**BEFORE THE**
**FEDERAL TRADE COMMISSION**
**WASHINGTON, D.C. 20554**

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| **In the Matter of** | ) |
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| **Protecting Consumers in Debt** | ) |
| **Collecting Proceedings, P094806** | ) |
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# ACA INTERNATIONAL'S COMMENT REGARDING PROTECTING CONSUMERS IN DEBT COLLECTING PROCEEDINGS, P094806

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## I. Introduction

ACA International welcomes the opportunity to comment for the Federal Trade Commission's workshop *Protecting Consumers in Debt Collection Litigation and Arbitration: A Roundtable Discussion.* Debt collection litigation and arbitration are the final steps of a long process to collect an outstanding debt created when a consumer receives a good or service without making full payment to the underlying credit grantor. As an association of credit grantors, third-party debt collectors, debt buyers, and attorneys specializing in the responsible resolution of debts and recovery of assets, ACA contributes a valuable perspective to the Commission's discussion of these issues. We also look forward to participating directly in the workshop as a panelist selected by the Commission.

It is important for the Commission to understand the process of attempting to recover consumer debts prior to resorting to litigation or arbitration. The process begins when a credit grantor extends credit to a consumer. In the example of credit card debts, the consumer signs an agreement with the credit grantor describing the terms of credit, including interest that will be charged and the amount and timing of payments that are to be made by the consumer. If the consumer fails to make payments and becomes delinquent, commonly credit grantors will attempt to bring the consumer back into current status through internal recovery efforts. Invariably these efforts are extensive, resulting in telephone and written communications in which the consumer is offered the opportunity to resolve the account balance.

These internal recovery efforts do not always succeed. The result is that credit grantors place accounts with third-party collection agencies that are licensed in the appropriate jurisdiction to communicate with the consumer in an effort to resolve the outstanding balance. These agencies locate consumers and contact them by telephone and in writing consistent with the Fair Debt Collection Practices Act, the Fair Credit Reporting Act, assorted state laws, and other federal laws that impact the recovery process, e.g. the Telephone Consumer Protection Act.

Alternatively, credit grantors may bypass placement with a third-party collection agency and sell the accounts in portfolios of debt, or perhaps do so after a period of unsuccessful placement with a third-party collection agency. These debt buying transactions take place in a developing, complex debt buying market that has grown exponentially in the past fifteen years and now processes billions of dollars in face value of debt on an annual basis.

Whether in the context of third-party collections or debt buying, the companies involved in the recovery of these consumer obligations engage in billions of contacts with consumers annually. Although the process is not error free, there are remarkably few complaints when compared to the number of contacts initiated. By all measures, the process is carried out with sensitivity to the impact on consumers and observance of the statutory and regulatory obligations imposed on the accounts receivable management industry. In many instances, consumers acknowledge the existence of the debts and their obligations to the respective credit grantor and agree to repay of some or all of the outstanding balance. In other instances, the unpaid balance is denied and not paid and the credit-grantor may elect to invoke its legal right to seek recovery in court or before an arbitrator. The parties to these proceedings are entitled to a fair hearing that adjudicates the dispute to finality. Indeed, ACA is sensitive to the need for fairness and transparency in the process of using arbitration to resolve disputes. Where the consumer accepts the goods or services with full disclosure of the clause, arbitration can serve as an important role in reducing already overcrowded court dockets. A key consideration is ensuring that a consumer does not forfeit rights otherwise available to him in a court of law and that the disclosure of the arbitration clause is meaningful and conspicuous.

Litigation and arbitration models aim to resolve an underlying dispute between the consumer and the credit grantor or debt buyer as to the existence and responsibility for the debt. In the experience of ACA, dispute resolution that does not trigger the time, expense, and legal fees of litigating in court or immediately arbitrating issues are worthy of consideration. It is for this reason that ACA has undertaken to develop a National Debt Collection Dispute Resolution Program as an alternative model to provide a fair alternative to consumers that are interested in resolving a dispute with a collection agency or debt collector. As envisioned by ACA, the parties to dispute resolution program would be afforded a period of time in which to resolve the complaint. If the parties are unable to resolve the dispute between themselves within thirty days, the National Debt Collection Dispute Resolution Program would provide a mediator to facilitate a resolution. If mediation is unsuccessful, the program will provide the parties an opportunity to utilize the services of an arbitrator to resolve the dispute.

