collective szabo MEDIA COLLECTION PROFESSIONALS wisdom®

SZABO ASSOCIATES, INC. VOLUME 22, ISSUE 1, MARCH 31, 2007

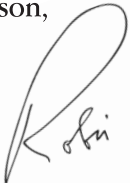
Dear Friends:

It's certainly been a long cold winter for many of you, and I know everyone is looking forward to spring! We did enjoy some bright spots mid-winter, though, including the RAB, GAB, and Comcast conferences, where we shared valuable information and good times with many friends and clients.

We hope to see many more of you at the great events—too numerous to include in this letter!—that have filled our spring calendar. Please be sure to check out our Calendar of Events in this issue for a complete list.

Our feature article explores what you can do to avoid the most common mistake we see credit managers make, as well as what you need to know to make sure your organization complies with two important federal laws—ECOA and the more recent Disposal Rule.

Best wishes for a terrific spring season,



C. Robin Szabo, President
Szabo Associates, Inc.

Identify, Reply, and Comply!

Protect Your Company's Interests in Credit Extension Transactions

Many of the payment problems and legal disputes that we continue to see at Szabo are among the easiest to avoid and the most difficult to resolve. They are among the easiest to avoid because up-front diligence as well as clear policy and procedures for credit extension are usually all that is needed to prevent them. Simply put, knowing exactly who is asking you for credit, responding with timely acceptance or rejection of the request for credit, and keeping records that document and support your decision can save you a lot of heartburn later.

Up-front diligence, as well as proper documentation and recordkeeping, not only can halt payment liability disputes in their tracks but also can help you avoid problems regarding compliance with federal law. More on the latter later, but first things first . . .

The Power of the App

Failure to know whom you are doing business with continues to be, by far, the most common and costly mistake that we see credit managers make. It is the result of vague agreements that fail to clearly identify the person or entity with whom the business agreement exists and who is therefore responsible for payment.

It is easy to understand how and why insufficient or nonexistent documentation occurs in the urgent and time-compressed media environment. Even so, given the inevitability that someone at some time will cost you dearly for lack of a clear agreement, the argument weighs heavily in favor of establishing one.

Your most powerful tool of the trade for establishing the identity of your customer is the credit application. While a signed contract should, in ideal circumstances, follow a signed credit application, we know that waiting for one can mean losing a sale. In the absence of a signed contract, the signed credit application assumes the starring role.

A good credit application is like a hefty Swiss Army knife. It is compact, it serves multiple and diverse purposes, and in certain circumstances, it can be a lifesaver. The credit application helps you identify the person or entity with whom you are doing business, determine whether or not to extend credit to that person or entity, communicate the terms of the agreement (including your payment liability position), and support your position down the road should it become necessary to do so.

We recommend getting a signed credit application on both the advertiser and its advertising agency. If it is not feasible to get a signed credit application from the advertiser, get written confirmation from the advertiser that the agency is authorized to negotiate and enter into a binding contract on the advertiser's behalf.

Apps That Work

Effective credit applications are comprehensive and accurate. The application should include the year that the agency or company was established as well as its structure (proprietorship,

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partnership, corporation, or other). A corporation is liable for debts except in cases of fraud. (In such cases, you could file a lawsuit to pierce the corporate veil and hold the principals personally liable.) If it is a general partnership, the partners are jointly and severally liable for the actions of the partnership. In limited partnerships, the general (not limited) partners are liable for the actions of the partnership. Sometimes the general partner is a corporation. A limited liability company has managing partners similar to officers of a corporation. For liability purposes, the limited liability company should be viewed as if you were dealing with a corporation.

Make sure you have the exact name of the entity. If it is a corporate customer, find out if the corporation is in good standing with the state. In most states, this information is available from the Corporation Division of the Secretary of State.

The credit application should also include the number of full-time employees; annual sales; federal tax I.D. number; the principals of the company, their addresses and home phone numbers; bank references; and at least three trade references, preferably media. And finally, make sure the application is signed by someone with the authority to bind the company. The individuals should clearly indicate in the agreement the legal capacity in which they are signing.

