ASK KENNEDY
November 3, 2021

Topics Covered:

Question #1: Article 9 of the Uniform Commercial Code (Secured Transactions) provides for a purchase-money security interest (PMSI) in livestock.

How should the cattle be described in the UCC-1 Financing Statement? Is "100 head of cattle" sufficient? Does the PMSI lender have to trace the cattle, or does it just get the first 100?

Response: **Use of the "livestock" category in the UCC-1 is likely sufficient, but it is recommended to be as specific as possible (head count, type, etc.). The more important point is to ensure that your loan documents indicate that the purpose of the loan is for the purchase of specific cattle and that you have documentation that allows you to sufficiently trace the loan proceeds to specific cattle. Again, be as specific as possible so that the cattle are identifiable. If the already-existing security interest is in the same type of cattle, you will need to provide the notice required by N.D.C.C. § 41-09-44 (U.C.C. § 9-324) and describe the livestock you expect to take a PMSI in.**

Secure American Opportunity

The American Bankers Association (ABA) has launched Secure American Opportunity, which is a grassroots initiative to engage bank leaders, employees, customers and consumers in issues that help our economy grow.[1] The ABA aims to use this program to promote a strong financial industry and economy be encouraging banks to oppose economic policies that would weaken the financial industry while advocating for policies aimed at benefiting the economy. It provides information on current issues affecting the industry and actions that can be taken. View SecureAmericanOpportunity.com to access all the tools you need to make a difference in today's policy debates.

[1] https://www.aba.com/advocacy/political-engagement/grassroots

IRS Reporting Update

During the October Ask Kennedy session, we discussed the Biden administration's proposal that would require financial institutions to annually report gross inflows and outflows to and from accounts above or equal to a low de minimis gross flow threshold of $600 or fair market value of $600.[2] The threshold was subsequently increased to $10,000. However, the American Bankers Association now says that House Democrats have reportedly omitted the provision from their current draft of the budget resolution.[3] There is still a possibility that it could be added back in at a later point in the legislative process.

CFPB Update: ECOA

On September 1, 2021, the Consumer Financial Protection Bureau issued a notice of proposed rulemaking inviting the public to comment on its proposal to implement the small business lending data collection requirements set forth in section 1071 of the Dodd-Frank Act. The CFPB is proposing to add a new subpart B to Regulation B to implement Section 1071's requirements. The CFPB is proposing to apply these new Section 1071 requirements to covered financial institutions, which they described as any partnership, company, corporation, association, trust, estate, cooperative organization, or other entity that engages in any financial activity.

Section 1071 amended the Equal Credit Opportunity Act (ECOA) to require that financial institutions collect and report to the CFPB certain data regarding certain business credit applications. Section 1071's purposes are to facilitate enforcement of fair lending laws and to enable the identification of business and community development needs and opportunities for women-owned, minority-owned, and small businesses. Section 1071 specifies several data points that financial institutions are required to collect and provides authority for the CFPB to require collection of additional data that the CFPB determines would aid in fulfilling Section 1071's purposes. Section 1071 also contains a number of other requirements regarding information collected pursuant to Section 1071, including a requirement that financial institutions restrict certain persons' access to certain information, requirements regarding maintaining certain information, and requirements regarding publication of data. Section 1071 also directs the CFPB to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data pursuant to Section 1071. It permits the CFPB to adopt exceptions and exemptions to Section 1071's requirements as the CFPB deems necessary or appropriate to carry out Section 1071's purposes.[4]

[2] *See* pages 88-89 of the General Explanations of the Administration's Fiscal Year 2022 Revenue Proposals.

[3] https://bankingjournal.aba.com/2021/10/report-irs-reporting-provision-pulled-from-house-budget-bill/#_ga=2.67274129.1681806127.1635775583-1938536488.1609283787

[4] https://files.consumerfinance.gov/f/documents/cfpb_section-1071-nprm_summary_2021-09.pdf

Beneficial Ownership Registry

Legal entities such as corporations and LLCs play an important role in the U.S. economy. By limiting individual liability, corporations and LLCs allow owners to manage the risks associated with participating in business ventures. They also facilitate the formation of capital, making it easier to finance large business projects and structure the relationships among individuals engaged in an enterprise. They often can be formed with relatively few formalities and abbreviated (if any) regulatory review and approval, and their availability can be viewed as a stimulus to investment, entrepreneurship, and economic activity.

