functioning of the consumer credit market and has a significant impact on consumers. By collecting consumer debt, collectors reduce creditors' losses from non-repayment and thereby help to keep credit accessible and more affordable to consumers.

Debt collection performed in illegal ways has the potential to cause consumers substantial harm. If collectors falsely represent amounts owed, consumers may pay debts they do not owe simply to stop collection efforts or because they are unsure how much they owe. In addition, consumers may unintentionally yield their rights, such as by waiving the statute of limitations on debt claims for which the relevant limit periods have expired. Whether or not consumers owe and are liable for the debts collectors are attempting to recover, unlawful collection practices can cause significant reputational damage, invade personal privacy, and inflict emotional distress.

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[24] Federal Trade Commission, *Collecting Consumer Debts: The Challenges of Change*, at 14 (Feb. 2009), *available at* http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf (citing Kaulkin Ginsberg, The Kaulkin Report: The Future of Receivables Management at 73 (7th ed. 2007)).
[25] Federal Reserve Bank of New York, *Quarterly Report on Household Debt and Credit* (May 2012), *available at* http://www.newyorkfed.org/research/national_economy/householdcredit/DistrictReport_Q12012.pdf.

Among the possible consequences, a collector's inappropriate interference with a consumer's employment relationships can also impair the consumer's ability to repay debts.

Federal consumer financial law related to debt collection, and its implementation by the Bureau, protects consumers from such harms. The FDCPA gives consumers certain rights that protect them from unfair, deceptive, misleading, or abusive collection practices as well as from the collection of debts they do not owe. In addition, Federal consumer financial law promotes fair competition in the debt collection marketplace. To the extent that unfair, deceptive, or abusive practices increase collectors' rate of recovery on debts subject to collection, debt collectors that avoid such practices could be at a competitive disadvantage. By placing important parameters on debt collection activities, the FDCPA was meant in part to ensure that those that refrain from improper practices in debt collection are not thereby competitively disadvantaged.[26] Title X's prohibition of unfair, deceptive, or abusive acts or practices serves, in part, a similar end. The Bureau's program of supervision in the consumer debt collection market will help to secure these benefits and advance the Bureau's mission of promoting fair, transparent, and competitive consumer financial markets.

The Final Consumer Debt Collection Rule describes a market for consumer debt collection. In response to comments received, the Bureau has adopted a definition of "consumer debt collection" that differs in some respects from that of the proposed definition. As defined in the Final Consumer Debt Collection Rule, the market includes collection by "debt collector[s]," as defined in the Final Consumer Debt Collection Rule, of debts incurred by consumers primarily for personal, family, or household purposes related to consumer financial products or

[26] *See* 15 U.S.C. 1692(e).

services.[27] This definition encompasses a scope of activity similar to what the definition in the Proposed Rule covered;[28] in light of comments received, the Bureau believes the definition adopted will be clearer.

The Final Consumer Debt Collection Rule also establishes a test, based on “annual receipts,” to assess whether a nonbank covered person engaging in consumer debt collection is a larger participant in this market. The definition of “annual receipts” is adapted from the definition of the term used by the Small Business Administration (SBA) for purposes of defining small business concerns. The Final Consumer Debt Collection Rule adopts the proposed test for qualifying as a larger participant of the consumer debt collection market: more than $10 million in annual receipts resulting from relevant consumer debt collection activities. However, the Final Consumer Debt Collection Rule excludes from the definition of annual receipts those receipts that result from collecting debts that were originally owed to a medical provider. Covered persons meeting the test qualify as larger participants and are subject to the Bureau’s supervision authority under 12 U.S.C. 5514.

The test to assess larger-participant status set forth in the Final Consumer Debt Collection Rule is tailored to the consumer debt collection market identified by the Final Consumer Debt Collection Rule. The Bureau has not determined that annual receipts, or a threshold of $10 million in annual receipts, would be appropriate for any other market that may be the subject of a

[27] The definition of “debt collector” in the Final Consumer Debt Collection Rule incorporates parts of the FDCPA’s definition of that term. 15 U.S.C. 1692a(6).

[28] The Proposed Rule suggested that medical debt is not a consumer financial product or service and that collection of such debt therefore did not fall within the proposed definition of “consumer debt collection.” The Final Consumer Debt Collection Rule acknowledges that medical debt may, if it arose from an extension of credit within the meaning of the Dodd-Frank Act, involve a consumer financial product or service. However, the rule excludes receipts resulting from collecting medical debt from the definition of “annual receipts,” and thus from the quantity that determines larger-participant status. *See infra* nn. 39-47 and accompanying text.

future larger-participant rulemaking. Rather, the Bureau will tailor each test for defining larger participants to the market to which it will be applied.

IV. Legal Authority and Effective Date

A. Rulemaking Authority

The Bureau is issuing this Final Consumer Debt Collection Rule pursuant to its authority under (1) 12 U.S.C. 5514(a)(1)(B) and (a)(2), which authorize the Bureau to supervise larger participants of markets for consumer financial products or services, as defined by rule; (2) 12 U.S.C. 5514(b)(7), which, among other things, authorizes the Bureau to prescribe rules to facilitate the supervision of covered persons under 12 U.S.C. 5514; and (3) 12 U.S.C. 5512(b)(1), which grants the Bureau the authority to prescribe rules as may be necessary and appropriate to enable the Bureau to administer and carry out the purposes and objectives of Federal consumer financial law, and to prevent evasions of such law.

B. Effective Date of Final Rule

The Bureau proposed an effective date of 30 days after the publication of the Final Consumer Debt Collection Rule, noting that the Administrative Procedure Act generally requires that rules be published not less than 30 days before their effective dates.[29] The Bureau received two comments requesting a postponement of the effective date to at least 180 days after publication of any rule finalizing larger-participant definitions for the consumer reporting or consumer debt collection markets. Responding to these comments, the Bureau set an effective date for the Consumer Reporting Rule that was more than 60 days after publication of that rule. The Bureau believes, for the same reasons expressed in the Consumer Reporting Rule, that it is reasonable to set an effective date more than 60 days after publication of this Final Consumer

[29] 5 U.S.C. 553(d).

Debt Collection Rule.[30] In balancing the requests for a longer pre-effective date period with the Bureau's view that too lengthy a period would be detrimental to consumers and the debt collection market, the Bureau believes it is reasonable to extend the effective date to January 2, 2013, to give larger participants, as defined by this rulemaking, more time to prepare for the possibility of Federal supervision. The Bureau therefore adopts this effective date for the Final Consumer Debt Collection Rule. As compared with the Proposal, this new effective date will provide more than double the time between the publication date and the date when consumer debt collectors may be subject to Bureau supervision under the Final Consumer Debt Collection Rule.

V. Section-by-Section Analysis of the Final Rule[31]

Subpart B—Markets

Section 1090.105—Consumer Debt Collection Market

As discussed in the Summary of the Final Rule above, consumer debt collection is important to the functioning of the consumer credit market and has a significant impact on consumers, with approximately 30 million individuals in the United States having debt in

[30] *See* 77 FR 42876. The Bureau decided to extend the effective date in the Consumer Reporting Rule to over 60 days after publication because companies affected by the Consumer Reporting Rule might not previously have been supervised at the Federal or State level and might need time to develop processes and engage in training to prepare for examinations. The Bureau declined to extend the effective date any further, as requested by commenters, because the Consumer Reporting Rule did not impose substantive conduct requirements requiring time to come into compliance. Furthermore, an extended delay in the Bureau's supervision program would have harmed consumers. Similar reasoning applies here.

[31] The Bureau notes that the Final Consumer Debt Collection Rule is structured differently than the Proposed Rule. Unlike the Proposed Rule, 12 CFR 1090 is divided into Subparts A and B. Subpart A establishes generally applicable definitions and processes for assessing larger-participant status. Subpart B establishes market-specific definitions and tests for assessing larger-participant status. The Final Consumer Debt Collection Rule amends 12 CFR 1090 by adding § 105 to define larger participants of the consumer debt collection market to follow § 104, which defines larger participants in a market for consumer reporting.

collection.[32] The market identified by the Final Consumer Debt Collection Rule generally includes third-party debt collectors, debt buyers, and collection attorneys.

Commenters criticized the Bureau's plan to supervise larger participants of the markets identified in the Proposed Rule. They stated that the Dodd-Frank Act requires the Bureau to consider the four specific factors listed in 12 U.S.C. 5514(b)(2)[33] when issuing a rule under 12 U.S.C. 5514(a)(2). As explained in the Consumer Reporting Rule, the Bureau believes that these commenters misinterpreted the scope and purpose of 12 U.S.C. 5514(b)(2).[34] That subsection describes how the Bureau must "exercise its authority under paragraph [(b)](1),"[35] which in turn authorizes the Bureau to supervise "persons described in subsection (a)(1)."[36] The Final Consumer Debt Collection Rule does not exercise authority provided by subsection (b)(1). Instead, it "describe[s]," in part, a set of entities falling within subsection (a)(1), a category of larger participants to which the Bureau may apply the authority that subsection (b)(1) provides. Thus, the Bureau is not required to conduct a risk-based analysis when deciding in which markets it will define "larger participants." Instead, the Bureau will conduct the risk-based analysis required under 12 U.S.C. 5514(b)(2) in choosing which persons to supervise among the larger participants in a given market.

One commenter also asked the Bureau to explain why it is identifying consumer debt collection as the subject of this rule, instead of some other market for a different consumer

[32] Federal Reserve Bank of New York, *Quarterly Report on Household Debt and Credit* (May 2012), *available at* http://www.newyorkfed.org/research/national_economy/householdcredit/DistrictReport_Q12012.pdf.
[33] These factors are "the asset size of the covered person; the volume of transactions involving consumer financial products or services in which the covered person engages; the risks to consumers created by the provision of such consumer financial products or services; [and] the extent to which such institutions are subject to oversight by State authorities for consumer protection." 12 U.S.C. 5514(b)(2).
[34] 77 FR 42883 (noting that the risk-based factors described in 12 U.S.C. 5514(b)(2) do not apply to "larger participant" rulemakings).
[35] 12 U.S.C. 5514(b)(2).
[36] 12 U.S.C. 5514(b)(1).

financial product or service. The Bureau has wide discretion in choosing markets in which to define larger participants. The Bureau need not conclude, before issuing a rule defining larger participants, that the market identified in the rule has a higher rate of non-compliance, poses a greater risk to consumers, or is in some other sense more important to supervise than other markets. Indeed, 12 U.S.C. 5514(b)(1), by recognizing that the purposes of supervision include assessing compliance and risks posed to consumers, suggests that the Bureau is not required to determine the level of compliance and risk in a market *before* issuing a larger-participant rule.

The consumer debt collection market is a reasonable choice for the Bureau. Because consumer debt collection is an important activity that affects millions of consumers, supervision of larger participants of this market will be beneficial to both consumers and the market as a whole. Supervision of larger participants in the consumer debt collection market will help the Bureau ensure that these market participants are complying with applicable Federal consumer financial law and thereby will further the Bureau's mission to ensure consumers' access to fair, transparent, and competitive markets for consumer financial products and services.

Section 1090.105(a)—Market-Related Definitions

Annual receipts. The Bureau received a number of comments relating to "annual receipts."

Overview of proposed definition. The proposed definition of "annual receipts" was informed by the method of calculating "annual receipts" used by the SBA in determining whether an entity is a "small business" concern.[37] Under the proposed definition, for purposes of calculating "annual receipts," the term "receipts" would mean "total income" (or in the case of a sole proprietorship, "gross income") plus "cost of goods sold" as these terms are defined and

[37] 13 CFR 121.104.

reported on Internal Revenue Service (IRS) tax return forms. Under the Proposal, the term would not include net capital gains or losses. In addition, annual receipts would be measured as the average over a person's three most recently completed fiscal years, or over the entire period the person has been in business if that period is less than three completed fiscal years.[38] The proposed calculation of annual receipts also would implement the aggregation requirement in 12 U.S.C. 5514(a)(3)(B) by providing that the annual receipts of a person shall be added to the annual receipts of each of its affiliated companies. As proposed, such aggregation includes the receipts of both the acquired and acquiring companies in the case of an acquisition occurring during any relevant measurement period.

Exclusion of receipts from collecting medical debt. In the Supplemental Information section of the Proposal, the Bureau stated that "debt related to . . . consumer financial products or services" generally does not include medical debt.[39] In light of that statement, consumer debt collectors might expect that annual receipts resulting from the collection of medical debt would not be used to determine whether they were larger participants in the identified market for consumer debt collection. The Bureau received several comments both in favor of and opposed to counting annual receipts resulting from the collection of medical debt towards larger-participant status. Several consumer groups stated that annual receipts resulting from the collection of medical debt should count towards larger-participant status because the collection of medical debt is conducted similarly to that of other debts and has similar impact on consumers. Another commenter pointed out that when a medical provider gives care first and then bills the consumer later, the medical debt arose from an extension of credit, so the collection of that debt is therefore related to a consumer financial product or service. Two industry

[38] 12 CFR 1090.101 defines terms such as "completed fiscal year," "fiscal year," and "tax year."
[39] 77 FR 9597.

commenters agreed with the Proposal that collection of medical debt should not be included in the market for consumer debt collection.

The Bureau agrees with commenters who took issue with the categorical statement that the collection of medical debt generally is not a consumer financial product or service. In some situations, the collection of medical debt may be a consumer financial product or service. The Dodd-Frank Act defines as a "financial product or service" the activity of collecting debt "related to any consumer financial product or service."[40] If the underlying transaction involved a consumer financial product or service under the Dodd-Frank Act, such as "extending credit" to a consumer for personal, family, or household purposes,[41] then the resulting debt arose from, and is thus "related to," a consumer financial product or service. The collection of that debt is also a consumer financial product or service within the meaning of the Dodd-Frank Act. Under the Dodd-Frank Act, "credit" is "the right granted by a person to a consumer to defer payment of a debt, incur debt and defer its payment, or purchase property or services and defer payment for such purchase."[42] In some situations, a medical provider may grant the right to defer payment after the medical service is rendered. In those circumstances, the transaction might involve an extension of credit.

However, the Bureau has decided to explicitly exclude from the definition of annual receipts those receipts that result from the collection of medical debt.[43] The Bureau is concerned that consumer debt collectors will find it impracticable to determine whether the medical debts they collect involved extensions of "credit," and therefore whether those medical debt collection

[40] 12 U.S.C. 5481(15)(A)(x).
[41] 12 U.S.C. 5481(15)(A)(i); 12 U.S.C. 5481(5)(A).
[42] 12 U.S.C. 5481(7).
[43] As discussed above, this exclusion was implicit in the Proposed Rule. Annual receipts under the proposed definition included only receipts resulting from the collection of debt related to consumer financial products or services, and the Proposed Rule stated that this category does not include medical debt.

receipts should be counted toward the threshold defining larger-participant status. The Bureau expects that a consumer debt collector will know certain information about a debt it collects, such as whether the debt was originally owed to a medical provider.[44] However, a consumer debt collector may not have enough information to determine whether the debt involved an extension of credit, because that question turns on additional details about whether the medical provider granted the consumer the right to defer payment. The Bureau believes that consumer debt collectors often do not have enough details to answer that question for each debt under collection, and they therefore may not have enough information to determine whether particular medical debts arose from consumer financial products or services.

Accordingly, the Final Consumer Debt Collection Rule excludes from the definition of annual receipts those amounts that result from collecting medical debt. For these purposes, medical debt means debt that was originally owed to a medical provider.[45] As noted above, the Bureau expects that debt collectors already know the identities of the persons to whom the debts were originally owed. Therefore, an exclusion defined by reference to such persons will be straightforward for consumer debt collectors to apply. Neither the Bureau, in making its assessments regarding a consumer debt collector's larger-participant status, nor a consumer debt collector, in challenging an assertion by the Bureau that it qualified as a larger participant, would need to determine the specific details of each underlying transaction that gave rise to medical debt.

