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VIA ELECTRONIC MAIL

Department of Financial Protection and Innovation
Attn: Mark Dyer, Regulations Coordinator
1515 K Street, Suite 200
Sacramento, California 95814-4052
regulations@dbo.ca.gov

RE: *Comments on Notice of Rulemaking Action*
Commercial Financing Disclosures (PRO 01-18)

Dear Mr. Dyer:

This law office, in consultation with another firm representing multiple factoring companies in the industry ("Factors"), previously submitted responses to the Department of Business Oversight's Invitation for Comments on Proposed Rulemaking in Commercial Financing Disclosures. We have reviewed the DBO's most recent draft regulations and hereby submit these written comments.

As we previously noted, Factors finance customers on an ongoing basis similar to a bank's line of credit where money continues to flow in and out depending on the needs of the customer. Most Factors enter one master general agreement with their customers to purchase eligible receivables over the life of the agreement, which sometimes has a set term. With this structure in mind, we request the following clarifications to the regulations.

1. **Clarify The $500,000 Threshold In The Factoring Context.**

Section 22800(n) states that the law applies where a person "is presented a specific commercial financing offer by a provider that is equal to or less than five hundred thousand dollars ($500,000)."

The new proposed relevant regulations state:

> For the purpose of determining whether the amount of a commercial financing offer is equal to or less than $500,000, a provider shall:
>
> (3) For a factoring transaction,
>
> (A) Use the approved advance limit, if the transaction meets all of the following requirements:
>
> (i) The provider offers the recipient an agreement that describes the general terms and conditions of the commercial financing transaction that will occur under the agreement;
>
> (ii) The approved advance limit exceeds $500,000; and
>
> (iii) The parties to the factoring transaction agree in writing prior to execution of their agreement that at some point during the agreement, an amount exceeding $500,000 is reasonably expected to be advanced to the recipient for legally enforceable claims that have not yet been paid.

(§ 2071.)

"Approved advance limit" means the maximum advance **that a financer is required to pay** a recipient for the purchase of outstanding, unpaid legally enforceable claims under a factoring agreement.[1]

(§ 2057.)

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[1] The proposed regulations changed from:

"Approved advance limit" means the maximum advance a recipient can receive on outstanding, unpaid legally enforceable claims under a factoring agreement

to:

"Approved advance limit" means the maximum advance that a financer is required to pay a recipient for the purchase of outstanding, unpaid legally enforceable claims under a factoring agreement.

We assume but request clarification that the regulation is meant to convey that the "approved advance limit" in the factoring context is the maximum advance that a financer is required to pay a recipient for the purchase of outstanding, unpaid legally enforceable claims under a factoring agreement, **if the customer presents collectable accounts receivable qualifying the customer to receive the advance, the customer is not in default, and the customer requests such an advance**. Alternatively, the language could be revised to state, "'Approved advance limit' means the minimum amount that a financer is reasonably expected to advance to the recipient for legally enforceable claims that have not yet been paid."

Because of the nature of a factoring relationship, a Factor could never require itself to pay $500,000 at the outset of the relationship when the master agreement is entered between the parties (which is when the disclosure would be made). Factoring agreements generally have no hard limit nor any minimum. The "limit" is governed entirely by the accounts receivable that the customer may or may not choose to sell to the Factor. Thus, unless the customer arrives at the relationship already ready to sell $500,000 in accounts receivable, which is very unlikely and not usually the case, it would not be possible for the Factor to truly require itself to advance $500,000 – without at least including language that the Factor will do so if the customer presents collectable accounts receivable and requests the Factor to purchase them.

We also reiterate our request for clarification regarding whether the "approved advance limit" includes amounts to be held in a reserve account.

2. Clarify the "Term" to Be Used in a Disclosure in the Factoring Context.

We are concerned that the use of the word "term" in the factoring context may inadvertently prohibit a Factor from providing information based on a term that is comparable to other types of financing the customers may be comparing when shopping for financing opportunities. To allow flexibility to provide useful information to the customer, we request the following change to Section 2057(a)(25):

> "Term" means, with respect to: … Factoring disclosures made pursuant to section 22803, subdivision (a)(3), the maximum length of time between when a financer will accept a legally enforceable claim and when that legally enforceable claim will become due and payable by the legally enforceable claim's account debtor. For a factoring transaction, if the maximum length of time will vary, the provider may use a sample term reasonably expected to be within the range of the terms expected to be used during the life of the master agreement.

(§ 2057(a)(25).)

Because the term varies in the factoring context, depending on when accounts receivable happen to be due, and because there is generally no prepayment penalty, the best way for a customer to compare financing offers is to allow Factors to use a standard term of 30 days, or alternatively allow Factors to provide information using both a term of 30 days and a longer term. As the regulations are currently written, they could be interpreted to mean that if a Factor has allowed a payment term of 6 months under one contract, the Factor is prohibited from providing information about a standard 30 day term in its disclosure form.

Alternatively, we request that the regulations allow Factors to add columns with an additional sample term to give the customers a more complete picture of the cost of the financing.

3. Clarify the Finance Charge Disclosure in the Factoring Context.

The revised proposed regulations clarify what a "finance charge" means in the context of factoring. However, we request one additional clarification, as follows:

A finance charge is:

> In a factoring transaction, the difference between **(a)** the face value on the invoice and **(b)** the amount paid directly to the recipient upon assignment of the legally enforceable claim to the financer~~, but excluding~~ plus reserve amounts, only if the financer reasonably anticipates that it will return all reserve amounts to the recipient once it has been paid for the legally enforceable claim or claims assigned by the recipient or upon termination of the contractual relationship between the financer and the recipient, properly crediting payments made by account debtors and previous collections by the financer from the recipient, all amounts held in reserve, and payments by insurers on defaulted accounts. In determining what the financer can reasonably anticipate, the financer shall consider past performance of similar contracts (both those made to the recipient and other similar recipients) and the policies and procedures of the financer.

In addition, the disclosure should be permitted to caution the customer that the finance charge and APR does not include potential non-finance fees such as bank charges, set-up or application fees at the outset of the factoring

relationship, or actual legal or administrative fees[2] should they become necessary.

We would appreciate the opportunity to discuss these suggested changes. Please let us know if it would be possible to arrange a phone conference to discuss these matters.

Sincerely,

[redacted]

Rebecca Coll

Cc: Charles Carriere
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[2] Factors frequently act as service companies for customers in addition to finance companies, by taking over the administrative work of accounts receivables, including handling and cashing checks, tracking payments, handling paperwork and keeping clients apprised of the status of payments. Factors absorb many of these costs (unlike other types of lenders, which provide no such services), but it sometimes becomes necessary to make separate itemized charges for administrative work. The administrative time is unrelated to the financed amount, and may continue to occur even when funds are not being advanced but payments continue to arrive. Factors will handle the accounts receivable payments and turn payments over to their customers when the customers do not require funds. Factors should be permitted to continue to charge these administrative fees without attempting to factor in unknown administrative fees unrelated to financing at the outset of the relationship.