However, these legal entities can also be misused to conceal and facilitate illicit activity. Business owners aiming to skirt the law often seek to conceal their ownership of corporations, limited liability companies, or other similar entities in the United States in order to facilitate their illicit activity, which frequently includes money laundering, the financing of terrorism, proliferation financing, serious tax fraud, human and drug trafficking, counterfeiting, piracy, securities fraud, financial fraud, and acts of foreign corruption. The ability to engage in activity and obtain financial services in the name of a legal entity without disclosing the identities of the natural persons who own or control the entity (i.e., the natural persons whose interests the legal entity directly serves) enables those persons to conceal their interests."[5]

In response to the concerns surrounding illicit-run businesses, the Biden administration is stepping up its efforts to combat this corruption, with its primary focus on a Treasury Department proposal to create a federal registry of the individuals behind legal entities. The administration began this push on June 3 when it released a study memorandum that prioritized public corruption as a national security issue which gave the U.S. government 200 days to outline ways of combating corruption-related illicit finance, to take action related to the flow of corruption funds into real estate, and to find new ways to cooperate with foreign partners. On April 1, FinCEN took the first step in what will be a months-long rulemaking process to enact the Corporate Transparency Agreement (passed by Congress on January 1 as part of the ant-corruption push) by issuing an Advanced Notice of Proposed Rulemaking that requested public comment. FinCEN will be required to issue a final rule implementing the registry by January 1 of next year. This process is being watched closely by the financial services industry, as the final rule could have a significant impact on the customer due diligence obligations of banks and other financial institutions.

[5] https://www.federalregister.gov/documents/2021/04/05/2021-06922/beneficial-ownership-information-reporting-requirements#h-20

PPP Fraud Tracker

As part of the Coronavirus Aid, Relief, and Economic Security (CARES) Act, the federal government made hundreds of billions of dollars in forgivable loans available to American businesses through the Paycheck Protection Program (PPP).[6] Unfortunately, making such large amounts of money available to the public on an expedited basis provided fraudsters and other bad actors with unique opportunities for fraud.[7] The Criminal Division of the Department of Justice (DOJ) set up a team dedicated to PPP fraud early on and has aggressively prosecuted those who have abused and defrauded the PPP.[8] A chart tracking the criminal cases brought by the DOJ is available here.[9]

Considerations for Your 2022 Ag Loan Renewals

To be discussed during live session.

Regulation of the Month

This month we've covered Regulation F.

Urgent Request for Holiday Recipes

Please submit your favorite holiday recipes to either tracy@ndba.com or dorothy@ndba.com!

[6] https://www.justice.gov/opa/speech/acting-assistant-attorney-general-brian-rabbitt-delivers-remarks-ppp-criminal-fraud

[7] *Id.*

[8] *Id.*

[9] The DOJ also provides court documents for cases publicly charged here.

REGULATION OF THE MONTH[i]
REG F: DEBT COLLECTION PRACTICES

In 2020, the Bureau of Consumer Financial Protection (CFPB) finalized two rules amending Regulation F (12 C.F.R. Part 1006), which implements the Fair Debt Collection Practices Act (FDCPA; 15 U.S.C. §§ 1692 et seq.), to prescribe Federal rules governing certain activities of debt collectors. The Debt Collection Final Rules will be effective November 30, 2021.

APPLICABILITY TO BANKS

The FDCPA generally only applies to debt collectors collecting debts on behalf of another and not to banks seeking to collect their own debt. However, the following entities *do* constitute debt collectors under the FDCPA:

- Third parties such as collection agencies and collection attorneys collecting on behalf of banks;
- Any bank that, in the process of collecting its own debts, uses any name other than its own which would indicate that a third person is collecting or attempting to collect such debts[1]; and
- A person that receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.[2]

Read on to find out more about how Regulation F may impact banks even though they do not fall into these categories.

