

THE CREDIT TIMES



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Greetings Credit and Collection Professionals and Practitioners!

In this edition of “The Credit Times,” we feature an article submitted by long-time contributor and friend of CCC, Wanda Borges. Wanda is the principal member of the well-respected collection law firm, Borges & Associates, LLC. She is also a board member for the International Association of Commercial Collectors (IACC) and a frequent speaker, contributor and panelist throughout the credit and collection community. In her article, Wanda addresses House Resolution 6814 (H.R.6814), “The Small Business Fair Debt Collection Practices Act (FDCPA),” who introduced it into Congress, who it protects and what the potential implications are for those who extend credit to small businesses. Like all bills and regulations related to credit and collections, CCC is watching how this progresses very closely to ensure our organization continues to operate in full compliance with the law. If you are not familiar with H.R.6814 this a great read and we appreciate Wanda for providing our clients and audience with timely and meaningful content.

CAVEAT! Attempts to Treat Commercial Debtors Like Consumers Abound

By: Wanda Borges, Esq., Borges & Associates, LLC

The movement to treat commercial debtors like consumers began many years ago but it has grown more forceful over the past few years, partly because of COVID; and maybe that’s just a good excuse used by the CFPB and legislators. This article will highlight only a few of the current statutes and rules that are forcing or attempting to force this integration of consumer protections onto commercial transactions.

ECO A: The Equal Credit Opportunity Act (“ECO A”) was originally enacted in 1974 to address widespread discrimination in the extension of credit to women. Two years later, the ECO A was broadened to prohibit discrimination in the extension of credit based on “race, color, religion, national origin, sex, marital status, or age...” The ECO A has always been understood to protect both individuals and small businesses from such discrimination and takes the definition of “individual” from the Fair Credit Reporting Act, which defines an “individual” as a “consumer.” Therefore, trade creditors have long been cautioned to comply with the ECO A when dealing with small businesses or sole proprietors. Regulation B sets forth the directives that trade creditors must obey in order to be compliant with the ECO A; and Regulation B is amended/updated from time to time. Over the years there has been some confusion as to whether ECO A and Regulation B governs only when an applicant first applies for credit or throughout ensuing credit transactions. In May 2022, the Bureau of Consumer Financial Protection (“CFPB”) issued an Advisory Opinion making it clear that “ECO A” protects applicants from discrimination both during the process of requesting credit and once credit has been extended—precludes obvious paths to evasion.”

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Under the ECOA, the term “applicant” means any “person who requests or who has received an extension of credit from a creditor, and includes any person who is or may become contractually liable regarding an extension of credit” including “guarantors, sureties, endorsers, and similar parties.” “Person” is defined as “a natural person,” corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative, or association.” Under these statutes, rules and advisory opinions, commercial businesses are being brought into the “consumer” fold and trade creditors must be watchful to remain compliant.

FCRA: The Fair Credit Reporting Act (“FCRA”) among other things, limits the circumstances under which debt collectors may obtain and use consumer report information from consumer reporting agencies. When pursuing a personal guarantor of a commercial debt, one may not think of this information as consumer related. Nevertheless, the FCRA defines a “consumer” as “an individual,” making no exception for a personal guarantor of a commercial debt. The FCRA provides for specific “permissible purposes” when a debt collector may obtain and use a consumer report. The CFPB issued its Advisory Opinion on July 12, 2022 to outline certain obligations of consumer reporting agencies and consumer report users under section 604 of the Fair Credit Reporting Act (FCRA), reiterating that the permissible purposes listed in FCRA section 604(a)(3) are consumer specific, and affirming that a consumer reporting agency may not provide a consumer report to a user under FCRA section 604(a)(3) unless it has reason to believe that all of the consumer report information it includes pertains to the consumer who is the subject of the user’s request. The good news is that one of the permissible purposes to obtain and use a consumer report under the FCRA is “connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer.”

H.R.6814: The Small Business Fair Debt Collection Practices Act (“Small Business FDCPA”) was introduced in Congress in February 2022. The Fair Debt Collection Practices Act (“FDCPA”) was enacted to protect consumers from abusive, deceptive, and unfair debt collection practices. Representative Al Lawson, who introduced this bill said that this Small Business FDCPA is intended to expand the FDCPA to “promote entrepreneurship and allows small business owners to have equivalent protections as consumers when dealing with debt collectors” The term “Small Business Debt” is expanded to include “any non-equity obligation or alleged obligation of a partnership, corporation, trust, estate, cooperative, association, government, or governmental subdivision or agency, or other entity that is less than \$5,000,000.” One of the many flaws in H.R.6814 is that, despite the expanded definition of a “small business debt” there is no definition of a “small business.” The ACA, IACC and CLLA have opposed this bill. All of the opposition submitted by these associations agree that small business owners are entrepreneurs who accept a certain amount of risk when opening its business. It risks its capital with the goal of building greater capital. Most small businesses are corporations or limited liability companies, insulated by a corporate or LLC shell so that the business owners generally cannot be held liable for the debts of that small business. Only about 10% of small businesses operate as sole proprietorships. Small business debt differs from consumer debt. Small business debt is not incurred for personal, family or household purposes. A small business does not incur medical debt or student loans. On June 29, 2022, the bill was marked up but remains in committee to date and the hope and expectation is that it will not proceed to a vote.



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