FACTURING OUTLOOK FOR 2021

ALSO INSIDE:
The Next Big Disruptors in Factoring
How Factors Can Increase Sales by Resolving Payroll Tax Liability
Regulation of Commercial Finance Companies is Here and Intensifying
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As 2020 comes to an end, it seems impossible to encapsulate this year into one word. Although 2020 can probably bring forth many negative connotations to most people, the word that I choose is innovate.

There have been many challenges this year, but 2020 has allowed us to open our minds to possibilities that we didn’t know existed before. We have been able to innovate new ideas and new approaches to overcome challenges, obstacles, hardship and adversity, instead of being defeated by them. The reason why innovate is my word of the year is because it is a word that will carry us forward into 2021 and beyond.

Technology has rapidly accelerated and opened the door to exciting innovations for the commercial finance industry. The IFA has conducted more than 30 webinars and online training classes this year, allowing the community to stay informed and connected during this turbulent time. New ideas are implemented weekly as we stay at the forefront of timely issues important to helping factoring companies thrive and succeed. We offered our first hybrid training class in October, which further opened the way to more opportunities, including a new range of attendees from all over the globe.

Our Presidents and Senior Executives Meeting in January will be a hybrid roundtable meeting, allowing both in-person and virtual attendees to come together as a group. Educational roundtable discussions and networking opportunities will take place between both groups as technology seamlessly integrates participation between a live and virtual audience. Guest speakers for this meeting include Neal Umphress, a supervisory special agent from the FBI (Reporting Fraud and Recovering Losses), Joseph Amato, the Nevada District director from the Small Business Administration (Obtaining Subordinations and Working with the SBA), Mack Jackson, a cybersecurity awareness speaker (Protecting your Company Against Cybercrime) and Palmer Hamilton, a partner and lobbyist at Jones Walker (New and Proposed Legislation and its Impact on Factors). Whether in person or virtual, you won’t want to miss this important meeting if you are a senior executive or owner of an IFA member organization. Please go to our website for more information on this meeting and all upcoming events.

We are now actively planning a hybrid format for the IFA Annual Conference as well. The event will take place May 12 to May 15 in Palm Desert, CA. While virtual events certainly have their benefits, peer-to-peer networking at live events will always be a valuable part of our industry, so it is important for us to continue to offer that experience while making sure attendees are comfortable in a large group setting. Strategic planning and coordination are underway for the 2021 live event, which also will offer online attendees a rich digital experience by synchronizing the benefits of an in-person conference. For more information, go to factoringconference.com. Registration will be open soon!

The American Factoring Association also has innovated this year by offering monthly newsletters and bi-monthly webinars to keep members informed. During these times, it is more important than ever to establish and strengthen meaningful relationships in Washington in order to protect the factoring industry. If you missed any of the previous webinars, go to americanfactoring.org to download them.

2020 has been a year of challenges and change, but with innovation we can bring optimism, growth and new possibilities in 2021. I look forward to seeing you at one of our events soon, whether in person or virtually.
The International Factoring Association’s (IFA) goal is to assist the factoring community by providing information, training, purchasing power and a resource for factors. The IFA provides a way for commercial factors to get together and discuss a variety of issues and concerns about the industry. Membership is open to all banks and finance companies that perform financing through the purchase of invoices or other types of accounts receivable.

The Commercial Factor is published bi-monthly by the International Factoring Association. To subscribe, please email info@factoring.org.

The views expressed in the Commercial Factor are those of the authors and do not necessarily represent the views of, and should not be attributed to, the International Factoring Association.

NEWS

PEOPLE

CapitalPlus Hires Deegan as Director of Human Resources
CapitalPlus Construction Services hired Clare J. Deegan as director of human resources and business office manager. Before joining CapitalPlus, Deegan worked in both small and large hospitality environments, leading HR, accounting and office management efforts.

Crestmark Equipment Finance Adds Jenkins as National Account Executive
Crestmark appointed James Jenkins national account executive for the Crestmark Equipment Finance group. Jenkins has nearly 40 years of equipment financing experience and most recently served as senior vice president, director of vendor and head of commercial direct with BCI Capital.

Binns Joins Tradewind as VP of Sales, Europe
Tradewind Finance appointed Derek Binns vice president of sales in Europe. Previously, Binns managed parts of the Otto Group, including its e-commerce services company, Zitra GmbH. Binns also served as an e-commerce specialist and international trade advisor to the UK Government Department of International Trade and held executive positions at Stenn International and Primadollar.

Axiom Appoints Karas EVP of Allied Affiliated Funding
Axiom Bank appointed Dan Karas executive vice president of Allied Affiliated Funding, the bank’s factoring and asset-based lending division. Karas’ commercial lending experience spans nearly four decades with national and regional banks, including his most recent role at a Dallas-based community bank.

Taulia Appoints Lee Director of Supply Chain Finance
Taulia, a working capital technology solutions provider, appointed Andy Lee director of supply chain finance. Prior to joining Taulia, Lee spent eight years at HSBC, with a focus on open account trade finance and fintech development.

eCapital Names Sheppard Chief Operating Officer
eCapital named Charles Sheppard, formerly president of the company’s freight factoring division, chief operating officer. In this new role, Sheppard will oversee both the eCapital freight factoring and eCapital commercial finance divisions and lead the newly formed corporate-level marketing and IT departments.

BFC Names Jacobs Senior Marketing and Development Director
Business Finance Corporation (BFC) named Jeff Jacobs senior marketing and development director. Jacobs joined BFC with 35 years of factoring and receivable financing experience.
NEWS

SoCAL CHAPTER EVENTS 2021

TBA
For more information on joining the SoCal Chapter, contact: John Cummings, Chapter President, at cummings.john@acsfactors.com.

MIDWEST CHAPTER EVENTS 2021

January 21
Webinar
2pm-3pm EDT
Topic: Broker and Consultant Arrangement Best Practices
Free for IFA Midwest Chapter Members, $25 for Non-Members
For more information on joining the Midwest Chapter, contact: Robert Meyers, Chapter President, at rmeyers@republicbc.com.

Siska Joins Sterling Commercial Credit as Managing Partner
Thomas G. Siska joined Sterling Commercial Credit as a managing partner. He will initially be charged with building Sterling’s national origination platform. Siska has previously initiated four different startups and orchestrated three turnarounds.

Huntington Business Credit Opens West Coast ABL Offices, Adds New Team Members
Huntington Business Credit opened three new asset-based lending offices in Los Angeles, San Francisco and Portland, OR. The company also hired Tab French, Robert Alexander, Martin Valencia, David Lehner and John Kolb. French joined HBC as senior vice president, managing director and west business development team lead. Alexander and Valencia joined as senior vice presidents and business development officers. Lehner joined as senior vice president and relationship manager.

ship manager team lead. John Kolb joined as vice president and relationship manager.

eCapital Promotes Howard to Chief Credit and Portfolio Officer
eCapital named Tony Howard chief credit and portfolio officer. Howard was formerly chief credit officer of the company. Before eCapital, Howard served as managing director of CBIZ, managing director at PricewaterhouseCoopers and director with KPMG’s corporate finance group in Atlanta.

Sterling Commercial Credit Hires Gill as Senior VP of Sales
Sterling Commercial Credit hired Eric Gill as senior vice president of sales located in Charlotte, NC. Gill joined with more than 30 years of experience, having served as a business development officer, chief credit officer, relationship manager, credit underwriter and senior regional field examiner.

North Mill Equipment Finance Appoints Five New Employees
North Mill Equipment Finance appointed Jeffrey T. Schick operational controller. The company also hired Elizabeth Arias-Hernandez as portfolio manager, Kimberly Merryfield as account manager, Yocasta Olivo as title and insurance administrator and Maya Samad as sales and marketing assistant.

Iron Horse Credit Hires Savi Hussain as SVP of Underwriting
Iron Horse Credit hired Savi Hussain as senior vice president of underwriting. Hussain has more than 25 years of ABL experience and will be responsible for the company’s credit and underwriting operations.

Ahmad Joins eCapital as EVP, Chief Credit Officer of Commercial Finance
eCapital named Kash Ahmad executive vice president and chief credit officer of its commercial finance division. Prior to taking this role, Ahmad served as managing director for Bibby Financial Services Canada and UK specialist director responsible for the trade finance, export finance, construction finance and recruitment finance divisions.

