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Via E-mail

Monica Jackson
Administrative Specialist
Office of the Executive Secretary
Bureau of Consumer Financial Protection
1700 G Street NW
Washington, DC 20552

Attention: CFPB Docket No. CFPB-2012-0021 (RIN 3170-AA24)

Re: Comment Letter on Proposed Rule and Request for Public Comment regarding Procedural Rules to Establish Supervisory Authority Over Certain Nonbank Covered Persons Based on Risk Determination

Dear Madam:

This letter is submitted to the Consumer Financial Protection Bureau (“CFPB” or “Bureau”) on behalf of the Network Branded Prepaid Card Association (“NBPCA”) in response to the proposed rule and request for public comment regarding Procedural Rules to Establish Supervisory Authority Over Certain Nonbank Covered Persons Based on Risk Determination, published in the *Federal Register* on May 25, 2012, at 77 *Fed. Reg.* 31226-37 (the “Proposal” or “Proposed Rule”).

The NBPCA is a non-profit trade association representing a diverse group of organizations that take part in delivering network branded (often referred to as “open loop”) prepaid cards and other forms of prepaid access used by consumers, businesses and governments. The NBPCA’s members include prepaid access providers and sellers, in addition to depository institutions, card organizations, processors, program managers, marketing and incentive companies, card distributors, and law and media firms. The NBPCA works on behalf of and through its members to inform and educate government officials, the media and consumers about these important payment products that provide critical access to financial services as well as convenience, security and efficiency to a wide range of users . In its role as a leader in the prepaid industry, the NBPCA works with its members to establish and encourage best practices designed not only to

benefit card users and industry participants but also to protect our financial system from misuse and abuse.¹ We welcome the opportunity to respond to the Proposed Rule.

The Proposal seeks input on the Bureau’s plans to supervise certain nonbank covered persons (“Nonbanks”)² that it has reasonable cause to believe are engaging in, or have engaged in, conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services (hereafter, “Risky Conduct”). We appreciate the Bureau’s efforts to provide such persons with a “more robust process” than required under 12 USC 5514(a)(1)(C).³

Our comments regarding specific provisions of the Proposed Rule are set forth below.

§ 1091.102 Issuance of Notice of Reasonable Cause

The Proposed Rule provides, in § 1091.102(a), that Bureau’s Deputy Assistant Director for Nonbank Supervision or his or her designee (the “Deputy”) is authorized to issue a Notice of Reasonable Cause to a Nonbank stating that the Bureau may have reasonable cause to determine that the Nonbank is engaging, or has engaged, in Risky Conduct. Section 1091.102(b) provides that a Notice of Reasonable Cause shall be based on “(1) Complaints collected through the system under 12 U.S.C. 5493(b)(3); or (2) Information from other sources.”

Verification of Consumer Complaints. We urge the Bureau to verify consumer complaints before considering whether to issue a Notice of Reasonable Cause. We are concerned that an unverified process could place undue and possibly significant unjustified burdens on Nonbanks. Without a verification process, consumer complaints that lack substance or that are fraudulent may contribute to the issuance of a Notice of Reasonable Cause. Such a system, it appears, could be based on the presumption of guilt. Although we fully support protecting consumers from Risky Conduct, and we agree that every legitimate consumer complaint is important and should be handled promptly and effectively, we also recognize that not every consumer complaint is legitimate or valid. We are also concerned that an unverified process is open to intentional abuse by a competitor or third-party organization.

¹ This letter does not necessarily represent the position of every NBPCA member. While we share our general views in this letter, given the wide diversity of our membership, we understand that many of our individual members also may submit specific comments to address how the issues presented in the Proposal impact their respective organizations.

² In Section 1091.101, the Proposed Rule defines the term “nonbank covered person” to mean “except for persons described in 12 U.S.C. 5515(a) and 5516(a): (1) Any person that engages in offering or providing a consumer financial product or service; and (2) Any affiliate of a person described in subparagraph (1) of this paragraph if such affiliate acts as a service provider to such person.”