The National Debt Collection Dispute Resolution Program is not intended to serve as a condition precedent to filing suit. Rather, it is ACA's intention is to provide a convenient forum for consumers to have their grievances addressed, without incurring the expense and expending the time required for seeking relief through the court system. Ultimately, it is our hope the Federal Trade Commission, state attorneys general and state regulators would forward complaints they receive from consumers regarding the debt collection industry to the National Debt Collection Dispute Resolution Program for resolution that ACA is committed to realizing as a consumer friendly alternative to the expensive and time-consuming alternatives of litigation or binding arbitration.

## II. Background on ACA International.

ACA International is an international trade association formed in 1939. It is the leading umbrella organization of the accounts receivable management industy. Headquartered in Minneapolis, Minnesota, ACA represents approximately 5,300 company members, including collection agencies, credit grantors, attorneys, asset buyers and vendor affiliates that together provide a wide variety of accounts receivable management services. ACA's membership base employees approximately 150,000 individuals worldwide.

The company-members of ACA comply with applicable federal and state laws and regulations regarding debt collection, as well as ethical standards and guidelines established by ACA. Specifically, the collection activities of ACA members are regulated primarily by the Federal Trade Commission under the Federal Trade Commission Act, 15 U.S.C. § 45 *et seq.*, the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 *et seq.*; the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* (as amended by the Fair and Accurate Credit Transactions Act); the Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 *et seq.*; and numerous other federal and state laws. Indeed, the accounts receivable management industry is unique if only because it is one of the few industries in which Congress enacted a specific statute governing all manner of communications with consumers when recovering debts.[1] In so doing, Congress committed the primary regulation of third-party debt collection to the jurisdiction of the Federal Trade Commission. 15 U.S.C. § 16921.

ACA members range in size from small businesses with a few employees to large, publicly held corporations. Together, ACA members employ in excess of 150,000 workers. These members include the smallest of businesses that operate within a limited geographic range of a single town, city or state, and the largest of national corporations doing business in every state. The majority of ACA members, however, are small businesses. Approximately 2,000 of the company members maintain fewer than ten employees, and more than 2,500 of the members employ fewer than twenty persons.

Uncollected consumer debt threatens America's economy, making ACA members a crucial component in safeguarding the economy's health. According to the Federal Reserve Board and United States Census Bureau, consumer bad debt costs every adult in the United States $683 every year. This translates into a cost for the average non-supervisory worker of nearly 54 hours (before taxes) in annual salary that pays for the bad debt of other consumers. Outstanding credit card debt alone has doubled in the past decade and now approaches three quarters of one trillion dollars. Total consumer debt, including home mortgages, exceeds $9 trillion.[2] Moreover, the greatest increases in consumer debt are traceable to consumers with the least amount of disposable income to repay their obligations.

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1 The FDCPA defines "communications" subject to statute broadly to include "the conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. § 1692a(2).

2 William Branigan, "U.S. Consumer Debt Grows at an Alarming Rate," *Washington Post*, Jan. 12, 2004.

As part of the process of recovering outstanding payments, ACA members are an extension of every community's businesses. They represent the local hardware store, the retailer down the street, and the family doctor. ACA members work with these businesses, large and small, to obtain payment for the goods and services received by consumers. In years past, the combined effort of ACA members have resulted in the recovery of billions of dollars every year that are returned to business and reinvested. For example, ACA members recovered and returned over $40 billion in 2007 alone, a massive infusion of money into the national economy.[3] Without an effective collection process, the economic viability of these businesses, and the American economy in general, is threatened. At the very least, Americans are forced to pay higher prices to compensate for uncollected debt.

## III. Comments on Debt Collection Litigation.

In response to the specific topics referenced by the Commission in the workshop draft agenda, ACA has the following comments.

### A. Default Judgments and Service of Process.

1. How frequently are default judgments entered in debt collection litigation? Are debt collectors more likely to obtain a default judgment with some types of debt, such as credit card debt, or on behalf of some types of owners of debts, such as debt buyers?

Debt collection litigation only occurs in a small percentage of accounts that become delinquent. There is no empirical evidence that suggests that the type of debt influences the frequency with which litigation is pursued. Again, it is important to understand the extensive effort that is made to recover the debt before litigation is

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3 PricewaterhouseCoopers, Value Of Third-Party Debt Collection To The U.S. Economy in 2007: Survey and Analysis, *available at* http://www.acainternational.org /files.aspx?p=/images/12546/pwc2007-final.pdf.

pursued. After a delinquency with a credit grantor, internal recovery efforts are made to recover the debt. Eventually the debt is placed with a third-party debt collector, and collection efforts are again made with the provision validation notices and other disclosures that inform the consumers of their rights. Some consumers are placed on a plan to pay over time. After a failure to meet the terms of the agreement, repeated efforts are made to collect without litigation. At every step of the way, multiple attempts are made to reach an agreement with the consumer. Litigation is a last resort following months of effort to consensually recover the debt. In addition, many credit grantors will only sue or authorize suit if the consumer has the capability of repaying the debt but is unwilling to do so.