DEALS

Rosenthal Provides $35MM Across Two Factoring Deals
Rosenthal & Rosenthal completed two separate factoring deals out of its Southeast office totaling $35 million. The first deal was with a designer of handbags and accessories that lost coverage on some of its retail customer accounts due to COVID-19-related challenges. The second deal was with a manufacturer of textiles and bedding that was looking to establish a U.S. entity to sell to retailers.

Versant Funds $1.5MM Factoring Facility for CBD Body Care Distributor
Versant Funding funded a $1.5 million non-recourse factoring facility for a na-
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NEWS

NORTHEAST CHAPTER EVENTS 2021

January 6
Virtual Happy Hour
4pm-5pm EDT

January 19
Webinar
10am-11am EDT
Topic: TBA

February 3
Virtual Happy Hour
4pm-5pm EDT

February 16
Webinar
10am-11am EDT
All events: Free for IFA Northeast Chapter Members, $25 for Non-Members
For more information, call Harvey Gross at (732) 672-8410 or e-mail hgross4@verizon.net or visit www.ifanortheast.org

SOUTHEAST CHAPTER EVENTS 2021

January 14
Virtual Happy Hour
4pm-5pm EDT

January 21
Webinar
2pm-3pm EDT
Topic: Broker and Consultant Arrangement Best Practices

February 11
Virtual Happy Hour
4pm-5pm EDT

February 25
Webinar
2pm-3pm EDT
Topic: TBA
All events: Free for IFA Southeast Chapter Members, $25 for Non-Members
For more information, call Harvey Gross at (732) 672-8410 or e-mail hgross4@verizon.net or visit www.ifasoutheast.org

IFA CALENDAR OF EVENTS 2021

January 13
Factoring Government Receivables
Webinar 11am-12pm PST

January 28-29
2021 Presidents & Senior Executives Hybrid Meeting
Waldorf Astoria
Las Vegas, NV

February 24
Debtor Credit Insights & Innovations From Trusted Industry Experts
Webinar 11am-12pm PST

March 9
Joint Factoring Meeting with the NYIC & IFA NE Chapter
Webinar Time TBA
See IFA’s full calendar on page 15.
Registration Information:
www.factoring.org

CANADA CHAPTER EVENTS 2021

2021 Dates TBA
Webinar Topics:
January - Legal Issues: Update from the Courts
February - Economic Outlook: Forecast for 2021
March - Transportation Issues
April - Factoring Fraud
May - Managing Clients during COVID
June - Underwriting New Clients: What to watch for?
July - Sales Strategies: How to become an efficient BDO
August - Summer Golf Gathering
September - Factoring vs MCA’s

For more information, call Oscar Rombolà at (905) 603-6284 or email oscar.rombola@ecapital.com. Visit IFA Canada’s website at www.FactoringAssociationCanada.com.
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King Trade Capital Delivers $4.5MM Supply Chain Finance Facility for PPE Distributor

King Trade Capital completed a $4.5 million purchase order-based supply chain finance facility for a New York-based personal protective equipment distributor importing medical gowns to be delivered to the U.S. government.

InterNex Capital Provides $2MM Velocity LOC to Florida-Based Food Manufacturer

InterNex Capital provided a $2 million Velocity line of credit and a $550,000 stretch facility to a Florida-based food manufacturer that sells low carb, ready-to-eat foods through U.S. distributors and directly to consumers online.

North Mill Delivers $20MM AR Facility to Reliable Tire Distributors

North Mill Capital provided a $20 million accounts receivable and inventory credit facility to Reliable Tire Distributors, a wholesale tire distributor headquartered in Blackwood, NJ.

FSW Funding Provides $5MM to West Coast Staffing Company

FSW Funding provided a $5 million credit line (along with an accordion feature) to a California-based staffing company that was having issues with its current lender.

Iron Horse and Alterna Provide $5.5MM of Working Capital to Women’s Footwear Manufacturer

Iron Horse Credit provided a $3 million stand-alone inventory revolving line of credit and Alterna Capital Solutions provided a $2.5 million accounts receivable-based facility to a manufacturer and importer of women’s footwear.

Huntington Business Credit Delivers $23MM Facility to Paragon Steel Enterprises

Huntington Business Credit provided Paragon Steel Enterprises with $23 million in credit facilities.

Celtic Capital Provides $2.5MM to California-Based Industrial Ceiling Fan Manufacturer

Celtic Capital provided $2.5 million accounts receivable and inventory lines of credit to a California-based manufacturer of high-volume, low-speed industrial ceiling fans.

CapitalPlus Funds $2.3MM in October

In October, CapitalPlus Construction Services, a provider of accounts receivable financing for the construction industry, completed $2.3 million in transactions.

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You are eligible to sit for the Certified Account Executive in Factoring exam if you have been involved in Factoring for at least two years and you are or have been in an Account Executive role, or you have managed such a position.

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The Commercial Factor | December 2020

J D Factors Provides $4.225MM in Recent Factoring Facilities

J D Factors provided $4.225 million in recent factoring facilities to transportation, manufacturing, telecommunications and wholesale companies.

Entrepreneur Growth Capital Delivers $5MM Facility for NY PPE Distributor

Entrepreneur Growth Capital delivered a $5 million working capital facility to a New York-based distributor of personal protective equipment.

Amerisource Closes $3MM Credit Facility for Membrane Manufacturer

Amerisource Business Capital closed and funded a $3 million credit facility for a Texas-based fabricator of membranes used in water treatment facilities.

Prestige Delivers $5MM Factoring Facility to Retail Display Manufacturer

Prestige Capital Finance delivered a $5 million factoring facility to a South-east-based company that focuses on the manufacturing and assembly of corrugated retail displays.

CoreFund Capital Provides $25MM Credit Facility for International Freight Forwarder

CoreFund Capital facilitated an increase to the credit facility for a global logistics and freight forwarding company.

eCapital Supplies $5MM Factoring Facility to Beverage Distributor

eCapital provided a $5 million factoring facility to an importer and distributor of wine and spirits.

Republic Provides $2.5MM Factoring Facility for LA-Based Apparel Importer

Republic Business Credit provided a $2.5 million factoring facility to a Los Angeles-based apparel manufacturer and importer to support its holiday season orders. The company is a distributor of footwear for men and women that recently expanded into fashionable gloves and some disposable gloves used as personal protective equipment.

Republic Provides $3.7MM Credit Facility for Plastics Manufacturer

Republic Business Credit provided a Midwest-based, privately-owned plastics manufacturer with a $3.7 million line of credit.

Express Trade Capital Closes $6MM Factoring Facility for Menswear Importer

Express Trade Capital provided a $6 million factoring facility for an importer of menswear.

Loeb Leverages More Than $12MM in Equipment to Finance Seven New Clients

Loeb financed more than $12 million in equipment to seven new clients, including $4 million to a Canadian construction company.

Entrepreneur Growth Capital Delivers $5MM Facility for NY PPE Distributor

Entrepreneur Growth Capital delivered a $5 million working capital facility to a New York-based distributor of personal protective equipment.

ADVERTISE ON THE NEW COMMERCIAL FACTOR WEBSITE

The Commercial Factor website publishes a variety of content including news and relevant magazine articles. One banner size ad provides maximum visibility and audience engagement across the entire website on both desktop and mobile.

To advertise, contact Laura Backe at laura.backe@nw-assoc.com

magazine.factoring.org
Encina Provides $80MM Revolver for Business Process Services Provider
Encina Business Credit provided an $80 million senior secured revolving credit facility to a global provider of business process services.

Espresso Capital Extends $7.5MM Credit Facility to Zype
Espresso Capital provided Zype, a video content management and distribution software company, with a $7.5 million credit facility.

HSB Funding Closes $1MM Credit Facility for Wholesale Seafood Distributor
HSB Funding, a division of Heritage Southeast Bank, closed and funded a $1 million credit facility for a firm that provides seafood products to grocery chains through the Southeast U.S.

White Oak Provides $1.5MM Factoring Facility to Service-Disabled Veteran-Owned Business
White Oak Commercial Finance’s government contracting finance arm provided a $1.5 million factoring facility to a service-disabled veteran-owned 8(a) company that provides operational and technical engineering support to the U.S. Army Cyber Command.

Sallyport Commercial Finance Provides $5MM Credit Facility for Apparel Company
Sallyport Commercial Finance provided a $5 million credit facility to an apparel company that suffered when major retailers began to cancel orders amidst the ongoing COVID-19 pandemic.

TAB Bank Provides $8MM Revolving Credit Facility to Commodity Brokerage Firm
TAB Bank provided an $8 million asset-based revolving credit facility for a commodity brokerage firm based in Texas.