[44] Very often, debt collectors may obtain accounts from the original creditors. In addition, under the FDCPA, if a consumer makes a timely request for verification of a claimed debt, the debt collector must, if it persists in its attempts to collect the debt, respond with information that generally includes the name and address of the original creditor. 15 U.S.C. 1692g(b). For these reasons, the Bureau expects that debt collectors ordinarily make themselves aware of the original creditors for debts they collect.

[45] Many debts that arise as a consequence of medical care are not originally owed to the medical care provider. For example, a consumer might use a credit card to pay some or all of a medical bill. The Bureau would regard the resulting debt as originally owed, for purposes of the Final Consumer Debt Collection Rule, to the credit card issuer.

Notwithstanding this exclusion, the Bureau believes that the collection of medical debt has an important impact on consumers.[46] The Bureau reiterates that the Final Consumer Debt Collection Rule excludes medical debt collection activities from receipts because of the difficulty, at the current time, of identifying whether particular medical debts resulted from extensions of credit. The Bureau will continue to seek more information relevant to that task, through supervision, through potential registration of nonbank covered persons under 12 U.S.C. 5512(c)(7) and 12 U.S.C. 5514 (b)(7), and from other sources. In addition, in supervising a larger participant of the consumer debt collection market, the Bureau will examine the entity's collection of medical debt along with other activities subject to the FDCPA and other Federal consumer financial law.[47]

Other categories of debt. Commenters also asked the Bureau to clarify whether a number of other categories of debt are included in or excluded from the defined consumer debt collection market and as a result whether annual receipts resulting from such collection are counted towards larger-participant status. But these comments did not identify any comparable uncertainty in determining, given the identities of the originating creditors, whether debts in these various categories involve consumer financial products or services. As noted above, the Bureau expects that consumer debt collectors know the identities of the originating creditors for debts they

[46] According to one survey, in 2010, medical debt constituted 35% of new business for debt collectors. ACA International, *ACA Top Collection Markets Survey*, 2011. The same survey also reported that at least 53% of all debt collectors participate in the medical debt collection market. The 2007 Commonwealth Fund Biennial Health Survey found that 16% of working age adults, approximately 28 million people, had been contacted by debt collectors regarding medical debts, up from 13% in 2005. S. Collins et al., *Losing Ground: How the Loss of Adequate Health Insurance is Burdening Working Families, Commonwealth Fund*, Aug. 2008 at 12 *available at* http://www.commonwealthfund.org/usr_doc/Collins_losinggroundbiennialsurvey2007_1163.pdf?section=4039. In 2011, 54% of third-party debt collectors listed health care (hospital) as one of their top three markets, and 64% listed health care (non-hospital). ACA International, *2012 Agency Benchmarking Survey*, 2012.

[47] As the Bureau explained in the Consumer Reporting Rule, it has the authority to examine an entity's compliance with Federal consumer financial law, beyond the activities that rendered the entity subject to supervision. 77 FR 42880.

collect. For many types of debt, that information should permit the consumer debt collector to determine, with a reasonable degree of accuracy, whether the underlying transaction involved a consumer financial product or service.[48] Thus, the difficulty a consumer debt collector would face in assessing the status of a medical debt should not arise as a general matter in the collection of other debts. In essence, commenters asking the Bureau to clarify the status of various other kinds of debt were asking the Bureau to state whether such types of debt are related to consumer financial products or services, as a categorical matter. The Bureau declines at this point to identify specific types of debt that involve consumer financial products or services, or to provide an exhaustive list of such debts.

Use of IRS guidance. A commenter asked whether the Bureau intends to bind itself to IRS guidance and related Federal tax law with respect to the calculation of annual receipts and recommended that the Bureau provide examples of how different industry participants should do that calculation. The Bureau noted in the Consumer Reporting Rule that to the extent a nonbank covered person uses IRS tax forms to calculate receipts, the person should rely on IRS guidance. Additionally, the Bureau declined to provide examples of how market participants should calculate annual receipts because there may be a variety of circumstances facing covered persons, and the Bureau is not in the best position to ascertain the most appropriate or useful calculation methods for each entity. The Bureau declines, for reasons similar to those articulated in the Consumer Reporting Rule, to provide examples of how participants in the consumer debt collection market should calculate annual receipts.

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[48] For example, consumer credit originated by a credit card issuer is a consumer financial product and the collection of that debt is therefore a consumer financial service. As another example, utility companies regularly extend credit to consumers who receive utility services. *See, e.g.*, *Mays v. Buckeye Rural Elec. Coop.*, 277 F.3d 873, 879 (6th Cir. 2002); *Mick v. Level Propane Gases, Inc*., 183 F. Supp. 2d 1014, 1019 (S.D. Ohio 2000); *Williams v. AT&T Wireless Services, Inc*., 5 F. Supp. 2d 1142, 1145 (W.D. Wash. 1998); *Haynesworth v. South Carolina Elec. & Gas Co*., 488 F. Supp. 565, 567 (D.S.C. 1979). A consumer debt collector could reasonably expect that a debt originally owed by a consumer to a utility company arose from an extension of credit.

Reimbursed amounts. The Bureau received a comment from an attorney representative expressing concern that the proposed definition of annual receipts included certain amounts for which attorneys or other consumer debt collectors receive reimbursement and recommending that such amounts be excluded. This commenter contended that certain reimbursements for expenses, such as recording or filing fees, are not considered income under Federal tax law. This commenter requested that the Final Consumer Debt Collection Rule make clear that such pass-through funds are not included in the calculation of annual receipts. The Bureau notes that the calculation of annual receipts in the Final Consumer Debt Collection Rule is built on the concepts of "total income" and "cost of goods sold," as used in Federal income tax reporting. Quantities that consumer debt collectors do not include in those categories would not count as annual receipts. If, on the other hand, some amount of reimbursed expense is included in one of these categories, that amount would count as annual receipts. Such an amount could fairly be considered a cost of doing business and providing the relevant consumer financial service. That some consumer debt collectors may characterize such an expense as a "reimbursed expense" and bill clients separately for the expense does not alter that fact. For these reasons, the Bureau declines to amend the definition of annual receipts to add a specific exclusion for reimbursed amounts.

Annual receipts and measurement period. The Bureau received several comments suggesting different measurement periods for assessing larger-participant status. One recommended that an entity be deemed a larger participant if either the entity's average annual receipts over the last three fiscal years or its receipts in the most recent fiscal year met the applicable threshold. Another commenter suggested that an entity should qualify as a larger participant only if its receipts were above the threshold for each of three years in a row. Some commenters, incorrectly believing the Proposal already specified that larger-participant status would be triggered by a single year's results, asked the Bureau to measure larger-participant status over a longer period of time. Otherwise, they stated, businesses would forego growing in order to avoid becoming subject to the Bureau's supervisory authority.

In the Consumer Reporting Rule, the Bureau clarified that "annual receipts" are not based solely on the receipts of a single year, but are generally based on the average of an entity's receipts over a three-year period.[49] Using a longer measurement period reduces the impact on the calculation of short-term and potentially temporary fluctuations in receipts a company may experience—both decreases and increases. Similar reasoning motivates the Bureau to adopt a three-year measurement period, as proposed, for the Final Consumer Debt Collection Rule.

Two consumer groups suggested that to prevent evasion of the rule, annual receipts should also include receipts of any person who is an agent or contractor of a consumer debt collector. One of these commenters expressed concern that a debt buyer, in particular, could evade coverage as a larger participant by engaging several third-party debt collectors to collect debts on its behalf.

The Bureau understands commenters' concern regarding possible evasion of the Final Consumer Debt Collection Rule that could potentially occur by market participants engaging third-party debt collectors. However, the Dodd-Frank Act requires that an entity's activity levels be computed by aggregating the activities of affiliated companies.[50] The definition of annual receipts implements this aggregation requirement by counting the receipts of affiliated

[49] As noted in the Proposal, if an entity has not completed three fiscal years, its "annual receipts" will reflect an average based on the shorter period of its existence.
[50] *See* 12 U.S.C. 5514(a)(3)(B).

companies.[51] Control or common control is a prerequisite for being an "affiliate" under the Dodd-Frank Act, and the Consumer Reporting Rule appropriately made control or common control a prerequisite for being an "affiliated company" under Part 1090. Commenters offered no reason to think a special, different understanding of the term should apply for the consumer debt collection market. The Bureau therefore declines to amend the Proposal to require aggregation of the annual receipts of companies that have only an agency or contractual relationship.

The Bureau adopts the proposed definition of "annual receipts" with the amendment described above, excluding receipts that result from collecting debt that was originally owed to a medical provider, and with other minor technical amendments.

Consumer debt collection. The Final Consumer Debt Collection Rule defines a market for "consumer debt collection," which is among the consumer financial products or services described in 12 U.S.C. 5481(5)(B) and 15(A).[52] Activities covered under these provisions of the Dodd-Frank Act include "collecting debt related to any consumer financial product or service."[53] Under 12 U.S.C. 5481(5)(B), such activity is a "consumer financial product or service" when "delivered, offered, or provided in connection with a consumer financial product or service." The definition of "consumer debt collection" in the Final Consumer Debt Collection Rule is not meant to track these related provisions in the Dodd-Frank Act. The Final Consumer Debt

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[51] *See* 12 U.S.C. 5481(1) (definition of "affiliate"); 12 CFR 1090.101 (definition of "affiliated company").

[52] The Proposal defined the term "consumer debt collection" as:

collecting or attempting to collect, directly or indirectly, any debt owed or due or asserted to be owed or due to another and related to any consumer financial product or service. A person offers or provides consumer debt collection where the relevant debt is either:

(1) Collected on behalf of another person; or
(2) Collected on the person's own behalf, if the person purchased or otherwise obtained the debt while the debt was in default under the terms of the contract or other instrument governing the debt.

77 FR 9607.

[53] 12 U.S.C. 5481(A)(x).

Collection Rule's definition has a different function. Rather than describing the scope of a certain consumer financial product or service, it identifies a specific market for such a product or service.

The Bureau received a number of comments asking it to exclude various types of activity from the definition of consumer debt collection. As discussed more fully below, the Bureau is adopting a number of the suggested exclusions, either in part or in full, and rejecting some of the suggestions. Many of the suggested exclusions were based on exclusions from the FDCPA's definition of debt collector.[54] For those suggestions the Bureau is accepting, it is incorporating into the rule's definitions language from the FDCPA that creates the corresponding exclusions in that statute.

To make the rule clearer in light of these changes, the Bureau is also restructuring the definition of consumer debt collection to track the FDCPA more closely. The Final Consumer Debt Collection Rule includes definitions of "creditor" and "debt collector" that are based on the FDCPA's definitions of those terms. Consumer debt collection, in turn, means the activity of a "debt collector," as defined in the rule, to collect debt incurred by a consumer for personal, family, or household purposes, and related to a consumer financial product or service. For most purposes, the scope of the Final Consumer Debt Collection Rule's definition will be the same as that of the proposed definition. The difference in structure facilitates the Bureau's response to the comments requesting various exclusions from the market.

Specific exclusions. The Bureau received a number of comments urging the adoption of particular exclusions from the definition of consumer debt collection.

[54] The Bureau notes that the usage, or omission, of specific language from the FDCPA in the Final Consumer Debt Collection Rule is not an endorsement by the Bureau of any specific interpretation of the FDCPA.

First, the Bureau received several comments that the proposed definition of consumer debt collection appeared to include loan servicing or the collection of debt that is not in default. Many commenters suggested that the Bureau should explicitly exclude loan servicing from the defined consumer debt collection market by incorporating an exclusion contained in the FDCPA's definition of debt collector. Under the FDCPA, a person who collects "debt which was not in default at the time it was obtained by such person"[55] is not, on the basis of that activity, a debt collector. Commenters stated that companies active in loan servicing rely on the FDCPA exclusion, with which they are familiar, to distinguish their servicing activities from debt collection.

The Bureau does not regard loan servicing as part of the same market, for purposes of this Final Consumer Debt Collection Rule, as consumer debt collection. Loan servicers send out billing statements, accept payments and assign them to accounts, and answer consumer questions. In many cases, loan servicing activities involve consumers who are current on payments of their loans and with whom creditors have ongoing relationships. Loan servicing in the traditional sense ordinarily does not involve attempts to locate a debtor by contacting relatives or employees; garnishment of wages or lawsuits. Attorneys are not often involved in loan servicing; they ordinarily do not become involved until debts are in default.[56] In light of these characteristics, the Bureau believes that the purposes of the Final Consumer Debt

[55] 15 U.S.C. 1692a(6)(F)(iii).
[56] The Bureau recognizes that some loan servicing activity may involve techniques like those used in debt collection. And some consumer debt collectors may engage in collecting on accounts that are not in default. To the extent that developments in the markets for obtaining consumers' repayment of debts blur or alter the line between servicing and debt collection, the Bureau may in the future revisit the distinction that the Final Consumer Debt Collection Rule draws between the two activities. Meanwhile, as noted above, the Bureau may examine any consumer financial service provided by a person that is subject to Bureau supervision, such as a larger participant in the consumer debt collection market.

Collection Rule are best served by excluding loan servicing, as described here, from the activity of "consumer debt collection" defined for purposes of the Final Consumer Debt Collection Rule.

Indeed, the Proposal did not contemplate including loan servicing in that market, as several commenters recognized.[57] As such commenters pointed out, the Proposal's economic assessment of the consumer debt collection market was based on Economic Census data that generally covered debt collection and did not cover loan servicing.[58] The scope of the economic data that the Bureau described in the Proposal was reasonably consistent with the scope of the market that the Proposal contemplated.

However, the Bureau acknowledges that the proposed definition could have been misunderstood on this point. To clarify that loan servicing is not within the defined consumer debt collection market, the Bureau accepts the commenters' suggestion and excludes from the definition of debt collection activity involving "debt which was not in default at the time it was obtained by such person[s]." The Bureau intends to include in the consumer debt collection market those entities that are engaged in debt collection activity and exclude those that only engage in loan servicing. The provision just described is an appropriate means to achieve that purpose, because it is similar to language in the FDCPA provision that, as commenters noted, many entities regard as distinguishing loan servicing from debt collection.[59]

Two trade associations representing student lenders commented that the proposed definition of consumer debt collection would prevent their members from engaging in default prevention and loan modification activities that they said are a form of loan servicing.

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[57] Because the Bureau already has supervisory authority over mortgage servicing pursuant to 12 U.S.C. 5514(a)(1)(A), the Bureau did not consider including mortgage servicing within the market for consumer debt collection.

[58] The Economic Census classifies industries using the North American Industry Classification System (NAICS) codes. The Bureau based its estimate of market coverage for the Proposed Rule on the NAICS code for debt collection (561440). Loan servicing activities fall under a different NAICS code (522390).

[59] 15 U.S.C. 1692a(6)(F)(iii).

According to the commenters, the goal of these activities is to benefit consumers by offering payment plans and other services in an effort to prevent default. If, as these commenters suggested, their loan modification and default prevention services involve debt that was not in default at the time it was obtained, then those activities are not consumer debt collection under the Final Consumer Debt Collection Rule.

Second, an association whose membership includes collectors of student loans suggested that the Bureau should exclude from the consumer debt collection market the activity of collectors of student loans made pursuant to Title IV of the Higher Education Act (Title IV loans).[60] According to the commenter, the collectors of Title IV loans undergo independent audits as part of their obligations to the Federal government and to state guaranty agencies that guarantee student loans on behalf of the Federal government. The association states that the audits include an on-site review of calls to consumers, complaints, and other activities related to the debt collection process. The commenter states that the United States Department of Education (Department of Education) and the state guaranty agencies use the audit findings to rank their contractors and allocate future accounts for collection. Because of the audits, the association asserts that practices associated with the collection of Title IV loans are less risky to consumers than are other debt collection activities.

Unlike the typical audits by the Department of Education, the Bureau's supervision program will assess compliance with Federal consumer financial law. The Department of

[60] Another commenter stated that courts have found that state guaranty agencies are not debt collectors pursuant to an FDCPA exception for collection activities that are "incidental to a bona fide fiduciary obligation." 15 U.S.C. 1692a(6)(F)(i). However, some courts have held that when guaranty agencies collect debts for which they are not the guarantors, that activity is not "incidental" to any "fiduciary obligation." *See Murungi v. Texas Guaranteed*, 402 Fed. Appx. 849, 851 (5th Cir. 2010); *Rowe v. Educ. Credit Mgmt. Corp.*, 559 F.3d 1028, 1035 (9th Cir. 2009).

