NACM Legislative Introduction and Position Brief 2015

The financial panic of 1893 created a disastrous depression and subsequent severe deflation, both of which stunned businesses. The chemistry of credit was not understood and commercial failures reached record numbers. So serious was the problem that a "Congress of Credit, Collections and Failures" was held as part of the 1893 Great Exposition in Chicago. That meeting, in turn, led to further exploration of the ways that credit practitioners could help each other.

In June of 1896, 82 delegates from several local credit groups met in Toledo to endorse a national movement, creating what is now the National Association of Credit Management. Membership has grown from 600 at the end of 1896, to more than 14,000 today, making NACM one of the oldest and the largest business credit organizations in the United States.

NACM is committed to enhancing, promoting and protecting the many credit management interests of the commercial credit grantor. NACM represents business credit grantors in all industries including manufacturing, wholesaling, service industries and financial institutions. NACM is a member-owned association and exists solely to serve and support its members.

The purposes and objectives of NACM are to:

- promote honesty and integrity in credit transactions;
- assure equitable laws for sound credit practices;
- foster and facilitate the exchange of credit information;
- encourage efficient service in the collection of accounts;
- provide credit education through colleges, universities, home study courses, NACM and NACM Affiliates;
- promote and expedite sound credit administration in international trade;
- foster and encourage research in the field of credit;
- disseminate useful and instructive information and ideas with respect to credit management techniques and policies;
- provide facilities for the investigation and prevention of fraud; and
- perform and encourage such other functions as the advancement and protection of business credit may require.

Business credit is an integral part of the American economy. The business credit executive—the NACM member—is an essential participant in our free enterprise system. Virtually every business transaction that concerns another business involves credit. Business credit is the single largest source of business financing by volume, even exceeding bank loans. Without business credit, America's economic system, as we know it, would not exist.

Congress has acknowledged many times that federal regulation of the credit reporting process must tackle a number of issues critical to businesses. Ultimately, NACM continues to note that anything that interferes with the free and complete ability of the business credit grantor to make a sound, accurate and equitable credit decision is an impediment to the commerce of this country.

Bankruptcy Reform

As the largest organization of unsecured trade credit grantors in the world, NACM is vitally concerned about the effects that bankruptcy law and practices have on the U.S. economy. To this end, NACM has fought for bankruptcy reform laws that accurately reflect the needed balance between creditors and debtors. NACM believes five areas need immediate attention for the good of business-to-business credit-granting and the fate of domestic economic growth: executory contracts, filing venue, preferences, Section 503(b)(9) and reclamation.

Filing Venue (Section 1408)

> ***Recommendation:***
> Require the debtor to file in the jurisdiction of its primary place of business or its principal assets within 180 days of a bankruptcy filing. This will allow for more access to the case by businesses, employees and local vendors who are owed money as well as have the case administered by a court that is familiar with the company and operations.

Where a case is filed can significantly impact its outcome. Filing the case in a jurisdiction other than that of the main offices of the debtor creates significant obstacles for trade creditors and key staff to participate in the process. Selecting a venue outside of the debtor's primary location increases the cost of participation for the debtor, adding travel and housing costs to the case—costs many American small businesses can ill afford, especially when a key customer has not paid them. Creditors are also affected by having to take more time away from their own locations to travel to a court, often in Delaware or New York, where the debtor has little in the way of significant activity or assets. Courts reputed as debtor-friendly also tend to be located in areas where the cost of legal representation and cost of living/lodging is significantly higher than the national average. Simply, the debtor should not be able to venue shop, looking for the court perceived to be most sympathetic to its case.

Preferences (Section 547)

Section 547 of the Bankruptcy Code requires that all payments made by a debtor to creditors within 90 days of a bankruptcy filing must be returned to the debtor's estate, unless the creditor can prove that the payment was made in the "ordinary course of business," that "new value" was given or that the transaction was a contemporaneous exchange for new value. The fundamental premise of this section of the Code is to prevent any one creditor from receiving favorable treatment over other creditors.

Trustee Due Diligence

Recommendation:
NACM and the trade credit community believe there should be a requirement that the trustee conduct due diligence to determine whether a preference claim exists before making any demand upon a creditor.

