PORTFOLIO RECOVERY ASSOCIATES

July 31, 2009

Federal Trade Commission
H-135 (Annex A)
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Re: Debt Collection Roundtable – Comment
Project No. P094806

Dear Sir or Madam:

Thank you for the opportunity to offer these comments in advance of the *Protecting Consumers in Debt Collection Litigation and Arbitration: A Roundtable Discussion* event in Chicago. As you may know, our company, Portfolio Recovery Associates ("PRA"), maintains an active litigation department and commences and prosecutes civil actions in all 50 states. But civil litigation to collect debts is our last resort. Litigation is unpleasant, expensive, time consuming, and requires a great deal of specialized knowledge. We much prefer to collect from our customers through one on one communication and are often willing to offer compromises or extended payment plans to facilitate our customers' willingness to meet their payment responsibilities. We only sue customers when we have no other realistic choice.

Although I will address the specific topics on the agenda for the roundtable discussion, the first thing any legal matter should guarantee is fairness: a level playing field for plaintiff and defendant. For that reason, we oppose any efforts to set special rules for credit card or other consumer debt litigation. If any procedural aspect of debt collection requires changes in the law or industry practice, then the same change should be required for divorce actions, adoptions, and any other civil lawsuit, and not single out debt collection litigation.

Initiating Suits: Default judgments and Service of Process

It has long been a basic tenet of the American legal system that a properly served defendant has to appear in court to protect his or her rights. That is true in criminal cases and in all manner of civil litigation. State statutes and court rules uniformly provide that a properly served defendant who simply does not appear will suffer a default judgment. While that is an unfortunate event for the defendant, modern jurisprudence was developed to fairly and finally resolve disputes in civilized societies. Our legal system must function properly for the rights of all to be peacefully resolved. That system would cease to function if either plaintiff or defendant could simply decline to participate in the process. Behaving as a good

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citizen requires some personal responsibility and society should be able to expect that a properly served party will appear for trial, or forfeit. The same result occurs, for example, if a defendant fails to appear in traffic court to defend a speeding ticket on the appointed trial date.

Although PRA does not maintain data on the percentage of its lawsuits that result in a default judgment, it is safe to say that many debt collection cases result in default judgments. We do not know all the reasons for that, but we understand that it is an unpleasant experience when any defendant who owes money on an account is served with a collection lawsuit. It is not hard to imagine that many defendants in collection lawsuits do not appear because the result will be the same whether the defendant appears or not, and the defendant may not wish to spend the time away from work or endure the unpleasant experience of a court appearance. It is also true that the consequences of failing to appear are clearly printed on every lower level court form, so a properly served defendant should not be surprised by the entry of a default judgment. Assuming defendants are properly served, the fact that a large number of debt collection cases result in default judgments is the result of defendants' choice not to appear, not a weakness in the law or industry practice.

We also believe that consumer debtors, creditors, and debt collectors would all be better served if the incidence of collection lawsuits were reduced. Well meaning attempts to protect consumers, by shortening statutes of limitations or restricting debt collectors from using all available means of electronic or telephonic communication, reduces the flexibility that is essential to creditors' and debt collectors' efforts to seek creative ways to help consumers resolve their debts. Simply put, some recent reform efforts are likely to result in increased litigation that will occur earlier in the life cycle of an account, an unfortunate result for consumers. Instead, we suggest that governmental entities, non-governmental organizations like DBA International, ACA International, the National Association of Retail Collection Attorneys (NARCA), creditors' bar assocations, and consumer advocacy groups should continue to engage in education and outreach efforts to inform debtors of the importance of good credit and the consequences of nonpayment (and, in particular, of failing to appear in court). Every actor in the credit and collections process and consumer advocacy groups ought to share the goal of financial literacy and responsible household financial practices.

Timing: Statute of Limitations Issues

No reputable debt collector ever intentionally files a lawsuit against a debtor after the statute of limitations has expired. But debt collectors are human, and while the account information we rely on to calculate a statute of limitations is extremely reliable, no process is foolproof and mistakes occasionally take place (in every type of civil litigation). But mistakes are events that can be fixed and when any plaintiff sues a defendant after the applicable statute of limitations has expired that mistake should be corrected.