Gibraltar Provides $130.5MM in New Commitments During COVID-19 Pandemic
Gibraltar Business Capital closed 12 transactions and $130.5 million in new commitments in the nine months after COVID-19 was declared a pandemic.

Ares Provides Financing for eCapital’s Acquisition of Advantedge Commercial Finance
Credit funds managed by Ares Management provided eCapital with financing for the company’s acquisition of Advantedge Commercial Finance, a UK-based, privately-owned invoice financing company.

HubTran Launches Invoice Intelligence for Factors
HubTran launched Invoice Intelligence, its newest product for factors. This product was designed to eliminate errors and fraud, allowing factors to get paid faster and more completely.

HPD Partners with Emirates Development Bank to Launch Supply Chain Finance Platform
HPD LendScape partnered with Emirates Development Bank to launch the UAE’s National Supply Chain Finance platform (SCF), providing UAE businesses access to working capital as they cope with pressures of the COVID-19 pandemic.

Encina Launches Lender Finance Platform, Graham & Thomas to Lead
Encina Capital Partners and an affiliate of certain funds managed by Oaktree Capital Management launched Encina Lender Finance (ELF), a new independent lender finance platform targeting commercial and consumer specialty finance companies in the U.S. and Canada. ELF will be led by Luke Graham (CEO) and John Thomas (president and chief risk officer). In addition, Alex Knowland was named vice president of capital markets and client services. Janet Riccard joined the firm as director of operations.

IFA Accepts Haversine Funding and FactorCloud as Preferred Vendors
The International Factoring Association accepted Haversine Funding and FactorCloud into its preferred vendor program. Approved vendors undergo a thorough screening process before being selected and are subject to ongoing monitoring. Both will offer an exclusive benefit available only to IFA members.

Gerber Finance Launches Division to Provide ‘Larger Amounts of Funding’
Gerber Finance launched Gerber+ to expand its portfolio services. While Gerber Finance currently focuses on facilities up to $10 million, the new division will service businesses seeking funding ranging from $10 million to $25 million.

Factoring Scheme Allegedly Costs San Antonio Area Banks More Than $13MM
According to the U.S. Attorney’s Office for the Western District of Texas, an indictment was filed on Nov. 10 that charged five individuals from San Antonio with defrauding Southwest Bank, the Bank of San Antonio and TransPecos Bank out of more than $13 million by submitting fake invoices that were factored by the banks.

Crestmark Provides More Than $23.1MM in Commercial Financing in H1/Nov
Crestmark secured a total of $6.05 million in ABL financial solutions for five new clients, Crestmark Equipment Finance provided $4,371,057 in three new lease transactions and Crestmark’s government guaranteed lending group provided $12.722 million in financing for three new clients in the first half of November.
"Organizations have gotten away with postponing their branding and marketing initiatives for a long time — That won't work in 2021 when everything is digital and all you have is your brand's digital exterior."

Yoshi Mua,
Principal, MM Media


www.muamedia.com
2021 Commercial Factor Outlook

As factors close the book on a year mired by the COVID-19 pandemic and get ready for 2021, Commercial Factor reached out to industry leaders from across the United States to take stock of current market conditions and predict what could be the next big disruptor for the industry.
There is no arguing that the COVID-19 pandemic was the biggest disruptor of 2020 for the factoring industry and the world at large. The pandemic has stretched through most of the year and although the recent approval of a vaccine provides some optimism, the fallout will carry into 2021 and beyond.

To get a better handle on where the factoring market currently stands and where it will go in 2021, Robyn Barrett, managing member of FSW Funding; Bonnie Castillo, president of CoreFund Capital; Dean Landis, president of Entrepreneur Growth Capital; and Glen Shu, president of the specialty finance group at Heritage Bank of Commerce/Bay View Funding share their insights in an exclusive Q&A for Commercial Factor.

**How would you describe the state of the factoring industry entering 2021?**

**BARRETT:** The factoring industry is set to have its best life ever. Merchant cash advance lenders were seriously hurt due to COVID, which means less predatory and destructive lending. Also, in the first half of 2021, banks will be re-evaluating their portfolio[s] and will be eager to shed under- and non-performing loans. Factors are in a good position to pick up this business from banks.

**CASTILLO:** Anxious. Everyone knows there is no playbook for what has occurred this year and how to prepare for 2021. The ripple effect and impact of the shutdown of many businesses due to the pandemic is still making its way through our economy. Our factoring business is focused on the transportation and oilfield market. Transportation will continue to be a necessity. The concern is the survival of the account debtors and the potential of seeing more bankruptcies. The oilfield is of course on the bubble during this. On the upside, there are many factoring shops that have been able to adapt to the situation at hand by embracing more technology to maintain a continuity within their organization with no interruption of service to their clients. I think that will continue to be a requirement for factors moving forward.

**LANDIS:** The industry is surprisingly healthy. It appears that we all weathered the storm about the same: the initial shock and “all hands on deck” spirit, the unprecedented drop in outstanding[s], followed by a gradual increase to levels pre-pandemic. We currently see as much competition as ever, although it is from existing players; new entrants seem to be attracted more to ABL not factoring.

**SHU:** Increased use of technology and the virtualization of our quote-unquote back offices. I’ve always been a believer that the portfolio and credit side of the business should be all under one roof because there we can leverage synergies and promote ongoing staff education.

Now, with that being said, COVID has forced the world to figure out how to work remotely. We learned quickly that you can still perform transactions, service clients and

That being said, the cautious part of being optimistic is that we must continue keeping a watchful eye on our portfolios, with even more focus on credit quality.

**What is one change adopted by the factoring industry in 2020 that you believe will become a fixture going forward?**

**BARRETT:** Working remotely. Whether you like it or not, this can of worms has been opened up. Factors are flexible in nature and were able to move to a remote workplace with little pain. I think going forward we all will be providing some mix of in-person and remote working — it is inevitable.

**CASTILLO:** Embracing more technology and automation. I have heard personally from prospects that have had the unfortunate experience of being with a factor that was not prepared to pivot their business so quickly to maintain continuity.

**LANDIS:** Working remotely worked far better than I expected. We learned to adapt quickly and successfully, something that I don’t think our industry has been known for. We will take these lessons to heart. The one area that I have renewed appreciation for is the value of relationships. Inasmuch as we all learned to work in new ways, it was much more difficult to create new relationships. This put a premium on all existing relationships between colleagues, clients, funding sources, referral sources, etc.

**SHU:** Increased use of technology and the virtualization of our quote-unquote back offices. I’ve always been a believer that the portfolio and credit side of the business should be all under one roof because there we can leverage synergies and promote ongoing staff education. Now, with that being said, COVID has forced the world to figure out how to work remotely. We learned quickly that you can still perform transactions, service clients and
The constant threat of another virus such as COVID-19. This virus shook the entire world and brought the U.S. to its knees. All factors are looking for prospects that will thrive in our new normal — online commerce, healthcare, PPE and government contracts. The other threat is regulation, but this will be tempered if the Republicans can hold the Senate.

I think risk seeing more unfriendly legislation toward factors and higher interest rates. This could impact many factors that have competed to be the lowest rate provider who will either not survive or lose much of their portfolio over rate increases to current clients.

Fears of any sort of cybercrime still keep me up at night. We still need to watch closely the fintech players that encroach on the factoring space and on attempts to increase regulation.

COVID-19 may continue to be a disruptor in 2021. There could be potential problems with distribution of the vaccine, which could in turn cause further delays in progress with moving the country forward and slowing economic recovery.

Which sectors do you expect to recover or continue to recover in 2021 and which ones do you expect to continue to struggle?

Apparel will continue to struggle for a while. We shall see how the holiday season plays out and then who files bankruptcy in the first quarter of 2021. One thing is for sure, the competitive landscape in terms of retail and wholesale will be much smaller. Oil and gas will also continue to suffer due to COVID-19 uncertainty and under the new president-elect, who is climate-conscious. The winners will be staffing, healthcare and construction.

Fortunately for us, the trucking industry will continue to exist and quite possibly continue to thrive into the first quarter, which historically is the slow season. Last mile delivery in the transportation industry will continue to grow as consumers have now become accustomed to more on-demand online ordering options. I’m hoping that there is not more government interference or restrictions placed on carriers. I think brick and mortar retail will continue to suffer if they are unable to expand online options.

I imagine a broad recovery, except for businesses that require the in-person experience: hospitality, travel, certain retail and restaurants. Trillions of additional stimulus and a large infrastructure bill could be great for basic industry and the building trades.

