

MCINTYRE LAW FIRM, PLLC

ATTORNEYS AND COUNSELORS AT LAW
MADISON OFFICE BUILDING
1155 15TH STREET, N.W.
SUITE 1101
WASHINGTON, D.C. 20005
TELEPHONE (202) 659-3900
FAX (202) 659-5763

September 29, 2008

Mr. Steven Cole
President
The Council of Better Business Bureaus
4200 Wilson Boulevard, Suite 800
Arlington, VA 22203

RE: **Proposed Revision of Current BBB Rating System**

Dear Mr. Cole:

We are writing on behalf of the Community Financial Services Association of America (CFSA), the primary association of businesses that offer payday advances (payday lenders). Many of CFSA's members have stores that are accredited in good standing with local Better Businesses Bureaus (BBB). As with many businesses, BBB membership and a rating of "Satisfactory" are very important to CFSA's member companies.

We understand that during the October meeting of the Board of the Council of BBBs (CBBB), an internal committee will present to the Board a recommendation to revise the CBBB's standards, currently used to rate a business, by adopting a new rating system. CFSA has been informed that the new system will incorporate a new, wholly subjective standard and a new rating scale of "A" to "F", and that a company can receive a failing grade based solely on the new subjective standard.

We have been informed that the CBBB staff views the payday advance industry as "problematic." (Representatives of CFSA attempted on several occasions to meet with CBBB staff concerning this issue. All attempts proved unsuccessful.) Indeed, even before CBBB Board action on the rating system, the impact of CBBB staff's opinion is being felt by industry members. Advance America, a long-time member of Greenville, South Carolina BBB and recipient of the CBBB's Torch Award, was recently told by the local chapter that its membership was not being renewed because of pressure from the national office.

The proposed change will harm competition and damage the reputation and goodwill payday advance companies have worked hard to build with their customers.

This will in turn cause economic harm to these companies. We are aware of at least three BBB member banks that are offering payday advances that compete with payday advance services offered by CFSA members.

We believe this change in the rating of companies runs counter to the CBBB's stated mission. Before the CBBB takes the significant step of adopting the proposed standard, CFSA urges the Board to thoughtfully consider how such a change would affect the mission of the CBBB, including its long-held reputation as a fair and impartial rating service, and whether the change could expose the association to a liability claim.

The CBBB's Mission is, in Large Part, to Provide Unbiased Ratings of Businesses Based on Objective Factors. The Proposed Change Runs Counter to that Mission.

The CBBB promotes its ratings, and they are heavily relied upon by the general public and other businesses. That is in large part because of the central tenets of the CBBB: impartiality, fairness and trust. According to the Mission statement on the CBBB's website:

The BBB ensures that high standards for trust are set and maintained. We exist so consumers and businesses alike have an *unbiased source* to guide them on matters of trust.

BBB is the resource to turn to for *objective, unbiased information on businesses*. (emphases added)

The proposed rating standard would run afoul of those claims. If the proposed standard is adopted, the CBBB no longer could be characterized as "objective," much less an "unbiased source" of information.

Currently, the Council and its local chapters employ a rating system that categorizes businesses as either "Satisfactory" or "Unsatisfactory." According to the CBBB's accreditation standards (also on its website), the primary factors in determining a rating are (1) whether the business makes a good faith effort to resolve consumer complaints; and (2) whether the industry engages in voluntary self-regulation. Both of these are largely *objective* standards (number of complaints, and industry best practices), which can easily be measured. They also focus on the relationship between the particular business and its customers – not on how the press, regulators, or others view the industry. The payday advance industry satisfies those standards. In 2007, the BBB had 1,778 inquiries about payday loans, with only 41 complaints, 40 of which were resolved to the consumer's satisfaction. CFSA also has voluntarily developed a set of best practices, which provide self-regulation of its members. Based on both of these factors, CFSA members qualify for the "Satisfactory" ratings they have received.

The proposed standard, however, would be entirely subjective, leading to biased results with no legitimate basis. In fact, we have been advised by BBB staff that the use

of the proposed standard would be a “value judgment and in the end, the rating is based on [the CBBB’s] opinion.” To make a judgment about business reputation, the BBB would have to rely on hearsay and biased evidence. How could that result in anything but arbitrary and capricious ratings that could harm a particular industry?