Because today's credit application must fulfill more than its original purpose, it should clearly define the responsibilities of the parties involved and state your liability position. Even if the agency is the entity with which you are doing business, you need to prepare for situations in which your best option is to look to the advertiser for payment. We strongly recommend the joint and several liability position, whereby both the advertiser and agency are liable for payment until the media outlet is paid. Your company's Terms and Conditions and your liability position should be clearly stated on the back side of your credit application. Make sure all parties receive notification of your liability position before the advertising is run!

You can find a Szabo-recommended Credit Application form as well as a Terms and Conditions of Credit Sales form under "sample forms" on our website, www.szabo.com.

Equal Credit Opportunity Act

Prompt notification, documentation, and recordkeeping procedures make practical sense on many levels. Detailed procedures are critical to maximizing the effectiveness and efficiency of your credit department. Additionally, they are critical to ensuring that your company maintains compliance with federal law.

The Equal Credit Opportunity Act (ECOA) makes it unlawful for creditors to discriminate in any aspect of a credit transaction on the basis of race, color, religion, national origin, sex, marital status, age, because an applicant receives income from a public assistance program, or because an applicant has in good faith exercised any right under the Consumer Credit Protection Act. The law also provides that a credit applicant has the right to obtain a written statement of reasons for a denial of credit and requires creditors to keep certain records on credit applications.

The ECOA, implemented by the Federal Reserve Board's "Regulation B," was originally designed to prevent discrimination in the extension of credit to consumers. As such, it afforded limited exceptions from some of the requirements of the act for certain types of credit, including business credit. In 1988, the law was amended by the Women's Business Ownership Act, intended primarily to provide small business owners with the same procedural rights afforded by the ECOA to consumer credit borrowers. When the Federal Reserve Board adopted the Regulation B amendments effective April 1990, it also included additional provisions that applied to businesses with gross revenues in excess of $1 million.

Various federal agencies have general regulatory authority over certain types of lenders and monitor creditors for their compliance with the ECOA. As "trade" creditors, media properties are regulated by the Federal Trade Commission. The term "trade credit" generally is limited to a short-term type of finance obtained by buying goods or services that do not require immediate payment. It does not apply to an extension of credit by a bank or other financial institution for the financing of such items.

At first blush, the amendments to Regulation B appear complex and burdensome, with one set of requirements for doing business with applicants with gross revenues of $1 million or less, and another for doing business with applicants with gross revenues of more than $1 million. A careful reading of the law reveals, however, that the designation of "trade creditor" renders irrelevant the different notification and recordkeeping requirements for businesses with revenues of $1 million or less. The requirements for media, as trade creditors, are the same, regardless of the size of your prospective client's business.

The ECOA requires you to notify credit applicants of actions taken regarding extension of trade credit, orally or in writing, within a reasonable time period. Thirty days is considered a reasonable time frame for compliance.

The law also states that applicants who have been denied credit or were offered less favorable terms than they applied for (unless they accepted the terms) have the right to find out why. The applicant must submit a written request for the reasons within 60 days of the denial of credit.

If you receive such a request from an applicant within the specified time frame, you must submit your "reasons for adverse action" to the applicant within 30 days of the applicant's request. The reasons must be specific and must indicate the principal

reason or reasons for the adverse action. You may not, for example, state that your action was based on your company's internal standards or policies or that the applicant failed to achieve the qualifying score on the creditor's credit scoring system.

A comprehensive credit application is useful in supporting your reasons for "adverse action." Acceptable reasons include: insufficient number of credit references; unacceptable type of credit references provided; unable to verify credit references; insufficient length of time in business; income insufficient for amount of credit requested; excessive obligations in relation to income; unable to verify revenues; no credit file; limited credit experience; poor credit performance with us; delinquent past or present credit obligations with others; garnishment, attachment, foreclosure, repossession, collection action, or judgment.