Typically, the Trustee for the debtor's estate or more recently the liquidating trust under a Chapter 11 plan will issue demands to creditors who received a payment within 90 days of the bankruptcy filing. It is common for the trustee, or the firm the trustee hires, to disregard existing defenses and send out blanket demands or complaints to every creditor who received payments within this 90-day window. The trustee often does little or no prior investigation other than to review the debtor's check register. It is rarely cost-effective for the creditor to contest the action, causing most creditors to enter into a negotiated settlement rather than incur the legal costs of defending the preference action. Making matters worse, there is no requirement that any funds returned to the debtor's estate through preference recoveries are ever dedicated to paying the claims of the unsecured class of creditors—more than 90% of preference recoveries do nothing more than fund recovery activities.

These costly issues will not stop unless the Code is modified. Current law places the burden on the creditor to prove that a payment is not a preference. The current Code offers no repercussions for trustees continuing to engage in this activity—even if the payments to the creditor are legitimate, as is often the case. As such, trade creditors routinely face a double jeopardy: They lose funds due to the bankruptcy and are forced to repay funds already collected. This reality has put many small companies out of business. Other credit grantors have been forced to adopt more rigid credit policies, making them less likely to continue offering credit terms that would help customers who do show signs of distress. NACM believes imposing a due diligence obligation on trustees would assure that blanket demands based on the 90-day clock and check register will stop.

Suggested Wording:
It is necessary for a definition of "due diligence" to be inserted in 547(a) as follows:

Subsection (a) of Section 547 of the Bankruptcy Code (11 U.S.C. §547) is amended by adding the following paragraph:

> (5) "due diligence" means a determination by the trustee that there are reasonable grounds to believe, in good faith, that a plausible claim for avoidance exists after taking into account the known or reasonably ascertainable defenses under 547(c) and should include a "new value" analysis for the purposes of Section 547(c)(1) and Section 547(c)(4) and an ordinary course of business analysis for the purposes of Section 547(c)(2).

Subsection (b) of Section 547 of the Bankruptcy Code (11 U.S.C. §547) is amended as follows:

> (b) Except as provided in subsections (c) and (i) of this section, and after conducting its due diligence, the trustee may avoid any transfer of an interest of the debtor in property—
> (1) to or for the benefit of a creditor;
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
> (3) made while the debtor was insolvent;
> (4) made—
> (A) on or within 90 days before the date of the filing of the petition; or
> (B) between 90 days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider, and;
> (5) that enables such creditor to receive more than such creditor would receive if—
> (A) the case was a case under Chapter 7 of this title;
> (B) the transfer had not been made; and
> (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

Ordinary Course of Business

Recommendation:
The trade credit community believes that any payment made to a trade creditor within the 90-day period before the filing of a bankruptcy proceeding should be presumed to have been made in the ordinary course of business, except in the event that a trade creditor is an insider of the debtor, and that the burden to overcome the presumption of ordinary should rest on the trustee.

The ordinary course of business defense contained in Section 547(c)(2) was created to encourage creditors to continue doing business with their financially distressed customers. However, the ordinary course of business defense is not working as intended because it is very difficult and costly to prove and its application is almost impossible to predict because of conflicting court rulings in different jurisdictions. As a result, creditors, who should benefit from the protections afforded by the ordinary course of business defense, are forced to settle due to the costs associated with proving the defense.

Suggested Wording:
Subsection (c)(2) of Section 547 of the Bankruptcy Code (11 U.S.C. §547) is amended by adding the following paragraph:

> (C) For purposes of this subsection, all payments made to a trade creditor that is not an insider of the debtor on or within

> 90 days before the filing of the petition are presumed to have been made in the ordinary course of business or financial affairs of the debtor and the transferee.

Creating a rebuttable presumption that all payments by a debtor to a non-insider creditor satisfy the subjective part of the ordinary course of business defense would make it easier to prove the defense. It would also further the purpose of preference law, which was to encourage creditors to continue doing business with their financially distressed customers and discourage creditors from racing to the courthouse to collect their claims.

Netting Concept to Replace New Value Defense

> ***Recommendation:***
> To minimize the conflicting results, Bankruptcy Code §547(c)(4) should be repealed and replaced by a netting concept. Therein all pre-petition extensions of credit on account of goods and/or services provided by a creditor to the debtor during the preference period that were not paid for by an otherwise unavoidable transfer by the debtor subsequent to the filing of the bankruptcy petition and were not secured by an otherwise unavoidable security interest would be subtracted from the total amount of transfers received by the creditor during the preference period.