A “consumer financial product or service” is defined as “any financial product or service, as defined in 12 U.S.C. 5481(15) that is described in one or more categories under: (1) 12 U.S.C. 5481(15) and is offered or provided for use by consumers primarily for personal, family, or household purposes; or (2) Clause (i), (iii), (ix), or (x) of 12 U.S.C. 5481(15)(A) and is delivered, offered, or provided in connection with a consumer financial product or service referred to in subparagraph (1) of this paragraph.”

³ 77 Fed. Reg. 31227.

Our concerns regarding the Bureau's collection of consumer complaints generally, including the potential for fraudulent consumer complaints specifically, are expressed in more detail in our July 19, 2012 comment letter submitted in response to the Bureau's notice of proposed policy statement regarding disclosure of consumer complaint data.⁴

Analysis and Use of Consumer Complaints. We urge the Bureau to explain its expected analysis of consumer complaints prior to issuing a Notice of Reasonable Cause so that Nonbanks may understand how consumer complaints will be reviewed and used in this process. Does the Bureau intend to issue such Notices based strictly on the total number of complaints received regarding a particular Nonbank? Or will the Bureau consider the specific type(s) of complaints received? Will the Bureau consider the number of complaints received in the context of the total number of consumers served? Will the Bureau consider whether the consumers submitting complaints contacted only the CFPB with their complaints versus contacting the Nonbank first and utilizing the CFPB's complaint process only when they were unable to achieve satisfactory results directly with the Nonbank?

The Bureau itself has noted that some of the complaints it has received in certain areas to date often stem from "consumer confusion."⁵ A Nonbank should not be penalized for consumer confusion that stems, for example, from specific regulatory requirements.

Information from "Other Sources." We request that the Bureau clarify what "other sources" it anticipates receiving information from under § 1091.102(b)(2), the nature of such information and the level of verification of such information the Bureau may undertake before issuing a Notice of Reasonable Cause.

⁴ See 77 Fed. Reg. 27616-17 (June 22, 2012). The NBPCA's comment letter is available at <http://www.nbpca.com/en/Government-Affairs/Comment-Letters/CFPB-Letter-on-Disclosure-of-Consumer-Complaint-Data.aspx>

⁵ See CFPB, *Consumer Response: A Snapshot of Complaints Received* (June 19, 2012), available at http://files.consumerfinance.gov/f/201206_cfpb_snapshot_complaints-received.pdf. Regarding credit card complaints, the *Snapshot* states in part:

... Some **consumers are confused** and frustrated by the process and limits of challenging inaccuracies on their monthly credit card billing statements. For example, some consumers only realize that they needed to notify their credit card companies within 60 days of any billing errors after their claim has been denied. In other cases, **consumers are not aware** that companies typically do not stop a merchant charge once the cardholder has authorized it or do not override a merchant's "no-return policy." Other common types of credit card complaints are those about annual percentage rates or interest rates ... (At 4-5, emphasis added.)

Regarding mortgage loans, the *Snapshot* states in part:

[C]onsumer confusion persists around the process and requirements for obtaining loan modifications and refinancing, especially regarding document submission timeframes, payment trial periods, allocation of payments, treatment of income in eligibility calculations, and credit bureau reporting during the evaluation period. The shelf life of documents provided as part of the loan modification process is of particular concern to consumers. Though consumers must provide documents within short time periods and income documentation generally remains valid for up to 60 days, lengthy evaluation periods can result in consumers having to resubmit documentation - sometimes more than once. This seems to contribute to **consumer fatigue and frustration** with these processes. (At 5, emphasis added.)

Multiple Parties Involved in Network Branded Prepaid Card Programs. A network branded prepaid card program typically involves at a minimum a card-issuing bank, program manager, processor and, often, third-party distributors or sales/reload outlets. When a consumer files a complaint regarding a network branded prepaid card, which entity (or entities) will the Bureau identify and refer the complaint to? We expect the most likely option is the bank that issued the card or the program manager. However, the bank or program manager may not necessarily be either the cause of the complaint or the appropriate entity to handle the complaint; the most appropriate entity depends both on the nature of the complaint and how the particular card program is structured. We urge the Bureau to be cognizant of the various parties that may be involved in a network branded prepaid card program, and their respective roles, when contemplating the issuance of a Notice of Reasonable Cause.