Education has specifically noted that third-party collectors of Title IV loans are subject to the FDCPA, notwithstanding its oversight of Title IV loan collection.[61]

Moreover, commenters' claim that student loan debt collectors pose relatively low risks to consumers does not, by itself, justify excluding those collectors from the overall consumer debt collection market. As noted above, the Dodd-Frank Act does not require the Bureau to consider risk in defining a larger participant market pursuant to 12 U.S.C. 5514(a)(1). When choosing which nonbank covered persons to supervise among the larger participants defined by rule, the Bureau must consider the factors set forth in 12 U.S.C. 5514(b)(2) which include, among others, "the risks to consumers created by the provision of such consumer financial products or services." The Dodd-Frank Act does not mandate consideration of those factors before issuing a rule that establishes the scope of coverage of the Bureau's supervision authority under 12 U.S.C. 5514(a)(1).

For these reasons, the Bureau declines to exclude collection of Title IV loans from the consumer debt collection market.

Third, a representative of non-profit consumer credit counselors asked the Bureau to exclude from the market their activities in assisting individuals with debt repayment. According to the commenter, non-profit consumer credit counselors operate differently from consumer debt collectors. At the consumers' request, non-profit consumer credit counselors work with consumers to help them restructure their debts and formulate repayment plans. Non-profit consumer counselors act as intermediaries between consumers and their creditors. The counselors help consumers devise budgets and plans to pay their debts. Consumers can decide whether they will participate in such counseling programs and, if they do, whether to adhere to

[61] 55 FR 40120, 40121 (Oct. 1, 1990).

the repayment plans negotiated by credit counselors. The Bureau agrees that this business model distinguishes non-profit consumer credit counselors from other debt collectors that work on behalf of themselves or on behalf of creditors to collect debts. Therefore, the Bureau is excluding non-profit consumer credit counselors from the definition of "debt collector." The FDCPA excludes such entities from its definition of "debt collector," and the Bureau is adopting comparable language in the Final Consumer Debt Collection Rule.[62]

Fourth, a consumer data trade association commented that the proposed definition of consumer debt collection requiring that the debt be "related to" a consumer financial product or service was too broad and may include, for instance, business debts related to a company's purchase of consumer reports or other consumer financial products. To make clear that such activities are not part of the consumer debt collection market, the Final Consumer Debt Collection Rule's definition adds to the proposed definition a requirement that the debts under collection be those incurred by consumers for personal, family or household purposes—not for business purposes and not by businesses.

Finally, an attorney group commenter contended that a person who enforces security interests, for example by pursuing foreclosure actions, should not be included in the consumer debt collection market. The commenter cited cases in which courts have held that the practice of enforcing security interests does not constitute debt collection under the FDCPA. Relatedly, a number of courts, distinguishing between collecting debt and enforcing security interests, have concluded that a person can be a debt collector for purposes of the FDCPA even when the person enforces security interests, but only if it is also engaged in collecting debts that are subject to the

[62] 15 U.S.C. 1692a(6)(E).

security agreement.[63] Other courts, however, have concluded that enforcing a security interest qualifies on its own as debt collection under the FDCPA.[64] Regardless of whether enforcing a security interest can, on its own, qualify as collecting debt under the FDCPA, the Bureau does not deem a person who only enforces a security interest, and does not seek payment of money or transfer of assets that are not designated as collateral for the note or instrument, to be, on that basis, a part of the consumer debt collection market defined by the Final Consumer Debt Collection Rule. However, when a person both seeks payment of money and enforces a security interest, that person can qualify as a debt collector for purposes of the Final Consumer Debt Collection Rule.

Collections by originating creditors. A commenter representing the debt buying industry suggested that the Bureau also include first-party debt collection by both banks and nonbanks within its definition of consumer debt collection. The commenter notes that originating creditors collect outstanding debts from their own customers. However, the Bureau regards such collections by originating creditors as part of a different market from third-party debt collection and debt buying. Collecting overdue debts is not the primary business of originating creditors. Rather, their primary business is to provide credit or other products or services. Collecting unpaid debts is usually an ancillary function. By contrast, neither third-party debt collectors nor debt buyers have originated the debts they collect or have ongoing business relationships with the consumers from whom they collect debts. Debt collectors are in the business of collecting on

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[63] *See, e.g.*, *Reese v. Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211 (11th Cir. 2012); *Birster v. Amer. Home Mortgage. Servicing Inc.*, No. 11-13574, 2012 WL 2913786, at *2 (11th Cir. July 18, 2012).

[64] *See, e.g.*, *Shapiro & Meinhold v. Zartman*, 823 P.2d 120, 124 (Colo. 1992) ("[A] foreclosure is a method of collecting a debt by acquiring and selling secured property to satisfy a debt.").

debts that were originated by a variety of creditors. Given these differences, the Bureau declines to include collection by originating creditors within the market for consumer debt collection.[65]

Moreover, the Bureau has the authority to supervise the first-party debt collection activities of many covered persons, regardless of whether the defined consumer debt collection market includes such activities.[66] Specifically, the Dodd-Frank Act authorizes the Bureau to supervise large banks and credit unions, and the affiliates of such entities, pursuant to 12 U.S.C. 5515.[67] In the course of such supervision, the Bureau can examine an entity's collection practices relating to mortgages, credit cards, auto loans, personal loans, deposit advance products, and other consumer financial products or services provided by the entity. In addition, pursuant to 12 U.S.C. 5514, the Bureau has authority to supervise certain nonbank originators: mortgages, private education loans, and payday loans.[68] In the course of such supervision, the Bureau can examine those persons' collection activities. Furthermore, to the extent the Bureau concludes it is important to examine collection activities conducted by nonbank institutions in other specific markets, the Bureau can define appropriate categories of larger participants in such markets. As earlier noted, this Final Consumer Debt Collection Rule is the second in what will be a series of larger-participant rulemakings. For these reasons as well, the Bureau declines to include collection by originating creditors in the defined market for consumer debt collection.[69]

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[65] For similar reasons, the Bureau is also excluding from the definition of "debt collector" an entity that collects debt only for a person to which the entity is related by common ownership or control, if the principal business of such person is not the collection of debts.

[66] In addition, the Bureau may supervise all collection services—whether or not they are subject to the FDCPA—that a larger participant of the consumer debt collection market provides to other persons such as originating creditors.

[67] 12 U.S.C. 5515(a)(1).

[68] 12 U.S.C. 5514(a).

[69] The Bureau declines to define submarkets, as some commenters suggested. These comments focused, for example, on consumer debt collection activities that have a disproportionate impact on minority groups, military groups, students, or senior citizens, or on geographic submarkets. One of these commenters stated that at a minimum, the Bureau should collect data that would allow it to define submarkets at a later time. The Bureau notes that different types of consumer debt collectors all participate in the same activity—consumer debt collection—

Attorneys. The Bureau received several comments from attorney groups asserting that attorneys should not be treated as participants of the consumer debt collection market that could, on that basis, be subject to the Bureau's supervision. This category of comments focused on 12 U.S.C. 5517(e)(1), a provision that restricts the Bureau's supervisory and enforcement authority, in some circumstances, over attorneys engaged in the practice of law.

Two related provisions preserve the Bureau's authority despite that restriction.[70] First, as provided in 12 U.S.C. 5571(e)(2), the Bureau retains its authority "regarding the offering or provision of a consumer financial product or service" (a) "that is not offered or provided as part of, or incidental to, the practice of law, occurring exclusively within the scope of the attorney-client relationship;" or (b) "that is . . . offered or provided by [an] attorney . . . with respect to any consumer who is not receiving legal advice or services from the attorney in connection with that product or service."[71] Second, 12 U.S.C. 5517(e)(3) preserves the Bureau's authority over attorneys who are otherwise subject to any "enumerated consumer law" within the meaning of the Act.[72]

Several commenters took the broad view that all attorneys and legal professionals engaged in collecting consumer debt should be excluded from the Final Consumer Debt

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regardless of their respective business models. And the same legal requirements cover participants in any market segment suggested by commenters. To the extent that the activities of larger participants of the consumer debt collection market differ, the Bureau can adjust the scope and focus of its supervision activities accordingly. Further, by identifying the broader market and supervising larger participants as defined in the Final Consumer Debt Collection Rule, the Bureau will be able to address emerging issues across the various business models. This approach will promote consistency in supervision across the consumer debt collection market. Therefore, the Bureau declines to revise the proposed definition of consumer debt collection to define submarkets as commenters suggested. The Bureau notes that nonbank covered persons generally are subject to the Bureau's regulatory and enforcement authority, and any applicable Federal consumer financial law. The Bureau also has the authority to supervise any nonbank covered person that it "has reasonable cause to determine, by order, after notice to the covered person and a reasonable opportunity . . . to respond," is "engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services." 12 U.S.C. 5514(a)(1)(C).

[70] 12 U.S.C. 5517(e)(1), (e)(2).

[71] 12 U.S.C. 5517(e)(2).

[72] 12 U.S.C. 5517(e)(3). Paragraph (e)(3) also preserves the authorities transferred under subtitle F or H of Title X.

Collection Rule. In support of this argument, commenters cited a floor speech by Representative John Conyers, one of the House's conferees with the Senate on the Dodd-Frank Act. According to these commenters, Representative Conyers expected the phrase "practice of law" in 12 U.S.C. 5571(e)(1) to be read as broadly as the term is construed by state courts and bar associations to prevent "regulation from a new source [that] would unavoidably conflict with the existing rules and lines of accountability," and wanted any determinations by the Bureau, "by rule, or otherwise, regarding what activities constitute the practice of law [to] be consistent with the view and practices of the State supreme court or State bar in question."[73]

The Bureau does not understand this statement to suggest that all activity conducted by attorneys is outside the Bureau's authority. Representative Conyers focused his remarks on attorneys who provide legal services to consumers, such as the "consumer clients of bankruptcy lawyers, consumer lawyers, and real estate lawyers."[74] He did not discuss legal services in which lawyers act on behalf of commercial clients with interests adverse to those of consumers, such as by collecting consumer debts.[75]

Moreover, the relevant statutory language clearly prescribes a different result.[76] Consumer debt collection is a consumer financial service.[77] The service is provided "with

[73] Cong. Rec. E1348-E1349 (Speech of Hon. John Conyers, Jr. on the Conference Report).

[74] Cong. Rec. E1349.

[75] Representative Conyers also observed that state courts and bar associations have a limited ability to regulate lawyers outside of the practice of law. He testified that "our Committee recognized that attorneys can be involved in activities outside the practice of law, and might even hold out their 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 . . . their disciplinary authority is not necessarily as extensive in these outside areas. The Committee was equally determined that these outside activities not escape effective regulation simply because the person engaging in them is an attorney or is working for an attorney." Cong. Rec. E1349.

[76] "[C]lear evidence of congressional intent may illuminate ambiguous text. We will not take the opposite tack of allowing ambiguous legislative history to muddy clear statutory language." *Milner v. Dep't of Navy*, 131 S. Ct. 1259, 1266 (2011).

[77] In addition, consumer debt collection, as defined in the Final Consumer Debt Collection Rule, is generally subject to the FDCPA. That is true even if the debt collector is an attorney or law firm. "[A]ttorneys who 'regularly'

respect to" those consumers who owe (or are claimed to owe) the debts subject to collection. Because debt collection attorneys do not provide "legal advice or services" to those consumers in connection with the debt collection services—the attorneys represent clients with interests adverse to the consumers'—subparagraph (e)(2)(B) preserves the Bureau's authority regarding those services.[78]

One commenter also suggested that if the paragraph (e)(2)(B) exception applied to consumer debt collection, that exception would swallow the general rule limiting the Bureau's authority with respect to the practice of law. But subsection (e)(2)(B) only preserves the Bureau's authority when an attorney offers or provides a consumer financial product or service with respect to a consumer who is not receiving legal advice or services from the attorney in connection with the product or service.[79] To fall within the scope of the Final Consumer Debt Collection Rule, attorneys must also collect debt related to a consumer financial product or service.[80]

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engage in consumer-debt-collection activity" are subject to the FDCPA, "even when that activity consists of litigation." *Heintz v. Jenkins*, 514 U.S. 291, 299 (1995).

[78] The Bureau also notes that pursuant to paragraph (e)(3), the restriction in paragraph (e)(1) "shall not be construed so as to limit the authority of the Bureau with respect to any attorney, to the extent that such attorney is otherwise subject to any of the enumerated consumer laws or the authorities transferred under subtitle F or H." 12 U.S.C. 5515(e)(3).

[79] An association representing attorneys expressed concern that the Bureau would supervise attorneys representing larger participants in matters unrelated to the offering or provision of consumer financial products or services through its jurisdiction over service providers to larger participants. According to the commenter, the Bureau could intrude on the attorney-client relationship in non-consumer litigation matters or in cases in which an attorney defends a case on behalf of a client against a consumer. The Bureau need not address these comments in this rulemaking. The Final Consumer Debt Collection Rule establishes the Bureau's supervisory authority over the identified market. It does not alter the Bureau's supervisory authority over service providers, except insofar as it enlarges the set of supervisable firms whose activities might form the basis for supervising their service providers. A discussion of which types of service providers might be subject to the Bureau's supervisory authority would be beyond the scope of the Final Consumer Debt Collection Rule.

[80] The Business Law Section of the American Bar Association noted, in a comment, that "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 the Bureau's supervision." The Bureau takes this commenter to agree that the subparagraph (e)(2)(B) exception applies to consumer debt collection. Letter from American Bar Association, Business Law Section, to Monica Jackson, Office of the Executive Secretary, Bureau of Consumer Financial Protection (Apr. 11, 2012).

An attorney group commenter suggested that the Bureau's supervision of debt collection attorneys would interfere with the established system of regulation by state bars. As the commenter notes, state bars issue law licenses and have the power to discipline and disbar lawyers for a variety of ethical and legal violations. The commenter concludes that the Bureau therefore ought not to impose additional requirements upon attorneys. The commenter also raised the concern that the Bureau's supervision of debt collection attorneys will expose attorneys to the risk that the Bureau would adopt standards inconsistent with those of states. However, nothing in the Final Consumer Debt Collection Rule requires attorneys to engage or refrain from engaging in any particular conduct. Whatever standards might govern attorneys' consumer debt collection activities arise under existing substantive law, not the Final Consumer Debt Collection Rule. Furthermore, the Final Consumer Debt Collection Rule does not impose professional conduct rules specific to attorneys. Of course, Federal consumer financial law does impose some conduct rules that apply to attorneys. These requirements are unlikely to be inconsistent with state professional conduct rules, as such rules presumably do not obligate attorneys to violate Federal law, including Federal consumer financial law.

This commenter also suggested that the Bureau's definition of consumer debt collection would bring into the market a myriad of attorneys who file legal claims against consumers. The commenter acknowledged that engaging in debt collection as defined by the FDCPA could bring an attorney under the Bureau's supervisory jurisdiction. But, the commenter pointed out, "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 not be "engaged in 'collecting debt'" under any accepted meaning of the term. The commenter cited as an example an attorney asserting a claim against a high net-worth individual who has defaulted on a jumbo loan secured by her residence. As another example, the commenter hypothesized an attorney asserting counter-claims against a consumer or purported class of consumers in consumer-related litigation.

The Bureau agrees that not every occasion on which an attorney seeks money from a consumer constitutes debt collection and that not all attorneys are fairly considered debt collectors active in the market defined by this Final Consumer Debt Collection Rule. Attorneys engage in a diverse set of activities, many of which do not fit into the defined market. For this reason, among others, the Bureau has amended the Proposed Rule to limit consumer debt collection activities to only those conducted by "debt collectors," which are defined to be only those persons whose principal business activity is debt collection or that "regularly" engage in debt collection. Under this definition, filing an occasional counter-claim against a consumer would not necessarily make a law firm a debt collector. However, if a law firm is indeed a debt collector under the rule, filing a counter-claim against a consumer could qualify as consumer debt collection.