The new value defense contained in Bankruptcy Code Section 547(c)(4) has also produced expensive litigation and conflicting results. As a result, the new value defense is frequently not applied consistently and uniformly across jurisdictions or within courts in the same jurisdiction.

Suggested Wording:
Subsection (c)(4) of the Bankruptcy Code (11 U.S.C. §547) is amended by replacing the current language with the following:

> (c) The trustee may not avoid under this section a transfer—
>
> (4) to or for the benefit of a creditor to the extent that during the 90 days before the date of the filing of the petition, the aggregate amount of all such transfers exceeds the aggregate amount of new value such creditor gave to or for the benefit of the debtor that is not paid by otherwise unavoidable transfer by the debtor to or for the benefit of such creditor subsequent to the filing of the petition and not secured by an otherwise unavoidable security interest.

These changes simplify the new value and ordinary course of business defenses and will help avoid much of the unnecessary litigation that has been prompted by issues concerning these defenses. The changes will also encourage creditors to continue extending credit to a financially troubled company, replenish the debtor's bankruptcy estate with new goods and services provided on credit and promote equality of treatment among similarly situated creditors. All are policies that Congress had intended to further when it created the preference statute.

Proposed changes will help minimize the conflicts of interest of firms hired by the trustee, which earn/are paid a percentage of what they collect, only incentivizing attempts to make requests without justifiable defenses. Adding due diligence requirements will compel the trustee to carefully examine any payment made to a creditor and the circumstances surrounding that payment before issuing a blanket preference recovery demand ("emptying the register"). This change would more thoughtfully restore the balance between debtor and creditor rights.

Administrative Priority Claims (Section 503(b)(9))

The current Bankruptcy Code gives business creditors who supported the debtor by supplying it with goods in the 20-day period before the filing date an advantage in recovering the value of their shipments by making the claim an administrative priority one.

Suppliers' Rights

> ***Recommendation:***
> Section 503(b)(9) should expand to include service providers, not just goods manufacturers.

The wording of the Code only addresses actual receipt of goods received in the 20-day window. Frequently in the period leading up to a bankruptcy filing, the debtor will have reduced its headcount in favor of hiring temporary workers, thereby eliminating the cost of benefits and transferring the obligation of employment taxes to the temporary help agency. Likewise, many service providers support the debtor in the final 20 days by supplying services on credit terms that go directly into its product or into the operation of the organization. These trade creditors should not be excluded from having an administrative claim for the work performed in the 20 days prior to the filing. The Code should be changed to require immediate payment for goods and services delivered within 20 days prior to the filing in order to encourage creditors to continue extending credit while the company is in financial distress prior to the bankruptcy filing. The definition of services should exclude claims of lessors and utilities, since these creditors already enjoy existing protections and remedies under other sections of the Bankruptcy Code.

Timing of Payment

> ***Recommendation:***
> Trade creditors who supply the debtor with goods and services on open account up until the time of the filing should have equal rights to other administrative claims. They should not have to wait until the conclusion of the case to be paid, when there are insufficient funds.

The Code fails to define the process for payment of administrative priority claims, sometimes resulting in payments being delayed until a reorganization plan is confirmed despite the fact that other administrative priority claims are being paid throughout the case. For example, secured lenders who had a lien on the debtor's entire inventory claim a lien on the inventory shipped in this 20-day period thereby taking a priority position over unsecured business creditors. Shipments in the 20 days preceding the bankruptcy do little more than support the secured lender on the backs of the trade creditors.

As other administrative expenses are paid throughout the case, the administrative priority trade claims should likewise be paid when they become due. Suppliers of services used in the actual production and distribution of the product or in the ordinary operation of the debtor's business should receive the same treatment as suppliers of goods. During at least 45 days preceding a bankruptcy filing, the majority of debtors filing Chapter 11 are, or should be, fully aware that they are insolvent. Nonetheless, these debtors continue to acquire goods and services on credit terms all for the benefit of their secured lenders whose collateral position improves as a result. These debtors are at the same time negotiating Chapter 11 financing arrangements with their lenders that grant the lenders first priority security interests in all of the debtors' assets. Clearly, there are instances in which debtors are accepting these goods and services on credit terms under false pretenses. Trade creditors would not have extended credit during this time had they known of their customer's insolvency or planned bankruptcy filing. Adequate remedy must be provided to trade creditors.

Drop Shipment

> ***Recommendation:***
> Treat goods sellers that engage in drop shipment transactions the same as sellers that deliver goods directly to their financially distressed customers, particularly where the customer receives the same benefits from both transactions.