Pre-Notice Meetings. We urge the Bureau to consider meeting with Nonbanks prior to issuing Notices of Reasonable Cause. This would allow the Bureau to discuss its concerns with a Nonbank, and possibly obtain explanations or additional information from the Nonbank, in a less formal process than anticipated in the Proposed Rule. We recognize that this may not be feasible in every instance. However, such a process might enable the Bureau to better focus its resources on Nonbanks that are in fact engaging in Risky Conduct.

§ 1091.103 Contents of Notice

Details Contained in a Notice of Reasonable Cause. Section 1091.103(a)(1) provides that a Notice of Reasonable Cause will contain a description of the basis for the assertion that the Bureau may have reasonable cause to determine that respondent is a Nonbank that is engaging, or has engaged, in Risky Conduct.

We request that the Bureau explain how much detail it expects to provide in this regard as well as the level of detail it expects to receive in response. We also request that the Bureau clarify whether it intends to include detailed information regarding the consumer complaints, if any, on which it bases its assertion, and whether it will provide copies of any such complaints together with the Notice of Reasonable Cause. We are concerned that a Nonbank receiving a Notice of Reasonable Cause may not have sufficient detail regarding the basis for the Bureau's assertion to provide an appropriate and comprehensive response. If the Bureau intends to provide information regarding each consumer complaint upon which the Notice is based, does the Bureau expect the Nonbank respondent to specifically address each complaint and the resolution thereof in its response?

Timeframe for Response to a Notice of Reasonable Cause. Section 1091.103(a)(2)(i) provides that a Notice of Reasonable Cause will include a statement informing the respondent that a written response to the Notice must be filed no later than 20 days after the Notice is served on the respondent.

Twenty days is not nearly a sufficient length of time to prepare and submit such a response. We urge the Bureau to extend the time period for responding to a Notice of Reasonable Cause to no less than 45 days *at a minimum*, and preferably 60 or 90 days. We also request that the Bureau allow respondents the opportunity to request an extension from the standard timeframe for response to a Notice of Reasonable Cause.

In order to respond to a Notice of Reasonable Cause, we expect that a Nonbank would have to do each of the following, at a minimum: engage counsel, locate and review potentially relevant documents and information, interview select personnel, draft a written response, compile documents and information to accompany the response, internally approve the response and submit the response. Twenty days is simply not enough time to effectively complete all of those steps.

Depending on the nature of issues raised in the Bureau's Notice of Reasonable Cause, a respondent may not have all relevant materials in its possession. As discussed above, responsibilities under network branded prepaid card programs are often shared across a number of parties, generally including at a minimum the card issuing bank, program manager and processor. Card networks also play a role, and other parties, such as distributors, marketers and/or sales/reload agents, are often involved as well. Additional time may be needed for a respondent to obtain the documents and information relevant to its response from other parties involved in its prepaid card program. Older data, whether held by the respondent or other parties, may be archived; retrieval of archived data can take a considerable amount of time, especially when the data is stored off-site.

We note that under §§ 1091.108(a) and .109(a) (discussed in more detail below) the Bureau's Assistant Director for Nonbank Supervision or his or her designee (the "Assistant Director") and the Director have a combined 90 days to consider whether a respondent is engaging, or has engaged, in Risky Conduct which should result in an order subjecting the respondent to the Bureau's authority. A respondent must be afforded more than 20 days to draft and assemble a response that the Bureau may take up to 90 days (or more) to review.

We note also that the standard response time for discovery in civil litigation is generally 30 days. For most larger civil litigation matters, document production occurs on a rolling basis so that the first set of materials is produced within 30 days and documents are produced regularly thereafter for a set period of time. The general standard for responding to a governmental subpoena is 21 days, although document productions related to such investigations are rarely completed within the initial response period because extensions are typically negotiated upon receipt of the subpoena. In addition, both civil document requests and subpoenas require respondents to supplement document productions when they become aware of additional responsive information or materials. We note that even a minimum of 30 days is provided to comment on proposed rules such as this one and that process is not nearly as comprehensive or potentially burdensome as is anticipated by the Proposal.