It’s probably easier to talk about those that I think will continue to struggle versus those that will recover. Brick and mortar retail is going to continue struggling, although it had been before the pandemic but then got worse. I believe the energy sector will continue to face challenges. On a daily basis, we closely monitor corporate bankruptcies for purposes of maintaining credit quality. Over the years, we have pulled back some from the energy sector, especially when we saw the significant declines in the price of oil. But clearly through the pandemic, the energy sector continues to be somewhat challenged, enough that many of the bankruptcy alerts we see are related to this industry. As the country reopens and businesses begin seeing more normal operations, we should see recoveries in industries such as manufacturing, wholesale and distribution.

What are your overall expectations for the industry in 2021?

It’s a mixed bag depending on when the vaccines are distributed and how fast people will get them. The economy won’t start a real recovery until people are spending money, employed and can travel.

I’m trying not to set too many expectations at this point. Our focus is on continuing to grow our portfolio wisely (we grew substantially during the pandemic), manage our risk and be prepared and nimble enough to adapt to any additional disruptors.

Barring anything apocalyptic, we are hopeful for a robust 2021. I think we all can’t wait to return to normal and enjoy all the in-person contact that we may have taken for granted. One item to note is that a lot of factors benefitted from the reduction in the MCA industry. My guess is that they come back as before.

I believe 2021 should provide plenty of new business opportunities for the specialty finance industry, which in turn should support moderate growth within our portfolios. I also think that there’s going to be an increase in the mergers and acquisitions activity for those companies looking to expand beyond organic means.
The IFA is registered with the National Association of State Boards of Accountancy (NASBA) as a sponsor of continuing professional education on the National Registry of CPE Sponsors. State boards of accountancy have final authority on the acceptance of individual courses for CPE credit. Complaints regarding registered sponsors may be submitted to the National Registry of CPE Sponsors through its website: www.learningmarket.org.

The IFA will assist with applications to receive continuing legal education. To receive CLE credits, participants will need to submit all documentation to their accrediting states for approval. For more information, please contact Heather Villa at info@factoring.org or 805-773-0011 ext 301.

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The IFA is the world’s largest association for the factoring industry.

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**REGISTRATION INFORMATION** 805-773-0011 www.factoring.org info@factoring.org

International Factoring Association, P.O. Box 39, Avila Beach, CA 93424-0039

CANCELLATION POLICY: Due to the ongoing uncertainty regarding COVID-19, the IFA will not charge a cancellation fee if you decide to not attend an in-person event based on concerns around your health or travel. For information on policies with online events, please refer to specific program registration pages or contact the IFA with inquiries.
How Factors Can Increase Sales by Resolving Payroll Tax Liability

Business development has become difficult enough in the COVID-19 environment without having to drop clients with potential payroll tax liability issues. Elizabeth Nelson walks through potential solutions so that factors can save and retain clients experiencing such difficulties.

BY ELIZABETH NELSON, ESQ.

The COVID-19 pandemic increased payroll tax delinquencies with resulting tax liens. Further, the IRS expects more delinquencies in 2021 than in 2020. Concurrently, factoring companies are facing challenges securing new clients. There are solutions for business development officers who want to help companies quickly resolve payroll tax liability and then convert those companies into clients. These solutions require a BDO to get more involved with companies to save or acquire new clients. This article discusses the pitfalls of payroll tax liability and resulting tax liens and provides strategies to settle them.

CONSEQUENCES OF FAILURE TO DEPOSIT, FILE AND PAY PAYROLL TAXES

Collection of payroll tax is vitally important to the functioning of the United States government. The IRS collects 95% to 96% of all the revenue for the United States. Payroll tax comprises 72% of tax collection. In 2019, payroll tax accounted for $1.2 trillion in revenue from 31.6 million filed returns. As a result, payroll tax delinquencies are the IRS’ highest enforcement priority, with increased unannounced revenue officer visits and asset seizures.

Companies that need factoring are usually subcontractors for industries such as construction, oil and gas, pipeline and transportation. When the contractor stops payments without cause, subcontractors are usually contractually required to finish a portion of the job, requiring continued payment of worker salaries. When that happens, any cash goes toward worker salaries and the payroll tax is not deposited and returns are not filed. This results in delinquent payroll tax liabilities, which are not the fault of the company.

The penalties and interest for late payroll tax deposits, late filing returns and late payment of payroll tax can total up to an additional 65% of the total tax due. In 2019, the IRS...
issued approximately 5 million civil penalties on employers who failed to pay employment taxes, with $13.7 billion in additional assessments.

Paying employment taxes is inevitable. A company withholds taxes from employee pay and, thus, has a fiduciary duty to transmit the money to the IRS. These taxes are called trust fund taxes and, by law, belong to the government.

A particularly severe penalty (the trust fund recovery penalty) applies to “responsible persons” of a company. Responsible persons are company officers, directors and/or anyone who makes decisions about how to pay employees or has check-signing authority. A civil penalty equal to the full amount of the unpaid trust fund tax, plus interest, can be assessed against the social security number of any responsible person. Hence, payroll tax becomes personal tax.

**EXPLAINING TAX LIENS AND THE 45-DAY SAFE HARBOR RULE**

A federal tax lien is the government’s legal claim against a company for failure to pay taxes. A federal tax lien is filed after the IRS assesses the tax liability and sends a bill that explains how much is due (Notice and Demand for Payment). The IRS files a federal tax lien after a company fails to pay the tax within a certain time. The IRS also files a Notice of Federal Tax lien within the county of the location of the client’s business.

Factor companies require the filing of a UCC-1 statement prior to funding a client. This UCC statement protects a factor company’s interest in the accounts receivable. What happens to the UCC statement when the IRS files a federal tax lien?

Ordinarily, pre-existing security interests, such as accounts receivable, lose priority to the federal tax lien. For accounts receivable, which come into existence after the lien is filed, the lien statute includes a statutory safe harbor, which allows a factor’s UCC to retain priority with respect to accounts receivable disbursements during the first 45 days following the filing of the federal tax lien. The IRS has priority on all accounts receivable and cash that come into existence commencing on the 46th day.

There is one exception to this safe harbor rule. The 45-day period is shortened to the date at which the factor has actual knowledge of such a lien filing. For example, if the factor has knowledge of the lien on the 25th day, the safe harbor is only 25 days. Thus, the IRS has priority of future advances made after the factor learns of the federal tax lien filing. The IRS has the burden of showing that the lender had actual knowledge of the tax lien filing. On the date that the factor discovers that a federal tax lien has been filed, all advances should cease until the federal tax lien is subordinated.

**CONVERTING COMPANIES WITH PAYROLL TAX ISSUES INTO CLIENTS**

Factor companies have different rules on settling tax liabilities prior to funding. Some require only an installment agreement, while others require both an installment agreement and an IRS lien subordination to the UCC statement if a lien was filed.

A successful factor BDO must be proactive in both assisting a company in securing factor services and stopping IRS collections. Experienced payroll tax professionals’ names and contact information must be provided to the company unless one is already working with the company. Believing that the company president can self-solve its IRS problems is not realistic. They will not. They cannot. The IRS is the largest collection agency in the U.S. and holds all the power and knowledge of the rules it requires. A business owner does not know the IRS rules, settlement options and pre-seizure time deadlines. They do not have access to the IRS attorney hotline. Failure to know IRS rules can cause a company to lose assets, leaving nothing left to factor.

For a BDO who has expended time securing a company as a client, especially in the COVID-19 business environment, time is of the essence, and a solution can be achieved within seven to approximately 30 days by working with a tax professional.

Obtain an IRS Power of Attorney (POA) from the tax professional to stop unexpected visits from the IRS collection revenue officer (RO). Why? Because the RO must contact the POA and ask permission before visiting the company. When the RO shows up unannounced, they are looking for assets to seize. Additionally, this protects against a potentially unaware company representative providing information that is not required.

**Continued on page 27**

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Elizabeth Nelson, Esq., has represented businesses, factors/IRS intervention and individuals with tax issues since 2001. She has a master’s degree in tax law from New York University and is vice president and a board member of the SoCal Chapter of the IFA, founder of EN Tax Law, was past vice-chair of the American Bar Association, Tax Section, Individual & Family Income Committee from 2012 to 2014, and was appointed to a judicial clerkship in the United States Tax Court. She practices in the areas of tax controversy, focusing on company payroll tax issues, lien subordinations and exempt organizations before all levels of the IRS. She can be reached by phone at 310-892-0339 or by email at enelson@enelsontax.com.
WHAT'S NEW AT IFA  
DECEMBER 2020

AFA Outlines Factoring Industry Problems and Solutions Entering 2021
BY ROBYN BARRETT AND COLE HARMONSON

As we wrap up a crazy 2020 and head into 2021, the factoring industry still has many regulatory problems to tackle.

