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CREDIT APPLICATIONS AND TERMS & CONDITIONS

Presented to:

**NACM BUSINESS CREDIT SERVICES
SEATTLE CREDIT FORUM**

Presented by:

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Jason M. Torf is a bankruptcy and creditors' rights partner in the law firm Tucker Ellis LLP, a 240-attorney, full-service law firm with offices throughout the United States. Jason regularly represent clients in helping them solve their problems with troubled customers, both in bankruptcy proceedings and otherwise. He is a frequent speaker to NACM, CFDD and other credit and finance groups to help them understand practical steps their companies can utilize to minimize risk and maximize their recovery when dealing with a financially troubled customer.

CREDIT APPLICATIONS

LEGAL FORM OF BUSINESS

- Confirm Legal Form of Business
 - Corporation
 - Artificial entity created in accordance with the law of the state in which it is organized
 - As a general rule, officers, directors and shareholders are shielded from personal liability
 - Limited Liability Company
 - Artificial entity created in accordance with the law of the state in which it is organized
 - As a general rule, members and managers are shielded from personal liability

CREDIT APPLICATIONS

LEGAL FORM OF BUSINESS

- Confirm Legal Form of Business
 - Partnership
 - General Partnership
 - Each partner responsible for partnership's debts
 - Limited Partnership
 - Only general partner responsible for partnership's debts
 - Limited Liability Partnership
 - Sole Proprietorship
 - Owner liable for all debts

CREDIT APPLICATIONS

LEGAL FORM OF BUSINESS

- Must Verify Legal Status
 - Determine state of incorporation/organization
 - Confirm no change in legal form of business
 - Check appropriate state or local office
- Consider including provision requiring applicant to notify seller of change in legal status
- Consider obtaining new credit application if customer changes legal status

CREDIT APPLICATIONS

CORRECT LEGAL NAME

- Importance of customer's correct legal name
 - Collecting Claim vs. customer
 - Accuracy of UCC filing for security interest or consignment
 - UCC, tax and other lien searches
 - Obtaining payment on letter of credit
 - Obtaining payment on credit insurance/put
- d/b/a might not be correct legal name
- Division name not correct legal name

CREDIT APPLICATIONS

INDICATORS OF CUSTOMER'S NAME CHANGE

- Customer's name on check
- Customer's name on purchase orders
- Customer's name on state sales/use tax exemption certificate
- Customer's name on letterhead
- Customer's e-mails – name in signature block
- Customer's name on shipping documents

CREDIT APPLICATIONS

CUSTOMER'S NAME CHANGE

- If you have reason to believe the customer's name or address has changed, check with the customer and check the customer's name as listed on the Secretary of State's website in the state where the customer was formed
- Each Fiscal Quarter
 - Send a questionnaire to customer to update name
 - Obtain a certified good standing certificate from the Secretary of State's website in the state where the customer was formed
- Fraud risk - customer changes its state of formation without notice

CREDIT APPLICATIONS

NAME INFORMATION TO OBTAIN FROM CUSTOMER

- Customer's correct legal name and jurisdiction of organization
- Customer's current location
- Customer's federal employer identification number and state organization number
- Name(s) of affiliate(s) and each affiliate's location, federal employer identification number and state organization number

CREDIT APPLICATIONS

IMPORTANCE OF CUSTOMER'S CORRECT LEGAL NAME

- Security agreement/UCC filings
 - Particularly for UCC filings, need debtor's correct legal name
- Letter of Credit
 - Name of Beneficiary/Applicant
- Credit Insurance
 - Correct legal name of obligor
- Put Agreement
- Enforcing Judgment

CREDIT APPLICATIONS

ENSURING CONTINUED ACCURACY OF CUSTOMER'S LEGAL NAME

- Consider including in Terms and Conditions a provision requiring applicant to inform seller of change in legal name
- Consider new credit application and guaranty if customer changes legal name