The law also requires that you include an ECOA notice similar to the following in the letter stating your reasons for adverse action:

"The federal Equal Credit Opportunity Act prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status, age (provided the applicant has the capacity to enter into a binding contract); because all or part of the applicant's income derives from any public assistance program; or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act. The federal agency that administers compliance with this law concerning this creditor is the Federal Trade Commission, Equal Credit Opportunity, Washington, D.C. 20580."

The record retention aspect of the law is simple for trade creditors. You must retain records for at least 60 days after notifying the applicant of the action taken. Since the law affords the applicant a maximum of 60 days following your notification to request the reasons for your action or to request that records be retained, the 60-day record retention requirement makes sense. If you do receive such a request, you must retain the records for 12 months.

"YOUR PROSPECT SAYS WE HAVE TO GIVE HIM CREDIT BECAUSE OF THE ECOA? WELL, UNLESS THEY'VE CHANGED IT TO 'ETHICS-CHALLENGED OPPORTUNISTS WITH ATTITUDE', I'D SAY WE HAVE NOTHING TO WORRY ABOUT."

Calendar of Events

April 12
Television Bureau of Advertising Annual Marketing Conference
New York, New York

April 19-22
Commercial Law League of America Midwest Conference
Chicago, Illinois

May 22-24
Broadcast Cable Credit Association/ Broadcast Cable Financial Management Annual Conference
Las Vegas, Nevada

June 7-10
Georgia Association of Broadcasters Summer Convention
Callaway Gardens
Pine Mountain, Georgia

June 16-20
International Newspaper Financial Executives Annual Conference
Chicago, Illinois

June 19-21
International Licensing Industry Merchandisers' Association Licensing International Expo 2007
New York, New York

The record retention requirement extends beyond 12 months if you receive notice that you are under investigation or are subject to an enforcement proceeding for an alleged violation. If that happens, you must retain the records until final disposition of the matter unless earlier disposal is allowed by the agency or court order. While the Federal Trade Commission is the agency charged with the responsibility for monitoring trade creditors for compliance with the ECOA, the

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law requires the FTC to refer matters to the Department of Justice when there is reason to believe that a creditor is engaged in a "pattern or practice" of discrimination (as opposed to an isolated instance) that violates the ECOA.

The Disposal Rule

In the interests of protecting the privacy of consumer information and reducing the risk of fraud and identity theft, a federal rule went into effect in 2005 requiring businesses and individuals to take appropriate measures to dispose of sensitive information derived from consumer reports. Enforced by the FTC, the Disposal Rule requires disposal practices that are "reasonable and appropriate to prevent the unauthorized access to—or use of—information in a consumer report." The "consumer information" covered by the Rule includes a variety of personal identifiers that alone or in combination could be used to identify particular individuals.

When collecting information on potential customers, be aware that personal information that you may request from the principals of a company on any document falls within the scope of the Rule. For example, creditors will often require principals to include their social security numbers on signed personal guarantees. Because the document contains a personal identifier, its disposal would need to be done in accordance with the Rule.

While the Rule does not mandate specific disposal measures, appropriate methods could include shredding or burning paper records, destroying or erasing electronic files or media, or hiring a document destruction contractor to dispose of material specifically identified as consumer report information consistent with the Rule. If you choose to hire a contractor, the Rule requires you to conduct due diligence in doing so. Due diligence could include reviewing an independent audit of the disposal company's operations and/or its compliance with the Rule; obtaining information about the company from several references; requiring that the company be certified by a recognized trade association; and reviewing and evaluating the company's information security policies or procedures.

Keeping It Simple

The best way to protect your company's interests with regard to credit extension transactions is to routinely review your procedures within the context of your credit and collection policy. By doing so, you can avert some of the most serious and easily avoidable problems early on in the business relationship.

Simply by clearly identifying the entity with whom you are doing business, you can avoid the most common and costly problem that credit managers make. By identifying your customer, replying in a timely manner to applications for credit, maintaining proper records, and establishing appropriate information disposal practices, you will not only prevent needless legal complications down the road but will also increase the effectiveness and efficiency of your credit and collections department. ♦

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