There has also been uncertainty and significant litigation over whether trade creditors who engage in the practice of "drop shipment" are entitled to priority status under Section 503(b)(9). In a "drop shipment" transaction and at the buyer's instruction, a goods seller ships goods to a third party (such as the buyer's customer or a third-party processor). Many debtors have argued against, and some courts have denied, priority status under Section 503(b)(9) because the debtor did not obtain physical possession of the goods in a "drop shipment" transaction. This should be rejected as there is no basis for the argument. As a result, the definition of "receipt" in Section 503(b)(9) should be changed to include drop shipment transactions. Changing the definition is supported by many credit industry experts and veteran attorneys alike.

Asserting Priority Claims

There is also a great deal of confusion about the manner in which goods sellers can assert their Section 503(b)(9) priority claims. Section 503(b) states that administrative expense claims, which include Section 503(b)(9) priority claims, are allowed "after notice and a hearing." This suggests that a creditor asserting a Section 503(b)(9) priority claim must go through the expense of retaining an attorney to file a motion for relief with the bankruptcy court. This is unnecessarily expensive both for the creditor and the debtor.

Suggested Wording:
The Administrative Claims section of the Bankruptcy Code (11U.S.C. §503(b)(9) is amended by replacing the current language with the following language:

> (b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under Section 502(f) of this title, including—
>
> > (9) the value of any goods and/or services received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business, which claim shall be payable by the debtor immediately upon the allowance thereof. "Services" shall not include claims asserted by lessors and utilities. "Receipt" shall occur upon either the debtor's receipt of the goods or receipt of goods by a third party pursuant to the debtor's instruction. A creditor shall be permitted to include a claim arising under Section 503(b)(9) as part of its proof of claim filed under Section 501(a) of this title.

Executory Contracts (Section 365)

> ***Recommendation:***
> No creditor shall be obligated to continue to extend trade credit to a debtor subsequent to the commencement of a case under any chapter of the Bankruptcy Code. Creditors should be permitted to switch to terms such as cash payment terms prior to shipment of goods or rendering of services to a company in bankruptcy.

In situations involving long-term contracts and/or supply orders, debtors are provided with a period to review each executory contract and either reject or accept it and pay any amount of prepetition debt owed on the contract. As this can take several months, it can be a financial burden to require trade creditors to support the debtor's reorganization and rehabilitation by supplying more goods and services needed in the normal operation of its business on credit terms prior to assumption or rejection. Requiring creditors to support debtors during the review period can cause a tremendous cash flow burden to creditors, through no fault of their own.

Trade creditors should not be required to continue to sell to the debtor on credit during this period prior to the debtor's decision to assume or reject their executory contracts. As is currently required, the continued extension of credit piles more debt and risk of loss on trade creditors. If, for any reason, the debtor is unsuccessful in its reorganization attempt and the case is converted to liquidation, those creditors who extended credit during the case will stand behind secured lenders in line and have little, if any, chance of recovering this additional, new loss.

Suggested Wording:
Section 365 of the Bankruptcy Code should be amended to include the following new subsection:

> (q) Notwithstanding any provision to the contrary in any executory contract, no creditor shall be obligated to continue to extend trade credit to a debtor subsequent to the commencement of a case under any chapter of this title.

Reclamation (Section 546(c)(1))

> ***Recommendation:***
> Reclamation should remain unchanged as long as a trade creditor's right to an administrative priority claim under Section 503(b)(9) is preserved or expanded.

The Bankruptcy Code provides trade creditors a remedy on reclamation, a remedy that is closely linked to the protections afforded in Section 503(b)(9). This right was expanded in the 2005 changes to the Code to include goods shipped within 45 days prior to the commencement of a bankruptcy proceeding, rather than the previous

10-day reclamation period. However, cases decided since the 2005 changes have often come down against trade creditor rights. Very frequently, reclamation claims in Chapter 11 cases provide trade creditors little to no protection, even if those goods were shipped within the statutory 45-day period. Despite this fact, the trade creditor community still believes the current state of the reclamation provision is preferable to the one used prior to the 2005 changes, but only due to the presence of Section 503(b)(9), which works as a critical safety net for creditors unable to assert reclamation claims.

