November 13, 2007

Federal Trade Commission
Office of the Secretary
Room H-135 (Annex N)
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Debt Collection Workshop - Supplemental, P074805

Dear FTC Staff:

The American Financial Services Association ("AFSA") thanks the Federal Trade Commission ("FTC") for the opportunity to comment on the issues it is considering for the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692o ("FDCPA"). AFSA is the national trade association for the consumer credit industry, protecting the ability of consumers to have access to credit and their right to choose products from the expanding array of credit facilities. The Association has provided services to its members for over ninety years, and AFSA and its members encourage and maintain ethical business practices. AFSA members, although creditors rather than debt collectors, voluntarily comply with all applicable aspects of the FDCPA as sound business practices.

The FTC's Workshop Description and Question for Comment asked for input and data on many topics. While we understand AFSA's input on many topics may be viewed as inappropriate, given the importance of this area to our membership we have chosen to comment on the Causes of the Growth of the Collection Industry.

During the thirty years since the enactment of the FDCPA, AFSA members have greatly expanded the availability of credit to American consumers largely due to the advent of risk based pricing which allows consumers who formerly had no access to credit to obtain credit at prices commensurate with their repayment risks. The willingness of creditors to offer credit to higher risk borrowers, not unexpectedly, results in a larger number of borrowers defaulting. That is to say, as the total population of consumers and number of credit products expand, the number (although not necessarily the percentage) of consumers who face credit issues also expands. As a result, the population of consumers who experience credit problems has expanded and there is a larger market for the services of debt collectors.

Representatives of AFSA's members were pleased to participate in the FTC Workshop on October 10 and 11. AFSA understands that the FTC will likely recommend to Congress the enactment of amendments to the FDCPA, and AFSA believes the Workshop positively pointed out some aspects of the FDCPA that need change.

The public policies behind the FDCPA, which include eliminating abusive debt collection practices by debt collectors and promoting consistent state action to protect consumers from abusive debt collection practices, are as valuable today as they were when the statute became law. During the 30 years since, however, unforeseen changes in debt collection business models, the unimagined rapid evolution of communications technologies, and changes in the quality and quantity of debt owed by our nation's citizens, have combined to demand revisions to the FDCPA, and building of additional structures into the statute. Therefore, AFSA and its members believe statutory revisions and new statutory structures will assist the Commission in fulfilling it mission of protecting consumers, while assisting in the effectiveness of the FTC and making its original goals more easily attainable in the 21st Century.

AFSA strongly encourages the FTC to refrain from recommending that Congress expand the scope of the FDCPA to include creditors. The reasons are as follows:

1. Most importantly, creditors generally have a strong desire to maintain or a prospect for developing continuing relationships with consumers that, for very valid business reasons, discourages creditors from engaging in conduct that the FDCPA prohibits.
2. Creditors have not been the principal reason the FTC is considering recommending that Congress amend the FDCPA. The debt collection industry and changes to its business models is one of the most important reasons the FTC is considering those amendments. Four or five of the largest debt collectors are publicly traded and, of necessity, their goals when communicating with consumers to collect debts are very different from the goals of creditors. The historically and ever increasing number of complaints the FTC receives about debt collectors far outpaces the number of complaints received about creditors, which decreased in 2006. Changes in the industries of creditors are not a prime motivating factor for the FTC to amend the FDCPA.
3. Creditors do not buy debt for pennies on the dollar, or debt which is charged off, determined to be uncollectible, or discharged in bankruptcy. When debt collectors purchase portfolios of debt of those kinds, their acquisition cost is miniscule in relation to the amount of debt they purchase, the amount they must collect to recover their initial investment is quite small and their profit potential is very significant. Creditors are at the opposite end of that spectrum. A creditor's cost of extending credit or acquiring a debt that is not in default is often 100% of the amount financed under TILA, a creditor's first responsibility is to recover its initial investment and its potential for profit is capped by the contracted finance charge, which pales in comparison to the profit potential for debt collectors. These factors, which do not impact debt collectors at all, require that creditors exhibit discretion toward the consumers who are indebted to them.
4. Creditors have ready access to the source loan documents and to payment histories for extensions of credit which allows them to promptly answer consumers' questions.
5. Many states have statutes authorized by § 816 of the FDCPA that restrict the conduct of creditors as well as that of debt collectors. Additionally, the Attorneys General and regulatory agencies of other states investigate and demand responses to complaints that consumers file with them about creditor conduct. If the FDCPA is expanded to restrict collection activities by creditors it will necessarily require preemption of those state laws.