UDAAP CONSIDERATIONS

After the proposed rule came out, banks and other lenders expressed concern that the CFPB's reliance on its Dodd-Frank Act section 1031 unfair, deceptive, or abusive acts or practices (UDAAP) authority for certain proposed provisions would be used to expand the rule to apply to such parties.[3] In the final rule, the CFPB declined to expand the rule to apply to "first-party debt collectors who are not FDCPA debt collectors".[4] However, the CFPB also wrote:

> This rule is not intended to address whether activities performed by entities that are not subject to the FDCPA may violate other laws, including the prohibitions against unfair, deceptive, or abusive practices in Dodd-Frank Act section 1031.
>
> For the same reasons, the Bureau also declines to clarify whether any particular actions taken by a first-party debt collector who is not an FDCPA debt collector would constitute an unfair, deceptive, or abusive practice under Dodd-Frank Act section 1031. [5]

Thus, banks must be aware of Regulation F's prohibitions and assess how the rule's conduct prohibitions

[1] 15 U.S.C. § 1692a(6); 12 C.F.R. § 1006.2(i).

[2] 15 U.S.C. § 1692a(4); 12 C.F.R. § 1006.2(g).

[3] https://www.federalregister.gov/documents/2021/01/19/2020-28422/debt-collection-practices-regulation-f

[4] https://www.federalregister.gov/documents/2021/01/19/2020-28422/debt-collection-practices-regulation-f

[5] https://www.federalregister.gov/documents/2021/01/19/2020-28422/debt-collection-practices-regulation-f

may impact the analysis of whether particular collection activities may be considered "unfair," "deceptive," or "abusive" under UDAAP.[6]

THIRD-PARTY RISK MANAGEMENT

As noted, third parties such as collection agencies and collection attorneys collecting on behalf of banks are "debt collectors" subject to the FDCPA and Regulation F. Banks have several responsibilities when entering into relationships with third parties, including the responsibility to evaluate the third party's ability to perform services in compliance with applicable laws, rules, or regulations.[7] Banks need to understand the requirements of Regulation F to perform due diligence of existing and potential third party collection agencies that are subject to the FDCPA and to fulfill their oversight and monitoring responsibilities.[8] Therefore, it is recommended banks consult with compliance resources and counsel to review and update their policies and procedures.

SUMMARY OF REG F PROVISIONS EFFECTIVE NOVEMBER 30, 2021

- **Electronic Communications**
    - Subject to the rules, debt collectors will be able to communicate with consumers using newer technologies, such as email and text messages[9]
    - Banks may play a significant role in verifying emails, as discussed below
- **Limits On Telephone Call Frequency**
    - Debt collectors may not call a consumer more than 7 times within 7 consecutive days or within a period of 7 consecutive days after having had a telephone conversation with the person in connection with the collection of such debt[10]
- **Credit Reporting**
    - Debt collectors cannot report collection items to CRAs unless there has already been communication with consumer[11]
- **Transfer, Sale, or Placement of Debt**
    - Debt collectors prohibited from transferring a debt to another debt collector if debt paid or settled, discharged in bankruptcy, or identity theft report has been filed.[12]
- **Rules for Decedent Debt**

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[6] https://www.jdsupra.com/legalnews/what-creditors-need-to-know-about-the-94338/

[7] Financial Institution Letter 44-2008 dated June 6, 2008, entitled *Guidance for Managing Third-Party Risk*; Section VII, Unfair and Deceptive Practices – Third Party Risk, FDIC Consumer Compliance Examination Manual dated June 2019.

[8] https://businesslawtoday.org/2020/12/six-things-creditors-know-new-federal-debt-collection-rule/

[9] § 1006.22 Unfair or unconscionable means provides a safe harbor for certain emails and text messages in accordance with the procedures described in § 1006.6(d)(3).

[10] § 1006.14 Harassing, oppressive, or abusive conduct.

[11] § 1006.30(a).

[12] § 1006.30(b). *See also* Comment 30(b)(1)-2 regarding identity theft.

