

Submitted by Electronic mail to: regulations@dfpi.ca.gov, with a copy to:

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August 24, 2021

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

Re: File No.: PRO 01-18 – Sixth 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 the opportunity to comment on the proposed regulations. Unfortunately, despite participating in planned meetings, filing comments on all proposed regulations, and registering to receive notifications from the DFPI, we did not receive the notice of modified regulations. Even if we did receive the notice on time, we believe two weeks is not enough time to review and comment on regulations that will have a dramatic impact on how small businesses shop for credit. We respectfully request the DFPI re-issue the notice and provide more time for companies and organizations to respond to this request.

#### **A. Disclosure of the Average Monthly Cost**

Since our concerns with the monthly pay disclosure have not been addressed, we would once again, like to reiterate that the disclosure of a monthly cost for a non-monthly pay product should be removed from the proposed Regulations. 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.

As stated in our previous comments, 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 as it could be confusing to recipients. Moreover, as SB 1235 requires that only the “method, frequency, and amount of payments” be disclosed, the additional of a monthly pay disclosure is not within the authority of the DFPI to implement. It was the intent of SB 1235 to only disclose the actual payment amount and frequency, not some arbitrary payment that is not what the recipient is contracting for. Displaying the average monthly cost will only do more harm than good and is not within the framework of SB 1235.

Furthermore, by requiring a provider to state a monthly cost for a non-monthly pay product opens provider up to litigation for misleading disclosures. 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 number 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. Although additions to the proposed

Regulations state that a provider can assume it can collect payments on all days, is this the calculation that is to be used for average monthly cost? If that is the calculation to be used, the result will be a misleading disclosure as most providers do not collect payments on holidays. This once again opens up providers to litigation for not only providing a misleading disclosure for the payment amount but also is misleading because a provider is required to state factually incorrect numbers based on a calculation that is not accurate or what the provider actually uses. Due to the numerous issues with providing an average monthly cost for a non-monthly pay product, the SBFA highly suggests that this be deleted across all parts of the Regulations.

## **B. Definitions and Disclosures**

There are some definitional issues that need to be addressed in order for a provider to understand and correctly disclose certain figures. The three (3) main definitions and disclosures that need to be addressed, as they have a similar issue. They are: “irregular payments,” “payment” and “estimated payment amount.”

- i. Section 2057(a)(14) defines “irregular payment” as anything that is not a “periodic payment.” While this in and of itself is not an issue, the calculation can present a challenge. As the proposed Regulations state that a provider can assume that all payments can be collected on bank holidays, weekends, etc., a provider is supposed to use that in its calculations. This presents a problem as now a standard periodic payment could be considered an irregular payment and would have to be disclosed as such. For instance, if a recipient is required to make \$200 daily payments but a bank holiday falls on a Wednesday, the provider may then collect \$400 on Thursday. While the \$400 is greater than the periodic payment, it is an ordinary course payment. The way the definition reads, this payment would be considered irregular and would have to be disclosed differently. Not only is the assumption that it is an irregular payment incorrect, if these were required to be disclosed, it would create significant headache because a provider would have to look at the proposed term or estimated term to see if it can

tell if an irregular payment would occur based on a calendar. Another occurrence would be after consummation of the agreement a recipient misses a payment due to changing bank accounts (situation that is not considered a default) and now has to make up two (2) days' worth of payments. Would that double payment be considered irregular? While this would be after the disclosure is given, if this type of payment would be considered irregular and not disclosed in the required disclosure, the original disclosure could be considered misleading and open the provider up to litigation. This just not seem practical or the intention of the DFPI. We are assuming the intention of the DFPI is that an irregular payment is one that is known and may change depending on the week or term. We would suggest the language be amended to so a provider that has periodic payments but has the potential to have one (1) irregular payment due to a holiday or a frozen bank account is not required to disclose them as irregular.

- ii. In specific financing products that discuss disclosing a “payment” (ex: Section 2061(a)(6)), that disclosure poses similar concerns to those raised above with irregular payments. Once again it could be interpreted that a double payment based on a holiday make up or due to an unforeseen bank switch could result in a payment being considered irregular and having been disclosed in the disclosure as such. It is vital that clarification is added so that a provider knows how to properly disclose. We would also argue that in these types of situations they are still periodic payments and in the ordinary course so they should not be considered irregular and have to be disclosed as such.
- iii. The disclosure of an “estimated payment” in Section 2065(a)(6) also has the same challenges as referenced above. We would once again request that these payments be considered periodic and that the solution is the same for all types of payments to be disclosure. Furthermore, we have additional concerns with how “true-ups” are handled in this Section. This Section requires that a provider disclose when true-ups are to occur in the disclosure.

This is problematic because most providers do not have scheduled true-ups listed out in the contracts. This allows for the flexibility for the recipient or provider to reach out to request a true-up. It is not common industry practice for a provider to list scheduled true-ups. Because of this, it would be very difficult to require a provider to be required to not only create a schedule but display it at the outset based on an approximate timeline (since it could be a couple days until financing is provided the timeline might be off). Moreover, if this were to be required, it would require providers to alter their contracts, which can take time to alter and then re-program systems to calculate the true-up dates, etc. Furthermore, if a recipient is paying as anticipated, and is not requesting a true-up but the provider is required, it can inconvenience the recipient and cause a poor customer service situation. Due to the many issues with requiring this, (iii) should be deleted. In the alternative it could simply require a provider to list on the disclosure where in the contract the recipient can find information on how and when to request a true-up.

### **C. Funding Provided**

While we do appreciate the DFPI attempting to provide a recipient with the best disclosures and to afford them the knowledge of where the funding is going, there is still an issue regarding “funding provided” sections throughout the Regulations. In Section 2061(a)(2)(c)(iv)(v), and the same in other sections, it only discusses “pay-offs” or “pay-downs” for “another financing.” While we agree that this should be disclosed, this should be broadened to include all types of pay-offs and pay-downs. There are times when a financier will pay-off unpaid rent or a mortgage payment directly and that will be deducted from the funding amount that is deposited into the business bank account. In order for a recipient to truly see where all the funding is going and to be able to make the calculation itself, all financing or debt that is being paid-off or paid-down should be disclosed. If it was the intention for (v) to cover these other types of pay-offs or pay-downs, it is confusing.

It would be clearer and cleaner to just have the one disclosure and have it cover all pay-offs and pay-downs.

#### **D. Pre-Payment**

The SBFA still has concerns over the prepayment requirement in its current form. While we are not opposed to disclosing that there may be a prepayment penalty, we think the way it is required by the proposed Regulations is incorrect, confusing and not helpful. It should be amended so that it makes sense, is easy to read and is meaningful.

SB 1235 only required that there be a description of the policy. As different providers have different policies it would make more sense to have generic language that informs the client if there are prepayment penalties or not. Another alternative would be that the disclosure state to look at a specific section in the provider's contract for the prepayment policy. This would be in line with The Truth In Lending Act ("TILA") and how it handles prepayment disclosures. TILA only requires a simple statement about prepayment penalties because requiring disclosure of amounts because doing so creates confusion. We would suggest that the DFPI follow TILA and only require a simple statement.

#### **E. Conclusion**

Again, we appreciate the opportunity to comment and understand this proposed regulation is complicated. Our goal as an association is to provide financing disclosure to our customers in a way that is meaningful, responsible, and continues to allow us the opportunity to offer products that meet the needs of all business owners in California. We are hopeful the DFPI extends the comment period to allow all organizations, companies, advocates, and interest groups to analyze the modified regulations and comment.

Respectfully,

Steve Denis

Executive Director  
Small Business Finance Association