

April 26, 2021

The Honorable Manuel P. Alvarez
Commissioner of Financial Protection and Innovation
Attn: Sandra Sandoval, Regulations Coordinator
300 South Spring Street, 15th Floor
Los Angeles, CA 90013
Email: regulations@dfpi.ca.gov

Re: PRO 01/18 Commercial Financing Disclosure Regulations

Dear Commissioner Alvarez,

The California Department of Financial Protection and Innovation's Notice of Modifications to Proposed Regulations Under Division 9.5 of the California Financial Code with respect to Commercial Financing Disclosures (PRO 01/18) invited written comments to the proposed changes to the draft regulations. We recognize and appreciate how much attention the Department has given to the careful crafting of these regulations and its very complex subject matter. A number of practical improvements have occurred through this process. However, there are a number of critical issues that arose from or were highlighted by the most recent draft language and need to be resolved to avoid unnecessarily restricting the financing available to commercial customers. We appreciate the opportunity to provide further comments and have attempted to provide practical and specific input that is consistent with the intent of providing meaningful disclosures to commercial financing customers while also providing the practical flexibility needed by commercial customers and financiers to efficiently negotiate and execute commercial financing transactions important to the success of California businesses.

1. Timing of Disclosures. The modifications made to section 2057(a)(4) highlight the issue that, as currently drafted, these regulations require multiple disclosure statements during the negotiation process and, potentially, multiple disclosure statements to be delivered on the same business day, which would be burdensome to the provider and confusing to the recipient and would needlessly extend the time for both parties to finalize financing transactions. In many cases, this delay would be detrimental to the recipient and potentially subvert the recipient's reason for seeking financing. We believe that "At the time of extending a specific commercial financing offer" should be defined as the time of a final loan offer to avoid interference with the common back-and-forth negotiation process that so often ends with more favorable final terms for the recipient. In addition, the new clause (D) to section 2057(a)(4) suggests that disclosures would be required for every draw on an open-end credit plan, even if the provider had previously provided disclosure with respect to such open-end credit plan. Such a

requirement would be duplicative and administratively burdensome for providers and would delay the recipient's ability to obtain an advance under the open-end credit plan, potentially preventing the recipient from taking advantage of early pay discounts or favorable purchase prices, without any obvious benefit to the recipient. If there is some reason to permit draw-by-draw disclosures for open-end credit plans, please consider allowing the provider the option to either disclose up-front or with each draw. Our recommended revision to section 2057(a)(4) to address these concerns would read as follows:

““At the time of extending a specific commercial financing offer” under section 22802 of the Code means:

- (A) The time when a final offer is quoted of a specific periodic payment or irregular payment amount, rate or price in connection with a commercial financing, based upon information from or about the recipient, and prior to consummating the commercial financing transaction; and
- (B) The time when a final offer is quoted to change the terms of an existing consummated commercial financing agreement, prior to the recipient agreeing to the changes, if the resulting changes would increase the finance charge; and
- (C) The time when a final offer is quoted of a specific periodic payment or irregular payment amount, rate or price in connection with a draw on an open-end credit plan subject to a consummated commercial financing agreement, prior to the draw on such open-end credit plan, if the terms applicable to such draw vary from the terms previously disclosed to the recipient based upon the retailer or supplier the recipient selects or the products or services the recipient purchases.”

2. Agreement on Threshold Amount. Section 2071 was modified to add the parenthetical “(and prior to the amendment of an existing agreement).” To make clear that such an agreement in writing on the expected outstanding amount may be related to an amendment of an agreement entered into before these regulations take effect or to an amendment of an agreement that increases the approved credit limit, we would recommend the following language for section 2071(a)(2)(A)(iii):

“The parties to the asset-based lending transaction agree in writing that an amount exceeding \$500,000 is reasonably expected to be unpaid and outstanding at some point during the agreement and such agreement in writing is made prior to execution of their agreement or, if applicable, any amendment to an agreement entered into prior to the effective date of these regulations or any amendment increasing the approved credit limit to an amount exceeding \$500,000.”

Similarly, we would recommend the following language for section 2071(a)(3)(A)(iii):

“The parties to the factoring transaction agree in writing that an amount exceeding \$500,000 is reasonably expected to be advanced to the recipient for legally enforceable claims that have not yet been paid at some point during the agreement and such agreement in writing is made prior to execution of their agreement or, if applicable, any amendment to an agreement entered into prior to the effective date of these regulations or any amendment increasing the approved advance limit to an amount exceeding \$500,000.”