Construction Law

Commercial credit, collections and financial risk management professionals who work in the construction industry for subcontractors and materials suppliers comprise more than 50% of NACM's membership. These individuals manage the complex process of extending credit to other companies while navigating the many rules and regulations that govern how work is performed on, or materials are supplied to, a public or private project. Payment on these projects is often secured through the use of liens, bonds and Uniform Commercial Code (UCC) filings, but the rights to these remedies are only extended to certain parties, and only if those parties follow the strict filing and notice requirements that often vary from state to state in cases of liens and bonds.

The concept of payment protection for building and construction is by no means new: the first attempt to enact a law granting mechanic's lien rights came from the urgent desire of founding fathers like Thomas Jefferson and James Madison to establish and improve—as quickly as possible—the future seat of the U.S. government (the District of Columbia). Protections that helped construct the District of Columbia still exist today throughout the country—without them, companies engaged in supplying materials and goods used in construction would take on inadvisable, untenable risks, and the entire construction industry would grind to a halt.

NACM's mission is to ensure that the laws enacted provide adequate payment protection to the businesses that provide materials, equipment and services to public and private projects.

NACM believes that each jurisdiction's laws should facilitate the extension of credit by maintaining and expanding the lien and bond rights of subcontractors and materials suppliers. States should also work to make it easier for these companies to assert and maintain their rights to payment under the law by minimizing administrative and technical hurdles, which have a disproportionately negative effect on smaller companies that are already the least equipped to handle many states' onerous filing and notice requirements. The goal, as always, is to foster the extension of commercial credit, and NACM, on a national level and through its nationwide network of local affiliates, will continue to work with state legislatures to ensure that the construction laws they enact accomplish that crucial goal.

At the federal level, NACM joined an effort with a number of industry groups and trade associations, including the American Subcontractors Association, to request the modification of statutes pertaining to the acceptability of individual sureties that will better ensure assets pledged are, in fact, real and readily available. A letter to the administrator for federal procurement policy and the Office of Management and Budget outlines the need to change Sections 1302 and 1303 of Title 41 in the United States Code, specifically, Part 28.203 of the Federal Acquisition Regulation (FAR).

Since 1935, the federal Miller Act has protected subcontractors and suppliers from the risk of nonpayment by requiring the prime or principal contractor on a federal project to provide a surety bond that assures the project itself will be completed and that contracted parties will be paid. These bonds must be provided by companies or "corporate sureties" that the U.S. Department of the Treasury has determined are capable of meeting the bond's payment obligation, or, under the terms of the FAR, by either corporate sureties or by licensed persons, also referred to as "individual sureties." Individual sureties are neither vetted by the federal government nor are they required to relinquish custody and control of any assets they pledge in order to secure a surety bond. This means, in many instances, these assets are insufficient to properly cover the bond's payment obligation, difficult to convert to cash, or nonexistent altogether.

As noted in the letter supported by NACM and ASA, coverage presently provided by FAR language in Subpart 28.2 (Sureties and Other Security for Bonds) provides the contracting officer insufficient guidance, as an unethical individual surety can, and often has, pledged assets that provide only illusory protection. Verifying these remains a core challenge for contracting officers, as they face so many challenges in determining if the acceptable assets truly exist and can be liquidated in reasonably expedient fashion to pay valid claims against a payment bond.

Even the most seasoned contracting officer in the acquisition of construction generally operates at a disadvantage doing this for reasons such as a property in question being located far from the contracting officer's location, difficulties in interpreting the sufficiency of documentation on the asset and the security interest or escrow arrangement as well as a near-impossibility of keeping abreast of the many ongoing contract awards and contract administration actions coupled with often thin staffing at many small companies. The latter issue especially can open the door for a focused, unscrupulous individual surety to take advantage of the system. Losses caused by such activity have unfortunately been documented countless times in recent years, with many resulting in a crippling loss to a small subcontractor or supplier even on the smallest contract.

Modifying FAR Part 28.203.2 (Acceptability of Assets) to conform to the existing standards of FAR Part 28.204 would reduce that existing administrative burden by making information more readily available for contracting officers and confirm that assets pledged by an individual surety in support of its bonds are real, sufficient in amount, readily available and in the possession of the U.S. Government.

The most recent Congressional effort to expand Miller Act bond requirements to individual sureties and end fraud and abuse at the expense of subcontractors and materials suppliers on federal construction projects came in the form of 113th Congress' Security in Bonding Act (H.R. 776), which NACM supported as a welcome step in this direction.

