

**COMMENTS OF THE
TAX PROBLEM RESOLUTION SERVICES COALITION
TO THE
BUREAU OF CONSUMER FINANCIAL PROTECTION
IN CONSIDERATION OF
DOCKET NUMBER CFPB-HQ-2011-2
FOR
“DEFINING LARGER PARTICIPANTS IN CERTAIN CONSUMER FINANCIAL
PRODUCTS AND SERVICES”**

AUGUST 15, 2011

The Tax Problem Resolution Services Coalition (TPRSC) appreciates the opportunity to provide comments on behalf of our membership to the Bureau of Consumer Financial Protection’s (CFPB) June 23, 2011 notice and request for comment (Notice) which seeks public comment on the development of rules to define covered persons that will be subject to the CFPB’s supervision program as a “larger participant” of a market for consumer financial products or services.

ABOUT THE COALITION

The TPRSC represents the efforts of a broad spectrum of the tax debt resolution industry including CPAs, attorneys and enrolled agents, located throughout the United States. Its mission is to promote and ensure the protection of taxpayers from unfair and deceptive advertising claims and practices by unscrupulous delinquent tax debt representation providers.

SUMMARY OF THE CFPB NOTICE

The TPRSC understands the provisions of the Notice as follows:

Section 1024 of the Act [Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203] provides that the CFPB may supervise covered persons in the residential mortgage, private education lending, and payday lending markets. For other markets, the supervision program generally will apply only to a “larger participant” of these markets. The CFPB must define such “larger participants” by rule. The CFPB is required to issue an initial rule to define covered persons that are “larger participants” of other markets not later than July 21, 2012, one year after the designated transfer date.

The “larger participant” rule will not impose new substantive consumer protection requirements on any nondepository entity, but rather will provide to the CFPB the authority to supervise larger participants in certain markets—including requiring reports and conducting examinations—to ensure, among other things, that they are complying with existing Federal consumer financial laws.

Markets identified in this Notice for possible inclusion in an initial rule are: debt collection; consumer reporting; consumer credit and related activities; money transmitting, check cashing and related activities; prepaid cards; and debt relief services.

The CFPB also has the authority to require, by rule, registration of certain covered persons. Such registration could help support the implementation of the supervision program

CFPB's nondepository supervisory authority generally applies only to any covered person that is "a larger participant of a market for other consumer financial products or services," as defined by rule by the CFPB.

Once the scope of the nondepository supervision program is established, the Act requires that the operation of the program be based on an assessment by the CFPB of the "risks posed to consumers in the relevant product markets and geographic markets." The factors to be considered in making this assessment include asset size, volume of transactions involving consumer financial products or services, (risks to consumers, the extent to which institutions are subject to state supervision, and any other factor that the CFPB determines to be relevant.

The CFPB's Notice detailed several specific and targeted markets for inclusion in "covered persons" that would be subject to rulemaking. Of these markets, the CFPB included:

F. Debt Relief Services

Debt relief services refer to consumer financial products and services offered to reduce a consumer's debt. Providers generally offer one of two products or services. Providers of "debt management plans," typically non-profit credit counseling agencies, work with creditors to develop repayment plans for consumers. These plans typically permit a consumer to repay the full credit balance owed under renegotiated terms, such as substantially reduced interest rates and fees. For consumers who are unable to repay the full balance owed, "debt settlement" entities offer to negotiate with a consumer's creditors to enable the consumer to make a lump-sum payment of less than the entire balance owed to the creditor, thereby settling the debt obligation.

A footnote (number 33) to the description of "Debt Relief Services" in the Notice expanded the term to be more than just debt management or debt settlement plans for unsecured consumer debt such as credit cards. The footnote states that providers that offer to reduce "tax debt" are included in the definition. The footnote in the Notice reads:

Principally, these providers offer to reduce consumers' credit card debt, but some providers offer to reduce medical or tax debt.

TAX DEBT RESOLUTION COMPANIES SHOULD NOT BE "COVERED PERSONS"

The TPRSC takes the position that individuals or firms that provide tax debt resolution (negotiation or settlement) services for taxpayers seeking to resolve tax obligations with the Internal Revenue Service (IRS) are exempted from the jurisdiction of the CFPB.

We note immediately that the Act excludes attorneys from the jurisdiction of the CFPB. Many tax debt resolution services rely on attorneys to appear before the IRS and the attorneys supervise the non-attorney staff member.

The Act states:

EXCLUSION FOR PRACTICE OF LAW.— (1) IN GENERAL.—Except as provided under paragraph (2), the Bureau may not exercise any supervisory or enforcement authority with respect to an activity engaged in by an attorney as part of the practice of law under the laws of a State in which the attorney is licensed to practice law.