Many state statutes specifically provide for the assignment of debts from the original creditor to a third-party debt collector. The usual intention is to allow the collector to lawfully pursue the claim against the consumer in the name of the debt collector. As well, the collector may be able to consolidate into one legal action, when legally appropriate, several debts owed by a single consumer. This makes a lawsuit more economically feasible than would be the case if individual small debts must each be pursued separately. These agencies can also legally inform consumers that they will be taking legal action if in fact they have the authority and intent to do so.

In the case of debt buyers, a different model applies. The debt buyer commonly purchases portfolios that already have gone through the entire collection process leading up to litigation. Debt buyers are then allowed in some jurisdictions to aggregate the claims and file multiple claims. This greatly decreases the case load of the courts. In order to protect consumers in these situations, it is essential for the debt buyer to complete its due diligence to assure it is receiving accurate information from the debt seller. ACA's Asset Buyers Division Committee has taken the position as a matter of policy that no lawsuit should be filed without due diligence to make sure the debt is owed, it is not barred by limitations, and the named defendant consumer is the proper party.

Once litigation has been initiated, the default judgment rate is relatively high. The total default judgment rate of a typical portfolio of accounts approximates 5-15 percent, but there is extreme variability in this data based on the variations in the types of accounts constituting the portfolio. By some projections, the default judgment rate applicable to the cases actually filed in court may reach as high as 80 percent, but again this represents a small percentage of accounts that actually are acquired by a debt buyer. In part, the default judgment rate is explained by the process that leads up to the filing of the lawsuit. As noted above, this process typically includes in-house attempts to recover the debt, referrals to third-party debt collectors hired by the credit grantor with full application of Federal and State credit and collection laws, return of the accounts to the credit grantor for packaging and sale, and finally, sale to a debt buyer that frequently will reinitiate the entire process by attempting to recover the debt before initiating suit. Embedded in this process are the many attempts to initiate dialogue with the consumer, the provision of validation and mini-Miranda notifications, and more often than not, a lineage of failed agreements with the consumer to pay all or part of the debt according to a protracted schedule of repayment.

What this process cannot change unfortunately is consumer behavior. All too often, consumers attempt to resolve delinquencies through cease and desist instructions that are not precipitated by unethical or non-compliant collection practices. ACA believes that these strategies spring from false and misleading information made available to consumers on-line which mischaracterizes their legal obligations to repay a debt and direct consumers invoke cease communication rights as a way toward debt avoidance. Apart from the irresponsible underpinning of this advice, the outcome for credit grantors, debt collectors, and debt buyers is that there is no other strategy to effectuate recovery but through the courts.

### 2. What costs and benefits result from the entry of default judgments?

The cost of litigation that results in the entry of a default judgment is not high. Default judgments do not unduly drain the courts' time and resources. As stated above, the percentage of debts that are litigated is very low due to the exhaustive attempts by creditors and debt buyers to settle the debt out of court. Consequently, default judgments in debt litigation do not result in any unnecessary costs to the judicial system. The entry of default judgments as a rule of civil procedure, yields vast benefits to the judicial system by alleviating the courts' docket and eliminating cases where a consumer who has been properly served intends not to assert a defense. Among other things, this means that the full range of due process protections available to all litigants are available to defendants in these suits. These protections are monitored and enforced by the federal and state judicial officials.

### 3. Should there be changes in the law or industry practice with respect to service of process or default judgments?

ACA does not believe it is necessary to change the law with respect to service of process or default judgments. There is no credible linkage between the high default judgment rate and service of process issues as it relates to the recovery of debts. In this regard, ACA is aware of no research that has examined default cases to determine if the rates are a function of defects in service, as opposed to a host of other factors that might lead a defendant in any other civil lawsuit to default. To be sure, there is always the possibility of fraud or deceit by a process server, but that is unquestionably the exception and not the rule. In addition, debt collectors and debt buyers have a system of checks and balances to address the possibility. For example, careful monitoring of the service of process should be able to identify bad service in many cases. After service of process, the server further provides an affidavit attesting to the accuracy of the service and providing specific information to substantiate it. Some firms use proprietary algorithms that evaluate the days the process server went out, times, and signatures on the affidavit, and other objective criteria that a computer program uses to picks up inconsistencies. Using a reputable process server does not pose any significant risk of bad service.

In addition, it is well established that debt collectors are entitled to rely on the information provided by third parties, such as credit grantors, in recovering outstanding payment obligations.[4] In the context of service of process, this is taken to another level of verification because collectors are permitted to rely upon the sworn affidavit of service provided by a process server concomitant with filing suit.