Particularly in light of the provision in § 1091.105(d) that deems a respondent to waive its right, in any future stage of the Bureau's consideration of the matter at hand or in any petition for judicial review, to rely on any argument, record, document or other information that it does not raise or include in its initial response to the Bureau, we are concerned that 20 days does not provide a respondent with sufficient time to prepare and submit an adequate response. Please see below for additional comments regarding the Bureau's proposed § 1091.105(d).

§ 1091.104 Service of Notice

Service on Persons Registered with the Bureau. Section 1091.104(a)(3) provides additional procedures for serving a Notice of Reasonable Cause on a person “currently registered with the Bureau” by sending such Notice to the most recent business address shown on the person’s registration form via U.S. Postal Service certified, registered or Express Mail and obtaining a confirmation of receipt or attempted delivery.

We request that the Bureau clarify what it means to be registered for this purpose. Does this registration form clearly indicate that the address provided may be used for service of Notice of Reasonable Cause? Or is such a registration form prepared any time a person provides information to the Bureau, even on a voluntary basis?

Waiver of Service. Section 1091.104(a)(6) provides that a Notice of Reasonable Cause may be served via first class mail or other reliable means, rather than by the methods set out in §1091.104(a)(1) and (2), if “a waiver of service is obtained from the party.”

We request that the Bureau clarify what such a “waiver of service” entails. We also request that any such waiver of service be given only in writing and that it must be given by a person upon whom a Notice of Reasonable Cause would be served under §1091.104(a)(1) or (2).

§ 1091.105 Response

Section 1091.105(b)(1) provides that a response to a Notice of Reasonable Cause must set forth the basis for the respondent’s contention that it is not a Nonbank that is engaging, or has engaged, in Risky Conduct. Section 1091.105(b)(1) provides that such a response must include all documents, records or other evidence a respondent wishes to use to support the arguments or assertions set forth in its response. Section 1091.105(d) provides that a respondent is deemed to have waived the right to rely on any argument, record, document or other information that the respondent does not raise or include in its response, at any future stage of the Bureau’s consideration of the matter as well as in any petition for judicial review.

In the preamble to the Proposed Rule, the Bureau explains that it intends for the waiver in § 1091.105(d) to “remove any incentive for a respondent to wait until after filing a response, such as at a supplemental oral response or during judicial review, to raise an argument or present documents or other information for the first time. This will help ensure that the Bureau is aware of all relevant issues upon which a respondent wishes to rely at the earliest opportunity before reaching a determination under this Proposed Rule.”⁶

We understand the Bureau’s concerns about receiving information in a timely manner from respondents. Nonetheless, we urge the Bureau to reconsider its position regarding a respondent’s waiver of rights to rely on any argument, record, document or other information that it does not raise or include in its initial response to a Notice of Reasonable Cause. The Bureau is potentially requesting an enormous amount of material that must be reviewed, compiled and delivered in a

⁶ 77 Fed. Reg. 31230.

proposed period of less than three weeks. What if information does not appear relevant to the Bureau's description of the matter contained in its Notice of Reasonable Cause but the respondent later learns that such information is relevant based on subsequent communications from the Bureau? What if relevant materials become available or are developed after a response is submitted?

In addition, please see our comments above under § 1091.103 regarding the timeframe for response to a Notice and level of detail the Bureau expects to provide in a Notice of Reasonable Cause so that a respondent may adequately respond thereto.

§ 1091.106 Supplemental Oral Response

Scheduling and Conduct of a Supplemental Oral Response. Section 1091.106(a) provides that a respondent may, in its response to a Notice, also request an opportunity to present a supplemental oral response to the Assistant Director in support of the respondent's assertion that it is not a Nonbank that is engaging, or has engaged, in Risky Conduct. Section 1091.106(d) provides that within 14 days after receiving a timely filed request to provide a supplemental oral response, the Assistant Director will notify the respondent of the date and time scheduled for the supplemental oral response as well as general information relating to the conduct of the supplemental oral response. A supplemental oral response will not be scheduled less than 10 days from the date the respondent is served with such notice by the Assistant Director. Under 1091.106(g), failure to participate in a scheduled supplemental oral response constitutes the respondent's waiver of the opportunity to present such a response.