- **Time-Barred Debts**
    - Debt collectors will be prohibited from bringing, or threatening to bring a legal action against a consumer to collect a time-barred debt[13]
- **Debt Validation Notice**
    - Consumer must be sent debt validation in writing or electronically (if E-Sign requirements are met) within 5 calendar days of initial communication unless the information is contained in the initial communication or unless the consumer pays the debt.[14]
    - Information required includes, in part:
        - Name of creditor, if debt is related to a consumer financial product or service to whom debt was owed on the itemization date, and name of creditor to whom the debt is currently owed
        - Account number (or truncated number) associated with the debt
        - Itemization Date (last statement date, charge-off date, last payment date, transaction date, or judgment date)
        - Amount of debt on the Itemization Date and the current amount of debt
        - Itemization of current amount of debt reflecting interest, fees, payments, and credits since Itemization Date

        *****Though banks are not required to provide this information, they are incentivized to do so because the debt collectors they hire or sell debts to will be unable to legally collect without it.**[15]
    - B-1 Model Form for Validation Notice
    - Debt Collection Rule: Disclosing the Model Validation Notice Itemization Table

EMAIL VERIFICATION VIA BANK NOTICE

The new regulation allows debt collectors to communicate with consumers by email using an email address provided from the bank if the following procedures were used:

- The bank obtained the email address from the consumer;
- The bank used the email address to communicate with the consumer about the account and the consumer did not ask the creditor to stop using it;
- Before the debt collector used the email address to communicate with the consumer about the debt, the bank sent the consumer a written or electronic notice, to an address the bank obtained from the consumer and used to communicate with the consumer about the account, that clearly and

[13] § 1006.26; *see also* 1006.18 False, deceptive, or misleading representations or means.

[14] § 1006.34.

[15] https://www.federalregister.gov/documents/2021/01/19/2020-28422/debt-collection-practices-regulation-f

conspicuously disclosed:

- That the debt has been or will be transferred to the debt collector;
- The email address and the fact that the debt collector might use the email address to communicate with the consumer about the debt;
- That, if others have access to the email address, then it is possible they may see the emails;
- Instructions for a reasonable and simple method by which the consumer could opt out of such communications[16]; and
- The date by which the debt collector or the bank[17] must receive the consumer's request to opt out, which must be at least 35 days after the date the notice is sent

- The opt-out period has expired and the consumer has not opted out; and
- The email address has a domain name that is available for use by the general public[18], unless the debt collector knows the address is provided by the consumer's employer.

Note that there are other verification methods available under the regulation. Banks will need to find out the policy of the debt collector to assess whether they must send out the specific notice required by Regulation F to enable the debt collector to qualify for the safe harbor when contacting a consumer via email.[19]

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[i] Written by Jocelyn A. Dravitz.

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[16] The notice must clearly and conspicuously disclose instructions for a reasonable and simple method by which the consumer can opt out of the debt collector's use of the email address to communicate about the debt. The following examples illustrate the rule:

i. When the bank sends the notice in writing, reasonable and simple methods for opting out include providing a reply form and a pre-addressed envelope together with the opt-out notice. Requiring a consumer to call or write to obtain a form for opting out, rather than including the form with the opt-out notice, does not meet the requirement to provide a reasonable and simple method for opting out.

ii. When the bank sends the notice electronically, reasonable and simple methods for opting out include providing an electronic means to opt out, such as a hyperlink, or allowing the consumer to opt out by replying to the communication with the word "stop." Requiring a consumer who receives the opt-out notice electronically to opt out by postal mail, telephone, or vising a website without providing a link does not meet the requirement to provide a reasonable and simple method for opting out.

Official Interpretation of Paragraph 6(d)(4)(ii)(C)(4).

[17] The notice may instruct the consumer to respond to the debt collector or to the bank but not to both. Official Interpretation of Paragraph 6(d)(4)(ii)(C)(5).

[18] The domain name of an email address is available for use by the general public when multiple members of the general public are permitted to use the same domain name, whether for free or through a paid subscription. Such a name does not include one that is reserved for use by specific registrants, such as a domain name branded for use by a particular commercial entity (*e.g.*, john.doe@springsidemortgage.com) or reserved for particular types of institutions (*e.g.*, john.doe@agency.gov, john.doe@university.edu, or john.doe@nonprofit.org). Official Interpretation of Paragraph 6(d)(4)(ii)(E).

[19] https://businesslawtoday.org/2020/12/six-things-creditors-know-new-federal-debt-collection-rule/