CREDIT APPLICATIONS

AFFILIATED ENTITIES

- Confirm if customer is part of group of affiliated companies
 - Parent
 - Subsidiary
 - Affiliates
- Confirm which entity you will look to for payment
 - Consider if guaranty is necessary
 - Consider setoff issues
 - Provision permitting cross-affiliate setoff

CREDIT APPLICATIONS

WHETHER TO INCLUDE A GUARANTY

- Can include as an extra short paragraph on credit application
 - Pro: Easier to obtain because customer is already signing credit application – just another signature on the same page of the same document
 - Con: Not as robust as a standalone guaranty
- Standalone guaranty
 - Pro: More robust – can include more seller-friendly provisions
 - Con: Requires more of an “ask” since it is a separate document

FORMS SHOULD BE STRONG

CREDIT APPLICATION, PURCHASE ORDERS AND TERMS & CONDITIONS

- Starting point – have good forms
 - Credit application
 - Purchase order
 - Terms & Conditions
- These documents should all be strong and seller-friendly
- Strong set of seller forms = good rights and remedies in the event of customer issues or default

TERMS AND CONDITIONS

BEST PRACTICES

- Terms & Conditions can be included with credit application
 - When customer signs credit application, agree to be bound by Terms & Conditions
- Better practice – Terms & Conditions on your website
 - Avoids having a lengthy and onerous set of Terms & Conditions attached to credit application
 - This can turn off a potential new customer
 - Include checkbox above signature line on credit application for customer to acknowledge location of Terms & Conditions and agree to accept them

TERMS AND CONDITIONS

BEST PRACTICES

- Benefits of Terms & Conditions on your website
 - Creates a single, unified set of Terms & Conditions as to all customers
 - You always know what your rights and remedies are as to all customers at all times
 - Avoids having different sets of Terms & Conditions applicable to different customers
 - Allows you to modify Terms & Conditions quickly and easily, from time to time
 - Should also have language stating that customers are bound to updated Terms & Conditions upon notice absent objection within specified period of time

TERMS AND CONDITIONS

- Credit terms, buyer's agreement to be bound by terms set forth elsewhere, or payment due according to invoice terms
- Shipping/delivery terms
- Title/risk of loss
- Obligation to inform seller of change in applicant's legal name and/or legal status
- Must provide financials at periodic intervals

TERMS AND CONDITIONS

- Buyer's agreement not to change terms unless seller agrees in writing
- Seller can revoke credit terms and ship only for cash
 - At seller's discretion
 - Upon buyer's default
- Warranty limitations
- Liability/damage limitations
- Limited period for buyer to assert claims

TERMS AND CONDITIONS

- Setoff rights
- Interest charge on delinquent invoices
- Attorneys' fees and other collection costs
- Choice of law
- Consent to jurisdiction/venue
 - Home court advantage
- Arbitration provision
- Waiver of jury trial

TERMS AND CONDITIONS

- No assignment of buyer's contractual obligations without seller's consent
- Merger clause (entire agreement)

TERMS AND CONDITIONS

- Setoff involving transactions between seller and buyer
- Sample language
 - Seller and Applicant agree that notwithstanding anything to the contrary contained herein or in any other contract, agreement or document, Seller may offset any debt now or hereafter owing to Applicant against any debt now or hereafter owing by Applicant to Seller.

TERMS AND CONDITIONS

- To the extent that any discrepancy exists between these Terms and those of any sales quotation, Purchase Order, invoice or other similar document, these Terms shall control
- No modification or waiver of any of these Terms shall be enforceable, unless agreed to in writing by Seller

TERMS AND CONDITIONS

- Sample provision to avoid delayed rejection of goods:
Applicant is under an obligation to inspect the Contracted Goods immediately upon receipt for correctness, completeness and conformity. Incorrect, incomplete or nonconforming Contracted Goods must be reported to Seller in writing within seven (7) days from the date of delivery of the Contracted Goods. Otherwise, Buyer shall be deemed to have accepted the Contracted Goods. Upon written notice from Buyer, Seller will correct incorrect and/or incomplete orders at its own expense. For nonconforming Contracted Goods, Seller, at its sole discretion, will: (i) repair the product or part thereof; (ii) furnish a replacement product or affected part thereof; (iii) issue a refund in an amount equal to the original selling price for the item; or (iv) deny the claim according to those terms.

