Submitted by Electronic mail to: regulations@dfpi.ca.gov, @dfpi.ca.gov and @dfpi.ca.com

April 26, 2021

Commissioner of Financial Protection and Innovation
Attn: Sandra Sandoval, Regulations Coordinator
300 South Spring Street, 15th Floor
Los Angeles, CA 90013

Re: File No.: PRO 01-18 – Fifth Invitation for Comments on Proposed Rulemaking for Commercial Financing Disclosures ("Invitation")

Dear Commissioner Alvarez,

The Small Business Financial Association ("SBFA") would like to thank the California Department of Financial Protection and Innovation ("DFPI") for reaching out for input on the above proposed regulations ("Regulations"). The SBFA is a non-profit advocacy organization dedicated to ensuring small businesses have access to working capital. Our member companies provide billions in commercial financing to small businesses across the country and offer many different and unique products. The proposed regulations will have a significant impact on the operations of our member companies and if implemented would put at risk billions in working capital for California small business owners.

I. Federal Preemption

We believe the proposed Regulations, as currently drafted, are preempted by the Truth in Lending Act. The Regulations include different calculations for APR and different definitions for the term "finance charge" than those provided for in the Truth in Lending Act ("TILA"). We believe these differences will cause confusion for small business owners and consumers and frustrate the purpose of TILA to ensure uniformity in financing disclosures. Accordingly, we believe the proposed use of APR and definitions of finance charge are preempted by TILA pursuant to 12 C.F.R. § 1026.28.

TILA was enacted for the specific purpose of helping consumers compare the cost of credit for lending products with different terms. Prior to TILA, consumers were given various disclosures with various calculations for a multitude of products. There was no uniformity in the information disclosed, or how it was calculated, between products or states. In order to provide uniformity in disclosures for consumer products, TILA created certain carefully defined terms of art so that when a consumer saw such a term in a disclosure, the consumer would know exactly what it meant and could compare it to the identical term in another disclosure. The terms "APR" and "finance charge"

are two of the most important such terms of art, and have specific definitions, calculations and applications under TILA.

We have requested federal regulators make a ruling on this proposal and a recently passed bill in the State of New York. Our strong belief is that this proposal, as drafted, is preempted and ask the DFPI to review the regulations to ensure there are no conflicts with TILA or any other federal disclosure law.

II. Disclosure of the Average Monthly Cost

It is imperative that the disclosure of the monthly cost for a non-monthly pay products be removed from the disclosures. The requirement to include the disclosure for non-monthly pay products does not comply with any provision of SB 1235. Not only is this disclosure in direct conflict with SB 1235, but it will be detrimental in creating confusion with recipients.

The SBFA was extremely involved in the drafting of SB 1235 and had numerous conversations with Senator Glazer surrounding whether or not to disclose a monthly payment for non-monthly pay products. The intent of Senator Glazer was not to include a monthly payment disclosure for non-monthly pay products. There was extensive discussions surrounding this and it was ultimately removed from the disclosures because Senator Glazer understood how confusing this could be for recipients, when the goal of SB 1235 was to create simple and understandable disclosures.

SB 1235 requires that only the "method, frequency, and amount of payments" be disclosed. Furthermore, SB 1235 does not provide the commissioner with authority to add disclosures, which is exactly what Section 2061(a)(11), Section 2062(a)(13) and Section 2065(a)(12) do. As the average monthly cost disclosure for non-monthly pay products is not the actual "frequency" of payments for those products, it is not required nor allowed by SB 1235. The DFPI does not have the authority nor was granted authority to create a disclosure that are not contemplated by SB 1235. If SB 1235 wanted the DFPI to create unnecessary disclosures, it would have granted the authority to do so. It was the intent of SB 1235 to only require the actual frequency of the payment not to include a frequency that is not the actual payment. If Senator Glazer wanted to include the average monthly payment for a non-monthly pay product, he would have done so.

