



EQUIPMENT LEASING AND FINANCE ASSOCIATION
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October 27, 2021

VIA E-MAIL

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

Via: regulations@dfpi.ca.gov

Attention: Acting Commissioner Christopher S. Shultz
Email: regulations@dfpi.ca.gov

Cc: Jesse Mattson
Email: [REDACTED]@dfpi.ca.gov

Cc: Charles Carriere
Email: [REDACTED]@dbo.ca.gov

Re: NOTICE OF THIRD MODIFICATIONS TO PROPOSED REGULATIONS UNDER DIVISION 9.5 OF THE CALIFORNIA FINANCIAL CODE PRO 01/18

Dear Acting Commissioner Shultz,

Please find below and attached for the DFPI's consideration the Equipment Leasing and Finance Association's comments along with targeted interlineated edits to the current draft regulations. As you review, please note the following overarching themes that impact equipment finance companies in particular:

- **Timing and Frequency of Disclosures** – The fluidity of commercial leasing negotiations, inclusive of the frequent back-and-forth between and among the provider, financier, broker, and recipient, will make the timing and frequency of the disclosures set forth in the regulations especially challenging. Contrary to our understanding of the primary intent of the statute to provide timely, accurate information in writing prior to consummation of a commercial financing, we fear this type of repeated disclosure during the course of negotiations is likely to be more confusing to customers than helpful. In that vein, we have provided a few suggested edits to the revised/new definitions of “at the time of extending a specific commercial financing offer” and “specific commercial financing offer” presented in the latest draft of the regulations. These suggested edits are designed to simplify and clarify the proposed regulations for the benefit of finance companies and their customers.

- **Clarification of Broker and Financer Responsibilities and Definitions** – In light of the recent updates to Section 952 of the regulations related responsibilities of financiers and brokers, we have sought to further avoid the potential for overlapping definitions and responsibilities given the discrete roles each party plays in a typical commercial financing transaction. To that end, we are also suggesting clarifications in the definition of “broker” to avoid the potential application of disclosure obligations to various third parties involved in these types of transactions, such as attorneys and document preparation and delivery companies.
- **System Updates and Enforcement** – Although ELFA members have been preparing for the implementation of this disclosure for many months, they will need time to update their systems to reflect the precise requirements set forth in the regulations. In order to avoid foot faults while companies do their best to implement these disclosures where applicable, we would appreciate if the DFPI would issue guidance indicating that enforcement will be tolled for a minimum of six months to allow companies to update their systems to account for the disclosures. We note that the New York Department of Financial Services has similarly indicated that there would be a six-month grace period after the regulations are final prior to enforcement for California transactions.

As always, the ELFA is grateful for this opportunity to assist the DFPI in issuing clear and meaningful commercial financing disclosure regulations that will help many small businesses.

Sincerely,

Scott Riehl
Vice President
State Government Relations
Equipment Leasing and Finance Association

Section 900 (a) (4):

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

- (A) Any time a specific commercial financing offer is quoted to a recipient. However, if a provider simultaneously presents multiple, distinct specific commercial financing offers to the recipient and allows the recipient to select from among those options, then “at time of extending a specific commercial financing offer” occurs at the time that within two (2) business days after the recipient selects an option.

Commented [.1]: The financier can only control the timing of when the offer goes to the recipient. Since the recipient determines when they will accept an offer, the responsibility to provide the necessary disclosures should be based on a reasonable amount of time to allow the financier to prepare the disclosures and deliver them.

Section 900 (a) (6):

“Broker,” as used in these regulations, means any person other than a provider, financier, or recipient, or recipient’s their respective agents or representatives, who, for compensation to be received based on the consummation of a commercial financing, does any of the following: participates in any financing negotiation; counsels or advises the recipient about financing options; participates in the preparation of any financing documents, including financing applications; contacts the financier on behalf of the recipient other than to refer the recipient; gathers financing application documentation or delivers the documentation to the financier; communicates financing decisions or inquiries from the financier to the recipient; or obtains the recipient’s signature on financing documents.

Commented [.2]: To avoid potential confusion and overlapping definitions/responsibilities, this language attempts to clarify that the definition of “broker” does not extend to the agents and representatives of the provider, financier, and recipient. In addition, as originally written, certain other parties could be deemed to be “brokers”, e.g., transaction counsel negotiating a deal on the financier’s behalf.

Section 900 (a) (23):

“Specific commercial financing offer” means a written communication to a recipient, based upon information from, or about, the recipient, of a (i) periodic payment amount, irregular payment amount, or financing amount, and (ii) any rate, price, or cost of financing (including, without limitation, any total repayment amount), in connection with a commercial financing, which, if accepted by a recipient, shall be binding upon the financier. Information “about the recipient” includes information about the recipient that informs the provider’s quote to the recipient, such as the recipient’s financial or credit information, but not the recipient’s name, address, or general interest in financing.

Commented [.3]: This reflects the common and practical understanding that when an offer is binding upon the financier is the appropriate point in the negotiations for providing the disclosures. Otherwise, every back and forth in the negotiations would require an additional disclosure, which would cause potential confusion and disputes as to which disclosure is correct. This approach is consistent with New York’s proposed regulations.

Section 900 (a) (33), (34):

“Average monthly cost” means the average total amount paid in a month to the financier over the term of contract, divided by the number of months in ~~under~~ the term of the contract.

Commented [.4]: These clarifications add necessary specificity for commercial financing transactions that may be interrelated with other transactions since the provider may not know or control all costs related to the contract. In addition, these changes account for transactions where certain payments may occur on a non-monthly basis (e.g., certain annual fees).

“Estimated monthly cost” means the estimated average total amount paid ~~in a month to the financier over the term of contract, divided by the number of months in under~~ the estimated term of the contract.

Section 952:

(a) A financier shall:

(1) Provide a copy of compliant disclosures required by this subchapter to a broker, whenever a financier provides a broker with a specific commercial financing offer for a recipient.

(2) Maintain a copy of the evidence of transmission of the disclosures provided ~~by to~~ a broker ~~to by~~ the financier in compliance with subdivision (b) for a period of at least four years following the date that the disclosure is presented to the recipient.

...

(b) Following receipt of the disclosures required by subdivision (a)(1) of this section and before communicating a specific commercial financing offer to a recipient, a broker shall transmit the unaltered, disclosures received ~~by from~~ the financier to the recipient. After a broker transmits disclosures to the recipient, if so required, the broker shall provide evidence of transmission of the disclosures to the financier, including the time of transmission

...

(f) This section shall not be construed to:

(1) Require a broker to evaluate the accuracy of the disclosures provided by the financier;

(2) Create any liability for a broker if the disclosures that the financier provides do not comply with this subchapter or Division 9.5 of the code; or

(3) Limit any liability that may arise when a broker makes representations concerning the commercial financing.

(4) Require a broker to provide any disclosures if the financier is not required to provide such disclosures or if the transaction is otherwise exempt.

NEW Section 957:

Compliance Date. The compliance date for these regulations shall be six months after publication of the Text of Final Rules and Final Statement of Reasons.

Commented [.5]: The suggested edits here are intended to highlight that the broker is only a transmitter of the disclosure, i.e., a broker only has a duty to provide the required disclosures if the disclosures are required to be provided by the financier in the first place. The language provides clarity for exempt transactions (e.g. below \$500,000, or transactions with an exempt financial institution) that do not trigger independent obligations for a broker to create and provide such disclosures.

Commented [.6]: Given the system and operational adjustments necessary, confirmation of a delayed compliance date is requested.