Several commenters were concerned that, in the course of the Bureau's supervision of an attorney, the attorney would be forced to reveal information protected by the attorney-client privilege and thereby cause the privilege to be waived. The Bureau has noted previously that it has general authority to require supervised entities to provide it with privileged information. The Bureau has promulgated a regulation clarifying that complying with such a requirement does not constitute a waiver of privilege; materials produced in response to the Bureau's demand will remain confidential.[81]

[81] 77 FR 39617 (July 5, 2012).

Moreover, the focus of the Bureau's supervision program will be the acts and practices of debt collectors as they relate to and impact consumers. Much of the relevant information is not privileged. For example, the Bureau might seek records of an attorney's communications with consumers. Thus, the Bureau can conduct meaningful supervisory activity of a debt collection attorney without asking for privileged information, and the attorney's possession of privileged information is not a reason to avoid examining the attorney. If the Bureau does seek privileged information from a debt collection attorney, it can address at that time any issues specific to that context.

For all these reasons, the Bureau declines to revise the rule to exclude collection attorneys categorically from the consumer debt collection market.

Section 1090.104 (b)—Test to Define Larger Participants

Criterion. The Bureau has broad discretion in choosing a criterion for determining whether a nonbank covered person is a larger participant of a market within which the Bureau will conduct supervision. For any specific market there might be several criteria, used alone or in combination, that could be viewed as reasonable alternatives. For the consumer debt collection market, the Bureau considered a variety of criteria, including annual receipts; number of consumers; number of accounts; annual recoveries; number of employees and annual amount of new business (debt purchased by or placed with a collector). The Bureau proposed to use annual receipts as the criterion for defining larger participants of the market for consumer debt collection. The proposed concept of "annual receipts" was based on the SBA's definition of "annual receipts," as well as on the calculations relevant for Federal income tax and for Census reporting.

The Bureau believes that annual receipts is a reasonable criterion because, among other things, it is a meaningful measure of the level of a consumer debt collector's participation in the consumer debt collection market and the consumer debt collector's corresponding impact on consumers. For example, third-party collectors, debt buyers, and collection law firms earn income from recovering consumer debt. Those recoveries are the result of market participation, either through traditional collection means or litigation. Thus, the level of a person's market participation is reflected by the amount of that person's annual receipts.

In addition, "annual receipts" is a quantity that is familiar to nonbank covered persons and that reflects calculations already performed using records created in the ordinary course of business. The SBA's definition of "annual receipts" has been used by the SBA for purposes of measuring small business concerns since soon after the inception of its program.[82] IRS tax forms require reporting of similar quantities. Thus, using "annual receipts" as the criterion should make it straightforward for firms to assess whether they qualify as larger participants.

In addition, using annual receipts as the criterion facilitates the Bureau's use of data from the Economic Census[83] to determine the general contours of the market for consumer debt collection. The Economic Census undertakes a direct survey of domestic business establishments and releases comprehensive statistics about key features and activity levels of these businesses, including total annual receipts.[84] To conduct an Economic Census, the Census

[82] *See* "SBA Size Standards Methodology" at 4, *available at* http://www.sba.gov/sites/default/files/size_standards_methodology.pdf.

[83] U.S. Census Bureau 2007 Economic Census, *available at* http://www.census.gov/econ/census07/.

[84] As noted in the section-by-section discussion of the definition of "annual receipts," the SBA and the Economic Census use the term "annual receipts" somewhat differently. As used by the Economic Census, the term includes receipts from all business activities, including net investment income, interest, and dividends, whether or not payment was received in the census year. The SBA, by contrast, defines the term to exclude net capital gains and losses and thus does not capture investment income. Notwithstanding this difference in the meaning of the term, the Economic Census data regarding annual receipts remain useful for purposes of developing a general understanding of the market for consumer debt collection and establishing a test for defining larger participants of that market.

Bureau mails out data collection forms for all establishments of multi-unit companies, large single-unit employers, and a sample of small employers (generally defined as having three or fewer employees).[85]

The Bureau recognizes that there are limitations to the use of the Economic Census data on annual receipts in the debt collection market for purposes of the Final Consumer Debt Collection Rule. The Economic Census data may be both over-inclusive and under-inclusive.[86] The Economic Census data are not limited to the collection of consumer financial debt, but rather include both business and non-financial consumer debt. They may also be under-inclusive because entities that fall within the NAICS code may not correctly identify themselves or may otherwise fail to respond accurately to the Census. Moreover, the NAICS code may not include all persons engaged in activities that meet the definition of consumer debt collection. However, the Economic Census data are nevertheless useful in showing the general contours of the consumer debt collection market, the relative size of participants within it on an aggregated basis, and how participants are distributed by size.

Commenters suggested a variety of alternative criteria such as the number of accounts, the number of complaints about an entity, the number of employees, an entity's relative market share, or the annual receipts of an entity in a given geographic or demographic segment. One commenter representing third-party debt collectors stated that annual receipts is not an

[85] Response to these forms is required by law. No firm-level data are released; rather, the data are aggregated by sector according to North American Industry Classification System (NAICS) codes. When categorizing the data by industry sector, both the SBA and the Economic Census use the NAICS codes. *See infra* n.86 and accompanying text.

[86] Entities whose activities fall within this NAICS code are described as: "establishments primarily engaged in collecting payments for claims and remitting payments collected to their clients" and include, among others, collection agencies, debt collection services, and account collection services. NAICS code 56144 (collection agencies), *available at* http://www.census.gov/cgi-bin/sssd/naics/naicsrch. The Bureau also believes that debt buyers often self-identify in this NAICS code, although the description does not explicitly mention them. *See, e.g.*, SquareTwo Financial Corp., Registration of Securities Issued in Business Combination Transactions (Form S-4/A) (Mar. 4, 2011), *available at* http://pdf.secdatabase.com/178/0001047469-11-001751.pdf.

appropriate criterion to measure participants in the consumer debt collection industry because it would capture amounts collected by an agency on behalf of the debt owner. This commenter suggested measuring gross revenue instead.

The Bureau does not believe these other suggested criteria are superior alternatives. The available data do not permit the Bureau meaningfully to measure the general contours of the market based on these criteria and thus, on such bases, to devise a test for defining larger participants of the consumer debt collection market or to apply the test efficiently. Further, as set forth in the Proposal, the Bureau believes that the number of employees is not a suitable alternative criterion because it could be difficult for a multi-line company to apportion employee time between market-related and other activities and because many responsibilities may be fulfilled by contractors rather than employees. With respect to the suggestion of gross revenues as a criterion, the Final Consumer Debt Collection Rule's definition of "annual receipts" is functionally similar to what the commenter proposed. Amounts collected on behalf of another are excluded from the proposed calculation for annual receipts, just as they would be from the commenter's proposed gross revenues criterion.

A representative of the debt buying industry argued that the annual receipts criterion discriminated unfairly between debt buying and third-party debt collection.[87] The proposed definition of annual receipts, in accordance with Federal income tax reporting and Census reporting, excludes amounts collected on behalf of and remitted to others.[88] This commenter

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[87] The Bureau notes that some firms function both as third-party debt collectors and as debt buyers. The discrepancy that the commenter observes is a difference between business models, not necessarily between firms.

[88] The Census quantity "receipts" "exclude[s] . . . gross receipts collected on behalf of others." Census Bureau, *American Factfinder Help*, http://factfinder2.census.gov/help/en/american_factfinder_help.htm (select "Glossary"; select "Sales, shipments, receipts, revenue, or business done"; select "sector specific definitions"), last visited Oct. 19, 2012. This is in accord with the usual treatment of such amounts under income tax accounting. *See generally Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955) (defining income as "instances of undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion.").

observed that for a given amount of annual receipts, calculated per the proposed definition, a debt buyer would have recovered substantially less debt from consumers than would a comparable third-party debt collector.[89] The commenter contended that the amounts recovered from consumers (gross recoveries) was the proper criterion for market participation. The commenter suggested that the Bureau could use an amount such as annual receipts as a substitute if the calculation included amounts recovered on behalf of others. Under that calculation, a debt buyer and a third-party debt collector with the same amount of gross recoveries would also have about the same amount of annual receipts.

The Bureau disagrees that the Final Consumer Debt Collection Rule's concept of annual receipts should correspond directly to gross recoveries, because the Bureau does not consider gross recoveries to be the sole or proper measure of market participation relevant for purposes of the Final Consumer Debt Collection Rule. Given that the goals of supervision include assessing risks to consumers and to consumer financial markets, the Bureau has chosen to view a firm's level of participation in this market chiefly in terms of the firm's overall impact on consumers. Actually receiving a sum of money from consumers is, to be sure, an important type of impact. But a consumer debt collector also can substantially affect consumers from whom it does not succeed in recovering money. For example, a firm affects consumers by having authority to collect and by attempting to collect their debts, regardless of how much it succeeds in recovering. In addition, a consumer debt collector may report to consumer reporting agencies those debts that go unrecovered. Furthermore, a firm's conduct in collecting debt—by

[89] A third-party debt collector receives a contingency fee based on the amounts recovered. For 2011, the average rate was 28%. ACA International, *2012 Agency Benchmarking Survey*, at 21. According to the ACA's 2012 Benchmarking Survey, collection agency commission rates averaged 28.4% in 2011, with a median of 25.5%. Thus, for annual receipts of $10 million, an average entity will have recovered around $36 million. By contrast, a debt buyer with $10 million of annual receipts will presumably have recovered only around $10 million.

contacting consumers, contacting third parties, filing lawsuits, garnishing wages, and using other debt collection techniques—affects even those consumers who actually do not owe or are not liable for the debts under collection.

Thus, a myriad of indicia reflect various types of impact on consumers. Among those indicia are the number of consumer contacts, the number of consumers or number of consumer accounts under collection, the frequency of reports to consumer reporting agencies, the number of lawsuits filed or judgments obtained, the total face value of debt under collection, the total fair value of debt under collection, and the amount recovered from consumers. Another measure of impact on consumers would be the scale of a firm's operations—such as the number of employees available to call consumers or the volume of mail the firm sends. The Bureau does not regard any of these indicia on its own as the true measure of market participation; rather, it has attempted to reflect all of them, albeit imperfectly, in a single criterion. Several options for the criterion might serve that purpose to some degree. For example, total face value, gross recoveries, and annual receipts should all generally correlate with the various types of consumer impact.

For none of these criteria is the relationship between the single numerical value and the various forms of consumer impact identical for all types of firms, all models of debt collection, or all types or ages of debt.[90] In particular, each criterion produces some variation between debt

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[90] All other things being equal, a firm that contacts a larger number of consumers is probably collecting on a larger face value of debt, will probably recover more, and will probably have greater annual receipts. However, the correlation is imperfect for each possible criterion, because the relationship between consumer impact and each criterion varies depending on a number of circumstances such as the age and type of the debts involved and the techniques and business models applied to collecting them. For example, a recent survey found liquidation rates ranging from 12.0 to 28.8 percent depending on the type of debt being collected. ACA International, *2012 Agency Benchmarking Survey*, at 21 (2012). As another example, recent studies have shown prices for charged-off debt that range from less than 1% of face value to over 15% of face value. *See, e.g.*, Kaulkin Ginsberg, *U.S. Credit Card Sector Update: Market Trends, Liquidation, and Portfolio Pricing*, Presentation to ACA International Fall Forum, Nov. 2010. And five publicly traded debt buyers have reported recovering from 150 percent to 250 percent of the

collection conducted on a debt buying model and performed as a third-party debt collector.[91] Total face value of debt under collection, as a criterion, would tend to magnify the apparent market participation of debt buyers. Debt buyers hold debts on their books for years, often purchase debts for a small fraction of their face values, and expect to recover relatively small fractions of the debts' face values. Thus, measuring the total face value of a debt buyer's portfolio at a given point in time could overstate its amount of consumer impact, as compared to a debt collector that turns over that volume of debt (measured by face value) on a much shorter time scale. On the other hand, gross recoveries, as a criterion, could tend to understate the impact of debt buyers as compared to third-party debt collectors. Third-party collectors tend to work with relatively recently defaulted debt and to retain accounts for fairly brief periods of time.[92] To the extent that a debt buyer focuses on older and longer-defaulted debt, and persists over years in its attempts to collect debts on its books, a given amount of gross recoveries will

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purchase price of their debts. Asset Acceptance Capital Corp., Annual Report (Form 10-K) (Mar. 6, 2012), Portfolio Recovery Associates, Inc., Annual Report (Form 10-K) (Feb. 28, 2012), SquareTwo Financial Corp., Annual Report (Form 10-K) (Feb. 24, 2012), Encore Capital Group, Inc., Annual Report (Form 10-K) (Feb. 9, 2012); Asta Funding, Inc., Annual Report (Form 10-K) (Dec. 14, 2011).

[91] The Bureau reiterates that these are different business models and do not necessarily involve different firms. Some firms operate both as debt buyers and as third-party debt collectors.

[92] The Bureau roughly estimates that third-party collectors, on average, collect on new accounts for approximately 220 days. That figure is the difference between the average account age for primary accounts (those with their first debt collectors after default) and for secondary accounts (those with their second debt collectors, after a first period as primary accounts). ACA International, *2011 Top Collection Markets Survey* (2011). In general, the age of a secondary account reflects the age at which it reached its first debt collector, plus the time that debt collector held the account before it was transferred to a second debt collector. Thus, the difference between primary and secondary ages is a rough indicator of how long debt collectors tend to hold primary accounts. ACA International's 2011 survey reported average ages for each of eight sub-markets; to reach the estimate of 220 days, the Bureau averaged the hold time, calculated in this manner, across all eight sub-markets. Debt buyers, on the other hand, collect on accounts for much longer; on average, the five publicly traded debt buyers' portfolios appear to yield, on average, 17% of their purchase price five years after purchase. This figure represents estimated remaining collections divided by purchase price, as reported in 2011 filings for debt purchased in 2006. Asset Acceptance Capital Corp., Annual Report (Form 10-K) (Mar. 6, 2012), Portfolio Recovery Associates, Inc., Annual Report (Form 10-K) (Feb. 28, 2012), SquareTwo Financial Corp., Annual Report (Form 10-K) (Feb. 24, 2012), Encore Capital Group, Inc., Annual Report (Form 10-K) (Feb. 9, 2012); Asta Funding, Inc., Annual Report (Form 10-K) (Dec. 14, 2011).

represent substantially more contact with consumers than would that same amount if recovered by a third-party collector.

That is not to say that total face value under collection or gross recoveries would be an illegitimate or improper measure of market participation. Each captures aspects of impact on consumers and thus of participation in the consumer debt collection market. Nor do the observations above suggest that the Bureau should treat third-party debt collectors and debt buyers separately. The Bureau regards the two types of activity as part of the same market. They fulfill the same purpose in consumer financial markets by generating recoveries that reduce creditors' losses on defaulted debts. Debt buyers and third-party debt collectors also use many of the same techniques to collect debts; their activities are therefore similar from consumers' perspectives. Moreover, the differences between the two business models, in terms of how the possible criteria of market participation measure them, are not necessarily greater than differences that exist among firms practicing each model. For example, total face value under collection might treat a debt buyer that focuses on recently defaulted debt similarly to a third-party collector and differently from a debt buyer that works with comparatively old debts. The Bureau concludes that the fact that a criterion tends to produce different results for different forms of debt collection activity is not, alone, a reason not to use a particular criterion.

Annual receipts, as the commenter pointed out, is not the best measure of gross recoveries, one aspect of consumer impact. However, annual receipts, as compared to the other two criteria just discussed, seems the most appropriate measure of overall market participation. Compared to those other criteria, it is a better measure of an entity's capacity to contact consumers, engage in debt collection techniques, and collect debts, as well as the likelihood of recovery.