**B. Statute of Limitations Issues.**

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[4] *In re Cooper v. Litton Loan Servicing*, 253 B.R. 286 (N.D. Fla. 2000) ("debt collectors are entitled to rely on the information they receive from the creditor."); *see also Shapiro v. Haenn*, 222 F.Supp.2d 29, 44 (D. Maine 2002) (staling that "debt collectors may rely on the information their clients provide, and the FDCPA does not require them to conduct their own investigation..."); *Htiise v. Ocwen Federal Bank*, FSB, 195 F.Supp.2d 1188, 1210 (D. Or. 2002) (stating that the FDCPA does not require independent verification of the validity of the debt..."); *Ducrest v. Alco Collections, Inc.*, 931 F.Supp. 459, 462 (M.D. La. 1996) (stating that a "debt collector should be able to rely on the representation and implied warranty from its client that the amount was due under either the lease or the law").

1. How frequently do debt collectors collect or seek to collect on debt that is beyond the statute of limitations?

Although ACA has no data on the frequency in which collection is attempted on out-of-statute accounts, we believe it is important to clear up some misconceptions about this practice. First, the attempted recovery of past statute accounts by threatened litigation is NOT a systemic problem in the industry. Indeed, relatively few companies engage in the business practice of attempting to recover these accounts at all and those that threaten or pursue litigation of an out of statute account do so in violation of the law and ACA's Code of Ethics. Second, and more important, most courts that have addressed the issue have ruled that the FDCPA does not prohibit debt collectors from trying to collect time-barred debts, as long as they do not sue or threaten to sue for the debt.[5] Debts that are past the statute of limitations are still owed to the creditor.[6]

The FTC itself encountered this issue in the auction of the assets of Capital Acquisitions and Management Corp ("CAMCO"). CAMCO's assets was seized and its assets auctioned. The assets were auctioned in four lots, one of which consisted of debts thought to be beyond the statute of limitations. If it was not possible to collect on these debts, then the FTC, the underlying court, and the receiver would not have treated the time-barred debts as assets.

The potential problem in this area is caused by debt collectors at the direction of the credit grantor or debt suing or threatening to sue to collect a time-barred debt. This is

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5 *See e.g., Freyermuth v. Credit Bureau Servs, Inc.*, 248 F.3d 767, 771 (8th Cir. 2001). *See also Shorty v. Capital One Bank*, 90 F. Supp. 2d 1330 (D. N.M. 2000); *Aronson v. Commercial Fin. Servs., Inc.*, Civ. No. 9602113, 1997 WL 1038818 (W.D. Pa. Dec. 22, 1997).

6 *Davis v. Mills*, 194 U.S. 451, 456 (1904).

strictly prohibited by the ACA Code of Ethics.[7] However, merely attempting to collect a time-barred debt is not prohibited. The consumer can send a cease communication letter, and effectively end any attempt to collect on a time-barred debt.

Reducing the statute of limitations on the collection of debts as is occurring in some jurisdictions does not solve the problem. It creates an incentive for debt buyers and creditors to initiate lawsuits earlier in the recovery process in order to avoid the expiration of the statute of limitations. It also constitutes a governmental taking when assets that have been sold and purchased are nullified by legislative decree without due process.

**2.** Are debt collectors more likely to collect or threaten to collect on debt that is beyond the statute of limitations with some types of debt, or on behalf of some types of owners of debts?

ACA is not aware of any significant differences in attempts to collect time-barred debts based on the type of debt or on the type of debt owner. Again, attempting to collect or threatening to collect a debt that is past statute is not inconsistent with the FDCPA provided that there is no false threat of legal action.

**3.** What are the costs and benefits of collectors attempting to collect on debt that is beyond the statute of limitations?

The costs of attempting collection are no different than pre-statute debts. The benefits are similar, and in some respects favorably compare to the recovery of pre-statute debts because the recovery efforts yield payments that otherwise would be uncollected. In terms of the cost of credit, it is well-established, as noted above, that uncollected debt substantially increases the cost of credit for all consumers including

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[7] Rule II.A.4 *ACA International Code of Ethics and Code of Operations as approved July 25, 2007* at 4.

those that timely pay their debts. During a financial period when the availability of credit is diminished, it makes financial sense to not create barriers to collect debts that are owed (and perhaps without dispute) but simply cannot be recovered through a legal process due to the passage of time.

**4.** Should collectors be required to affirmatively disclose to consumers that they have no legal obligation to pay a debt that is beyond the statute of limitations?

