

**Comments Regarding Modifications to Proposed Regulations
Under Division 9.5 of the California Financial Code
Commercial Financing Disclosures (PRO 01-18)**

The Revenue Based Finance Coalition (“RBFC”)¹ is comprised of responsible finance companies that provide needed capital to small businesses through innovative methods. RBFC members offer accounts receivable purchase financing to small businesses and some members also engage in lending in the state of California through a California Financing Law license. Our members also include select vendors that provide technology services to the small business finance industry. This letter responds to the Department of Financial Protection and Innovation’s “Notice of Third Modification to Proposed Regulations Under Division 9.5 of the California Financial Code” dated October 12, 2021.

We respectfully submit the following comments:

1. California Law Requires the DFPI to Issue the Notice of Proposed Action Again.

The DFPI issued its Notice of Proposed Action on September 11, 2020.² A Notice of Proposed Action is good for one year. Cal. Govt. Code § 11346.4(b) provides as follows:

The effective period of a notice issued pursuant to this section shall not exceed one year from the date thereof. If the adoption, amendment, or repeal of a regulation proposed in the notice is not completed and transmitted to the [Office of Administrative Law] within the period of one year, a notice of the proposed action shall again be issued pursuant to this article.

California’s Office of Administrative Law (“OAL”) further explains the one-year requirement on its web site:

What does OAL do in reviewing a regular rulemaking action?

A rulemaking agency must transmit a rulemaking action to OAL for review within one year from the date that the notice was published in the California Regulatory Notice Register. Once submitted, OAL has 30 working days to conduct a review of the rulemaking record to ensure that the agency satisfied the requirements of the APA and OAL’s regulations. OAL will then either approve the rulemaking action and file the proposed regulation with the Secretary of State or disapprove the rulemaking action.³

Accordingly, the Notice of Proposed Action issued on September 11, 2020, has expired and the DFPI must issue a notice again.

¹ The RBCF is formerly known as the Commercial Finance Coalition.

² <https://oal.ca.gov/wp-content/uploads/sites/166/2020/09/2020-Notice-Register-Number-37-Z-September-11-2020.pdf>.

³ https://oal.ca.gov/rulemaking_participation/#ten.

This is not merely a technical issue. California has a strong policy interest in public participation in the process of adopting new regulations. The DFPI's proposed commercial finance disclosure regulations are complex and getting the disclosures right is important for small businesses. Issuing a new Notice of Proposed Action will provide stakeholders 45 days to comment on the entirety of the proposed commercial finance regulations,⁴ rather than being limited to 15 days to react to the DFPI's most recent revisions.⁵

In addition, failing to comply with Cal. Govt. Code § 11346.4(b) will result in delay in implementing the commercial financing disclosures. If an agency fails to comply with California's process for adopting new regulations, the regulations will be invalid and unenforceable until the DFPI completes the proper procedure.⁶ We respectfully urge the DFPI to issue a Notice of Proposed Action again and restart the public participation process now, rather than wait until the OAL rejects the proposed final regulation for failure to comply with Cal. Govt. Code § 11346.4(b).

We respectfully note that although we have a limited number of comments in this letter, we have many additional substantive concerns regarding the accuracy and effectiveness of the proposed regulations. We have limited our comments to addressing the most recent substantive changes to the proposed regulations in keeping with the Cal. Gov. Code § 11346.8. We welcome the opportunity to further engage with the DFPI on the proposed disclosure regulations.

2. Change to the Definition of "Specific Financing Offer."

The revised regulations added Section 900(a)(23) that provides as follows:

"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. 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.

We respectfully ask the DFPI to modify this definition, by adding "which, if accepted by a recipient, shall be binding on the provider." As a result, Section 900(a)(23) would provide as follows:

"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 on the provider.** Information "about the recipient" includes information about the recipient that informs

⁴ Cal. Govt. Code § 11346.4(a).

⁵ Cal. Govt. Code § 11346.8(c).

⁶ See https://oal.ca.gov/underground_regulations/.

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.

This change would make California's disclosure requirement consistent with New York's proposed commercial finance disclosure regulations.⁷ It also recognizes that a commercial financing provider is in a position to give detailed disclosures addressing everything from estimated term, fees, collateral, and prepayment penalties only at the time of a binding offer. Finally, it recognizes the practicalities of how terms are presented, negotiated, reworked, and ultimately offered to recipients. Many providers use tools that show a sliding scale of available terms that correspondingly adjust as one term is altered, to reflect the impact of that change on other terms. During this process of negotiating various possible combinations of terms, the provider is not making a formal offer, but is determining which combination of terms works best for the recipient so that the provider can prepare offers that meet the recipient's needs. A rule requiring a separate disclosure each time any term changes during this process is unworkable, provides little benefit to the recipient, and defeats the purpose of providing disclosures by creating customer confusion. Rather, the disclosure is appropriate only when the provider has prepared one or more offers that, if accepted, would be binding on the provider.

⁷ See https://www.dfs.ny.gov/system/files/documents/2021/10/rp_23nycrr600_text_202110.pdf.