In addition, the concept of "annual receipts" has practical advantages, as discussed above. First, the proposed criterion can generally be calculated using existing business records because consumer debt collectors already prepare IRS filings on an annual basis and maintain accounting systems that support those filings.[93] Third-party debt collectors do not include amounts remitted to others in their income calculations for purposes of Federal income tax reporting. Using gross recoveries as the criterion, as the commenter suggested, would force consumer debt collectors to depart significantly from their IRS reports.[94] Second, the proposed criterion facilitates the Bureau's analysis of the market and development of a threshold for larger-participant status because third-party debt collectors already report their incomes to the Census on this basis. The Bureau is not aware of comparable market data on the gross recoveries of various consumer debt collectors.[95]

For the reasons set forth above, the Bureau declines to depart from the proposed criterion for the larger-participant test for the consumer debt collection market and adopts the use of annual receipts as proposed.

Threshold. As noted in the Proposal, the Bureau has broad discretion in setting the threshold above which an entity would qualify as a larger participant in the consumer debt collection market. The Bureau proposed $10 million in annual receipts as the threshold. For the

[93] Another alternative the Bureau considered was to exclude from annual receipts the price of debt buyers pay to purchase debt. But this alternative would be administratively difficult for debt buyers and for the Bureau. Because debt buyers typically amortize their debt purchases over a number of years, it would be difficult to know what amount to exclude when counting the income from recovering debts many years after purchase.

[94] Under the commenter's proposed method, a third-party debt collector would need to revise its annual receipts upwards by about 350 percent, with the actual amount of the change depending on the details of its pricing as agreed with various creditors.

[95] Such information would also be difficult for the Bureau to infer from the Census data, in part because some firms function both as third-party debt collectors and as debt buyers. To use gross recoveries as the criterion, the Bureau would need to understand what proportions of these firms' receipts came from which type of activity.

reasons stated below, the Bureau adopts that proposed threshold in the Final Consumer Debt Collection Rule.

Available data indicate that a threshold of $10 million in annual receipts resulting from consumer debt collection activities will enable the Bureau to cover in its nonbank supervision program a broad range of consumer debt collectors. The Bureau believes that this threshold will cover a sufficient number of market participants to enable the Bureau effectively to assess compliance and identify and assess risks to consumers, but at the same time cover only consumer debt collectors that can reasonably be considered "larger" participants in the market. Although the Bureau's supervision program would cover only a small percentage of firms in the market, the Bureau would have supervisory authority over nonbank entities interacting with a significant portion of consumers with debt under collection.[96]

As explained in the Proposal, based on the Economic Census, a threshold of $10 million would likely bring within the Bureau's supervisory authority approximately 175 out of the 4,500 entities engaged in debt collection under NAICS code 561440.[97] Thus, larger participants would include about 4% of all consumer debt collection firms, representing about 63% of annual

[96] As discussed below, the Bureau estimates it may examine the majority of larger participants at an average rate of up to once every five years. Individual consumer debt collectors may be subject to examination more frequently, as a result of the Bureau's consideration of the risk-based factors enumerated in 12 U.S.C. 5514(b)(2). The $10 million threshold is not set to enable the Bureau to supervise every larger participant on a regular basis but rather to permit the Bureau, using the available resources and exercising its discretion with respect to those risk-based factors, to focus its supervisory activity at those entities where it would most effectively serve the Bureau's missions.

[97] One *ex parte* submission noted that out of 745 collection agencies licensed in Colorado, 162 reported in an informal survey that they would meet the proposed threshold for larger-participant status in the consumer debt collection market. However, these figures are not comparable to the Bureau's estimates based on the nationwide Census data. A collection agency is required to obtain a Colorado license if it is located in Colorado; if it regularly collects from debtors located in Colorado; if it solicits the business of companies located in Colorado or if it collects debts on behalf of companies located in Colorado. Colo. Rev. Stat. § 12-14-102; Colo. Att'y Gen., Persons Required to be Licensed as a Colorado Collection Agency, pp. 4-5 (Aug. 12, 1994). As a result of Colorado's expansive licensing requirements, neither the count of larger participants that are operating in Colorado nor the count of debt collection agencies licensed there can be extrapolated (on the basis of population or other factors) to the overall counts of larger participants or consumer debt collectors.

receipts in the consumer debt collection market.[98] The Bureau must deploy its limited resources in an efficient manner in order to encourage lawful behavior and assess risks to consumers. Consumer debt collectors that are larger participants play a greater role in the market, and therefore have a greater impact on consumers, than consumer debt collectors that are not larger participants. Although consumer debt collectors that are not larger participants may commit abuses, lowering the threshold to cover them would require significant additional resources yet would add less than half the market—measured by annual receipts—to the Bureau's supervisory authority. Meanwhile, the Bureau has the authority to supervise any nonbank covered person who it determines, on the basis of reasonable cause, is engaging or has engaged in conduct that poses risk to consumers.[99] In addition, nonbank covered persons generally are subject to the Bureau's regulatory and enforcement authority, and any applicable Federal consumer financial law, regardless of whether they are subject to the Bureau's supervisory authority.

Several commenters suggested that the Bureau adopt a threshold lower than the one proposed. One suggested that the threshold be lowered to $7 million, the threshold that the Bureau adopted for the consumer reporting market. Another did not advocate a particular threshold but argued that the Bureau could reasonably supervise more than 4% of participants in the debt collection market. One commenter argued that 4% of the market is not sufficient

[98] The Bureau recognizes that because the Economic Census data include the collection of medical debt, which, according to the ACA Survey, was 35% of new business for debt collectors in 2010, the Bureau may be overestimating market coverage. ACA International, *ACA Top Collection Markets Survey*, 2011. A hypothetical collector might have $14 million in actual receipts, but, if 35% of them resulted from collecting medical debt, its annual receipts as defined by the rule would be just at the $10 million threshold. In reality, some debt collectors have portfolios with higher percentages of medical debt than average and some have lower. In addition, because recovery rates may vary depending on the type of debt being collected, medical debts may not account for the same proportion of receipts that they do of debts under collection. In sum, the Bureau does not have a way of ascertaining in detail how any overestimation with respect to medical debt might affect the scope of the supervisory authority established by the rule. The Bureau does not believe the effect is large. Even if the Bureau were to change the threshold to $14 million to account for the exclusion of medical debt, a $14 million threshold would cover approximately 144 firms, or approximately 3% of total firms, and approximately 61% of market share.

[99] 12 U.S.C. 5514(a)(1)(C).

coverage because small debt collectors commit the greatest abuses. Many consumer-group commenters recommended an approach that would effectively lower the threshold by counting a firm's receipts from any source, as long as at least $3.5 million of its receipts resulted from the collection of debts related to consumer financial products or services. For the reasons discussed above, the Bureau believes that a threshold of $10 million serves the purposes and objectives of its supervision program.[100]

One consumer group commented that the Bureau did not explain why the threshold for consumer debt collection differs from the $7 million threshold for consumer reporting. As stated in the Proposal, the Bureau considers each market separately and may adopt different criteria and thresholds for each market. Among other differences between the two markets that are the subjects of the Bureau's first two larger-participant rules, consumer reporting entities and consumer debt collectors perform entirely different functions; firms in the two markets interact with consumers in different ways; the market structures are different;[101] the substantive Federal consumer financial law principally relevant to the two markets have major differences;[102] and the manner in which annual receipts connect to consumer interactions is different in the two markets.[103] The Bureau does not mean to suggest that each such difference determines the

[100] The Bureau also will examine depository institutions, credit unions, and nonbanks, insofar as such entities are subject to its supervisory authority, with regard to those entities' processes for managing the risks of service-provider relationships with any third-party debt collectors whose services they use. The Bureau expects covered persons to take steps to ensure that their business arrangements with service providers do not present unwarranted risks to consumers. Such steps should include monitoring to ensure whether service providers are complying with Federal consumer financial law and reviewing service providers' policies, procedures, internal controls, and training materials to ensure that service providers conduct appropriate training and oversight of employees or agents that have consumer contact or compliance responsibilities. *See* Consumer Financial Protection Bureau, CFPB Bulletin 2012-03 (Apr. 13, 2012), *available at* http://files.consumerfinance.gov/f/201204_cfpb_bulletin_service-providers.pdf.

[101] For instance, the consumer debt collection market is diffuse and is made up of approximately 4,500 entities, a number which is more than 10 times greater than the number of consumer reporting entities.

[102] The statute principally relevant for the consumer reporting market is the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681 *et seq.*, while the statute primarily relevant to the consumer debt collection market is the FDCPA.

[103] *See* 77 FR 9594-9600.

Bureau's views with respect to the criterion or the threshold or that each difference would be important to justify using different criteria or thresholds for larger-participant status with respect to the two different markets. Rather, the Bureau recites these differences in order to explain that the thresholds for the consumer reporting and consumer debt collection markets, while they are both expressed in dollar figures related to annual receipts, are simply not comparable.

For these reasons, the Bureau declines to lower the threshold for larger-participant status in the consumer debt collection market.

The same consumer group commenter suggested that the Bureau undertake another rulemaking to supervise smaller debt collectors. The Bureau will continue to research and monitor the consumer debt collection market to determine if additional rulemakings are necessary. In addition, as discussed above, nonbank covered persons may be subject to the Bureau's enforcement, regulatory, and supervisory authority even if they are not larger participants.

A handful of commenters suggested raising the threshold. A commenter representing third-party debt collectors suggested that the threshold should be raised to $250 million in annual receipts.[104] The commenter also argued that its suggested threshold would be consistent with what the commenter said is the Bureau's mandate under the Dodd-Frank Act, to supervise only very large nonbank covered persons. This commenter, referring to the Bureau's supervisory authority over "very large" depository institutions and credit unions, *i.e.*, those with over $10

[104] The commenter stated that a $250 million threshold would account for the economics of the debt collection industry in which consumers make payments in trust to a consumer debt collector which then distributes the payment to the credit grantor, less a contingency fee. The commenter did not explain, and the Bureau is not aware, why a cash flow arrangement of this type should affect the selection of the larger-participant threshold, particularly given that for third-party debt collectors the amounts collected for others do not count towards the threshold.

billion in assets, and their affiliates,[105] argued that the Bureau correspondingly should supervise only very large nonbank entities. But, as the Bureau explained in the Consumer Reporting Rule, the Dodd-Frank Act's division of supervisory authority for insured depository institutions and credit unions does not govern the supervision of nonbank entities. Unlike depository institutions and credit unions with less than $10 billion in assets, nonbanks in the consumer debt collection market that are not subject to Bureau supervision under 12 U.S.C. 5514 generally will not be subject to other Federal supervision for assessing compliance with Federal consumer financial law or for other purposes. Moreover, the Dodd-Frank Act authorizes the Bureau to supervise entities that are "larger" participants of a market, not merely "very large" participants.[106] Accordingly, the Bureau declines to raise the proposed annual receipts threshold to $250 million for the consumer debt collection market in response to this comment.

Additionally, the Bureau does not believe that a $250 million annual receipts threshold would result in sufficient market coverage to allow it effectively to assess compliance with Federal consumer financial law and detect and assess risks to consumers in the overall market. The Bureau estimates that a $250 million threshold would cover, at most, 7 consumer debt collectors, less than 0.2 percent of market participants and representing approximately 20 percent of overall collection industry receipts.[107] The approximately 168 additional entities (for a total of about 175) covered by the Bureau's proposed threshold represent an additional 43 percent of annual receipts in the market. The proposed threshold would provide the Bureau with the ability to supervise a broader range of market participants and identify and evaluate risks to consumers.

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[105] 12 U.S.C. 5515.
[106] 12 U.S.C. 5514.
[107] Estimated from 2007 U.S. Economic Census, *available at* http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_56SSSZ6&prodType=table, scroll to NAICS code 561440.

A commenter representing debt buyers suggested that the Bureau raise the threshold to $50 million in annual receipts to provide “regulatory relief” to the many debt buying companies that are small businesses. But the SBA’s size standard in the debt collection market is $7 million.[108] Therefore, under the larger-participant threshold as proposed and adopted—$10 million—no businesses that qualify as small businesses for SBA purposes would ordinarily be classified as larger participants. Additionally, the Bureau does not believe that a $50 million annual receipt threshold would result in sufficient market coverage to allow it effectively to assess compliance with Federal consumer financial law and detect and assess risks to consumers. A $50 million threshold would cover fewer than 30 consumer debt collectors, less than one percent of market participants and representing only approximately 39 percent of overall collection industry receipts.[109]

The Bureau also received comments from the debt buying industry and a trade association for consumer credit agencies asserting that the proposed threshold would not reflect the middle market for consumer debt collection. According to the commenters, there must be a market of mid-sized firms that includes more than just those between $7 and $10 million in annual receipts. But the Bureau notes that the SBA’s small-business standard and the Bureau’s larger-participant threshold cannot be compared in this way. “[L]arger participants,” in 12 U.S.C. 5514(a)(2), does not refer to the absolute size of the businesses in question. As explained

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[108] A commenter noted that the SBA has proposed to amend its size standard for the category corresponding to debt collector. Under the SBA’s proposed rule, a debt collector would be a “small business” if it has $14 million or less in annual receipts. 76 FR 63510 (Oct. 12, 2011). This commenter urged the Bureau to increase the larger-participant threshold to avoid capturing would-be small businesses as larger participants. However, even if the SBA finalizes a regulation in accordance with its proposal, the change would not alter the degree to which various entities participate in the consumer debt collection market. Thus, the Bureau declines to raise the threshold for the consumer debt collection market to $50 million in annual receipts.

[109] *See* 2007 U.S. Economic Census, *available at* http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_56SSSZ6&prodType=table, scroll to NAICS code 561440.

in the Consumer Reporting Rule, the Bureau interprets “larger participants” to mean those persons that participate to a relatively large degree in the relevant market. Given the structure of the consumer debt collection market, the Bureau believes it is reasonable to set a threshold for larger-participant status at $10 million in annual receipts. In fact, the median annual receipts for businesses within the NAICS code for debt collection is less than $500,000.[110]

Finally, two commenters recommended that the Bureau index the threshold for annual receipts for inflation. At this time, the Bureau does not intend to index for inflation. To the extent necessary or appropriate, the Bureau anticipates making adjustments to the threshold through future rulemakings. These future rulemakings may reflect inflation, shifts in the market, and other data that may be available to the Bureau.

For the reasons stated above, the Bureau adopts the proposed threshold of $10 million in annual receipts for the consumer debt collection market.

Apportionment. As noted in the Proposal, some multi-line companies derive only portions of their annual receipts from consumer debt collection activities. The Proposed Rule provided that the only annual receipts to be considered for purposes of determining larger-participant status are those “resulting from” activities related to the consumer debt collection market.

The Bureau received a number of comments on the issue of apportionment. One industry representative said that apportionment would present substantial difficulties for multi-line companies because IRS forms generally do not differentiate between income streams within organizations, and a multi-line company will need to perform burdensome calculations beyond

[110] *See id*.

the calculations IRS forms require.[111] A group representing attorneys engaged in commercial law stated that the Proposed Rule would likely require participants to overhaul their accounting systems to segregate revenue by activity type, at a significant cost, in order to determine whether they are larger participants or to respond to Bureau assertions on that point. Two consumer groups suggested that the Bureau should count a company's total annual receipts, from any of its revenue streams, toward the larger-participant threshold. These commenters stated that determining a company's status as a larger participant using total annual receipts would be much simpler than trying to segregate annual receipts from market-related activities, and would serve to prevent evasion by reducing the temptation for companies to misclassify the source of their revenues to avoid supervision. Another commenter said that the Bureau should define the term "apportionment" and use that definition when describing the aggregation of annual receipts for affiliated companies.[112] Finally, one commenter representing third-party debt collectors supported the concept of apportionment and asked the Bureau to issue a simple form by which market participants could report apportioned data.

The Bureau declines to define the term "apportionment." The term is not used in the regulatory text; rather, apportionment is a concept that conveys the inclusion of receipts

[111] This commenter also appears to have misapprehended the Proposed Rule to make IRS forms the only permissible source of information about a company's annual receipts. The commenter recommended that the final rule state expressly that a market participant may make a good faith determination of its annual receipts based on records maintained in the ordinary course of business. The Bureau does not believe such an addition to the regulation is necessary, because the rule does not require companies to rely solely on their IRS forms. The criterion by which market participation is measured is annual receipts resulting from consumer debt collection; the Bureau is aware that this specific quantity does not necessarily correspond, for every company, to a figure reported to the IRS. In addition, § 1090.103(a) establishes that a person wishing to dispute whether it is a larger participant may provide the Bureau records, documents, or other evidence reasonably identifying what portion of its annual receipts result from activities falling outside a covered market.