Concern that payment for work performed will never be received due to an individual surety's inadequate bond pledge keeps many quality small business subcontractors and materials suppliers out of the federal procurement process. Such legislation would help alleviate this concern by giving subcontractors and materials suppliers the confidence they need to extend credit, enabling them to further contribute to economic and business growth and ultimately increase competition in the federal marketplace. All of this drives down costs to the benefit of the American taxpayer.

NACM also supports both federal and state efforts to expand the Miller Act's protections for subcontractors and suppliers to apply to construction jobs funded by public-private partnerships (P3s). The use of this innovative form of financing for public construction projects has expanded greatly in recent years, as federal agencies, and state and local governments, have sought to more efficiently use taxpayer dollars by incentivizing private firms to design, build and operate structures on public land for public use. But this effort to enable private entities to more easily fill in funding gaps for public projects only pays dividends if the payment protections for subcontractors and materials suppliers are preserved in the P3 arrangement, which they frequently are not.

The body of law governing P3s has not kept pace with their expanded use, meaning that most subcontractors and materials suppliers entering into a project funded through a P3 today will be granted no payment protections, and contracting agencies and entities that are authorized to enter into P3 arrangements are not required to grant any. State lien laws that provide subcontractors and materials suppliers with payment protections on private projects often do not apply because the P3 project is ultimately for public use, and public property is not subject to liens.

One of the frequent misconceptions is what P3s are meant to cover. President Barack Obama launched the Build America Investment Initiative in July 2014, calling on federal agencies to find new ways to increase investment in ports, roads, bridges, broadband networks, drinking water and sewer systems and "other projects" by facilitating partnerships between federal, state and local governments and private sector investors. "Other projects," however, is problematically misleading. Some state's P3 legislation only requires the general contractor to post a payment bond on road, bridge and rail projects. Still other states make a broad-stroke statement by suggesting that if the project is on public property with private investment, the job should be bonded (i.e., a private investor builds new dormitories at a public university). In essence, consistency is an ongoing problem and often difficult for suppliers and contractors to track or anticipate.

At the state level, through April 2015, 33 states had protections for P3 projects. That number stood at only four as of early 2014. Even so, a number of states, including Georgia and Arkansas, already are reworking language found to be insufficient. Places like the District of Columbia recently enacted P3-related statutes, but it remains too early to gauge if similar updates and fixes are needed to ensure adequate protections are in place. Without protections, savvy subcontractors and materials suppliers will either choose not to do business on P3 projects, or will price this added risk of nonpayment into the project, collectively limiting business participation and ultimately driving up the cost for taxpayers.

NACM proposes that any legislation that provides a federal agency with the ability to enter into a P3 arrangement should be amended to require that the agency build in payment assurances for subcontractors and materials suppliers through surety bonds. NACM believes the goal should be to facilitate the extension of credit, rather than limit it by allowing contractors to continue encroaching on subcontractors and materials suppliers' payment rights. Extending standard payment protections to P3s would encourage more companies to participate in projects funded by them, again driving down taxpayer costs while allowing businesses to grow by investing in projects built for the public's benefit.

NACM holds that virtually any law benefitting subcontractors and materials suppliers benefits the entire economy. Its membership stands ready to support the enactment of any law that facilitates the extension of credit on both private and public projects.

Unclaimed Property

Unclaimed property is tangible or intangible property owed to a person or entity yet held by another. Generally speaking, under unclaimed property laws (or escheatment), a holder of unclaimed property that is not ultimately returned to its owner must report and remit that property to the proper state after a designated period of time. It is, in essence, a custodial transfer of money from a private holder to some state government, which acts as a bank of last resort.

Early in 2015, NACM joined on with the American Bar Association, NACM North Central, the Unclaimed Property Professional Organization (UUPA) and the Coalition of State Taxation in urging the Uniform Law Commission (ULC) to add a business-to-business (B2B) exemption for business associations involved in the ordinary course of business. ULC is reviewing this in 2015. We continue to urge the Commission to offer guidance and clarification in the UUPA that states should indeed adopt a B2B exemption as part of the updated UUPA. This is deeply important because the federal legislation from 1995 does not specifically exempt such transactions. Fewer than one-third of all U.S. states have such an exemption in place. It is problematic because so many businesses face a host of onerous and inconsistent unclaimed property regulations in the present landscape. NACM and its partners suggest the following language in any update:

