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

November 22, 2021

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

Re: File No.: PRO 01-18 – Invitation to Comment on Fourth Modifications to Proposed Regulations under Division 9.5 of the California Finance Code ("Invitation")

Dear Commissioner Shultz,

Small Business Financial Solutions, LLC dba RapidAdvance ("RapidAdvance") would once again like to thank the California Department of Financial Protection and Innovation ("DFPI") for reaching out for input on the above proposed regulations ("Regulations"). RapidAdvance has previously provided in-depth comments to each of the numerous revisions you have made to the Regulations. In our previous comment letters, we provided a great deal of information regarding annual percentage rates ("APR") and the issues created by new Division 9.5 of the Financial Code (the "Code"). We request that our previous letters be reviewed again as they contain extensive information some of which the most recent version of the proposed Regulations still do not address.

The Regulations still contains various issues that must be fixed prior to the disclosure being provided to small businesses throughout California. As currently drafted, the Regulations will create significant confusion with financing providers causing provides to adopt varying methods to address unclear items that will lead to inconsistent disclosures. This will simply frustrate the purpose of the Code. Additionally, small businesses will be confused if the errors are not fixed prior to the Regulations being effective.

I. OUR COMPANY

Our business and the products we offer have been described in each of our previous comment letters. To save space, we will not restate them here.

II. COMMENTS

A. Definitions

The following definitions should be revised to avoid confusion.

(i) Definition (a)(4)(A) - "At the time of extending a specific commercial financing offer" – As currently written, if a provider permits an applicant to select multiple offers to view based solely on applicant stated information (no verification of that information by the provider) and then the applicant selects one of those, disclosures would be required to be given when no information has been verified. This will lead to completely misleading information being disclosed as applicants are frequently incorrect about the data they input. We suggest the disclosure be provided once when the offer is selected by the applicant *and* the supporting information has been verified or revised based on a review of relevant information. It is important for the information to be verified so that disclosures are not required for more general inquiries where all data is self-reported by the recipient. Additionally, this would stop providers from having to make multiple disclosures for the same application as information is verified and corrected (which happens on virtually all applications). As currently drafted, a provider would be required to make the disclosures once a quote is selected and then every time unverified data is corrected due to the review of documents submitted by the recipient (assuming the correction will impact any of the required disclosures – which will be the norm). This will result in an unnecessary and unhelpful volume of disclosures being provided for the same transaction. This will certainly cause confusion and lead to recipients simply ignoring the disclosures altogether. This change would make the disclosures more meaningful as they would be accurate each time they are provided as opposed to mere guesses based on unverified information. This issue can easily be addressed in the definition of "specific commercial financing offer" by adding a reference to data that is verified and not self-reported.

Additionally, the Regulations need to address early payoff discounts. In some circumstances, a provider might state that if a recipient repays a closed-end financing within a certain amount of time, the fixed fee is reduced. These types of discounts are given typically after the recipient agrees to a financing amount. Because these types of full-term fee discounts may increase the APR (but only if the recipient decides to execute the option) it is unclear how or if

this should be addressed in the disclosures. An example would be a recipient gets an approximately 10 month term loan with a fixed cost of $3,500 for an APR of 72.76%. However, the recipient is given the option of paying off the balance within the first 60 days and gets a discount of $1,500 (so the total cost would be $2,000 instead of $3,500 but the APR would be 159.87% given the reduced term). The proposed Regulations provide no guidance for this type of feature. These early payoff addendums are common in the industry so this issue should be addressed. Because of this, it is important to determine (i) whether or not a disclosure is required for early payoff addendums; and (ii) if a disclosure is required, how is it given and when (as it will conflict with the main disclosures and cause confusion). Our suggestion would be to expressly address this issue and not require a disclosure for discounts given as a result of early payment the recipient may choose to exercise but is not required to exercise.