We appreciate that the supplemental oral response will not take place less than 10 days from service of the Assistant Director's scheduling notice. We request that the Bureau clarify what its anticipated timing will be for scheduling a supplemental oral response. Does the Bureau intend, for example, for supplemental oral responses to occur generally within two weeks from service of the scheduling notice? Or does the Bureau expect that supplemental oral responses will occur much later to allow Bureau staff to review the respondent's written submission in advance of the supplemental oral response? We urge the Bureau to consult the respondent in selecting the date and time for the supplemental oral response to assure that appropriate person(s) are available to attend.

In addition, we request that the Bureau clarify whether it expects to ask questions during a supplemental oral response or whether it will be solely a time for the respondent to provide an oral statement.

Regarding a respondent's waiver of the opportunity to present a supplemental oral response if it fails to attend a scheduled supplemental oral response, we urge the Bureau to grant exceptions to this position in extenuating circumstances. What if a respondent never receives the Bureau's notice regarding scheduling? What if unexpected technological difficulties render the respondent unable to participate? In addition, what are the Bureau's plans if its own staff, rather than the respondent, are unable to attend a scheduled supplemental oral response?

Confidentiality of a Supplemental Oral Response. Section 1091.106(b)(6) provides that the Bureau will make a recording of a respondent's supplemental oral response, and that a respondent may purchase a copy or transcript of the recording at its own expense.

We request that the Bureau confirm that its recording of a respondent's supplemental oral response, its transcript thereof and any other information or materials provided in connection with a supplemental oral response are deemed confidential supervisory information. Section 1091.105(b)(2) provides that documents, records or other items submitted by a respondent with a response shall be deemed confidential supervisory information under 12 CFR 1070.2(i)(1)(iv) but is silent as to the recording, transcript and other materials associated with a supplemental oral response.

§ 1091.108 Recommended Determination

Section 1091.108 explains the process whereby the Assistant Director will make his/her recommended determination as to whether a respondent should be subjected to the Bureau's supervisory authority. Section 1091.108(e) provides a list of items that the Assistant Director shall include when submitting his/her recommended determination to the Director. Item iii on that list is a copy of the respondent's response to the Notice of Reasonable Cause; item iv is any documents, records or other items filed with the written response, *as well as any document, record or other item considered by the Assistant Director to be material* in making his/her recommended determination.

We request that the Bureau clarify whether the respondent will be notified of and/or provided copies of any documents, records and other items provided by the Assistant Director to the Director pursuant to § 1091.108(e)(1)(iv).

§ 1091.109 Determination by the Director

Reconsideration of Issues after the Director Has Determined a Respondent Should Not Be Subject to the Bureau's Supervisory Authority. Section 1091.109(a) provides that, after considering the Assistant Director's recommended determination as to whether a respondent should be subjected to the Bureau's supervisory authority and all documents, records and related items submitted therewith, the Director shall make a determination to either adopt, modify or reject the Assistant Director's recommended determination. The Director shall then issue to the respondent either a decision and order subjecting the respondent to the Bureau's supervisory authority or a notification that the Director has determined that the respondent is not subject to the Bureau's supervisory authority as a result of the proceedings. Section 1091.109(a)(2) provides that the latter notification has no precedential effect and does not prevent the issuance of another Notice of Reasonable Cause under either § 1091.102 or the procedures set forth in § 1091.114 (regarding a notice of charges in adjudication proceedings by the Bureau), at any time, or the issuance of an order subjecting the respondent to the Bureau's authority pursuant to either of those sections.

We request that the Bureau reconsider whether it is appropriate to subject a respondent to what appears to be "double jeopardy" in issuing another Notice of Reasonable Cause or commencing adjudication proceedings against a respondent where the issue is one that the Director has

previously determined does not warrant subjecting the respondent to the Bureau’s supervisory authority.