CONTROL OF THE SENATE
The national elections were on Nov. 3 and we are still not sure which party will have control of the Senate — it all comes down to Georgia. Currently, the Democrats have 48 seats and the Republicans have 50, with 51 needed for a majority. The Georgia runoff for two Senate seats is on Jan. 5 and it is a total guess as to who will win. We will have to wait until then to get a better idea of how the AFA will plan to continue lobbying efforts for the factoring industry.

DODD-FRANK ACT SECTION 1071
The AFA, through its consultant, Palmer Hamilton of Jones Walker, sent a letter on Nov. 17 to the Consumer Financial Protection Bureau regarding the Small Business Regulatory Enforcement Fairness Act panel feedback on the CFPB implementation of Section 1071 of the Dodd-Frank Act. Hamilton reiterated the CFPB has properly interpreted Section 1071 and ECOA to not cover factoring transactions. The CFPB panel is preparing a report that examines the impact of the potential rule on small businesses. The report, along with feedback received from small businesses, will be considered by the bureau in its rulemaking to implement Section 1071. With the very good possibility of a new director of the CFPB, this means factors are not out of the woods in terms of Section 1071, so the AFA will continue to lobby on behalf of the factoring industry on this matter.

MORE REGULATIONS
California Governor Gavin Newsom approved Bill AB1864 on Sept. 25. This bill creates a state version of the federal Consumer Financial Protection Bureau by restructuring the Department of Business Oversight. That department will be renamed the Department of Financial Protection and Innovation and be given broad general jurisdiction over providers of consumer financial products and services. The bill also gives the department authority over certain companies that are not subject to state oversight, such as credit reporting agencies, debt collectors and certain financial technology companies, including those providing loan products. This means more regulation to come in California. AB 1864 will take effect on Jan. 1.
In addition, New York SB 55470B requires certain providers that extend specific terms of commercial financing to a recipient to disclose certain information about the offer to the recipient. The bill is on the governor’s desk, so we will have to continue to watch for now.

Both measures raise the question: Are we better off with one standard federal disclosure form or different ones state by state?

**AFA CONTRIBUTIONS**

We appreciate the ongoing contributions from current AFA members and still need to raise more contributions to meet our 2020/2021 goals. Our goal in increasing communications is to drive up membership! In addition, Hamilton gave a great election update as it relates to factors on our monthly AFA webinar on Dec. 9. If you missed it, please check it out on the AFA website.

Our membership and fundraising drive have great momentum, with new members and contributions going in the right direction. Besides contributions, please be heard by joining, listening and participating. Please contact Cole or Robyn with any ideas or comments.

Cole Harmonson, Dare Capital
cole@darebizcapital.com
512-886-3272

Robyn Barrett, FSW Funding
robyn@fswfunding.com
602-535-5984, ext 101

The goal of the AFA is to increase membership and financial support from every IFA member. We urge every IFA member to contribute to the AFA as we are in the midst of our annual membership fund drive. Currently, we have Bronze Members, who have contributed as little as $500, up to Diamond Members, who have contributed in excess of $10,000. This is a very inexpensive insurance policy to help protect our industry from needless regulation which will be both costly and prohibitive. Please consider supporting the American Factoring Association.

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### 2020 Members

**Diamond Member ($10,000+)**
- Accord Financial, Inc.
- Apex Capital Corp
- Crestmark Bank
- Great Plains Transportation Services, Inc.
- Gulf Coast Business Credit
- International Factoring Association
- J D Factors
- Sallyport Commercial Finance, LLC
- TBS Factoring Service, LLC
- Triumph Business Capital

**Platinum ($5,000-$9,999)**
- 12five Capital
- Accutrac Capital Solutions Inc.
- CapFlow Funding Group
- eCapital LLC
- FSW Funding
- Goodman Capital Finance, a division of Independent Bank
- LSQ Funding Group, LC
- PRN Funding
- Republic Business Credit, LLC
- Southstar Capital
- Sunbelt Finance
- Truckstop Factoring
- Viva Capital Funding, LLC

**Gold ($2,500-$4,999)**
- AR Funding, Inc.
- Assist Financial Services, Inc.
- Charter Capital Holdings LP
- Dare Capital
- Evergreen Working Capital
- FirstLine Funding Group
- Gateway Commercial Finance
- Heritage Bank of Commerce/ Bay View Funding
- Lenders Funding, LLC
- Match Factors, Inc.
- Mazon Associates, Inc.
- Orange Commercial Credit
- Sekady Capital
- SevenOaks Capital Associates, LLC

**Silver ($1,000-$2,499)**
- Amerisource Funding, Inc.
- AmeriTrust Capital Corp.
- Business Finance Corporation
- Capital Solutions Bancorp LLC
- Cash Flow Resources, LLC
- Commercial Business Funding Corporation
- Commercial Finance Consultants
- Commission Express National, Inc.
- Commonwealth Capital, LLC
- CoreFund Capital, LLC
- ENSG Commercial Capital Factoring Club
- Factor King, LLC
- Gary M. Krasna, P.A.
- J.O.B.E. Services, Inc.
- K.W. Receivables
- LDI Growth Partners, LLC
- Levinson, Arshonsky & Kurtz, LLP
- Nationwide Capital Funding, Inc.
- New Century Financial
- Prestige Capital Finance, LLC
- Primary Funding Corporation
- QC Capital Solutions
- Sky Business Credit, LLC
- Southwest Commercial Capital, Inc.
- Steelhead Finance

**Bronze ($500-$999)**
- ACS Factors
- Camel Financial, Inc.
- Chesapeake Bank
- Concept Financial Group
- Entrepreneur Growth Capital
- Exchange Capital Corporation
- Grace Capital Resources, LLC
- Integrated Logistics & Associates
- Invescap
- Paragon Financial Group
- The Interface Financial Group

**Other (Under $500)**
- Plus Funding Group
- Stonebridge Financial Services, Inc.
- TradeGate Finance, Inc.

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cole@darebizcapital.com
512-886-3272

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WHAT'S NEW AT IFA

Our Preferred Vendors have undergone a screening and evaluation process. When you contact the Preferred Vendors, you will need to indicate that you are an IFA member to receive your benefit.

If you offer a good or service to the Factoring Industry and are interested in applying for Preferred Vendor Status, please contact the IFA at 805-773-0011.

ASSOCIATIONS

The following trade associations offer member pricing for events attended by IFA members:

Commercial Factoring Expertise Committee of China (CFEC)
http://cfec.org.cn

FCI
www.fci.nl

World of Open Account (WOA)
https://woa.community/

COLLECTIONS

The Collection Law Group, Inc.
The Collection Law Group (“TCLG”) is a group of lawyers who collect past due commercial accounts receivables from businesses across the United States. Our collection approach has been helping finance and factoring organizations collect past due amounts more quickly and more efficiently and more cost effectively than other approaches. Our approach combines the best of collection agencies with the best of law firms giving our clients higher recover amounts more quickly with less cost. At TCLG we call our approach our “Attorney Driven Approach”.

Brad Magill • brmagill@tclginc.com
www.tclginc.com • 888-304-4347

IFA Member Discount: For the first five collection files sent to TCLG by IFA members that are $10,000 or more in amount due, TCLG will offer a reduced fee from our normal 20% contingency fee to a 15% contingency fee. Future discounts if any will depend on the volume of files and nature of the files.

VeriCore

VeriCore is the pioneer of ZERO fee collections! A ZERO fee collection takes place when VeriCore compels the debtor to pay for the cost of collection. ZERO fee collections don’t happen every time, but many IFA members have already experienced ZERO fee collections over 100 times! VeriCore is a contingent, fully licensed and bonded agency with an A+ rating with the BBB and a strong focus on compliance. Our proprietary process is designed to create constant and methodical pressure on a debtor which compels them to prioritize you at the top of their AP list. We have a national and international presence and we would relish an opportunity to show you how good we truly are.

800-433-4903 x1162
Chris Dawson: chris.dawson@vericore.com
www.vericore.com

IFA Member Discount: Contingency rate of 22% or will match the rate of any agency that is fully licensed.

CREDIT INFORMATION

Ansonia, An Equifax Company
Ansonia is your next generation business credit and collections solution offering decisioning tools and over $1.3 trillion in accounts receivable data from major industries across North America.