(ii) Definition (a)(14) – "Irregular Payment" – An "irregular payment" is defined as anything that is not a "periodic payment." Our concern with this definition is that due to bank holidays or a potential bank account switch by the recipient, two or more payments might be collected on the same day. For example, a recipient makes regular contractual payments of $100 each business day but cannot make one on a bank holiday due to the bank being closed and the provider takes two payments ($200 total) the day after the bank holiday (that day's payment and the payment for the bank holiday). The $200 is contractually owed and represents two days' worth of payments, but that specific payment might be considered "irregular" under the definition as it is not the amount paid at regular intervals (definition of periodic payment). It would not make sense for this type of payment to be considered irregular as it is in the ordinary course of the contract and occurs due to a bank holiday. The definition should specify that this type of situation is not considered an irregular payment. We would also recommend that the definition of periodic payment be revised as the reference to "regular intervals" is not clear and creates ambiguity. Other disclosures refuse to use the phrase "regular intervals" for this exact reason. For example, the Truth In Lending Act ("TILA") refers to scheduled payments. The use of the word "regular" in the current definition is unnecessarily vague given the word's more expansive meaning compared to more narrow alternatives available and used in other disclosure laws.[1]

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[1] The reference to periodic payments also highlights the various issues created by the Regulations' use of TILA terms in the incorrect context. In TILA, a periodic payment is a payment made on an open-end credit plan as open-end credit plans have payment periods (*e.g.* weeks, months, etc.) while closed-end credit plans simply have a payment schedule as there is a term for repayment. The Regulations attempt to merge different products by making

(iii) Definition (a)(22) – "Sales-based financing" – The proposed Regulations attempt to differentiate between closed-end transactions and sales-based financing, but there is still overlap that will create uncertainty as to what disclosures a provider should deliver. This differentiation is important to get right and make sure there is no confusion as the disclosures for sales-based financing include estimated disclosures (*e.g.,* APR, term, total payment amount, payment) but closed-end transaction disclosures do not include all the same estimates. Confusion will arise in connection with products that have hybrid repayment features, where payments are based on sales revenue but there is also a minimum payment component that creates a "term" (the industry refers to this product as a variable payment amount loan). The unique payment features of these products are not currently addressed by the proposed Regulations. Because there is a fixed maximum term for these transactions, they fit within California's definition of a loan, but the variable nature of these products makes them function similar to some sales-based financing products. However, the two types of products are legally distinct and should require different disclosures. Under the proposed Regulations, both the variable payment amount loan and sales-based financing (whether variable pay or true-up) would be subject to the sales-based financing disclosures. However, the variable payment amount loan disclosure should provide some information from the closed-end transaction disclosure (as there is a fixed term and APR and California law would treat the product as a loan) and some information from the sales-based financing disclosures as payments vary. For instance, a variable payment loan product has a determinable maximum term duration because of the requirement that minimum payment amounts be received within a certain timeframe. However, under the proposed Regulations, only an estimated term would be permitted to be disclosed even though there would be a known date by which the transaction would have to be repaid. It is going to be horribly confusing to disclose to a recipient that a product's term can only be estimated when it actually has an exact term. Providers would be prohibited from disclosing an exact term under the sales-based financing disclosure rules. In fact, the legal agreement will make it clear there is a very specific term for such transactions despite what the disclosure states.

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open-end products provide closed-end disclosures and adopting TILA terms for this but TILA is not structured in the same manner. This creates numerous issues including smaller ones like references to periodic payments for closed-end transactions (when they are only relevant for open-end credit plans) but also very significant ones like closed-end APR disclosures being required for open-end plans when TILA has a different APR disclosure for open-end credit plans. These types of issues will create material confusion for both the recipient and the provider and in some cases makes it impossible for providers to deliver accurate disclosures.