We also note that certified public accounts - and tax preparers - are specifically excluded by the Act. Many tax debt resolution services rely on certified public accounts to appear before the IRS and employ tax preparers to assist tax filers and the CPA also supervise the non-CPA staff member. The exclusion states:

EXCLUSION FOR ACCOUNTANTS AND TAX PREPARERS.—

(1) IN GENERAL.—Except as permitted in paragraph (2), the Bureau may not exercise any rule making, supervisory, enforcement, or other authority over—

(A) any person that is a certified public accountant, permitted to practice as a certified public accounting firm, or certified or licensed for such purpose by a State, or any individual who is employed by or holds an ownership interest with respect to a person described in this subparagraph, when such person is performing or offering to perform— (i) customary and usual accounting activities, including the provision of accounting, tax, advisory, or other services that are subject to the regulatory authority of a State board of accountancy or a Federal authority; or(ii) other services that are incidental to such customary and usual accounting activities, to the extent that such incidental services are not offered or provided— (I) by the person separate and apart from such customary and usual accounting activities; or (II) to consumers who are not receiving such customary and usual accounting activities; or

(B) any person, other than a person described in subparagraph (A) that performs income tax preparation activities for consumers.

The term “performs income tax preparation activities for consumers” includes a “tax return preparer”, “any person regulated by the Secretary under section 330 of title 31, United States Code” and any authorized “IRS e-file Providers”.

The term “income tax return preparer” is further clarified in Title 26 U.S.C. 7701(a)(36)(A) to mean:

...any person who prepares for compensation, or who employs one or more persons to prepare for compensation, any return of tax imposed by subtitle A or any claim for refund of tax imposed by subtitle A. For purposes of the preceding sentence, the preparation of a substantial portion of a return or claim for refund shall be treated as if it were the preparation of such return or claim for refund.

Further, “any person regulated” under Title 31 U.S.C. 330 generally means only those who are authorized to appear before the IRS - attorneys, certified public accountants and enrolled agents.

It is also informative to note that the Act provides a definition of the user of a provider's services to be a "consumer". This definition creates an immediate reduction in the pool of users over which the CFPB would have jurisdiction because it applies solely to "an individual" not a "person" which includes a partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity. The Act states:

CONSUMER.—The term "consumer" means an individual or an agent, trustee, or representative acting on behalf of an individual.

Given the limited universe of providers who are authorized to appear before the IRS the exclusions in the Act leave no possible jurisdiction of the CFPB over tax negotiation and tax settlement providers except to the extent that these services are being provided by parties without the legal authority to appear before the IRS.

RESPONSES TO CFPB'S REQUEST FOR COMMENT

The TPRSC continues to assert its position that tax negotiation and settlement providers are exempted from the jurisdiction of the CFPB, are not "covered persons" and are not subject to consideration for rulemaking regarding "larger participants". The TPRSC responds to the CFPB's request for comment solely due to the fact that the Bureau has included in the definition of "Debt Relief Services" those providers that offer to reduce "tax debt". However, the use of the term "tax debt" is misleading in the context in which it is being used. As we are sure you are aware, federal tax debt is a secured debt from the time of assessment. Many states have similar laws that makes state tax debt also secured debt.

Tax debt is unique in that unlike most other debt, a statutory lien upon all of the taxpayer's property and property rights arises 10 days after a tax assessment. According to the Internal Revenue Manual (IRM), this "assessment lien" is effective from the date the IRS assesses the tax and, if not paid, is deemed to relate back to the date of the assessment. The recording of a Notice of Filing Tax Lien is not required to perfect the lien against the taxpayer. I.R.C. §6321; IRM §§ 5.17.2.1, 5.17.2.2, 5.17.2.3.1. A tax debt is not dischargeable in bankruptcy unless a nonfraudulent return was filed more than 3 years prior to the time of the bankruptcy petition. 11 U.S.C. §523(a)(1). Tax debt is given a priority position in a distribution of assets from the bankruptcy estate. 11 U.S.C. §507(a)(8).

Therefore, the TPRSC responds to the request of the CFPB seeking public comment with the proviso that the Act does not apply to our industry but provides the following comments:

Should a larger participant be defined based on the relative size of the participants within a market (e.g., whether the number of annual transactions of the market participants is above the mean or median) or, alternatively, should a larger participant be defined based on an absolute threshold, such as doing business in a specified number of states?

RESPONSE: The TPRSC believes that the "largeness" of a tax resolution provider, whether defined by the number of customers, market share or revenue should not be the sole determinant factors. The regulatory mechanisms already in place, however, provide several layers of protection to consumers.