200+ factors and 70% of North American Truckload, LTL and 3PLs rely on Ansonia for innovative ways to manage debtors and fraud risk. As always, Ansonia delivers quality data, credit, and collections solutions you can afford. Call us today to see why IFA members voted Ansonia their number one source for underwriting account debtors.

855-ANSONIA • 855-267-6642
www.ansoniacreditdata.com

IFA Member Benefits: Complimentary review of your portfolio’s risk distribution. Includes a breakdown of debtors by risk category (high, medium, or low) and visibility to how debtors are paying other factors as well as all industries and much more. Ansonia Alerts $20 per month (20% savings)

FactorsNetwork
FactorsNetwork provides an online platform where Factors share trade experiences with each other. Members are able to pull unlimited Credit Reports as well as monitor and analyze their portfolio. Transportation Factors benefit from our CarrierMonitoring and ChameleonCatcher programs and their clients profit from our LoadBoard. We even offer a Sales Tool to help you find new clients.

435-659-4612
www.factorsnetwork.com

IFA Member Benefits: 50% cost savings for the monthly membership fee. It is normally $1,000 per month, but IFA members will pay $500 per month.

CREDIT CARD PROCESSING

Clarus Merchant Services
Clarus Merchant Services offers a custom program developed specifically for how the Factoring Industry processes their credit card transactions. Our program provides detailed reporting that allows tracking of each invoice and fee transaction for easy account reconciliation with their customers and clients. We work with each member to ensure all processing costs are covered and that they are doing so within the guidelines of MasterCard / Visa. In addition we provide IFA members direct access to their account manager for immediate response and support.

540-222-3925 • www.clarusdc.com

IFA Member Benefits: IFA members that purchase the CardX program receive a one-time $200 rebate.*

“Once the member has processed a whole month using the program

ePayment America

ePayment America is the nation’s leading provider of processing services for the factoring, A/R financing, and P/O financing industries. They

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offer IFA members exclusive VISA, MasterCard, American Express and Discover pricing, a discount on their virtual gateway, and a discount on PCI Compliance Certifications.

901-385-5327 • www.epaymentamerica.com factoring_program@epaymentamerica.com

IFA Member Benefits: Interchange Plus Pricing* Bundled Monthly Service Fee of $30.00 (includes IRS regulatory compliance, account maintenance, PCI compliance, virtual gateway & online management tool.) *Based on volume/transaction count.

FUNDING
Haversine Funding
Haversine Funding helps commercial lenders fill funding gaps through participation programs, lender finance and growth capital funding. Our clients are factors, ABLs, inventory, purchase order and other commercial finance companies. We offer lines up to $5MM for individual transactions and up to $25MM for portfolio participations.

Gen Merritt: gmerritt@haversinefunding.com 469-360-9712 • www.haversinefunding.com

IFA Member Discount: For transactions that equate to funds employed averaging $5 million during the previous 6 months. Haversine Funding would sponsor an IFA conference or course registration fee. The member may receive one free admission to an event per year.

Liquid Capital Corp.
Liquid Capital has been in the Factoring industry since 1999 and entered into a partnership with Next Edge Capital in 2015. This relationship has allowed them to pursue an aggressive growth strategy focused on the following key initiatives:

• The acquisition of A/R portfolios from Factors looking to exit the industry
• Soliciting Factors to join the Liquid Capital network to gain access to additional capital, a robust range of working capital and trade finance products, extensive marketing and back office support
• Member benefit: Liquid will pay your IFA membership or Annual Conference registration fee for the following year.
• ABL referrals from existing Factors who would not normally lend this type of transaction

Member Benefit: The referring Factor will earn an origination fee and have the opportunity to participate in the funding.

Robert Thompson • 866-272-3704 www.Liquidcapitalcorp.com

MARKETING
50 Words LLC
50 Words is a marketing outsourcing firm for companies that either do not have a marketing department or need to add more manpower to their existing marketing team. They serve as your dedicated marketing department.

610-631-5702 • www.50wordsmarketing.com

IFA Member Benefits: IFA Members will receive five free hours of marketing services with the purchase of any marketing service. (Offer for new clients only)

RECRUITMENT AGENCY
Commercial Finance Consultants
Established in 2002, CFC is the premier provider of human talent for the factoring industry. CFC’s goal is to provide the clients with the best available human capital and the most current industry information to assist in accomplishing their growth potential.

IFA members will receive an additional 60 days added to the guarantee on all placements.

SOFTWARE
Arts Trade Systems
Arts Trade Systems offers ArtsPay, the revolutionary Supply Chain Finance (SCF) app that allows companies and lenders to provide buyers and suppliers with a flexible, customizable, easy-to-use enterprise-grade software. ArtsPay is a fully cloud-based software-as-a-service (SaaS). Partnering with Arts Trade endows lenders with a high-tech innovative partner with deep industry experience that will help market and grow their SCF program.

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The Future of Factoring: Identifying the Top Industry Trends for 2021

After a turbulent year for the factoring industry, Steve McDonald predicts which trends will carry over into 2021, specifically noting that a tightening of bank lending will cause many small businesses to look for alternative financing such as factoring.

BY STEVE MCDONALD

There is a mantra in the factoring industry that says: “Banks look primarily in the rearview mirror with respect to a client’s financial performance, whereas a factoring company looks at the opportunities a company has in the future.” Considering this, as we look to the new year, it’s going to be difficult for banks to evaluate a business’ performance in 2020. Therefore, does this present a potential growth opportunity for the factoring industry in 2021?

We are wrapping up an unprecedented year that was led by the devastating economic fallout and ongoing ramifications of the COVID-19 pandemic. With the recent vaccine news, we look to 2021 with the promise of a new year filled with renewed optimism for a return to normalcy mixed with a healthy dose of concern for the unknown. Despite this uncertainty, I expect the need for factoring to increase as companies look for financing partners to help them manage their cash flow and keep their businesses running smoothly during these challenging times.

As a larger-scale factoring and asset-based lending company, eCapital processes more than 125,000 invoices per month for 80 different market sectors. This data allows us to pick up on trends and get a snapshot of which areas are doing well and which are not. Looking at that data, I see many reasons to be bullish about 2021, but first let us see what we learned in 2020.

TRENDS HERE TO STAY

The world has changed. More specifically, consumer spending habits and priorities have all changed as a result of the pandemic, which has forced businesses to adapt in real time. We all experienced this change in behavior almost immediately with the somewhat irrational uptick in the purchase and hoarding of paper goods, cleaning supplies and groceries in March. Later, this transition led to a surge of interest in home décor, housewares, bicycles, pools and other items that have helped people distract themselves during lockdown periods. These changes in consumer behavior and greater reliance on e-commerce have caused a massive shift across all facets of the supply chain.
As we look ahead to 2021 and the general outlook for factoring services, several aspects should be considered. For example, despite the overall negative economic impact of COVID-19, the freight factoring sector is thriving as a result of truckers having to adapt to the shifts in the supply chain that have occurred during the pandemic. Some businesses need funding for growth or ongoing operations, while some need financial support while they work to reduce expenses and adapt to the new normal. Transportation companies will likely continue to experience growth, as there is a shortage of supply and consumer spending is rising again, at least in the short term. Furthermore, equipment values are low, enabling firms to buy new trucks from auctions and increase their fleet size. These firms will have to rely on factoring to secure the funding they need to effectively scale their businesses.

On the consumer spending habits side, with more consumers relying on online shopping as a result of lockdowns, small shops on Main Street are struggling due to a lack of customers and reduced interest in shopping in person. The pandemic also accelerated growth and demand for last-mile carriers like Amazon, meal delivery services like Good Food and Hello Fresh, and many other e-commerce delivery companies. This shift from shopping at grocery stores to receiving pre-made meal kits through the mail will continue well beyond the pandemic.

FILLING GAPS LEFT BY BANKS

At eCapital, our client profile typically fits into two categories. They are generally experiencing rapid growth where “opportunity” is putting a strain on their cash flow, or they have tripped a financial covenant with their banking institution. In most cases, banks are uncomfortable financing fast-growing small and medium-sized businesses because of the strain that growth puts on cash flow and the uncertainty of future financial performance. Banks typically prefer to finance companies with predictable earnings, steady cash flow and manageable growth rates, while factors often can look past those issues and provide financing based on the quality of a client’s accounts receivable and overall account debtors. Earnings, cash flow and growth rates don’t present a roadblock for a factoring business if it can get comfortable with the overall collateral and customer base of the client.

Factors look past the numbers to understand the story, understand why the company is having issues, evaluate the company’s plans to address the problem and determine if they can support the company. Factors also look to evaluate the larger company story. For example, the company may have lost a significant customer or a contract, or won a new contract, and need help with financing as result.