Neither credit grantors nor collectors should have an obligation to notify consumers that they have no legal obligation to repay a debt that is past statute. Doing so may mislead consumers and create the false impression that the debt is no longer valid. Again, the Commission needs to carefully distinguish between enforcing a debt in a court of law versus extinguishing the debt. The passage of a statute of limitations does not extinguish a debt, as the cases cited above demonstrate. One way to avoid this confusion, if the Commission was inclined to require such as disclosure, is to also require that the collector inform the consumer that the passage of the statute of limitations does not extinguish the debt and it does not impact the legal obligation to pay a debt prior to the expiration of the statute.

**5.** Should there be other changes in the law or industry practice with respect to collecting on debt that is beyond the statute of limitations?

One positive change that could be made to the current debt collection laws is the implementation of a uniform statute of limitations across all jurisdictions. The current state of the law is a widely varied collection of different conditions and lengths of time.[8] This may have made sense decades ago when credit granting was a local function, but

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[8] ACA's Fast-Fax on Statutes of Limitation (June 18, 2009) is available to the Commission upon request.

times have changed. It is the rule today that debts are created in one jurisdiction and recovery is effectuated years later in a different jurisdiction. This makes it more difficult and expensive for debt collectors to determine when the statute of limitations for a particular debt has expired. To remedy this situation, ACA suggests that a uniform statute of limitations period of ten years be implemented. However, ACA strongly disagrees with any such universal statute of limitations that falls short of the period of time within which a debt may be included on a consumer's credit report. ACA encourages the Commission's consideration of federal preemption not only in the area of creating a uniform statute of limitations for consumer debt but with regard to collection practices, notices and remedies generally.

### C. Prima Facie Collection Case and Evidentiary Burden.

**1.** What evidence of indebtedness do debt collectors typically provide to courts in connection with the debt collection complaints they file?

The type of evidence included with a debt collection complaint varies from state to state, as it is a function of each state's rules of civil procedure. In some states, such as New York, no evidence of indebtedness need be included in the filing. In other jurisdictions, documents must be filed substantiating the claim. Still other jurisdictions require the plaintiff to have access to documentation prior to suit rather than possessing the underlying documents.

One of the key considerations is whether the debt collector had access to the appropriate documentation to substantiate the claim. Debt buyers can and should be able to rely upon the information contained in electronic documents from the asset seller in order to file. It may be that this is the best information available to validate the existence of the debt. Such information is prima facie evidence to file suit because they are business records of the debt seller under the applicable rules of evidence.

**2.** Does the evidence that is provided vary based on the type of debt being collected or the type of debt owner?

ACA is not aware of a significant variance in the type of evidence provided to prove indebtedness based on the type of debt or the type of debt owner. ACA notes that many credit card applications are initiated by telephone or on the Internet and signed documents therefore may not be available to the credit grantor. This is in contrast to most consumer loans which typically have a signed document, although that too is changing. The point is that the documents used to originate, and later evidence, the existence of a debt are anything but standardized. The highly decentralized nature of the evidence is something that the Commission should take into consideration when evaluating the type of debt and debt owner.

**3.** Is sufficient evidence typically provided along with the complaints that are filed in debt collection litigation?

A properly drafted complaint should provide sufficient information to the defendant of the nature of the claim and the alleged indebtedness in order to evaluate the claim for indebtedness. Moreover, the complaint must comply with the applicable rules of civil procedure. In some instances, state civil procedure rules require that debt instruments or other documents be attached to the complaint.

**4.** Should there be changes in the law or industry practice to require debt collectors to file greater evidence of indebtedness?

ACA believes that debt collection litigation should fully comply with the state-specific civil procedure requirements to file suit. These are time-tested rules that are designed to give adequate notice to a defendant of a complaint and the allegations made against the party. Filing greater evidence of the claim, that is, the indebtedness, in the initial complaint respectfully presents itself as an effort to circumvent the function of discovery and motions practice in litigation. We see no valid basis to impose a heightened pleading requirement (as one might expect in a fraud suit) in a collection action where there is no allegation of fraud, particularly where other commercial lawsuits would not be required to satisfy a heightened standard. Moreover, the Commission is well aware of the privacy, third party disclosure, and identity theft issues that are created when documents concerning debt obligations are placed on the public record.