TERMS AND CONDITIONS

- Sample provision for return of conforming and non-defective goods:

Seller will not accept the return of any Contracted Goods that are conforming and non-defective unless such return has previously been agreed to in writing and signed by Seller's Customer Service Operations Manager. All permitted returns of the Contracted Goods shall be made in its original packaging and not broken or altered. A twenty percent (20%) restocking fee applies to all returns of conforming and non-defective goods and for abandoned Contracted Goods. Return shipping is at the expense of Applicant. The determination of whether any particular Contracted Goods are conforming and/or nondefective shall be made exclusively by Seller.

TERMS AND CONDITIONS

- Sample provision for disclaimer of warranties:
Except as provided in Seller's product warranty, warranty of title or infringement, Seller does not make or give any representations, guarantees, warranties or conditions of any kind, express or implied, including warranties as to performance, merchantability, or fitness for a particular purpose, and warranties arising by statute or otherwise, or from a course of dealing or usage of trade.

TERMS AND CONDITIONS

- Sample provision for limitation of liability:

The aggregate cumulative liability of Seller and its affiliates under common control with it, directors, officers, employees, representatives and agents for all claims arising hereunder, notwithstanding the form in which any such action is brought, whether in contract, tort (including negligence), or otherwise, shall be limited in the aggregate to the total amounts paid by Applicant to Seller under the applicable purchase order or order confirmation.

TERMS AND CONDITIONS

- Sample provision for limitation of damages:
Seller shall not be liable for any consequential, incidental, indirect, special, exemplary or punitive damages, third party claims, loss of revenues, loss of profits or loss of savings even if advised of the possibility of such damages and regardless of the form in which any action is brought, whether in contract, tort (including negligence), or otherwise.

TERMS AND CONDITIONS

- Sample provision for shortening statute of limitations:

Any action for Seller's breach of its warranties or any other breach of contract must be commenced by Applicant within one (1) year after the cause of action arose

TERMS AND CONDITIONS

- Sample provision for revocation of credit terms:
The credit terms provided by Seller are in its sole discretion and can be terminated at any time by Seller. If at any time Seller reasonably determines that Applicant's financial condition does not justify the continuation of Seller's performance, Seller, at its sole discretion, may require full or partial payment in advance for the Contracted Goods from Applicant; declare the total amount owed by Applicant immediately due and payable; or, without any notice, suspend or terminate any performance without protest or penalty from Applicant, including cancelling all unfulfilled orders.

TERMS AND CONDITIONS

- Sample provision for conflict in terms:

Seller's acceptance of any order (written or otherwise) from Buyer is limited to the terms hereof. Any terms proposed by Buyer which purport to add to, vary from or conflict with the terms herein will be void, and these Terms and Conditions exclusively control. If these Terms and Conditions have been issued by Seller in response to an offer, the Terms of which are in addition to or different from any of the provisions hereof, then the issuance of these Terms and Conditions will constitute an acceptance of such offer subject to the express condition that Buyer deems these Terms and Conditions (and the last invoice from Seller with respect to the products specifically delivered hereunder) to constitute the entire agreement between Seller and Buyer. In the event that there is a conflict between these Terms and Conditions and (i) any purchase order or other document of or from Buyer, (ii) any prior course of dealing between Buyer and Seller, (iii) or any trade usage or customs in the industry, these Terms and Conditions will control. By accepting delivery of products from Seller, Buyer consents and agrees to these Terms and Conditions in their entirety. This paragraph is to be construed in accordance with the foregoing provisions of these Terms and Conditions and is not intended to abridge or limit any of Seller's rights otherwise granted herein.