[112] The Bureau also received a comment from a representative of the loan servicing industry recommending that the concept of apportionment should apply to both the multi-line entities and their affiliates. This commenter apparently interpreted the Proposal to mean that only an affiliated company's receipts would be subject to apportionment, which would then be aggregated with the parent company's annual receipts from any activity. In fact, the rule permits a company to apportion both its receipts and its affiliates' to calculate its annual receipts for purposes of the rule.

“resulting from” activities related to the consumer debt collection market. The Bureau believes it is appropriate to permit apportionment of annual receipts. In some instances there may be nonbank covered persons that have significantly different business lines, with certain business lines not relating to the consumer debt collection market. In addition, as noted above, participants of the consumer debt collection market should be reasonably aware of the sources of their revenue, and should thus be able to apportion without undue burden. To clarify, market participants are not required to apportion their annual receipts on a periodic or other basis under the Final Consumer Debt Collection Rule. Accordingly, the Bureau finds it unnecessary to publish a form by which market participants could report such data. On the contrary, the Bureau has decided to permit apportionment, in part to enable a nonbank covered person to apportion its annual receipts if it wishes to challenge an assertion by the Bureau that it qualifies as a larger participant. In such a case, the person may provide records, documents, or other evidence to the Bureau reasonably identifying that portion of its annual receipts that do not result from market-related activities. However, if the person does not wish to apportion receipts in challenging such an assertion, it may forego doing so, with the sole result being that it will have higher annual receipts counted toward the $10 million threshold for larger-participant status.

Accordingly, the Bureau adopts in the Final Consumer Debt Collection Rule the provision that the only receipts counting toward the calculation of “annual receipts” are those “resulting from” activities related to the covered market.

VI. Section 1022(b)(2)(A) of the Dodd-Frank Act

A. Overview

In developing the Final Consumer Debt Collection Rule, the Bureau has considered potential benefits, costs, and impacts.[113] The Proposal set forth a preliminary analysis of these effects, and the Bureau requested and received comments on the topic. In addition, the Bureau has consulted or offered to consult with the Federal Trade Commission, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Federal Housing Finance Agency, the National Credit Union Administration, and the United States Departments of Education, and Housing and Urban Development, in connection with this rulemaking, including regarding consistency with any prudential, market, or systemic objectives administered by such agencies.

The Final Consumer Debt Collection Rule defines a category of "larger participants of other markets for consumer financial products or services" that will be subject to the Bureau's nonbank supervision program pursuant to 12 U.S.C. 5514(a)(1)(B). The category defined by the rule includes "larger participants" of a market for "consumer debt collection" that the rule describes. Participation in this market is assessed on the basis of annual receipts, generally averaged over three years, resulting from consumer debt collection activities. If a nonbank covered person's annual receipts from consumer debt collection are over a threshold of $10 million, the entity is a larger participant in that market and thus subject to the Bureau's

[113] Specifically, 12 U.S.C. 5512(b)(2)(A) calls for the Bureau to consider the potential benefits and costs of a regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services, the impact on depository institutions and credit unions with $10 billion or less in total assets as described in 12 U.S.C. 5516, and the impact on consumers in rural areas. In addition, 12 U.S.C. 5512(b)(2)(B) directs the Bureau to consult, before and during the rulemaking, with appropriate prudential regulators or other Federal agencies, regarding consistency with objectives those agencies administer. The manner and extent to which the provisions of 12 U.S.C. 5512(b)(2) apply to a rulemaking of this kind that does not establish standards of conduct is unclear. Nevertheless, to inform this rulemaking more fully, the Bureau performed the analysis and consultations described in those provisions of the Dodd-Frank Act.

supervisory authority. With the rule in place, the Bureau will be able to commence supervisory activities in the identified consumer debt collection market.

B. Potential Benefits and Costs to Consumers and Covered Persons

This analysis considers the benefits, costs, and impacts of the key provisions of the rule against a pre-statutory baseline; that is, the analysis evaluates the benefits, costs, and impacts of the relevant statutory provisions and the regulation combined.[114] Before the Dodd-Frank Act, there was no Federal program for supervision of nonbank participants of the consumer debt collection market. With the statute and the Final Consumer Debt Collection Rule in effect, the Bureau will be able to supervise participants of the consumer debt collection market who have annual receipts from consumer debt collection of more than $10 million.

The Bureau notes at the outset that limited data are publicly available with which to quantify the potential benefits, costs, and impacts of the rule. For example, although the Bureau has general quantitative information, discussed above, on the number of market participants and their receipts, the Bureau lacks detailed information about their rate of compliance or non-compliance with Federal consumer financial law (including the FDCPA) and about the range of compliance mechanisms and their costs to market participants. The Proposal requested information to support the analysis of benefits, costs, and impacts, but commenters did not provide, or identify sources for, relevant data.[115] Over time, the Bureau expects to develop information related to these topics through its supervisory and other activities.

[114] The Bureau has discretion in any rulemaking to choose an appropriate scope of analysis with respect to potential benefits and costs and an appropriate baseline. The Bureau, as a matter of discretion, has chosen to describe a broader range of potential effects to more fully inform the rulemaking.

[115] One commenter asserted without explanation that medium-sized firms would need to dedicate between three and eight employees to the supervision process during the two weeks before and two weeks of an examination.

In light of these data limitations, this analysis generally provides a qualitative discussion of the benefits, costs, and impacts of the Final Consumer Debt Collection Rule. General economic principles, together with the limited data that are available, provide insight into these benefits, costs, and impacts. Where possible, the Bureau has made quantitative estimates based on these principles and data as well as its experience of supervision.

The discussion below describes three categories of potential benefits and costs. First, after the rule authorizes the Bureau's supervision in the consumer debt collection market, larger participants in the market may respond to the possibility of supervision by changing their systems and conduct. Second, when the Bureau undertakes supervisory activity at specific consumer debt collectors, those consumer debt collectors will incur costs from participating in supervision, and the results of these individual supervisory activities may also produce benefits and costs.[116] Third, the Bureau analyzes the costs associated with entities' efforts to assess whether they qualify as larger participants under the rule.

1. Benefits and Costs of Responses to the Possibility of Supervision

The Final Consumer Debt Collection Rule subjects larger participants of the consumer debt collection market to the possibility of Bureau supervision. That the Bureau is authorized to undertake supervisory activities with respect to a nonbank covered person who qualifies as a larger participant does not necessarily mean the Bureau will in fact undertake such activities regarding that covered person in the near future or at all. Rather, as explained in the Proposal, supervision of any particular larger participant as a result of this rulemaking will be probabilistic

[116] Pursuant to section 12 U.S.C. 5514(e), the Bureau also has supervisory authority over service providers to nonbank covered persons encompassed by 12 U.S.C. 5514(a)(1), which includes larger participants. The Bureau does not have data on the number or characteristics of service providers to the roughly 175 larger participants of the consumer debt collection market. The discussion herein of potential costs, benefits, and impacts that may result from the Final Consumer Debt Collection Rule generally applies to service providers to larger participants.

in nature. For example, the Bureau will examine certain larger participants on a periodic or occasional basis. The Bureau's decisions about supervision will be informed, as applicable, by the factors set forth in 12 U.S.C. 5514(b)(2), relating to the size and transaction volume of individual participants, the risks their consumer financial products and services pose to consumers, the extent of State consumer protection oversight, and other factors the Bureau may determine are relevant. Each entity that believes it qualifies as a larger participant will know that it might be supervised and may gauge, given its circumstances, the likelihood that the Bureau will initiate an examination or other supervisory activity.

As the Proposal pointed out, the prospect of potential supervisory activity may create an incentive for larger participants to increase compliance with Federal consumer financial law. They may anticipate that by doing so (and thereby decreasing risks to consumers), they can decrease their chances of actually being subjected to supervision as the Bureau evaluates the factors outlined above. In addition, an actual examination would likely reveal any past or present noncompliance, which the Bureau may seek to correct through supervisory activity or, in some cases, enforcement actions. Larger participants may therefore judge that the prospect of supervision has increased the potential consequences of noncompliance with Federal consumer financial law, and they may seek to decrease that risk by curing or mitigating any noncompliance.

The Bureau believes it is likely that market participants will increase compliance in response to the Bureau's supervisory activities authorized by this rule. However, because the Final Consumer Debt Collection Rule itself does not require any consumer debt collector to alter its conduct of consumer debt collection, any estimate of the amount of increased compliance would be a prediction of market participants' behavior. The data the Bureau currently has do not support a specific quantitative prediction. But, to the extent that consumer debt collectors increase their compliance in response to the Final Consumer Debt Collection Rule, that response will result in both benefits and costs.[117]

a. Benefits from Increased Compliance

Increased compliance would be beneficial to consumers that are affected by consumer debt collection. As discussed above, the potential pool of consumers who are directly affected by debt collection is broad and includes, on average, 14% of the population. Lawful consumer debt collection is important to the functioning of the consumer credit market, because participants in this market reduce creditors' losses from nonpayment and thereby help to keep consumer credit accessible and potentially more affordable to many consumers. Unlawful debt collection can damage consumers' finances and harm them in other ways. Unfair, deceptive, and abusive practices, to the extent they succeed in recovering more from consumers (including perhaps more than is owed) can also damage the broader debt collection market by altering the competitive balance. A number of Federal consumer financial laws, including, among others, the FDCPA, the FCRA, and Title X of the Dodd-Frank Act, and related regulations, offer substantive protections to consumers regarding consumer debt collection. Increasing the rate of compliance with such laws will benefit consumers and the consumer financial market by providing more of the protections mandated by those laws.

For example, the FDCPA prohibits debt collectors from recovering amounts that are not expressly authorized by agreement or permitted by law.[118] The FDCPA also prohibits certain

[117] Another approach to considering the benefits, costs, and impacts of the rule would be to focus almost entirely on the supervision-related costs for larger participants and omit a broader consideration of the benefits and costs of increased compliance. As noted above, the Bureau has, as a matter of discretion, chosen to describe a broader range of potential effects to more fully inform the rulemaking.

[118] 15 U.S.C. 1692f(1).

forms of communication with consumers that debt collectors might otherwise be tempted to make.[119] And it requires debt collectors to make information available to consumers, in certain circumstances, about the origins, status, and amounts of debts under collection.[120] Thus, increased compliance by debt collectors with the FDCPA would likely result in a decrease in the collection of invalid debt claims, and an increase in the protections of consumers and of the market that the FDCPA affords.

As another example, the Fair Credit Reporting Act imposes certain duties on businesses that furnish information about consumers to consumer reporting agencies.[121] Debt collectors frequently furnish such information, and the Bureau's supervision program may lead to their increased fulfillment of FCRA obligations. Those obligations may include, among others, not furnishing information that a furnisher has reasonable cause to believe is inaccurate; updating or correcting information, already furnished, that the furnisher determines to have been inaccurate; and carrying out reasonable investigations of consumer disputes. Thus, in general, an increase in a furnisher's compliance with the FCRA can lead to an improvement in the accuracy of information the furnisher provides to consumer reporting agencies. Such an increase, to the degree it occurs, would tend to benefit consumers. An increase would also benefit consumer reporting agencies, which sell consumer reports, based in part on information gathered from furnishers, that are meant to be reliable sources of information about consumers' past credit experiences, and would also benefit users of such reports.

[119] 15 U.S.C. 1692c.
[120] 15 U.S.C. 1692g (validation of debts).
[121] *See* 15 U.S.C. 1681s-2.

b. Costs of Increased Compliance

On the other hand, as discussed in the Proposal, increasing compliance involves costs. In the first instance, those costs will be paid by the market participants that choose to increase compliance. Consumer debt collectors may need to hire or train additional personnel to effectuate any changes in their practices that are necessary to produce the increased compliance. They may need to invest in systems changes to carry out their revised procedures. In addition, consumer debt collectors may need to develop or enhance compliance management systems, to ensure that they are aware of any gaps in their compliance. Such changes would also require investment and may entail increased operating costs.

An entity that does incur costs in support of increasing compliance may try to recoup those costs by demanding increased revenue for collecting debt.[122] Whether and to what extent this increase occurs will depend on competitive conditions in the consumer debt collection market. In addition, if increasing compliance leads to lower recovery rates, creditors may perceive the risk of loss on loans to be greater. In either case, consumers' access to credit may decrease, although whether and to what extent such a decrease might occur would also depend on competitive conditions in the consumer credit markets.[123] At the same time, to the extent the decrease in recovery resulted from the collection of fewer debts for which consumers were not

[122] How a participant receives its revenue depends on the participant's business model. Because third-party debt collectors often collect debt on commission, they may demand larger percentages. Debt buyers typically buy debt at a substantial discount to its face value, and their revenue is based on the difference between the amount collected and the price paid for the debt. These participants might lower the amount they were willing to pay for a given amount of debt.

[123] The Bureau is aware that changes in bankruptcy law that affect creditors' ability to recover amounts lent to consumers have been found to affect the pricing and availability of credit offered to consumers. If recovery rates for debt subject to collection decrease, that change may also affect the pricing and availability of credit for those consumers whose debts are considered relatively likely to end up in collection. However, the Bureau is not aware of any published research estimating the quantitative magnitude of the latter effect. The Bureau notes that the Equal Credit Opportunity Act would prohibit creditors from undertaking underwriting or pricing actions on a prohibited basis. Equal Credit Opportunity Act, 15 U.S.C. 1691 *et seq*.

legally responsible—such as debts not truly owed—the change ought to represent an improvement in the allocation of credit. Credit should be allocated to reflect the real risk of loss—without that risk's being masked by collectors' recovering amounts that are not actually owed.

2. Benefits and Costs of Individual Supervisory Activities

In addition to the responses of market participants anticipating supervision, the possible consequences of the rule include the effects of individual examinations or other supervisory activity that the Bureau may conduct in the consumer debt collection market.

a. Benefits of Supervisory Activities

The information gathered during supervisory activity will be useful in several ways. For example, when an examination uncovers deficiencies in a company's policies and procedures, both the company and the Bureau will become aware of those deficiencies. The Bureau's examination manual calls for the Bureau to prepare a report of each examination and to assess the strength of the subject entity's compliance mechanisms and the risks the entity poses to consumers, among other topics. The Bureau will share the examination report with the subject entity, because one purpose of supervision is to inform the entity of problems detected by examinations.

Thus, for example, an examination may reveal that, due to the design of its procedures, a company frequently collects on debt that cannot be validated. Or an examination may determine that a company has sometimes failed to provide consumers required notices while attempting to collect debts, or has engaged in inappropriate communications with third parties regarding debts subject to collection. Examiners may find evidence of widespread noncompliance with Federal consumer financial law, or they may identify specific areas where a company has inadvertently failed to comply. These examples are only illustrative of what kinds of information an examination might deliver.

Detecting and informing companies about such problems should be beneficial to consumers. When the Bureau notifies a company about risks associated with an aspect of its activities, the company is expected to adjust its practices to reduce those risks. That response may result in increased compliance with Federal consumer financial law, with benefits like those described above. Or it may avert a violation that would have occurred had Bureau supervision not detected the risk promptly. The Bureau may also inform companies about risks they pose to consumers short of violating the law. Action to reduce those risks would also be a benefit to consumers.

Given the obligations consumer debt collectors have under Federal consumer financial law and the existence of efforts to enforce such law, the results of supervision may also benefit consumer debt collectors under supervision by detecting compliance problems early. When an entity's level of noncompliance has resulted in litigation or an enforcement action, the company must face both the costs of defending its actions and the penalties for noncompliance—including potential liability for statutory damages to private plaintiffs—and must also adjust its systems to cure the breach. Changing practices at this point can be expected to be relatively difficult, because a level of noncompliance that has attracted the attention of enforcement authorities or private plaintiffs will sometimes be severe enough to represent a serious failing of a company's systems. Supervision may detect flaws at a point when correcting them is relatively inexpensive. And catching problems before they involve a company in costly private litigation or administrative enforcement, and potentially the payment of legal penalties or other forms of relief, could save the company substantial time and money. In short, supervision might benefit consumer debt collectors under supervision by reducing the need for other more expensive activities, like enforcement and private litigation, to achieve a given compliance rate. Accordingly, a shift of some amount of regulatory oversight from enforcement to supervision would be beneficial to market participants.