Another question we have is whether the CBBB has considered the possible effect of the proposed standard on other businesses. Many people have different views on the reputation of used car dealers or gunshops. If those that do not like them are more “vocal” than those who do, then under your subjective criterion, would they get an “F” rating? What about businesses that offer payday advances as part of their product and service offerings, such as some financial institutions? Would the CBBB consider changes to their rating solely because they offer payday advances to their customers? The proposed standard, clearly, is fraught with problems and is arbitrary and capricious.

The Proposed Standard Could Pose Potential Liability Problems for the CBBB.

We also urge the Board to consider whether adoption of the proposed standard would increase the CBBB’s legal risk? Certification and standards-setting activities provide a valuable service for businesses and economic development. But they also can be a guise for harming a particular industry, which raises antitrust concerns. Under Section 1 of the Sherman Act,¹ it is improper for a trade association to conspire to engage in anti-competitive conduct, including using a certification standard “with the intent to restrain trade.”² Such an action could be viewed as an attempt by the Council to use a rating protocol to effectively boycott an industry. In evaluating whether a certification organization has engaged in an illegal boycott, courts will look to the purpose and effect of the rating system. There appears to be a good argument that the CBBB’s proposed standard has both the purpose and effect of harming the payday advance industry by actively lowering its members’ current rating and refusing membership in the BBB.

And that appears to be by design. Regarding the purpose of the proposed standard, we understand, based on telephonic communications between CFSA and CBBB staff, that its genesis was a concern of some of the internal committee members about “what they were hearing” about the payday advance industry. As to the effect of the proposed standard on payday lenders, as mentioned above, we are already seeing the effect of pressure from staff of the CBBB’s office on local chapters to implement the proposed change

Moreover, the proposed standard, because it is subjective and biased against payday lenders, might subject the CBBB to a state defamation claim, similar to that

¹ 15 U.S.C. §§ 1 *et seq.*

² See, e.g., *Structural Laminates v. Douglas Fir Plywood Ass’n*, 261 F. Supp. 154, 158 (D. Or. 1966); *aff’d*, 399 F.2d 155 (9th Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969).

involving a complaint brought by Patio World against the CBBB in the late 1980s.³ Currently, as a matter of public policy, organizations such as the CBBB are generally granted a qualified privilege when disseminating reports about companies; however, this privilege may be revoked if there is evidence of ill will, malice, or abuse of the privilege. Thus, according to the *Patio World* case:

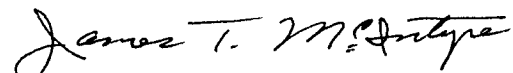
“Users of reports of mercantile agencies[, organizations that collect and distribute information to clients concerning the standing of commercial firms,] usually have utmost confidence in the accuracy of such reports and act accordingly. . . . To be privileged, a mercantile agency’s representatives must act *impartially and in good faith*, carefully evaluating all information before disseminating any defamatory statements to its subscribers. This requires them to make a thorough and complete investigation and to fully and accurately *report information only from reliable sources*. An erroneous or careless report serves no purpose except to substantially damage the subject of the report, and when once the report is published, the damage has been done and very little can be done to correct it.”⁴ (Emphasis added.)

The CBBB also could be subjecting itself to a state law claim of intentional interference with a business relationship.

In sum, by adopting the proposed standard, the CBBB would appear to be acting in bad faith by singling out one industry that provides a legitimate, useful source of credit. The result would be a change in the CBBB’s mission and, possibly, legal claims. In this time of financial crisis, where credit is being severely limited because of problems in the financial system, does it make any sense to harm an industry solely because some individuals might have “concerns” about its general business reputation? By adopting the proposed standard, the CBBB would change from an impartial judge of whether a business provides quality products and services for its customers, to an organization that makes rating decisions based on rumor, hearsay, and other unsubstantiated information derived from those who are not customers. We urge the Board to consider these potential problems before it goes down that road.

Sincerely,

McINTYRE LAW FIRM, PLLC



James T. McIntyre

CC: CBBB Board Members
Alan Cohen, CBBB General Counsel

³ *Patio World v. Better Business Bureau, Inc.*, 43 Ohio App. 3d 6; 538 N.E.2d 1098 (1989).

⁴ *Patio World* at 11, 1103 (citing *Bartels v. Retail Credit Co.*, 185 Neb. 304, 309, 175 N.W. 2d 292, 296 (1970)).