

**ARKANSAS ETHICS COMMISSION
ADVISORY OPINION 97-EC-014**

ISSUED: October 17, 1997

ISSUE PRESENTED

For the purposes of completing the annual Statement of Financial Interest, what should be reported under Section 6 which requires a listing of creditors to whom the value of \$5,000.00 or more is personally owed? What is meant by "debts not incurred in the ordinary course of business?"

BRIEF RESPONSE

Section 6 of the Statement of Financial Interest requires public servants to report each creditor to whom more than \$5,000.00 is personally owed unless the debt was incurred in the ordinary course of business. The phrase "ordinary course of business" is a factual issue, to be determined on a case by case basis by the Arkansas Ethics Commission.

DISCUSSION

Pursuant to Ark. Code Ann. § 21-8-701(d)(5)(A), each person required to file a written Statement of Financial Interest must include in that statement the name and address of each creditor to whom the value of \$5,000.00 or more is personally owed and outstanding at the time of filling out the Statement of Financial Interest. However, § 21-8-701(d)(5)(B)(i) provides that "[l]oans made in the ordinary course of business by either a financial institution or a person who regularly and customarily extends credit" are not required to be disclosed. Thus, the law anticipates two types of loans relating to the ordinary course of business which may be excluded properly from disclosure. Whether a debt arises out of the ordinary course of business is gauged from the viewpoint of the creditor and depends upon whether the creditor is in the business of lending money or extending credit, and not from the viewpoint of the debtor.

The first part of the exemption under § 21-8-701(d)(5)(B)(i) involves loans by a financial institution. This is a fairly specific exemption. Ark. Code Ann. § 7-6-201(8) defines "financial institution" as "any commercial bank, savings and loan, mutual saving bank or savings bank, insurance company brokerage house, or any corporation that is in the business of lending money that is subject to state and federal regulation." (Emphasis added.) If a person has received a loan by a financial institution as defined by § 7-6-201(8), or has a debt owed to a financial institution, it is exempted from disclosure on the Statement of Financial Interest even if the amount owed exceeds \$5,000.

This exclusion applies to such items as a personal residence mortgage secured by real property, home equity loans, credit from a financial institution extended to purchase personal property, such as furniture or appliances, and loans or lines of credit by financial institutions given to businesses owned by the person completing the statement.

The definition of "financial institution" does not include governmental bodies, such as courts or the Internal Revenue Service. Debts not incurred in the ordinary course of business include, but are not limited to, such items as legal judgments, child support, alimony, judgment liens, money borrowed from individuals other than family members, who are not normally in the business of lending money, and tax liens owed to any governmental agency. Essentially, the identity of the lender or creditor controls the issue of whether the debt needs to be disclosed.

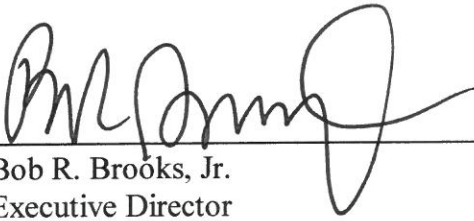
If a person defaults on a loan, originally extended in the ordinary course of business, the resulting debt may be taken out of the exemption and therefore disclosure compelled if the creditor obtains a judgment for the outstanding balance owed. This is required because the identity of the creditor has changed to a entity not in the business of lending money and the nature of the debt has changed. Debts in excess of \$5,000.00 or owed to any business or government institution other than those enumerated in Ark. Code Ann. § 7-6-201(8) must be disclosed. If the person has a debt greater than \$5,000 and the entity to whom the debt is owed is not a financial institution, it must be disclosed unless it falls within the second part of the exemption.

The second part of the exemption under Ark. Code Ann. § 21-8-701(D)(5) provides that loans from persons, other than financial institutions, who "regularly and customarily" extend credit, may similarly be exempted from disclosure. Conversely, any debt, exceeding \$ 5,000.00, owed to any person, other than to someone who regularly and customarily extends credit, must be disclosed. Again, the test whether the loan falls within the ordinary course of business will depend upon whether the creditor, not the debtor, is in the business of lending money.

A "person" included in this exception might include a union, business trust, association or an individual who is in the business of providing credit or funds to other individuals. Most debts owed to individuals will not fall within the exception noted in § 701(d)(5)(B)(i). The burden of establishing that the lender regularly and customarily extends credit will rest upon the person required to disclose the information. The exemption will not normally apply to money borrowed from individuals who simply have the funds necessary to make the loan, i.e. a campaign loan from the candidate's attorney is not a loan from a person who regularly extends credit. The lender must be in the business of providing credit. Again, as with loans from financial institutions, a debt, such as a judgment lien owed an individual as a result of a failure by the debtor to meet a credit obligation, will not be viewed as a debt arising out of the ordinary course of business. When a creditor is compelled to seek legal action to enforce an otherwise ordinary business debt, the debtor is not allowed to avail himself of the exemptions found in § 21-8-701(d)(5)(B)(i) and must disclose the debt if it exceeds \$ 5,000. Legal judgments and liens are outside the ordinary course of business as applied to this statute. This exemption is construed narrowly in favor of disclosure and is expected to be a rarer occurrence than loans made by financial institutions.

SUMMARY

As a general rule, persons required to file a Statement of Financial Interest should disclose the names and addresses of each creditor to whom the value of \$ 5,000.00 or more is owed. The exception to this rule, found in Ark. Code Ann. § 21-8-701(d)(5) primarily is for loans from financial institutions. Credit extended by or debts owed to other persons, companies, governmental bodies, or entities, with a value of \$ 5,000.00 or more must be disclosed unless the person or entity to whom the debt is owed is someone or something who regularly and customarily extends credit. The determination of whether someone regularly extends credit is a factual issue to be decided on a case by case basis by the Arkansas Ethics Commission.



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