Involvement of Decisional Employees. Section 1091.109(c) provides that only decisional employees may advise and assist the Director in the consideration and disposition of proceedings under this proposed 12 CFR Part 1091. The term “decisional employee” is defined in §1091.101 as any employee of the Bureau who has *not* engaged in either “(1) Assisting the Deputy in either determining whether to issue a Notice of Reasonable Cause, or presenting the Deputy’s position in support of a Notice of Reasonable Cause, either in writing or in a supplemental oral response, to the Assistant Director; (2) Assisting the Assistant Director in the preparation of a recommended determination.”

We support and appreciate the Bureau’s efforts to separate employees involved in the Deputy’s and Assistant Director’s decisions and activities with respect to the Proposed Rule from the Director’s role in this process.

Consistency among Decisions. We urge the Bureau to consider ways it might ensure that determinations are made consistently for similarly situated nonbanks.

§ 1091.110 Petition for Termination of Order

Section 1091.110(a) provides that any person subject to the Bureau’s supervisory authority based on the procedures described in the Proposed Rule may petition the Director for termination of that order no sooner than two years after issuance of the order, and no more frequently than annually thereafter.

We request that the Bureau reconsider requiring two years to pass before a Nonbank subject to the Bureau’s supervisory authority under the Proposal may petition for termination of its order. One year of supervision by the Bureau, rather than two, seems more appropriate in these circumstances. For example, what if there are significant changes made to the nonbank’s business (in response to the supervision order or otherwise)? What if the Nonbank simply ceases offering the particular products or services that were the reason for the Bureau’s Notice of Reasonable Cause?

§ 1091.111 Construction of Time Limits

Section 1091.111(b)(2) provides that filing or service of papers is deemed to occur upon deposit in or delivery to an appropriate point of collection for overnight commercial delivery service, U.S. Express Mail delivery, or first class, registered or certified mail.

Using the date a respondent’s submission is deposited or delivered for mailing as described above is appropriate; this standard is also used by other governmental agencies in other contexts. However, we are concerned that use of such a standard to determine a date that the Bureau itself has served papers on a respondent may result in confusion as to the respondent’s deadline for response. Even use of a postmark date for this purpose is not always reliable, as metered mail stamps and cancellation stamps may be smudged or otherwise unclear. We urge the Bureau to include clear deadlines (i.e., specific dates) for response in its Notices of Reasonable Cause and other papers served on respondents.

§ 1091.115 No Limitation on Relief Sought in Civil Action or Administrative Adjudication

Section 1091.115 provides that nothing in the Proposed Rules limits the relief the Bureau may seek in any civil action or administrative adjudication, including seeking an order to have a person deemed subject to the Bureau’s supervisory authority.

In the preamble to the Proposed Rule, the Bureau explains that a Notice of Reasonable Cause does not “constitute a notice of charges for any alleged violation of Federal consumer financial law or other law. The proceedings under the Proposed Rule would be informal and would not constitute an adjudicatory proceeding under section 554 of the Administrative Procedure Act (APA). Appropriately, under the informal process that would be established by the Proposed Rule if made final, no discovery would be permitted, a supplemental oral response would not constitute a hearing on the record, and no witnesses would be permitted to be called as part of a supplemental oral response.”⁷

We request that the Bureau permit respondents, in order to assure their due process rights under the 14th Amendment, the option of converting informal proceedings under the Proposal to a formal adjudicatory proceeding under the Administrative Procedures Act. Certain respondents may prefer to have a determination that they are subject to the Bureau’s supervisory authority made following formal discovery and a hearing on the record with witnesses called. If the Bureau has the option to proceed using a formal adjudicatory proceeding, so should respondents.

Thank you, once again, for this opportunity to provide input and guidance regarding the CFPB’s proposed supervision of certain nonbanks. The NBPCA supports the innovation, growth and success of network branded prepaid cards in a manner that meets your goals of safety and transparency. Our members not only seek to meet consumer product demand, they also strive to achieve the highest level of consumer confidence and satisfaction.

The NBPCA supports the goals of the CFPB, and we respectfully urge the CFPB to consider our response set forth herein. We hope we have answered your questions. Should you require any further assistance, please do not hesitate to contact us at (201) 746-0725.

Very truly yours,



The Network Branded Prepaid Card Association
Kirsten Trusko
President and Executive Director

⁷ 77 Fed. Reg. 31228, internal citation omitted.