3. Recipient Funds Paid to Third Parties. The new definition of “recipient funds” in section 2057(a)(31) should include amounts paid to third parties on the recipient's behalf. In many commercial financing transactions

and in inventory and equipment financing transactions in particular, the amount funded is generally paid directly to the recipient's inventory or equipment supplier. We recommend that section 2057(a)(31) be revised to read as follows:

““Recipient funds” means the part of the amount financed that will be made available directly to the recipient or to a third party on the recipient's behalf. Recipient funds excludes, without limitation, any part of the amount financed used to pay off other financings, funds paid to brokers and funds paid to other third parties on behalf of the financier.”

Alternatively, if the definition of “recipient funds” is not so revised, then the new section 3027 should not require that the name of each person or entity receiving payments be listed. For asset-based lending transactions that are inventory floorplan financing and for open-end credit plans, the funding amount may be paid to suppliers or retailers on the recipient's behalf, rather than to the recipient. At the time of the disclosure, the provider may not know which supplier or retailer the recipient may select to purchase goods or services from and, over time, the recipient may utilize the commercial financing transaction to purchase goods or services from multiple suppliers or retailers. To address this common scenario, we recommend that section 3027(a)(2) be revised to read as follows:

“The amount of any deductions from the amount financed labelled “Deductions”, itemized separately and listed as negative numbers, and a description of those deductions and either the names of persons or entities receiving payments as a result of those deductions or, if payments under an asset-based lending transaction or a commercial open-end credit plan will be made to suppliers or retailers on the recipient's behalf, a statement that the applicable purchase price or invoice amount will be paid to recipient's supplier or retailer.”

If the definition of “recipient funds” is revised as requested above, this change to section 3027(a)(2) is unnecessary.

4. Lease Amount Financed. Lease transactions often involve the lessor financing more than just the purchase price of the property to be leased. We believe that the “amount financed” in such context would include any soft costs that the financier may finance as a part of such commercial financing transaction, including, without limitation, installation costs, freight charges, delivery costs, taxes, and related software licenses. However, it may be helpful to clarify this point, and we propose the following revised clause (F) to the new definition of “amount financed” in section 2057(a)(30) as a clarification:

“With respect to a lease transaction:

- i. If the financier does not select, manufacture or supply the goods to be leased, the net cost to the financier to acquire the property to be leased, including any related costs and charges financed as a part of such transaction, which may include, without limitation, installation charges, delivery costs, software license fees, sales and use taxes, and similar charges.
- ii. If the financier selects, manufactures or supplies the goods to be leased, the price that the financier would sell the goods in a cash transaction, including any related costs and charges financed as a part of such transaction, which may include, without limitation, installation charges, delivery costs, software license fees, sales or use taxes, and similar charges, minus any down payment or other deposit to be paid by the recipient.”

5. Delayed Effectiveness. We anticipate that the modifications to our agreements, processes, procedures, and systems of record necessitated by these regulations will take significant time and effort and note that we will need to communicate and explain necessary changes to our customers. The Initial Statement of Reasons published by the Department in September 2020 advised that the effective date of these regulations will be approximately six months after the final regulations are issued. It is our view that the full 6-month delay in effectiveness will be needed to implement the changes required by these regulations.

6. Principally Directed or Managed. We understand that the new provision added as clause (b) to section 3025 was intended to provide clarity on whether a recipient may be “principally directed or managed from California.” However, further clarity would be helpful when an application includes multiple addresses – such as addresses for equipment or inventory, in addition to the recipient’s billing address or corporate headquarters – and when the commercial financing transaction does not utilize an application. To address these concerns, we recommend that the new clause (b) be replaced with the following:

“For the purpose of determining whether a recipient’s business is “principally directed or managed from California” as described in subdivision (a), a provider may rely upon (i) any representation by the recipient as to whether it is principally directed or managed from California, (ii) any representation by the broker submitting an application for financing to a provider on behalf of a recipient, or (iii) the business address provided in the recipient’s application for financing, including any application submitted by a broker on behalf of a recipient.”


7. Funding Recipient Will Receive. Sections 2061 through 2068 each direct that the disclosure must include particular disclosure language when “...the amount financed is less than the funds available to the recipient...” We recommend the Department review these sections for technical consistency with the terminology and requirements of section 3027. In particular, we believe that the Department intended this language in sections 2061 through 2068 to be as it appears in sections 3027: “...the amount financed is greater than the recipient funds...”


We welcome any questions you may have with respect to our comments and the practical application of these regulations to our commercial financing customers and businesses. Please feel free to contact me by email (Christine.G.Hamm@WellsFargo.com) or phone ((312) 920-3543) at your convenience.

Sincerely,



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