Further potential benefits to consumers, covered persons, or both may arise from the Bureau's gathering of information during supervisory activities. The goals of supervision include informing the Bureau about activities of market participants and assessing risks to consumers and to markets for consumer financial products and services. The Bureau may use this information to improve regulation of consumer financial products and services and enforcement of Federal consumer financial law, in order to better serve its mission of ensuring consumers' access to fair, transparent, and competitive markets for such products and services. Benefits of this type will depend on what the Bureau learns during supervision and how it uses that knowledge.

b. Costs of Supervisory Activities

The potential costs of actual supervision arise in two categories. The first involves the costs of individual consumer debt collectors' increasing compliance in response to the Bureau's findings during supervisory activity and to supervisory actions. These costs are similar in nature to the possible compliance costs, described above, that larger participants in general may incur in anticipation of possible supervisory activity. This analysis will not repeat that discussion. The second category is the cost of supporting supervisory activity.

Supervisory activity may involve requests for information or records, on-site or off-site examinations, or some combination of these activities. For example, in an on-site examination, generally, Bureau examiners begin by contacting the entity for an initial conference with management. That initial contact is often accompanied by a request for information or records. Based on the discussion with management and an initial review of the information received, examiners will determine the scope of the on-site exam. While on-site, examiners will spend some time in further conversation with management about the entity's processes and procedures. The examiners will also review documents, records, and accounts to assess the entity's compliance and evaluate the entity's compliance management systems. As with the Bureau's bank examinations, examinations of nonbank covered persons will involve issuing confidential examination reports and compliance ratings. The Bureau's examination manual describes the supervision process and indicates what materials and information an entity can expect examiners to request and review, both before they arrive and during their time on-site. The primary cost an entity faces in connection with an examination is the cost of employees' time to collect and provide the necessary information.

At this early stage in its nonbank supervision program, the Bureau does not have precise estimates of the expected duration and frequency of its examinations and the resources that entities may expend to cooperate with such examinations. The frequency and duration of any examinations of any particular entity will depend on a number of factors, including the size of the entity, the compliance or other risks identified, whether the entity has been examined previously, and the demands on the Bureau's supervisory resources imposed by other entities and markets. Nevertheless, some rough estimates may be useful to provide a sense of the magnitude of potential staff costs that entities may incur.

Typical examinations of consumer debt collectors within the category of larger participants with annual receipts close to the $10 million threshold might be relatively brief. Bureau examiners might review materials and interview employees for four weeks, and an entity might devote the equivalent of one full employee during that time and for two weeks beforehand to prepare materials for the examination. The typical cost of the employee involved in responding to supervision can be expected to be roughly $49 per hour.[124] Six weeks of such an employee's time would cost less than $12,000.[125] For a larger participant with annual receipts from consumer debt collection of more than $10 million, this cost would represent 0.12 percent of those annual receipts.[126] Even if an examination required twice as much employee time, the cost would still come to only 0.24 percent of annual receipts for such an entity.

By contrast, at the very largest consumer debt collectors in the market, supervisory activity could last much longer. Given the complexity of a very large entity, Bureau examiners might need months to review the relevant materials. Such an entity might dedicate the equivalent of two full-time employees to participate in the examination.[127] The cost of eight months of employee time (four months each for two employees) would be about $68,000, or about 0.07 percent of annual receipts for an entity with $100 million in receipts.

For an entity of a more typical size, which would be between the two size groupings discussed above, Bureau examiners might review materials and interview employees for eight weeks, and an entity might devote the equivalent of one full employee during that time and for

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[124] Bureau of Labor Statistics, (BLS), National Compensation Survey, Employment Cost Trends, *available at* http://www.bls.gov/ncs/ect/. BLS data for "nondepository credit intermediation" indicate that the mean hourly wage of a compliance officer in that sector is $33.40. BLS data also indicate that salary and wages constitute 67.5 percent of the total cost of compensation. Dividing the hourly wage by 67.5 percent yields a wage (including total costs, such as salary, benefits, and taxes) rounded to the nearest dollar of $49 per hour.

[125] All figures assume 40 hours of work per week.

[126] The Proposal described four business-weeks of employee time as "a fraction of a percent" of revenues, for a service provider that was a small business. Six business-weeks is also a fraction of a percent, as estimated above.

[127] Of course, multiple individuals, both inside and outside a firm, might participate in a supervisory activity. For example, a firm might seek an attorney's advice on how to respond to and participate in an examination. The Bureau of Labor Statistics estimates the relevant attorney wage as $112.34, and it is conceivable that attorney activity might constitute 10 percent of a firm's overall activity during the course of an examination. The rough estimate provided above is meant to represent the aggregate amount of labor resources a company might dedicate to responding to supervisory activity.

two weeks beforehand to prepare materials for the examination. Thus, a typical examination would take ten weeks of such an employee's time and would cost less than $20,000.

To put the market-wide impact of supervision in perspective, the Bureau estimates that the average annual market-wide cost of supervision is 0.015 percent of receipts. The Bureau does not expect to supervise every larger participant in every year. For purposes of estimation, the Bureau assumes that each of the sixteen largest market participants will be examined at most every other year, at a cost of $68,000 each, for an aggregate annual cost of $544,000. By way of estimation, the Bureau assumes that each of the remaining larger participants, about 160 in total, will be examined up to once every five years, at a cost of $20,000 each, giving an aggregate annual cost of $640,000. The total staff cost of responding to supervision comes to approximately $1,184,000 annually.[128] This figure represents 0.015 percent of the aggregate annual receipts—$7.7 billion[129]—of the larger participants of the consumer debt collection market.

The Bureau declines to predict, at this point, precisely how many examinations in the consumer debt collection market it will undertake in a given year. Once the rule takes effect, the Bureau will be able to undertake supervisory activity in the identified market; neither the Dodd-Frank Act nor the Final Consumer Debt Collection Rule specifies a particular level or frequency of examination. The frequency of examination will depend on a number of factors, including the Bureau's understanding of the conduct of market participants and the specific risks they pose to consumers; the responses of larger participants to prior examinations and the demands that other

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[128] As noted above, there are roughly 175 entities whose annual receipts from consumer debt collection exceed the $10 million threshold.

[129] *See* http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_56SSSZ4&prodType=table, scroll to NAICS code 561440. $7.7 billion represents 63 percent of all receipts for "collection agencies," which total $12.2 billion.

markets make on the Bureau’s supervisory resources. These factors can be expected to change over time, and the Bureau’s understanding of these factors may change as it gathers more information about the market through its supervision and by other means.

3. Costs of Assessing Larger-Participant Status

Finally, the Bureau acknowledges that in some cases consumer debt collectors may incur costs in assessing whether they qualify as larger participants and potentially disputing their status. The rule is designed to minimize those costs.

Larger-participant status depends on annual receipts, a quantity that for many consumer debt collectors should correspond to data they already report to the IRS. For such consumer debt collectors, assessing whether they satisfy the Final Consumer Debt Collection Rule’s definition of larger participant in the consumer debt collection market will involve minimal expense. Potential differences from the IRS figures arise only for consumer debt collectors that have annual receipts arising from activities besides consumer debt collection as defined in the Final Consumer Debt Collection Rule. Some consumer debt collectors may have multiple distinct lines of business. The Bureau believes that such consumer debt collectors ordinarily have records for each division of the accounting quantities underlying the calculation of annual receipts.

If, in addition, a consumer debt collector sometimes engages in debt collection that is excluded from the market and sometimes in debt collection within the defined market, the consumer debt collector’s accounting systems might not distinguish the two types of activity. However, most market participants should not need such detailed information. The rule does not require market participants to submit data on their annual receipts. Most of the time, a consumer debt collector only needs to know its annual receipts resulting from market-related activity to the extent it wants to determine in advance of any supervisory activity by the Bureau whether it is a larger participant. A consumer debt collector with receipts from all activities that are above the threshold will not necessarily need to trace precisely what quantity derives from activities other than consumer debt collection (as defined by the Final Consumer Debt Collection Rule). A rough estimate would suffice to inform such an entity whether its consumer debt collection receipts cross the threshold. Most likely, the only consumer debt collectors that might need a more precise calculation of annual receipts would be those that have total receipts not greatly exceeding the threshold and significant receipts from activities (like collection of medical debt) that would be excluded from the calculation.

The data the Bureau currently has do not support a detailed estimate of how many consumer debt collectors will incur such costs, or how much they might spend. Regardless, consumer debt collectors would be unlikely to spend significantly more on specialized accounting systems to enable these calculations than it would cost them to be supervised by the Bureau as larger participants. It bears emphasizing that expenditures on an accounting system intended to prove a consumer debt collector is not a larger participant will not necessarily mean that the consumer debt collector cannot be supervised. The Bureau can supervise a consumer debt collector whose conduct the Bureau determines, pursuant to 12 U.S.C. 5514(a)(1)(C), poses risks to consumers. Thus, a consumer debt collector choosing to spend significant amounts on an accounting system directed toward the larger-participant test could not be sure it would not be subject to Bureau supervision notwithstanding those expenses. The Bureau therefore believes it is unlikely that any but a very few consumer debt collectors would undertake such expenditures.

4. Consideration of Alternatives

The Bureau considered selecting different thresholds for larger-participant status in the consumer debt collection market. If the threshold were much higher—say \$250 million, as one commenter suggested—then the Bureau's supervisory authority under the rule would reach only the very largest consumer debt collectors—approximately 7—in the market. Such an approach would reduce both the expected benefits to consumers and the costs to covered persons, because fewer consumer debt collectors would be subject to the Bureau's supervisory authority. As the Proposal explained, if a change in an consumer debt collector's systems or practices results in increased compliance with Federal consumer financial law, such a change would produce greater benefit at a large consumer debt collector than at a smaller consumer debt collector. The largest consumer debt collectors are expected to affect the most consumers, and any increase in compliance by such consumer debt collectors would benefit a relatively large number of consumers.

At which market participants supervision produces the greatest benefits or costs due to increased compliance depends on where the greatest risks to consumers lie. If some consumer debt collectors below \$250 million in annual receipts have particular compliance problems, bringing such consumer debt collectors within the Bureau's supervisory authority, and conducting actual examinations at those consumer debt collectors, can be expected to produce larger increases in compliance than would supervising larger consumer debt collectors. The statutory criteria regarding supervision should ensure that those larger participants that are supervised are the same consumer debt collectors where the benefits from supervision are likely to be highest.[130] The selected threshold of \$10 million gives the Bureau the flexibility to direct

[130] 12 U.S.C. 5514(b)(2).

its supervisory resources to the consumer debt collectors where supervision will be of greatest use, even if they are not the very largest in the market.

5. Responses to Comments

The Bureau received a number of comments on its preliminary analysis under 12 U.S.C. 5512(b)(2).

Several comments related to the Bureau's characterization of supervision as probabilistic. One commenter criticized the Bureau for asserting that the rule only authorizes supervisory activities and that the Bureau will likely not supervise all larger participants in any given year. According to this commenter, the Bureau was trying to avoid acknowledging the costs of supervision. Later, when the Bureau actually undertakes supervisory activity, the commenter claims that the Bureau will not consider benefits, costs, and impacts because such consideration is only necessary for rulemaking, not supervision. Another commenter argued that the Bureau had assumed the rule would produce increased compliance yet had discounted the costs as "probabilistic." One commenter suggested that consumer debt collectors will make additional efforts at compliance, in anticipation that they might be supervised, and will therefore bear the resulting costs regardless of how often the Bureau actually conducts supervisory activity.

As reflected above, the Bureau continues to believe that supervision of specific consumer debt collectors pursuant to the Final Consumer Debt Collection Rule is probabilistic in nature. The Bureau has recognized two stages in which the rule could increase compliance, with its attendant benefits and costs. First, the Bureau acknowledges that consumer debt collectors may respond to the possibility of the Bureau's supervision activity by changing their systems and conduct to produce more compliance with Federal consumer financial law. The discussion above presented benefits and costs associated with consumer debt collectors' changing their conduct in anticipation of possible supervision. Second, in the course of actual examinations, the Bureau may uncover specific problems that consumer debt collectors then correct. The benefits resulting from this second stage, like the costs of actual supervisory activity, are indeed probabilistic in nature for the reasons described above.

Commenters offered somewhat contradictory comments regarding the rate of existing compliance. Some suggested that the Bureau had underestimated the efficacy of consumer debt collectors' existing incentives—from sources such as enforcement and supervision by State regulators—to comply with the law. Such commenters asserted that market participants are already aware of the risks of enforcement action and regulatory oversight and have effective compliance mechanisms. Thus, the commenter concluded, the benefits of the rule are smaller than the Proposal assumed. Another commenter stated that the rule will be more costly than the Proposal acknowledged, because consumer debt collectors will have to develop compliance policies and procedures, by hiring new staff and developing new systems. Yet another commenter contended that because the rule is not substantive, but only establishes the possibility of supervision, the Bureau cannot assume that consumer debt collectors will increase their legal compliance in response.

The comments do not lead the Bureau to different conclusions regarding the benefits and costs of increased compliance as a potential effect of the rule. If the rule incentivizes consumer debt collectors to develop compliance management systems that they do not already have, that result will likely both produce benefits in the form of improved compliance and the costs involved in creating and administering such systems. As a general matter, the Bureau believes it is unlikely that consumer debt collectors can consistently comply with the law without having reasonably thorough systems for promoting and monitoring compliance. Without such systems, a consumer debt collector may happen to comply with the law, but it cannot be assured that it is doing so; cannot reliably learn of problems and fix them; and cannot modify its practices to keep up with changes in the law.

If, on the other hand, compliance levels are already high—in part because of incentives that one commenter pointed out, arising from Federal and State enforcement and State supervisory activity—then the benefits of the rule will be lower. However, to achieve high levels of compliance, consumer debt collectors presumably already incur corresponding costs. The compliance-related costs of the rule will therefore be lower as well. In addition, the Bureau's likely level of supervisory activity over time may also be lower. The commenters provided no evidence of the existing level of compliance of consumer debt collectors. In any event, whatever increase in compliance may occur as a result of the rule is accompanied by the associated benefits and costs of that increase.[131]

Commenters also questioned the Bureau's estimates of how much supervision would cost entities. An industry association asserted that the Bureau's estimate, for actual supervisory activity, of four full weeks of employee time at a small consumer debt collector was a significant underestimate. The commenter did not offer an alternative estimate, but the commenter argued that even a month of employee time would be burdensome for a small business.

The Bureau acknowledges that staff time can be a cost for an entity responding to particular supervisory activity. The Bureau has estimated the magnitude of that cost for

[131] According to several commenters, the Bureau also overlooked the cost of firms' organizing their compliance management policies in a format consistent with the Bureau's supervision manual. These commenters asserted that companies would, anticipating the possibility of supervisory activity, expand their compliance management systems beyond what is appropriate for assuring compliance. The Bureau notes that its examination manual does not specify a particular format for compliance management policies. Of course, it is nonetheless possible that some companies may develop more comprehensive compliance management systems than would be necessary or appropriate for their circumstances. The Bureau has, and commenters provided, no information with which to assess the possible magnitude of such an effect.

consumer debt collectors of various sizes. The estimated amount of staff time involved represents the Bureau's experience of supervision. Depending on the circumstances, that amount may be an underestimate or overestimate for some supervisory activities. But even if all supervisory activity cost twice as much as the Bureau estimated, the cost would still, as noted above, be 0.24 percent of the annual receipts of an individual entity with receipts just above the $10 million threshold.