In the coming year, banking relationships will become increasingly strained, with banks looking to exit long-held relationships that have become unprofitable. Bank clients that have tripped covenants will be forced to look for additional funding from non-bank sources. As a result, many companies will need alternative financing, and factoring is a good solution. The approval process is easier, it doesn’t create debt when clients use their own company’s assets and there are lighter underwriting criteria, translating into faster access to increased working capital.

DOUBLE DOWN ON TECHNOLOGY

The time it takes to submit applications and get cash in hand has been greatly reduced because of technology adapted by the factoring industry at large. Providing clients with online onboarding, direct digital payments and payouts is essential in providing capital quickly. Giving them an online portal that helps them review and answer common questions about their account quickly and easily gives clients another level of self-service that can help their bottom line. In the long term, technology is critical, particularly when it comes to payments, but it will be important to scale up carefully.

Client demands also will vary. For example, freight businesses want their money quickly without complex requirements. They want more transparency and insight into their financing requests. On the commercial finance side, companies want smooth operations and want to secure alternative financing with less hassle and fewer requirements, such as strict covenant and revenue requirements from banks. While their funding requirements may differ, all businesses will want to work with a stable financier on which they can depend.

I expect the potential for renewed growth for our industry in 2021, especially if there is a lack of further federal aid and if the industry learns how to capitalize on the “new normal.” Since banks rely on their existing business models, they will have to decide if they can continue to support these businesses when they no longer meet their risk profile.

The bottom line is that factoring will play a larger role in helping companies improve their chance of success during this time of economic uncertainty. Factoring companies are uniquely positioned to look past numbers, listen and understand the story while working with these businesses during these “new” times. 2021 might just have the potential to be a good year for our industry after all.
Build with Bricks, Not Sticks: Helpful Provisions for Factoring Agreements

Ross Angus Williams and Scott R. Larson outline the most important provisions to include in a factoring agreement to ensure it holds up no matter which way the wind blows.

BY ROSS ANGUS WILLIAMS, ESQ. AND SCOTT R. LARSON, ESQ.
We all know the story of the three little pigs. Factors can think of the contracts they enter with their clients as the legal house they have built to protect against the day the big bad wolf — the client’s efforts to prevent or evade collection — comes to visit. Each clause is a piece of the building materials in that house. Based on experience, some of the important clauses that are left out or poorly drafted most often include those covering recovery of attorneys’ fees, forum selection, UCC filing authorizations and confidentiality. For factors who want to build their legal houses from bricks and not sticks, here are some helpful tips to follow.

**ATTORNEYS’ FEE RECOVERY PROVISIONS**

The ability to recover attorneys’ fees is often the key factor that determines whether a factor will pursue collection through litigation and from whom they will pursue collection. Including an attorneys’ fee recovery provision in a factor’s contract with the client and requiring client verification that the client’s own contracts with account debtors contain such a provision benefiting the client are important protections to maximize a factor’s ability to economically collect through litigation against as many potentially solvent parties as possible.

Under the “American” rule, a party can recover attorneys’ fees only if authorized to do so by contract or statute. The illustration of that rule in statutes differs from state to state. Some states, like Texas, have statutes that allow a person to recover attorneys’ fees from certain types of defendants (but not others), regardless of whether there is a fee recovery provision in the contract, on certain enumerated claims, such as: 1) rendered services, 2) performed labor, 3) furnished material or 4) an oral or written contract. Other jurisdictions, like Pennsylvania, provide that no fee recovery is available on contract claims absent an express provision in the contract. Other states have different statutory schemes that may be more or less restrictive. Including an attorneys’ fee provision in the pertinent contracts will likely improve the chances of recovery.

Regardless of the state a factor operates in, including well-crafted attorneys’ fee provisions in the factoring agreement is by far the best way for a factor to ensure that it can obtain attorneys’ fees in litigation against the client. Likewise, factors should include provisions that require their clients to have attorneys’ fee recovery provisions in their contracts with account debtors. This second step will increase the likelihood that the factor can viably pursue the account debtor in lieu of or in addition to the client if the account debtor hasn’t paid the client.

**FORUM-SELECTION PROVISIONS**

An enforceable forum-selection provision in a factoring agreement — often included in the “additional terms” tucked at the end of the agreement — may mean the difference between litigating a case in a factor’s “home court” or the obscure, far-flung and often unsympathetic hometown of a client or account debtor.

A forum-selection provision, when crafted correctly, 1) determines the venue where a case will be tried (such as courts within a specific city, county or state) and 2) provides courts in that venue with personal jurisdiction over the parties. Both points are important: Venue determines whether the case is being brought in the correct court and jurisdiction determines whether that court has the authority to rule over the defendant. Without both, a case may be subject to dismissal or transfer. Having a proper forum-selection clause allows the parties to decide up front where their disputes will be litigated, which can reduce costs. Having uniform, enforceable forum-selection clauses across all factoring agreements also can lead to greater predictability in dispute resolution and even greater cost reduction.

As opposed to permissive language, the forum-selection clause should provide for a mandatory and exclusive venue. Although specific magic words are not
At the start of the negotiation process, one important document to have in the factor’s toolkit is a concise and effective non-disclosure agreement (NDA) that protects the pricing information the factor discloses in the negotiation process as confidential and proprietary information.

Key provisions to include in a factoring agreement include those that 1) expressly permit a factor to file UCC statements on a client’s collateral and the collateral of a client’s guarantor and 2) prohibit the filing or amending of UCC filing statements by the client or its guarantor without prior written consent of the factor.

The first type of provision is important because it gives a factor the express right to perfect its security interest in the collateral. This protects against claims that the factor’s security interest in certain collateral was not perfected merely because the filing of an otherwise valid financing statement was not authorized by the client or guarantor without prior written consent of the factor.

The wording of these provisions is a minefield. Additionally, the parties should agree that they submit to the jurisdiction of the courts in the chosen venue and that those courts have jurisdiction over the parties. Finally, the clause should provide that the parties waive any challenge or objection to a lawsuit being brought in the chosen forum on grounds of lack of jurisdiction or improper or inconvenient venue.

CONFIDENTIALITY CLAUSES

Many factors can justifiably consider their pricing models confidential and proprietary business information. Factoring clients may, however, be tempted to shop around a factor’s pricing. Through confidentiality provisions, factors can (and should) seek to protect valuable pricing information in both the negotiation process and in a resulting factoring agreement.

At the start of the negotiation process, one important document to have in the factor’s toolkit is a concise and effective non-disclosure agreement (NDA) that protects the pricing information the factor discloses in the negotiation process as confidential and proprietary information.

NDA forms vary widely in complexity, length and scope. But an effective NDA will almost always:

1. Identify the parties to the agreement
2. Define what is deemed to be confidential in language clear enough for a stranger to the contract — like a juror or judge — to be able to tell what the confidentiality material comprises
3. Define the scope of the confidentiality obligation by the receiving party — what uses and disclosures are prohibited
4. List any exclusions from confidentiality treatment, such as for information obtained through a third party under no confidentiality obligation or for publicly available information
5. Define the term of the agreement — how long it will last.
Specific requirements may vary by jurisdiction. The NDA does not prevent the potential client from shopping around, but it can seek to obligate them to not disclose a factor’s pricing model as part of that process.

Once the deal is struck and memorialized in writing, a further confidentiality provision is advisable as a provision of the factoring agreement. While the building blocks of such a provision are typically virtually identical to those in the NDA, including such a provision in the factoring agreement allows its term to be extended on from the effective date of that agreement forward. It also makes sure that the confidentiality obligations continue past the merger and integration clause of the factoring agreement, which will otherwise cut off prior agreements between the parties unless specifically excepted.

CONCLUSION

Following these tips in consultation with counsel, or in review of one’s agreements, will help keep a factor’s legal house strong and, ultimately, increase the collectability of — or at least the options for collecting on — unpaid accounts despite huffing and puffing from the client or account debtor. •

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PAYROLL TAX LIABILITY
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The next step is for the tax professional to secure an installment agreement (IA) within seven to 30 days while simultaneously filing a lien subordination, which takes approximately 30 days. The BDO should quickly provide the factor company contract and UCC statement to the tax professional. It will be required for the lien subordination.

In my experience, with proper documentation of the factor contract, the IRS will subordinate the lien. Under IRC §6325(d)(2), the IRS will subordinate its tax lien with proof that collection of the tax liability will increase. The subordination will increase the collection of taxes because the factor company will continue payments of accounts receivable to the company so it will have funds to continue its business. The IRS does not want the company to go out of business.

