October 27, 2021

Via E-Mail: **_____@dfpi.ca.gov**
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Commissioner of Financial Protection and Innovation
Attn: Sandra Sandoval, Regulations Coordinator
300 South Spring Street, 15th Floor
Los Angeles, CA 90013

Re: Comments on Proposed Regulations for implementation of Commercial Financing Disclosure Regulations

Dear Commissioner:

The Secured Finance Network (formerly known as the Commercial Finance Association) ("SFNet") is the international trade organization founded in 1944 representing the asset-based lending, factoring, trade and supply chain finance industries, with 260 member organizations throughout the State of California, the U.S., Canada and around the world. As we have stated in previous comment letters, we continue to be grateful to your openness in discussing with us our concerns regarding the disclosure requirements under Commercial Finance Disclosures enacted under SB1235 (Chapter 1011, Statutes of 2018) and signed into law by Governor Brown on September 30, 2018 ("Disclosure Requirements") as well as the regulations proposed by the California Department of Financial Protection and Innovation regarding compliance with the Disclosure Requirements ("Proposed Regulations"). We have read the latest revisions to the Proposed Regulations and appreciate the changes made to address some of the concerns we have raised with prior versions of the Proposed Regulations. We continue to have some concerns with the Proposed Regulations and SFNet and its members strongly urge you to take the below comments and suggestions into account with respect to the Proposed Regulations.

DISCLOSURES FOR CHANGES TO COMMERCIAL FINANCINGS

Although Section 900(a)(4)(B) of the Proposed Regulations was changed in the latest round of revisions to address certain ambiguities, it continues to provide that disclosure will be required subsequent to the consummation of the commercial financing contract if the

contract is “amended, supplemented or changed” and the resulting change would result in an increase in the annual percentage rate. Without repeating our discussions with the DFPI, it is important to note that factoring and asset-based credit facilities are designed to provide working capital for the recipient and, therefore, have to adapt to the working capital needs and fluctuations of the recipient, which results in **frequent** changes and accommodations provided to the recipient.

Our members have universally indicated that they **often** receive requests for additional capital from their borrowers to satisfy a temporary working capital need. This could be due to a large order received by the borrower or other large expenditures such as a need to replace or add new equipment. This need for additional capital would be satisfied by the provider through a temporary increase in the commercial financing or similar accommodation which is accomplished through amendments, supplements or changes to the financing agreement, triggering a need to provide a disclosure under Section 900(a)(4)(B) of the Proposed Regulations.

It is very important to point out that in the above situation, the recipient is not looking to multiple sources of financing and is simply reaching out to its current provider to satisfy its additional capital requirements. As such, a disclosure by the provider does not serve the intended purpose of providing information that the recipient can use to compare financing products. This can simply be addressed in the Proposed Regulations by only requiring a new disclosure if the recipient has informed the provider that it is seeking financing proposals from multiple providers or the recipient requests one in order to compare financing products.

It is also important to point out that the fees and charges with respect to a temporary accommodation like the one outlined above can be fairly small. For example, the provider may seek a documentation or similar fee of a few hundred dollars. Strictly read, the Proposed Regulations would require a new disclosure even if an immaterial fee is to be paid by the recipient. This issue can be addressed by having a fairly immaterial threshold for redisclosure related to such fees. For example, the Proposed Regulations could state that if the APR is increased because a fee of less than $1000 is to be paid, a new disclosure requirement will not be triggered.

As is evident in the above comments, our members are concerned that a disclosure requirement triggered by amendments, supplements or changes to an existing financing can become burdensome due to the nature of the financing products our members provide and the frequency of changes that occur during the term of the financing. As such, we strongly request that the DFPI make efforts to limit the disclosure requirement related to such changes to material changes rather than all changes that may impact APR regardless of materiality.

A few additional ways in which the re-disclosure requirement may be tailored to provide more useful information to the recipient while staying in line with the public policy:

(1) Excluded Avoidable Fees and Expenses. In many instances when changes are made to a financing, they are due to a request by the recipient. In the above, example, it is the recipient who is asking for an accommodation to the credit

facility to obtain additional liquidity necessary to fulfill a customer order. We request that an exception be included in the regulations for re-disclosure due to increases in the financing charge due to the charging of avoidable fees that were charged due to a modification, supplement or change made at the request of the recipient.

(2) Exclusion for Ordinary Course Changes. As discussed above, all businesses, small and large, will have ebbs and flows and a financing provided to such business will have to adapt to these changes. There will be ordinary course modifications to a factoring facility or asset-based facility which should not trigger a re-disclosure as these changes could happen often and create a burden on the financier and confuse small businesses at a time when the small business is not looking for new financing or the ability to compare one financing product against another financing product. We request an exclusion for re-disclosure related to changes in the financing if the changes are in the ordinary course of business.

SAFE HARBOR

Despite the great efforts put into drafting thoughtful Proposed Regulations, including allowing for a tolerance in Section 3026 with respect to the information disclosed, because of the numerous assumptions required to allow factors and asset-based lenders to provide an APR calculation, even the best estimation and assumptions could result in a margin of error greater than the tolerance level provided. We continue to strongly urge the DFPI to provide a safe harbor for providers of commercial loans to small business which insulates the providers from liability (through litigation or otherwise), if these providers comply with the Disclosure Requirements in good faith. Additionally, if the DFPI believes that it is not able to provide for a safe harbor due to the language in the statute setting forth the Disclosure Requirements, we urge the DFPI to communicate the need for a safe harbor to the legislature. Such a safe harbor would be very similar to safe harbors contained in the Federal Truth-In-Lending Act for consumer lending disclosures. Specifically see 15 U.S.C. § 1640(b) and 15 U.S.C. § 1640(c). As we have previously indicated, the safe harbor is necessary because many of the providers of commercial loans to small businesses are small businesses themselves and can't absorb the cost of litigating perceived violations of the Disclosure Requirements when they are acting in good faith in their compliance.

We appreciate the opportunity to comment and will make ourselves available for continued discussions with the DFPI as this process progresses.

Sincerely,
/s/

Richard Gumbrecht
Chief Executive Officer
Secured Finance Network