The person who is authorized to appear for a taxpayer before the IRS has the IRS as the ultimate “gatekeeper”. Also, typically the person appearing before the IRS is regulated by a State Bar Association or State Accountancy Board.

At the point of entry to the marketplace for enrolled agents, they must be approved by the IRS through a process of background checks and passing a subject matter proficiency exam. Then, ultimately, IRS has the ability to remove its approval from any provider that violates its standards of practice.

Similarly, for attorneys and certified public accounts these providers must first have approval or licensure by a state authorized organization that provides oversight and regulatory authority over their conduct and practices. While the IRS can bar these providers from appearing before the agency, the state authorities also have the ability to remove the individuals from a legally operating status.

Should more than one criterion be used to determine the size of a market participant, such as the number of annual transactions and/or the number of states in which the participant conducts business?

RESPONSE: The TPRSC believes that more than one criterion should be used to determine the size of a market participant. In our industry, the number of transactions may not be an appropriate measure of size for tax debt resolution provider. A provider can have a small portfolio of clients that have extremely large or complex tax issues that may, for example, cross the boundaries of business and personal obligations.

The number of states in which a participant conducts business also may not be a suitable measure of market participation. Given the specialization of certain providers that work with state tax debt, these participants may only serve one state, but have a large “footprint” in that state.

Once again, the TPRSC believes that as long as a person supervises the staff and that person is subject to regulation by the IRS or a State Regulatory Agency that the number of transactions should not determine the market size of a participant. The criterion should be the number of transactions conducted without supervision of a regulated person.

Should the same criteria and thresholds be used to define a larger participant for every market, or should different criteria and thresholds be tailored for each market based on the market’s characteristics?

RESPONSE: The TPRSC believes that the characteristics of markets are unique to each segment and should not be grouped for consideration. The CFPB has included tax debt resolution services in the “Debt Relief Services” category which also includes credit counseling agencies that offer debt management plans and debt settlement services.

Debt management plans and debt settlement services are mutually exclusive services that share very few, if any, common practices or operations. Both of these services should be separately regulated. Similarly, tax debt negotiation and settlement has absolutely no common characteristics with, and should not be viewed as, debt management or debt settlement. See the discussion above regarding the uniqueness of tax debt.

For each market, what reliable data sources are available and would be suitable for the CFPB to use in its larger participant determinations?

RESPONSE: The TPRSC believes that the IRS, state taxing authorities, state boards of accountancy, state bar associations and state attorneys general are reliable data sources for information about the suitability of larger participants to legally provide services.

What data should the CFPB collect through a registration process to use in its larger participant determinations?

RESPONSE: The TPRSC believes that larger participants should provide basic identification information including legal business names, assumed names, names and addresses of officers and directors, legal address and required licenses or permits. If the CFPB chooses to consider tax debt resolution providers as “covered persons”, contrary to the recommendations of the TPRSC, it will want to identify information relating to the number of regulated persons, attorneys, certified public accountants and enrolled agents to staff persons in firms.

In evaluating a market participant’s size, should the CFPB measure the size of a market participant based on the relevant criteria for the previous one year, two years, or more – or at one or more than one points in time? Should a market participant be a larger participant if it meets the applicable threshold in any one of a specified number of prior years, or only if it meets the threshold in the most recent period?

RESPONSE: The TPRSC believes that the current “era” of market participation should be the measure of time when evaluating a participant. Certainly, a market participant is different at the point of start up, once becoming a mature stable provider and becoming a market leader.

If a provider had been operating three years earlier at a single location with only one employee, it is substantially different that a venture capital driven mass television marketer with multiple locations and large employee base.

What consumer financial product or service markets should be included in the initial rule?

RESPONSE: The TPRSC believes that tax negotiation and settlement services should not be included in the initial rule because these providers are generally excluded from the Consumer Financial Protection Act of 2010.

For the most part tax debt is secured rather than unsecured debt and the persons who handle tax negotiation and settlement services with the IRS are typically persons excluded from the CFPB's jurisdiction.

Whether the defined categories (i.e. "Debt Relief Services") should be covered in the initial rule, whether each particular category consists of a single market or multiple markets, and whether other markets also should be addressed.

RESPONSE: The TPRSC believes that tax negotiation and settlement providers are already regulated by the IRS and should not be in the defined categories of markets that the CFPB intends to supervise. The TPRSC finds it inappropriate to comment on the "Debt Relief Services" market because their services and operational mechanics are wholly different than our industry and market.

CONCLUSION

The TPRSC appreciates the opportunity to present our comments to the CFPB in the matter. Should you have any questions or require any additional information, please feel free to contact us.

TPRSC CONTACT:

Mark Guimond
National Policy Group
700 12th St., N.W.
Suite 700
Washington, D.C. 20005
202-271-3569