Lastly, it is possible to mitigate IRS wrath for unpaid payroll tax. BDOs can work with the company and the tax professional to find proof of the following:

1. The company did not pay other bills during the time the IRS was not paid
2. The contractor illegally withheld funding or illegally cancelled the contract
3. Lawsuit information that will lead to full payment of the outstanding taxes and penalties
4. Embezzlement or theft
5. Delinquency was due to unforeseeable events, such as an illness, major accident or death of a partner, significant other or child

The BDO, company and tax professional also should review the numbers on the payroll tax forms that were filed for accuracy, and then perhaps conduct a forensic accounting. Provide these explanatory situations to the IRS RO when requesting both the IA and the lien subordination for improved IRS assistance in securing the requested relief.

While waiting for the lien subordination, the factor company can fund the IA by directly paying the IRS from the accounts receivable invoices. There are additional methods to successfully solve company payroll tax issues, but they are beyond the scope of this article.

If a BDO finds that a client or a prospective client owes payroll tax, it is possible to keep or sign the client. The specific solutions listed earlier in this article will enable a BDO to help a company navigate resolution for payroll tax liability by securing an IRS installment agreement and/or lien subordination. As factoring companies continue to face COVID-19 challenges, do not dismiss potential clients with payroll or other tax issues. Instead, seek the advice of a payroll tax professional to quickly resolve these tax issues to save or acquire new clients. •
Regulation of Commercial Finance Companies is Here and Intensifying

Until recently, non-bank lenders have escaped regulation, with the exception of those in California. Although California has had a long established regulatory scheme for non-bank lenders, in the past, those regulatory efforts were relatively minor. For years, non-bank lenders, including factors, obtained a California finance lenders license and in exchange for a small fee every year and minor reporting, were granted a safe harbor from California’s strict usury laws.

Steven N. Kurtz, Esq. has represented factors, banks and asset-based lenders on a continuous basis since 1987. He is the co-general counsel to the IFA and a founding partner of Levinson Arshonsky & Kurtz, which has offices in California and Oklahoma. He practices in the areas of commercial law, insolvency, workouts, loan documentation and trade finance, in both transactions and litigation matters. He can be reached by phone at 818-382-3434 or by email at skurtz@laklawyers.com.
The times have changed for the commercial finance industry and regulation has intensified, primarily at the state level. Although there was an effort by the federal government to include factors in shadow banking regulation, this never happened, in part, through the efforts of the American Factoring Association. However, thanks to several years of merchant cash advance lenders extending credit to anyone with a pulse and bank account while charging 70% plus rates of return and enforcing New York contractual confession of judgments, lawmakers throughout the country woke up. Now, non-bank lenders, including factors, will be the subject of additional efforts to regulate.

State legislators are looking into all forms of non-bank lending. This includes factors who engage in traditional non-recourse deals, which, according to most case law, are true sales and not loans. The lending versus true sale argument for purposes of regulation is now irrelevant. The pending laws just look at one thing: Do you extend money to someone and expect to be repaid? If the answer to this question is yes — and it always is — then the regulations apply.

The new trend of regulation at this point is primarily at the state level, but it could easily be subject to federal regulation under the Commerce Clause of the U.S. Constitution.

likely work with each state's laws on usury.

California is the first state to require a finance lenders license for all non-bank lenders or factors. The law is based upon the California State Constitution, which sets a maximum rate of interest at 10%, then branches out to a patchwork of different statutes and regulations. For years, California just focused on licensing. The licensing and its one-time sleepy enforcement were handled by the Department of Corporations and then by the Department of Business Oversight. However, under Governor Gavin Newsom, the Department of Business Oversight has been reorganized and is now known as the Department of Financial Protection and Innovation, whatever that means. This change is so recent that forms have not yet been modified and it's not clear what the acronym will be. I'm guessing it will be the DFPI.

The DFPI is headed up by Manny Alverez, who served with the Consumer Financial Protection Bureau. If you are a non-bank lender, including a non-recourse factor, the DFPI will expect you to have a license regardless of the rate charged or whether the transaction can hold up in court as a true sale. The mere act of financing by a non-bank will trigger the requirement for a finance lenders license. The finance lenders license subjects the holder/applicant to background checks, financial net-worth requirements and periodic audits (a different conversation). The license holder is exempt from California's usury law, which is 10% and coupled with stringent civil penalties in favor of the borrower as well as civil, administrative and criminal penalties in favor of the state.

The second piece of California's regulatory framework for non-bank lenders is that for every offer of commercial financing of $500,000 or lower, the offer must include a statement that reflects how much the financing will cost. For factoring and other forms of financing where advancing funds — and the collection thereof always varies — the lender cannot give an example of a typical financing. This new law has been on California's books for nearly two years but will not go live until the DFPI prepares its accompanying regulations. These regulations are nearly finished and may even be in place by the time this article is published.

New York recently passed two pieces of legislation that are substantially similar to the scheme in California, including its own licensing law as well as a business truth in lending law. The licensing rules are set forth in Senate Bill S6688, which is waiting for Governor Andrew Cuomo's signature, and will require all non-bank lenders to obtain a license. The licensing scheme will include the usual things, such as background checks and capital requirements. However, there is more. New York will not allow confession of judgments to be executed in connection with a non-bank loan. There is a safe harbor for lenders that enter into or solicit fewer than five transactions in a 12-month period. While this safe harbor may be helpful to a lender or factor outside of New York, the
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The regulation of non-bank lenders is a trend that is growing. This will probably be a red state versus blue state issue, and it’s highly likely other states will follow California and New York’s lead.

Solicitation language is troubling and can sweep up almost any communication. Also, it is likely that a New York regulator may take a tip from a California regulator and consider each advance under a revolving line of credit or factoring agreement to be a separate loan. If a lender violates Senate Bill S6688, the loan is void, meaning that the borrower/factor client does not have to pay it back.

In addition, New York passed a business truth in lending law, known as S5470A. This rule is similar to California’s rule and requires a financing cost disclosure at the inception for all finance offers under $500,000.

Not to be outdone, the legislature in New Jersey put together Senate Bill 3616, which appears to have died in committee. This effort (and the drafting) shows what can happen when legislators who are not friendly to business come together and regulate. The purpose of the law was to target “alternative business loans,” which are loosely defined as loans that rely on non-standard credit approvals, interest rates of greater than 25%, maturity of fewer than two years and payment frequency greater than bi-weekly. This law would have required licensing for all alternative lenders and brokers and detailed disclosure on what and how brokers are paid. In addition, the law had continuing education requirements for the alternative lenders as well as requirements that all new employees receive education. The law also would have required that all litigation for alternative lenders against the borrower be commenced solely in New Jersey. This proposed law would have likely caused many factors and asset-based lenders to retreat from the state, and it seems that the drafters and sponsors did not understand or care.

The regulation of non-bank lenders is a trend that is growing. This will probably be a red state versus blue state issue, and it’s highly likely other states will follow California and New York’s lead. The most likely result will be licensing requirements and disclosure requirements. Although factors and asset-based lenders have mostly operated outside the regulatory scope, simple licensing and rate disclosures, which are challenging, are things with which they can live. Problems will arise if states try to enact something along the lines of what failed in New Jersey. In addition, each set of state laws also will result in an accompanying set of regulations. If states legislate and regulate beyond licensing and rate disclosures, or give an enforcement group wide latitude similar to what is happening in California, factors are in danger of having to operate in a patchwork of different and contradicting state laws.

Right now, factors and asset-based lenders operate nationally and are protected by the Uniform Commercial Code, which, with the exception of a few provisions, is the same in every state. The UCC is set up so that its rules govern commercial transactions and that the terms of a security agreement bind the debtor and all creditors. There is a real possibility that laws or regulations may be enacted which contradict the UCC, which will result in messy litigation. Also, there is the danger that state regulators will start to take away the benefits of financing contracts, setting up potential constitutional challenges.

The trend toward regulation in the commercial finance industry must be monitored closely. The AFA was set up by the International Factoring Association for this very purpose. Other trade organizations that assist lenders also are on the watch for regulation, much of which is done at the local level. An elected state official in your district may not understand your business but has the power to regulate and change it. If you can, meet your elected local state legislator or a key staff member and let them know how factors and asset-based lenders help small businesses and entrepreneurs.

In addition, the trend toward increased regulation must be addressed in your document suite. Part two of this article will discuss how to best protect yourself in your agreements and related documentation.
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