> *"Notwithstanding any other provision of the [Act], any property due or owing from a business association to another business association including, but not limited to, checks, drafts or similar instruments, credit memoranda, overpayments, credit balances, deposits, unidentified remittances, nonrefunded overcharges, discounts, refunds and rebates, shall not constitute unclaimed property under this [Act]. This section also applies to all amounts due or owing from a business association to another business association that, on the effective date of this section, is in possession, custody or control of a business association."*

Consumer Credit Report Regulation versus Commercial Credit Report Regulation

Historically, lawmakers have recognized and respected the differences between commercial and consumer credit and the important differences in how information is used in both arenas. As defined in the Fair Credit Reporting Act (FCRA), whether a purchase on credit is a consumer or a commercial transaction is determined by the end use of the purchase: if the purchase is for personal, family or household use, it is a consumer transaction. On the other hand, purchases made on credit for business use are generally accepted as commercial transactions.

Although the FCRA does not define the term "commercial transaction" specifically, and only governs commercial transactions when a business relies on a consumer report to make a business credit decision, there are a number of important practical characteristics that illustrate the vast differences between commercial credit transactions and consumer credit transactions. Commercial credit executives must review everything from the customer's application, financial statements, business references, commercial credit reports and beyond. To increase the speed and reliability of this decision, and to increase the quality of commercial credit reports, companies share their accounts receivable information, or historical, factual data about their customers' payment habits, with commercial credit reporting agencies. In turn, trade payment information is one of the components used by the nation's thousands of credit and risk professionals to arrive at an independent decision about whether or not to sell to a business customer on credit. This information helps business creditors determine the willingness and likelihood of a new customer to pay their obligations as they become due and the level of integrity with which they operate, and to assess their character. It is critical to keep this information flowing freely.

Experts have warned Congress that onerous or poorly conceived regulation in this area could result in serious delays in the availability of business credit information. Such delays could cost the economy an annual sales loss exceeding $60 billion. Any restrictions on the free flow of credit information will retard the economy and further place American businesses at a competitive disadvantage. Ultimately, anything that interferes with the free and complete ability of the business credit grantor to make a sound, accurate and equitable credit decision is an impediment to the commerce of this country. Everyone loses—Not only the businesses themselves, but also the consumer of the goods and services they provide.

Despite the vast differences between consumer and commercial transactions, many people incorrectly and dangerously blur the line between the two. This presents two issues for the commercial credit community from a regulatory standpoint:

Protecting Information

Information on companies and individuals is now more accessible and more freely exchanged than at any previous point in history. As a result, lawmakers have sought to protect individuals from criminals who would use this openness to their own nefarious ends. NACM fully believes in every American's right to the security of their own financial and personally identifiable information, and wholly supports legislative efforts that seek to guarantee that right. However, NACM urges the federal government and states that any such legislation must be carefully defined and accurately drafted to apply specifically to personal information rather than to the commercial data willingly exchanged between businesses in order to assess creditworthiness. Extending the approach that some state legislators unknowingly tried to take in recent years toward regulating the exchange of consumer information in the same manner as trade credit information would be disastrous for the U.S. economy and must be avoided.

Sources of Negative Commercial Payment Information

In 2013 and 2014, some of the nation's smallest businesses were targeted by marketing companies promising to help improve a business' commercial credit in exchange for a subscription fee, borrowing a tactic that's already in use in the consumer credit arena. In reaction to this deceptive marketing practice, some lawmakers unsuccessfully proposed legislation designed to require disclosure of the identity of a source of negative trade payment information on a commercial credit report should be disclosed. NACM's position is that rescinding a company's right to anonymously share its historical, factual trade payment data would result in a massive chilling effect on business's participation therein and, thus, overall credit-granting activity levels. This would badly impair the economy. It would also require businesses to allocate staff, that it often can ill afford, to respond to inquiries, or decide to omit any trade data that could be construed as negative, distorting a potential debtor's true profile. NACM believes that rather than regulating *commercial* credit information, educating small companies about commercial credit and about how it differs from consumer credit would correct the problem being caused by savvy marketers in search of fees. NACM also believes that it is critical for lawmakers to use specific language in legislation to ensure that credit extended for business purposes is not swept into regulations that govern credit extended for personal, family or household use. Failure to do so would fail to address existing problems, notably on the consumer side, while creating significant unintended consequences. To support and educate small businesses and legislators on this topic, NACM created a fact sheet, "Commercial Credit: What Every Company Needs to Know," as a basic yet definitive guide.

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