Because the average monthly payment is not an actual "frequency" for most providers, requiring the provider to disclose that goes in direct contradiction from SB 1235 and opens up providers to litigation. It is extremely misleading to have an average monthly payment on a disclosure when the actual payment of the product is daily or weekly. While providers do the best to explain and display the terms of the financing, by showing a monthly payment a lot of recipients will believe (regardless if there is language to state this is not the payment amount) that they have a monthly pay product. Moreover, there could be circumstances that some brokers may try to present the financing offer as a monthly pay product to some recipients, which is intentional misrepresentation. There are a number of recipients that request a monthly payment, but a lot of providers do not offer a monthly payment, so recipients may be confused and not understand that when they see the monthly payment the actual payment of the financing is daily or weekly. While there is the requirement for language to state that the average monthly payment is not the actual payment, as we have seen before, some recipients might not read the fine print, especially due to the voluminous amount of disclosures and explanations being required by the DFPI.

Lastly, the proposed Regulations require the "Average Monthly Cost" be disclosed, but does not provide any guidance on calculation. It makes it extremely difficult for a provider to comply when there is no guidance on calculations. Is the provider only supposed to count weekdays and not included weekends or holidays? As each provider may calculate products differently due to the payment structure, not all providers are going to display the same type of average monthly cost because calculations will be different. This again opens up providers to litigation for misleading disclosures because not only is a frequency being displayed that is not the actual frequency, but the calculations could be misleading as there is no formula for providers to use.

III. Specific Offer Definition

Another material issue that needs to be addressed is regarding the "At the time of extending a specific commercial financing offer" (Section 2057(a)(4)). Because the definition applies to whenever a "specific amount, rate or price" is quoted to a recipient "based upon information from, or about, the recipient," the use of the word "about" creates material issues. Basically anytime a provider receives any type of information about the recipient (i.e. just a name and address) and the provider is discussing some type of financing it offers or gives examples of fictitious numbers, a provider would have to provide a disclosure. The disclosures provided in this scenario would be worthless and misleading because they are fictitious and not actually based off an underwriting of the recipient. The "about" should be deleted so that disclosures are only required when an actual offer, based on relevant information from the recipient, is received.

Secondly, the definition is broad and would require an excessive amount of disclosures. In order to limit this, we would suggest that a disclosure only be required when the following items are known by the provider and disclosed to the recipient: specific amount, term, cost and periodic payment amount. This way the disclosures provided to the recipient are meaningful and contain all of the actual terms that are known to the provider.

Lastly, because recipients like to view all possible options that might be open to them, recipients may ask for quotes for multiple products of over multiple terms or estimated terms. Due to the request, a recipient could receive a voluminous amount of disclosures. This results in over-disclosure and may cause the recipient to not actually review the terms of the financing. As referenced in Section I of this letter, if a recipient receives nine (9) disclosures for different financing and terms, a recipient may only glance and think it is a monthly pay product, because it sees that disclosures and not realize that the product is actually daily or weekly payment. Too many disclosures along with the requirement to provide the disclosure so early on in the process will only lead to recipients being unintentionally mislead and unwarranted litigation for providers. A disclosure should mimic the Truth In Lending Act ("TILA") and only be required prior to consummation.

IV. Recipient Funds Definition

The new definition regarding "Recipient funds" in Section 2057(a)(30)(31) is unclear. The definition excludes deductions for pay-offs; however, in other sections of the Proposed Regulations that references "Recipient funds" it appears to want the amount that includes the pay-offs so that the recipient is aware of the amount of funds that will be deposited into the bank account. The way it is currently written does not appear to further the DFPI's intent to have the

recipient understand what the actual amount received after deductions will be. We would suggest clarifying the definition to make sure that the amount that is required by the definition matches the same amount that is to be disclosed throughout the rest of the Proposed Regulations.

V. Conclusion

The SBFA remains committed to uniform disclosures that provide a meaningful cost comparison tool for small businesses shopping for financing. It has been proven through various studies that over-disclosure of confusing terms and metrics can lead to business owners making bad cognitive decisions when comparing products. We believe any disclosure should be meaningful, simple, and apply to all products available to business owners. We look forward to working with the DFPI as you continue to work through the implementation of SB 1235.

Respectfully,

Steve Denis

Executive Director

Small Business Finance Association