Several commenters suggested that the rule would force consumer debt collectors to develop new accounting systems to generate data on the amount of receipts attributable to consumer debt collection. It bears emphasis that the rule imposes no such requirement. The Bureau has not required market participants regularly to submit accounting data. Market participants might be motivated to alter accounting systems to some degree to improve their assessments of whether they qualify as larger participants, but the Bureau is not persuaded by these commenters that consumer debt collectors will spend significant amounts on such alterations. As noted above, a consumer debt collector with multiple lines of business presumably knows basic accounting information, such as receipts, for each division. If existing accounting systems do not provide detailed information corresponding to the rule's test for assessing larger participant status, the discrepancy would only relate to the amount of receipts related to activities that the rule excludes from the consumer debt collection market. As discussed above, an entity would only need to know such information in detail to the degree that the precise facts might render the entity not a larger participant. Moreover, consumer debt collectors would be unlikely to spend significantly more on accounting systems than it would cost them to be supervised by the Bureau.

One commenter also discussed how the costs of supervision will affect the consumer debt collection market. The commenter argued that the cost of undergoing examination will be most easily borne by large businesses. The commenter inferred that the existence of supervision would create an economy of scale that would favor the growth of large consumer debt collectors in the market at the expense of smaller participants. The commenter did not explain whether this hypothesized market effect would be beneficial or harmful, either to consumers or to covered persons.

Even if, as the commenter contends, a larger entity is better able to bear the costs of supervision, the rule as a whole does not necessarily burden smaller firms disproportionately. The Bureau may supervise the largest consumer debt collector more frequently than those that are just above the threshold to qualify as larger participants. As the Proposal noted, the benefits gained from detecting noncompliance are likely to be greater when the consumer debt collector under examination is larger. Larger consumer debt collectors affect larger numbers of consumers. The benefit from any improvement in policies and processes will therefore be multiplied across the experiences of more consumers. In addition, participants' asset sizes and transaction volumes are among the 12 U.S.C. 5514(b)(2) factors that the Bureau may consider in prioritizing its supervisory activities. There is little reason to believe that the Bureau's general supervision of larger participants of this market will skew the playing field in favor of the largest consumer debt collectors—particularly in view of the fact, explained above, that the staff costs of responding to supervisory activity are likely to be small even for entities just above the larger-participant threshold.

This commenter also argued that the costs of examination will be passed on to creditors and will therefore lead to a decrease in consumers' access to credit.[132] The commenter offered no data or argument to support this assertion. As noted above, an increase in the cost of consumer debt collection may lead to an increase in the price or a decrease in the availability of credit to those consumers whose debts are regarded as likely to need the work of consumer debt collectors. However, whether and to what extent newly supervised consumer debt collectors shift the cost of supervision, or of increased compliance, to creditors will depend on complex market conditions. The Bureau believes any such effects are likely to be very small.

C. Impact on Depository Institutions and Credit Unions With Total Assets of $10 Billion or Less, and Impact on Consumers in Rural Areas

The Final Consumer Debt Collection Rule does not apply to depository institutions or credit unions of any size.[133] Nor would the rule have a unique impact on rural consumers. The Bureau is not aware of any evidence suggesting that rural consumers have been subject to unlawful collection practices at a rate higher than other consumers, or that the size distribution of consumer debt collectors operating in rural areas differs from that of participants in the overall market.

VII. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires each agency to consider the potential impact of its regulations on small entities, including small businesses, small governmental units, and small

[132] *See supra* n.123 and accompanying text.

[133] As potential users of consumer debt collection services, depository institutions and credit unions might see changes in the quality and pricing of such services. The Bureau knows of, and commenters have suggested, no reason to think that these entities would be negatively affected by the Final Consumer Debt Collection Rule.

not-for-profit organizations.[134] The RFA defines a "small business" as a business that meets the size standard developed by the Small Business Administration pursuant to the Small Business Act.[135]

The RFA generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis (FRFA) of any rule subject to notice-and-comment rulemaking requirements, unless the agency certifies that the final rule will not have a significant economic impact on a substantial number of small entities. The Bureau also is subject to certain additional procedures under the RFA involving the convening of a panel to consult with small entity representatives prior to proposing a rule for which an IRFA is required.[136]

The undersigned certified that the Proposal, if adopted, would not have a significant economic impact on a substantial number of small entities and that an initial regulatory flexibility analysis was therefore not required. The Final Consumer Debt Collection Rule adopts the Proposal, with some modifications that do not lead to a different conclusion. Therefore, a final regulatory flexibility analysis is not required.

The Final Consumer Debt Collection Rule will define a class of consumer debt collectors as larger participants of the consumer debt collection market and thereby authorize the Bureau to undertake supervisory activities with respect to those consumer debt collectors. Because the Final Consumer Debt Collection Rule adopts a test for larger-participant status of more than $10 million in annual receipts resulting from consumer debt collection activities, larger market

[134] 5 U.S.C. 601 *et seq*. The Bureau is not aware of any governmental units or not-for-profit organizations to which the Final Consumer Debt Collection Rule would apply.
[135] 5 U.S.C. 601(3). The Bureau may establish an alternative definition after consultation with the SBA and an opportunity for public comment.
[136] 5 U.S.C. 609.

participants would generally be above the existing SBA small-business size standard for this market: annual receipts at or below $7 million. Moreover, the rule does not itself impose any obligations or standards of conduct on businesses outside the category of larger participants. The rule therefore does not have a significant impact on a substantial number of small entities.[137]

Additionally, and in any event, the Bureau believes that the Final Consumer Debt Collection Rule would not result in a "significant impact" on any small entities that could be affected. As previously noted, whether the Bureau would in fact engage in supervisory activity, such as an examination, with respect to a larger participant (and, if so, the frequency and extent of such activity) would depend on a number of considerations, including, among others, the Bureau's allocation of resources and the application of the statutory factors set forth in 12 U.S.C. 5514(b)(2). Given the Bureau's finite supervisory resources, and the range of industries over which it has supervisory responsibility for consumer financial protection, whether and when a consumer debt collector would be supervised is probabilistic. Moreover, even in cases where supervisory activity were to occur, the costs that would result from such activity are expected to be minimal in relation to the overall activities of the consumer debt collector.[138]

Finally, 12 U.S.C. 5514(e) authorizes the Bureau to supervise service providers to nonbank covered persons encompassed by 12 U.S.C. 5514(a)(1), which includes larger

[137] The Proposal hypothesized two circumstances in which a business might be a larger participant of the consumer debt collection market yet be a small business for RFA purposes. First, a nonbank covered person that was not a small business might become a small business during the second year after it qualified as a larger participant. This occurrence would be rare, because relatively few nonbank covered persons appear (according to the Economic Census data) to have annual receipts near the $10 million threshold. The second hypothesized circumstance involves the rule's definition of "control," which is somewhat more expansive than the SBA's. A company might be affiliated with another company for purposes of this rule, so that the two company's receipts would be aggregated in assessing whether the threshold was met. Yet the SBA's method might not treat the two companies as affiliated, and their separate receipts might not exceed the $10 million threshold. The Bureau anticipates no more than a very few such cases in the market covered by the Final Consumer Debt Collection Rule. Commenters provided no reason to alter the Bureau's evaluation of these issues.

[138] As discussed above, the cost of participating in an examination might be roughly 0.12 percent of annual receipts for a firm near the $10 million threshold. The proportion would be larger for a smaller firm, but the impact will still not be substantial.

participants. As the Bureau noted in the Proposal, because the rule does not address service providers, effects on service providers need not be addressed for purposes of this RFA analysis. Even were such effects relevant, the Bureau continues to believe that it is very unlikely that any supervisory activities with respect to the service providers to the approximately 175 larger participants in the consumer debt collection market delineated in the Final Consumer Debt Collection Rule would result in a significant economic impact on a substantial number of small entities.[139]

One commenter pointed out that the SBA has issued a notice of proposed rulemaking, considering an increase in the small business size standard for the debt collection market to $14 million in annual receipts. The SBA's proposal does not affect the accuracy of the Bureau's RFA analysis, because the size standard has not yet changed. In any event, even if a $14 million standard applied, the rule would still not impact a "substantial number" of small entities. The Bureau estimates, using the Economic Census data, that the rule treats as larger participants approximately 175 consumer debt collection entities out of approximately 4,500 entities in the market. Out of these 4,500 entities, the Bureau estimates that approximately 4,356 market participants would be small business entities under the SBA's proposed size standard of $14 million. Among the approximately 175 larger participants of the consumer debt collection market, about 31 might fall below a $14 million threshold. Thus, the Final Consumer Debt

[139] As the Bureau noted in the Proposal, it reaches this judgment in light of the number of relevant small firms in the relevant NAICS codes. For example, many of these service providers would be considered to be in the industries with NAICS code 522390, "Other activities related to credit intermediation," or 518210, "Data Processing, Hosting, and Related Services." According to the 2007 Economics Census, there are more than 5,000 small firms in the first industry group and nearly 8,000 in the second. The number of firms connected to the 175 larger participants of the consumer debt collection market is likely to be a fraction of these two figures. Moreover, the impact of supervisory activities at such service providers would likely be no more intensive—and probably much less, given the Bureau's exercise of its discretion in supervision—than at the larger participants themselves. As discussed above, supervisory activities at larger participants would not be expected to give rise to a significant economic impact. Finally, because it is very unlikely that the Bureau would supervise many of such entities, a substantial number of entities would not likely be affected.

Collection Rule would impact only 0.7 percent of consumer debt collectors that might be considered small businesses under the SBA's proposal, and the impact on these consumer debt collectors would not be significant in any event, for the reasons previously articulated. The Final Consumer Debt Collection Rule would thus not have a significant impact on a substantial number of small entities, even if the SBA were to adopt its proposed change to the relevant definition of small business.

One commenter argued that the Bureau was incorrect in taking the positions that "[t]he rule would not itself impose any obligations or standards of conduct on larger participants for purposes of [Regulatory Flexibility Act] analysis" and that "whether and when an entity in the . . . consumer debt collection market[] would be supervised is probabilistic."[140] This commenter stated that the actual imposition of examination requirements will have an effect on small businesses, because the consequences of supervision could include an increase in the cost of credit and a diminution in access to credit. The commenter argued that the Bureau should not have certified the Proposed Rule and should have convened a panel and consulted representatives of small entities in compliance with the requirements set forth in the Small Business Regulatory Enforcement Fairness Act (SBREFA), as amended by Section 1100G of the Dodd-Frank Act.

The Bureau believes that its certification of the Proposed Rule was appropriate and that, as a result, the convening of a panel to consult with small entities was not required under the RFA. The Proposed Rule would not have imposed any standards of conduct on entities for purposes of RFA analysis, but rather would have authorized the Bureau to exercise its supervisory authority with respect to a class of entities. Furthermore, the Bureau does not have

[140] 77 FR 9606.

any evidence suggesting that this rule would increase small entities' cost of credit. Thus, the Proposal, like the Final Consumer Debt Collection Rule, does not give rise to a regulatory compliance burden for small entities. In any event, the Bureau properly found (as described above with respect to the Final Consumer Debt Collection Rule) that even if the Proposed Rule were considered to impose regulatory obligations for purposes of RFA analysis, it would not have created a significant impact on a substantial number of small entities.

Accordingly, the undersigned certifies that this rule will not have a significant economic impact on a substantial number of small entities.

VIII. Paperwork Reduction Act

The Bureau determined that the Proposed Rule would not impose any new recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would constitute collections of information requiring approval under the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq*. The Bureau did not receive any comments regarding this conclusion, to which the Bureau adheres. The Bureau concludes that the Final Consumer Debt Collection Rule, which adopts the Proposal in relevant respects, also imposes no new information collection requirements subject to the Paperwork Reduction Act.

List of Subjects in 12 CFR Part 1090

Consumer protection, Credit.

PART 1090 - DEFINING LARGER PARTICIPANTS OF CERTAIN CONSUMER FINANCIAL PRODUCT AND SERVICE MARKETS

1. The authority citation for part 1090 continues to read as follows:

Authority: 12 U.S.C. 5514(a)(1)(B); 12 U.S.C. 5514(a)(2); 12 U.S.C. 5514(b)(7)(A); and 12 U.S.C. 5512(b)(1).

2. For the reasons set forth in the preamble, the Bureau amends Part 1090 to add a new § 1090.105 to subpart B to read as follows:

Subpart B—Markets

*   *   *   *   *

§ 1090.105 Consumer debt collection market

Subpart B—Market

*   *   *   *   *

§ 1090.105 Consumer Debt Collection Market.

(a) Market-Related definitions.

Annual receipts means, for the consumer debt collection market, receipts calculated as follows:

(1) Receipts means "total income" (or in the case of a sole proprietorship, "gross income") plus "cost of goods sold" as these terms are defined and reported on Internal Revenue Service (IRS) tax return forms (such as Form 1120 for corporations; Form 1120S and Schedule K for S corporations; Form 1120, Form 1065 or Form 1040 for LLCs; Form 1065 and Schedule K for partnerships; and Form 1040, Schedule C for sole proprietorships). Receipts do not include net capital gains or losses; taxes collected for and remitted to a taxing authority if included in gross or total income, such as sales or other taxes collected from customers but excluding taxes levied on the entity or its employees; or amounts collected for another (but fees earned in connection with such collections are receipts). Items such as subcontractor costs, reimbursements for purchases a contractor makes at a customer's request, and employee-based costs such as payroll taxes are included in receipts.

(2) Period of measurement.

(i) Annual receipts of a person that has been in business for three or more completed fiscal years means the total receipts of the person over its three most recently completed fiscal years divided by three.

(ii) Annual receipts of a person that has been in business for less than three completed fiscal years means the total receipts of the person for the period the person has been in business divided by the number of weeks in business, multiplied by 52.

(iii) Where a person has been in business for three or more completed fiscal years, but one of the years within its period of measurement is a short tax year, annual receipts means the total receipts for the short year and the two full fiscal or calendar years divided by the total number of weeks in the short year and the two full fiscal or calendar years, multiplied by 52.

(3) Annual receipts of affiliated companies.

(i) The annual receipts of a person are calculated by adding the annual receipts of the person with the annual receipts of each of its affiliated companies.

(ii) If a person has acquired an affiliated company or been acquired by an affiliated company during the applicable period of measurement, the annual receipts of the person and the affiliated company are aggregated for the entire period of measurement (not just the period after the affiliation arose).

(iii) Receipts are calculated separately for the person and each of its affiliated companies in accordance with paragraph (ii) of this definition even though this may result in using a different period of measurement to calculate an affiliated company's annual receipts. Thus, for example, if an affiliated company has been in business for a period of less than three years, the affiliated company's receipts are to be annualized in accordance with paragraph (ii)(B) of this definition even if the person has been in business for three or more completed fiscal years.

(iv) The annual receipts of a formerly affiliated company are not included if affiliation ceased before the applicable period of measurement as set forth in paragraph (ii) of this definition. This exclusion of annual receipts of formerly affiliated companies applies during the entire period of measurement, rather than only for the period after which affiliation ceased.

(v) Annual receipts do not include receipts that result from the collection of debt that was originally owed to a medical provider.

Consumer debt collection is a debt collector's collection of debt incurred by a consumer primarily for personal, family, or household purposes and related to a consumer financial product or service.

Creditor means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that the person receives an assignment or transfer of a debt in default solely for the purpose of facilitating the collection of debt for another.

Debt collector means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due to another. Notwithstanding the exclusion provided by clause C of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. The term does not include:

(A) Any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;

(B) Any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors;

(C) Any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity

a. Concerns a debt which was originated by such person; or

b. Concerns a debt which was not in default at the time it was obtained by such person; and

(D) Any person engaged solely in enforcing a security interest.

Test to define larger participants. A nonbank covered person is a larger participant of the consumer debt collection market if the nonbank covered person's annual receipts resulting from consumer debt collection are more than $10 million.

[THIS SIGNATURE PAGE PERTAINS TO THE FINAL RULE ENTITLED, “DEFINING LARGER PARTICIPANTS OF THE CONSUMDER DEBT COLLECTION MARKET”]

Dated: October,__ 2012.

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Richard Cordray,

Director, Bureau of Consumer Financial Protection.