Nonetheless, the running of a statute of limitations does not typically "bar" a debt; it only bars a particular remedy: judicial enforcement of the debt. Accordingly, a 2004 FTC Consumer Alert specifically concluded that collection of a debt for which the statute of

limitations has run is not deceptive, misleading, or prohibited by law. For that reason, attempts to restrict collectors from collecting out of statute debt or require them to make additional disclosures explaining statutes of limitations to debtors misplaces the responsibility for ensuring that defendants are properly educated.

Finally, the first and perhaps most important step is to ensure that every defendant is properly served with process. That ensures that the right party is summoned before the court and enables that party to weigh the merits of appearing in court and explore what defenses he or she may have to the action.

Prima Facie Collection Case and Evidentiary Burdens

"Notice pleading" deliberately de-emphasizes pleading, instead requiring "a short and plain statement of the claim" showing that the plaintiff is entitled to relief. By design, notice pleading leaves to the discovery phase the burden of developing facts that are either proven at trial or not. Only state legislatures are empowered to write rules of evidence for state and local courts; not judges, nor the federal government. Contrary to recent developments, it is not the role of a judge to write his or her own courtroom specific pleading requirements or adopt a personal evidentiary standard. Moreover, the law is supposed to be fair to everyone and to favor no one. Establishing pleading requirements specific to debt collection (or even more narrowly to consumer debt collection), but not other types of actions, is unjust.

Garnishment

No reputable debt collector (or other private litigant) would intentionally garnish exempt funds. But a garnishor can only avoid garnishing exempt benefits if the garnishor knows that funds in a bank account are exempt. Whether garnishing funds to satisfy a credit card debt or enforce a child support order, garnishors can only rely on information that is available to them. That is why debtor education is so important and why it is also important for debtors not to avoid court dates and not to avoid communicating with a debt collector. The solution to intentional garnishment of exempt funds is to sue the garnishor. The solution to unintentional garnishment of exempt funds is for a potential garnishee to communicate with any party who has a reason to garnish his bank account.

Productive Change and Best Practices

The most effective productive change lies not in new laws, rules, or regulations, but in better communication between debt collectors and debtors. There is already so much required language in a dunning letter that scarcely enough room is left to make a payment demand. Debtors would be far better served if more debt collectors were inclined to cooperate with their customers and adopt formal training procedures and curricula. Similarly, litigation would be reduced if more customers chose not to ignore communications from debt collectors or seek "debt elimination" gimmicks on the internet. We have found that communicating with our customers, listening and compromising with them when we think we should do so is good for business and for our customers' lives. We would rather take that course than sue any of our 20 million customers. Similarly, consumers throughout

the country would be better off if both debt collectors and consumer advocates worked to make debt collection less frequent and less adversarial. Debt collectors are often willing to extend a hand to their customers, but we cannot negotiate with ourselves. We need our customers' cooperation in order to help them.

Arbitration

PRA has been involved in arbitration cases, but not by choice. We have arbitrated because the terms of some contracts required arbitration. If cooperation with a customer is not likely we would prefer to litigate rather than arbitrate because litigation is better defined and more certain.

We were also surprised to learn of alleged conflicts of interest between the National Arbitration Forum and some law firms and lawyers who brought cases before the Forum and of the Forum's alleged efforts to market itself to major financial institutions as a collection mechanism. We do not condone any type of adjudicative forum that is not fair or free of deception. We endorse the original goals of alternative dispute resolution: to reduce costs and streamline processes, for the sake of judicial economy and the convenience of the participants. We welcome ongoing legislative efforts to restore that spirit to alternative dispute resolution.

Thank you again for the opportunity to submit these comments. Please feel free to contact me if I can provide any additional perspective or answer any questions or concerns.

Sincerely,

Donald W. Redmond
Senior Counsel