There is, however, a recognition by ACA that a robust flow of information to substantiate debts helps consumers and collectors alike. Indeed, collectors have no desire to waste resources on attempting to recover debts not owed or from the wrong consumer. For these reasons, ACA is currently proposing changes to the Truth in Lending Act that would mandate better maintenance of evidence of indebtedness.[9] Debt sellers would be required to maintain either in original or electronic format copies of the credit application, credit statements, credit agreement, any reporting done to consumer reporting agencies and the chain of title. This information would be required to be maintained until such time as the creditor sells, forwards, or assigns the debt to another person. When the debt is sold, this information would be delivered to the buyer of the debt or access to that information would be given to the buyer. ACA supports insuring that sufficient information is made available to debt buyers (and collectors) from creditors and subsequent purchasers provided that it is grandfathered in to cover already purchased

[9] Attached as Exhibit 1 is a copy of ACA International's Proposed Amendments to the Truth in Lending Act.

debt and notice of market place solutions to this problem made (i.e. secure debt documentation / media repositories).

### D. Garnishment.

1. <u>How frequently do debt collectors freeze or garnish bank accounts containing exempt federal benefits to collect on judgments? Are debt collectors more likely to do so with some types of debt, or on behalf of some types of owners of debts?</u>

Debt collectors and debt buyers do not knowingly or intentionally garnish or freeze exempt funds. Most collectors and debt buyers have written guidelines to prevent this from occurring. The difficulty is that there is no universal system available to creditors, collectors and debt buyers to identify which funds are exempt. This issue does not come up, with the exception of a few States, in the pre-judgment phase. Upon execution when the account is restrained, the bank may determine that there are exempt funds. These funds are then released by the debt buyer.[10]

2. <u>What are the costs and benefits of collectors seeking to freeze or garnish bank accounts containing exempt federal benefits?</u>

There are no benefits gained by a debt collector in freezing or garnishing bank accounts containing exempt federal benefits. ACA believes that the Commission and the Social Security Administration, among other Agencies, have a responsibility and role to educate beneficiaries about exempt funds and measures to protect these funds from seizure. This can be accomplished through a required notice given orally and in writing when the accounts are created. Financial institutions also should be required to offer special accounts to house these funds and direct deposit without commingling them with unprotected assets, much the same as banks currently due for minors.

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[10] Exhibit 2 contains additional information about garnishment.

3. Should there be changes in the law or industry practice with respect to debt collectors freezing and garnishing bank accounts containing exempt federal benefits?

There should be a change in the law requiring banks to notify debt collectors before the collector freezes or garnishes an account containing exempt federal funds. Moreover, the government should mandate that Social Security Administration and other Federal Agencies educate consumers on their rights concerning accounts containing exempt funds and on the problems with commingling funds. Currently, some states such as New York require asset buyers to send notice to consumers of what type of accounts are exempt.

## E. Productive Change and Best Practices.

1. How have industry members, consumer advocates, and court personnel worked, together or separately, on possible changes in the law or industry practice to address problems related to debt collection litigation? Do any of these possible solutions appear to be working or likely to work?

There is no incentive for the debt collection industry to sue the wrong person or to pursue debts not owed. ACA wants better clarification of the consumer's responsibilities for debts by making sure that there is a free and full flow of information from the entities where the debt originates to those who are later charged with the responsibility to collect the debt.

Perception and reality unfortunately diverge when there are characterizations of the entire industry as rogue companies that do not follow the existing rules or act without accurate documentation. The fact of the matter is that most of the events that precipitate the need for a workshop such as the one sponsored by the Commission trace to the wrongful conduct of only a few market actors. Enforcement by the Commission and state agencies, as well as the self-policing techniques of Rule 11 sanctions and bar rules of ethics should be suited to address these problems.

ACA also wishes to emphasize that there is a great danger in reducing the ability of collectors to communicate with consumers. Increased restrictions will create more litigation by erecting insurmountable barriers to working with consumers pre-litigation to try to resolve disputes. This increase in litigation would ultimately increase the cost of credit to all consumers.

## IV. Comments on Arbitration.

### A. Initiating Proceedings and Consumer Participation Rates

1. How should arbitration proceedings be initiated so that consumers are made aware of them and their potential consequences?

The advantage of arbitration is that it is a non-intimidating, lower cost option to resolve disputes as compared to litigation. Consumers can act pro se or with counsel, which gives the consumer flexibility. The initiation of the arbitration proceedings must be done fairly and disclosed clearly to the consumer. The key aspect to the initiation of arbitration proceedings is to ensure that it is done so with effective service.

2. Should there be changes in the law or industry practices with respect to notifying consumers about arbitration?

ACA does not have a comment.

### B. Choice of Provider, Choice of Location, and Role of Consumer Choice.

1. To what extent should consumers have a choice as to whether disputes regarding their debts are subject to arbitration?

ACA has no comment on this policy issue.