TERMS AND CONDITIONS

- Sample provision granting a purchase money security interest:
Buyer hereby grants Seller a purchase money security interest in all products shipped by Seller to Buyer, including all accessions, replacements, and proceeds thereof, to secure payment of amounts due therefor. Buyer will execute such documents as may be reasonably requested by Seller in connection with said purchase money security interest, and Buyer authorizes Seller to file any financing statements or other documents as may be advisable or necessary, in Seller's discretion, for the perfection of Seller's security interest hereby granted.
- Can also do a regular UCC-1 security interest
 - On all assets
 - Might not be first in line
 - On select assets
 - Perhaps there are unencumbered assets where you will be first in line

TERMS AND CONDITIONS

- Sample indemnification provision:

Buyer will indemnify, defend, and hold Seller and its shareholders, directors, officers, employees, and agents harmless from and against all obligations and expenses, including reasonable attorneys' fees, resulting from, arising out of, or otherwise relating to (i) Buyer's use and/or misuse of the products, whether negligent, intentional, or otherwise; and (ii) Buyer's breach of any of the terms hereof.

TERMS AND CONDITIONS

- Sample choice of law provision:

These Terms shall be governed and construed in accordance with the laws of the State of New York, and any action, claim, litigation or dispute resolution process brought to enforce these Terms shall be commenced and adjudicated in the state or federal courts in New York.

TERMS AND CONDITIONS

- Sample provision restricting assignment:

Neither Party may assign its rights or delegate its duties or obligations under these Terms without the prior written consent of the other Party. Any attempt to make such an assignment or delegation without written consent will be void.

TERMS AND CONDITIONS

- Sample attorneys' fees provision:
Should Buyer fail to make timely payment of any amount due to Seller hereunder and legal action becomes necessary to collect such amount, Seller shall be entitled to recover from Applicant all costs incurred in connection with such action, including Seller's attorneys' fees and expenses.

TERMS AND CONDITIONS

ELECTRONIC SIGNATURES

- Same rules applicable to written contracts apply to e-contracts
- Relevant law
- – Electronic Signatures in Global and National Commerce Act (“E-Sign”)
 - Compliant electronic signatures, contracts and records are just as enforceable as paper contracts
 - Federal statute – governs transactions affecting interstate or foreign commerce
 - Does not preempt state law based on UETA

TERMS AND CONDITIONS

ELECTRONIC SIGNATURES

- Relevant law (cont'd)
 - Uniform Electronic Transactions Act (“UETA”) adopted by 47 states, District of Columbia, Puerto Rico and Virgin Islands
 - State Law
 - E-sign rules applicable to e-signatures and e-contracts under state law
 - New York, Illinois and Washington have adopted their own statutes governing electronic transactions

TERMS AND CONDITIONS

ELECTRONIC SIGNATURES

- E-sign and UETA require that a party
 - Have an intent to sign electronically for an electronic signature to be valid and enforceable
 - Obtain credible electronic signatures
 - Maintain security of electronic contracts
- Examples of electronic signature
 - Mouse click “I agree”
 - Password or pin number
 - Name typed at end of sender’s message

TERMS AND CONDITIONS

ENFORCEABILITY OF ONLINE Ts & Cs

- Trend
 - Case law trending toward enforcement of terms and conditions that are sufficiently incorporated by reference into a written or electronic contract but accessible exclusively on the seller's website

TERMS AND CONDITIONS

ENFORCEABILITY OF ONLINE Ts & Cs

- Tips to ensure enforceability of online Ts & Cs include:
 - Written agreement should state in conspicuous location in bold type or capital letters that agreement is governed by and parties agree to be bound by terms and conditions posted on designated website and terms and conditions are incorporated by reference in agreement
 - Terms should be readily accessible on website and full website address, from which terms can be viewed and downloaded, should be included

TERMS AND CONDITIONS

ENFORCEABILITY OF ONLINE Ts & Cs

- Sample language:
 - “By my signature below, I certify that I have read and agree to the provisions set forth in this agreement and to the terms and conditions posted at www.abccorp.com and am duly authorized to bind [name of customer] to such provisions.”

QUESTIONS



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