Sandoval, Sandra@DFPI

From: Danny Mourning <DMourning@RivieraFinance.com>
Sent: Wednesday, October 20, 2021 6:21 PM
To: DFPI Regulations
Cc: Carriere, Charles@DFPI; Mattson, Jesse@DFPI
Subject: Public Comment to SB-1235 Draft Regulations as of October 12, 2021

Commissioner:

Riviera Finance ("Riviera") submits this comment to the latest regulations proposed by the DFPI.

I.
Riviera reiterates and incorporates by reference Riviera's prior comments regarding the distinctions between "lending" and "purchases" of accounts. For reasons unexplained, DFPI continues to ignore the distinction between ***recourse*** factoring (which should be regulated as lending) and ***non-recourse*** factoring (which should be exempted from these disclosures). The DFPI's ignorance leaves the regulations drafted in a state of unconstitutionally compelling purchasers of personal property to speak using terms that are inaccurate, confusing, and nonsensical in a purchase transaction. **The DFPI must exempt non-recourse factoring from the disclosures because non-recourse factoring does not require the seller of accounts to repay the purchase price to the buyer**. Failing to account for this distinction renders the regulations patently unconstitutional.

II.
The DFPI's regulations fail to address contingencies in the proposed formula for "financing charge" under section 943(a)(3). While the formula contemplates a "reserve amount," **the formula does not contemplate a "fee rebate."** Rebates are expected to be paid to the seller of the account, like a reserve; *unlike a reserve*, however, rebates may be based on volume of accounts sold in a month (higher volumes result in higher amounts rebated) or speed of payments (faster payments from account debtors result in higher amounts rebated).

III.
The DFPI is on notice that the proposed regulations run afoul of standards set by the Supreme Court of the United States in *Ibanez v. Fla. Dept. of Bus. & Prof'l Regulation*, 512 US. 136 (1994), and *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2019). Under *Ibanez*, commercial speech can be regulated so long as the government asserts an interest that is "***more than 'purely hypothetical'***, and under *NIFLA*, the law "require[s] disclosures to ***remedy a harm*** . . . [***and***] ***extend no broader than reasonably necessary***." SB 1235 and the DFPI's regulations trade in hypotheticals, fail to remedy an actual harm, and extend beyond the bounds of lending.

By ignoring both the non-recourse distinction in factoring and the actual moving parts in factoring fees, the DFPI has failed to draft legally enforceable regulations.

Danny Mourning, Esq.
General Counsel
Office 925-426-1092
Fax 1 925-397-2141
Fax 2 408-273-6751
220 Avenue "I"
Redondo Beach, CA 90277
www.rivierafinance.com

Admitted to Practice Law in:
California (SBN 286090)
Texas (SBN 24108759)

USDC, Northern Dist. of California
USDC, Central Dist. of California