2. Should there be changes in the law or industry practice regarding the degree of consumer choice about arbitration disputes, such as whether, when, or where to arbitrate, which organization is the

arbitration provider, or which individual arbitrator will adjudicate the proceeding?

ACA believes that the current laws sufficiently provide consumers with the information they need to make decisions concerning the arbitration process. No changes in the law or practices are necessary unless there are improvements needed on a specific disclosure agreement to make the arbitration process clear and conspicuous.

**C. Arbitration Provider Procedures.**

**1.** What procedures should apply in debt collection arbitration proceedings?

No special procedures are necessary to determine the arbitration provider. This is a contractual issue that should be worked out between the credit grantor and the consumer. As long as the consumer is given full and fair disclosure of the arbitration terms, the two parties should be given the freedom to reach a contractual agreement concerning arbitration terms.

**2.** Should there be changes in the law or industry practice with respect to these procedures?

ACA has no comment on these policy issues.

**D. Bias and Perceptions of Bias.**

**1.** To what extent are there ownership, contractual, or other ties between collectors and arbitration providers? Which, if any, of these ties should be prohibited or disclosed to consumers?

Although there have been recent actions that portray the arbitration process as subject to a pro-business bias as a consequence of alleged financial relationships involving arbitration providers, ACA has no reason to believe that this is systemic problem. The complication in objectively assessing bias by looking at data points such as default rates or award rates is that one also would need to assess the validity of the underlying claim to the debt. Merely because a creditor is successful in court or before an arbitrator in recovering a debt that is validly owed offers no independent evidence whether bias affected the outcome.

2. Should there be changes in the law or industry practice with respect to arbitration conduct to address real or perceived bias?

ACA does not believe that any changes in the law are necessary to address real or perceived bias in the arbitration process.

**E. Transparency of Results; Role of Precedent.**

1. Should the results and reasoning behind arbitration decisions be stated clearly and publicly? Should arbitration decisions have precedential effects on future arbitrations?

Arbitration decisions are informal, non-precedential, fact-resolution events. If this was changed, arbitration would lose the characteristics that differentiate it from civil litigation. Blurring the lines between litigation and arbitration would defeat the purpose of engaging in arbitration.

2. Should there be changes in the law or industry practice to make arbitration decisions more transparent or to increase their precedential value?

ACA has no comment on these policy issues.

3. Should there be changes in the law or industry practice to require the systematic reporting of data about consumer arbitration, as is done in California?

ACA does not believe that the value of requiring the systematic reporting of consumer arbitration data is sufficient to justify the costs of such a system.

**F. Enforcing Awards; Contesting Awards.**

1. How should a debt collector who wins an arbitration award be able to convert that decision into an enforceable judgment?

From an efficiency point of view and in recognition that arbitration is binding and final, the parties should be required to convert the judgment at the time of the decision or according to a verifiable schedule determined as part of the decision.

**2.** How and when should a consumer be able to contest an arbitration decision?

The purpose of arbitration is to quickly and efficiently deal with cases without the costs and difficulties of litigation. Allowing either party to contest the ruling of the neutral arbiter would defeat the purpose of arbitration.

**3.** Should there be changes in the law or industry practice with respect to collectors' ability to convert arbitration decisions into judgments or consumers' ability to contest such decisions?

ACA does not believe that any changes to the law concerning consumer's ability to contest arbitration decisions are necessary at this time.

## V. Conclusion

If you have any questions, please contact Andrew Beato at 202-737-7777.


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**BEFORE THE**
**FEDERAL TRADE COMMISSION**
**WASHINGTON, D.C. 20554**

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|---|---|
| **In the Matter of** | ) |
| | ) |
| **Protecting Consumers in Debt** | ) |
| **Collecting Proceedings, P094806** | ) |
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**ACA INTERNATIONAL'S COMMENT REGARDING PROTECTING CONSUMERS IN DEBT COLLECTING PROCEEDINGS, P094806**

**Exhibit 1**

**As approved by the ACA International Legislative Council and Asset Buyers Division**

ACA INTERNATIONAL
The Association of Credit and Collection Professionals

## ACA International
## Proposed Amendments to the
## Truth in Lending Act

§ 1616 Documentation requirements

A creditor must maintain either in original or electronic format, the documentation identified in this subsection evidencing the extension, renewal, or continuation of credit until such time as the creditor sells, forwards, or assigns the debt to another person, at which time the documentation or access thereto must be provided to that person. Any person to whom the debt is sold must comply with this subsection.

(a) Application
The application for credit including
- (1) Evidence of the consumer's consent to enter into a credit transaction with the creditor;
- (2) Evidence of the consent of any co-obligor or guarantor to enter into a credit transaction with the creditor;
- (3) The terms and conditions of the application extension, renewal, guaranty, or continuation of credit as agreed to by the consumer and the creditor; and
- (4) The date on which the terms and conditions of the extension, renewal, or continuation of credit was accepted or granted.