One structure that AFSA recommends be added to the FDCPA is a series of safe harbor letters. This is particularly important for the initial validation communication that § 809(a) requires debt collectors send to consumers. A safe harbor for this communication will eliminate risks for debt collectors and serve as a model that creditors who choose to send such notices may adapt, it will assure that consumers are adequately informed about a debt so they can make informed decisions, it will draw a sharp line between unintentional violations and careless omissions, and reduce the frequency of litigation over the adequacy of such notices. While AFSA generally supports this approach, we feel it would be prudent to limit the content of such letters given some of the information may not be readily accessible to debt collectors.

The FTC has proposed that the FDCPA should expressly provide that a consumer's *oral* dispute is sufficient to trigger a debt collector's duty to report an account as "in dispute" to consumer reporting agencies. However, a dispute is not clearly defined in the FDCPA or related legislation such as the Fair Credit Reporting Act. Permitting oral communications to be later interpreted as notice of a "dispute" over the validity of the debt will only lead to fractious litigation without protecting consumers who have real concerns about the account validity. AFSA recommends that § 809(b) of the FDCPA be amended to require that dispute notices that consumers provide to debt collectors be in writing, that the FTC create a safe harbor form for such a notice, and that such a notice accompany a debt collector's § 809(a) validation notice. AFSA additionally recommends that debt collectors be required to provide a return envelope (not postage prepaid) for consumers to mail debt collectors a dispute notice, or that debt collectors provide consumers with a fax number, a text message phone number, or an email address where dispute notices will be received 24 hours a day, seven days a week. These technologies provide consumers with ready means to prove the sending of such notices. Amendments to § 809(b) to this effect will provide a level of certainty to a debt collector that there is a dispute by a consumer and its nature, and it will also increase among debt collectors and consumers the certainty that dispute notices are sent and received.

Furthermore, AFSA urges that the FTC not recommend to Congress that the FDCPA be amended to prohibit legal actions being taken to enforce debts on which a state statute of limitations has expired. Limitations periods on debt obligations are purely matters of state law, and it is has historically been a judicial function to determine whether they are waived or tolled for which the quanta and standards of proof differ among the states. *Sherwood v. Sutton,* 21 Fed. Cas. 1303 (1st Cir. 1828). Moreover, the passing of a limitations period on an action to collect a debt in almost all states is not a jurisdictional element of an action, but an affirmative defense because the debt is still owed but the claim is stale. An amendment to the FDCPA or FTC rule making on this issue will fundamentally change the elements of state created causes of action, both common law and statutory, by making commencing an action within the limitations period a jurisdictional element of such an action. An amendment to the FDCPA or a grant of FTC rule making on this issue will create unnecessary and potentially unavoidable conflicts with state laws that may rise to constitution proportions.

Lastly, AFSA recommends that the FTC address the growing prevalence of securitization and other funding transactions in the revisions to the FDCPA. Specifically, in the collection of debt obligations that are included within the scope of securitization and other funding transactions, where a creditor performs these (as well as servicing) functions for its affiliated entities, set up for the sole purpose of facilitating funding transactions, we request clarification that the affiliated sole purpose entities do not need to be disclosed to the customer in the context of collection transactions. Disclosure of a sole purpose trust set up to hold certain assets, for example, may lead to confusion on the part of a consumer that has otherwise received all documentation and communications relating to the account from the servicing creditor.

Thank you again for the opportunity to comment. Please feel free to contact me with any questions: 202-776-7300 or bhimpler@afsamail.org.

Sincerely,

Bill Himpler
Executive Vice Present, Federal Affairs