(b) Credit statements
A statement of the extension, renewal, or continuation of credit including
- (1) The original account number;
- (2) Any subsequent account numbers associated with the application, extension, renewal, or continuation of credit;
- (3) The name of the original creditor;
- (4) The date of any extension, renewal, or continuation of credit;
- (5) The name and contact information of the consumer and any co-obligor and guarantor;
- (6) An itemization of principal, interest and fees charged to the consumer during the term of the credit;
- (7) An itemization of payments and dates of payment made on the extension, renewal, or continuation of credit; and
- (8) The date the debt became delinquent and the date the debt was charged to profit or loss, if applicable.

(c) Credit agreement

The original and subsequent terms and conditions for the extension, renewal, or continuation of credit during the term of the credit, including the effective dates for such terms and conditions.

(d) Reporting to consumer reporting agencies
Information reported by the creditor to consumer reporting agencies including
- (1) The original and current account number;
- (2) The date the information was reported;
- (3) The name of the creditor which reported the information;
- (4) The name and address of the consumer whose information was reported;
- (5) The reported status of the debt; and
- (6) The names of the consumer reporting agencies to which information was reported.

(e) Chain of title
Any documentation evidencing the sale or assignment of a debt to a person other than the original creditor including
- (1) Fully executed bills of sale or assignment;
- (2) Specific debts that were sold or assigned including
  - (A) The original and current account number;
  - (B) The name and address of the consumer obligated on the debt;
  - (C) The balance of the debt; and
  - (D) The names and addresses of the persons to whom the debt has been sold or assigned.

**BEFORE THE**
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**ACA INTERNATIONAL'S COMMENT REGARDING PROTECTING CONSUMERS IN DEBT COLLECTING PROCEEDINGS, P094806**

**Exhibit 2**

# Garnishment

Identification of Exempt Funds

ACA INTERNATIONAL
The Association of Credit and Collection Professionals

ACA International, the Association of Credit and Collection Professionals, supports federal garnishment legislation that protects consumers without unreasonably burdening creditors, debt collectors, as well as other judgment holders. In particular, ACA strongly believes financial institutions should play a role in determining whether account funds are exempt from garnishment because they are better able to identify exempt funds over judgment holders.

***Background***

Garnishment is predominantly a post-judicial legal remedy, often governed by state law, and is an important tool used by creditors and collectors as a last resort when all other efforts to obtain payment have been unsuccessful. Aside from wage garnishment, judgment holders may obtain a court order to garnish a consumer's bank account to satisfy the outstanding judgment.

Federal and state law provides certain funds are exempt from garnishment, including deposits from sources such as Social Security, disability benefits, child support payments, veterans benefits, public assistance, workers' compensation, unemployment insurance, and pensions, to name a few.

However, consumers often commingle exempt and non-exempt income in the same bank account, making it difficult to determine whether funds in the consumer's account are protected from, or subject to, garnishment. More importantly, judgment holders are often unable to independently verify whether funds are exempt.

For a majority of state garnishment laws, once the consumer's account is garnished per a court order, it is the consumer's responsibility to prove funds seized through garnishment are exempt. As a result, under the current system exempt funds may be improperly garnished until the consumer identifies the funds as exempt.

***Identifying exempt funds***

As judgment holders are often unable to verify whether funds are exempt, ACA believes financial institutions are better able to determine whether seized funds are in fact exempt – these financial institutions have an important role to play in the garnishment process in determining whether funds are exempt from garnishment. ACA does not support any attempt to prohibit garnishment of an account up to a particular amount if a financial institution reasonably identifies exempt funds in the account. Such attempts will significantly prohibit legal and appropriate garnishment to recover non-exempt funds from an individual to satisfy a judgment. If a financial institution identifies exempt funds, only those funds should be exempt from garnishment.

ACA supports legislation limiting the garnishment of a consumer's bank account to satisfy a judgment if the financial institution administering the account reasonably identifies exempt funds were deposited to the consumer's account, either by direct deposit or electronic payments. Moreover, ACA believes financial institutions should encourage consumers to have a separate account specifically to deposit exempt funds. Such accounts prevent commingling of exempt and non-exempt funds and mitigate improper garnishment.

Such legislation balances the rights of creditors and collectors to use garnishment and the rights of consumers to protect assets that are exempt from garnishment. It would also lessen the strain on the already overburdened court system as the private sector would be responsible for ensuring consumer exempt monies are not garnished.

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