Additionally, the sales-based financing disclosure under the proposed Regulations would prohibit the disclosure of the minimum payment information for a variable payment loan. A minimum payment requirement is inapposite for a sales-based financing transaction because these transactions, by definition, do not require minimum payments to be made (which is why the term must be estimated). Therefore, the sales-based financing disclosures do not, and should not, account for variable payment loan products. However, the minimum payment amount of a variable payment loan is a material term that should be disclosed to the recipient. Given that variable payment loans are loans and that various disclosures associated with them would be inconsistent with the sales-based disclosures, they should be subject to the closed-end transaction disclosures of Section 910. As such, we believe it is critical that DFPI review and rethink the treatment of variable payment loans by the Regulations and propose revisions that account for these products' unique payment features.

(iv) Definitions (a)(33)(34) – the most recent edits to the definitions have resulted in the calculation of these terms to be based on the "average total amount paid" by the recipient over the term or estimated term of the financing divided by the months in the term or estimated term. These definition make no sense as there is no such thing as an "average total amount paid" in a commercial financing transaction. An "average total amount paid" implies that there are multiple "total amounts paid" to be averaged. We believe the inclusion of the word "average" in the phrase "average total amount paid" was an error and should be deleted from the definitions.

(v) As explained in previous comment letters certain definitions still appear out of alphabetical order. It is unclear to us why you would attempt to make all the definitions appear in alphabetical order in a previous revision and then just ignore that in the most recent revisions. Alphabetical order is incorrect starting with definition (28) ("reasonably anticipated true-up").

(vi) The definition of average monthly cost is confusing. The label (average monthly cost) implies this would be the monthly cost of the funding. However, the calculation includes the cost and the principal repayment. So this amount is not actually the average monthly cost but the average monthly payment amount. Either this definition needs to be changed so the calculation is just the monthly costs (the finance charge divided by the number of months) or that the term is relabeled to be average monthly payment amount (although this would also be confusing as it makes it appear as if this amount is an actual payment, which it is not as explained below). Additionally, it is confusing that for purposes of this calculation a provider must assume 30.4 days in a month

but elsewhere the Regulations permit each provider to assume months have the same number of days with no requirement on how many days per month should be assumed (see Section 901(a)(16)(C)). This will lead to providers using 30.4 days for this calculation but maybe 28 or 31 for other calculations. The rules for days in a month should be uniform for each calculation for the disclosures to have meaning and be reliable.

B. General Comments

The Regulations and disclosures continue to include conflicting and varying requirements that will cause confusion and make compliance difficult. In various comment letters we have identified typos, incorrect section references and confusing wording. Despite the complicated nature of the Regulations and the numerous drafting errors, companies wishing to provide comments are only provided approximately less than 12 business days to provide comments after revisions are proposed. Maybe this is permitted under the California process to issue regulations but it is not a good way to proceed to develop Regulations that are free from basic errors and makes sense. This is simply not enough time to analyze all the issues, do mock up disclosures and confirm the complicated mathematical calculations required. Given you only provided us days to submit this response, we cannot go through every part of the Regulations in detail. So I am sure we have not identified all the issues that exist. However, set forth below is a brief list of examples of basic drafting problems that remain:

Incorrect Outlining Format – Despite numerous comments we have submitted highlighting outlining errors, such errors have still not been fixed. For example, Section 901 starts with subsection (a) but there is no other subjection. This will lead to confusion as basic outlining practices permit the use of subsections only if there are more than one subsection. It is not proper to have a subsection (a) when there is no subsection (b). Yet, this is exactly what Section 901 does. It includes a subsection (a) but there is no subsection (b). Additionally, section 914(a)(3) includes subsection (A) twice. This should clearly be (A), (B), (C) and (D) and not (A), (A), (B) and (C). This incorrect references matter and must be fixed. Section 914(a)(3)(C) now refers to itself when it is meant to refer to Section 914(a)(3)(B) due to the outlining errors.

Imprecise Grammar – At various places in the Regulations, the grammar should be improved. For example, conjunctions are used throughout the Regulations. Because and since are two such conjunctions. Both are used to describe a logical relationship between two or more ideas or events. However, since is typically used when the ideas or events have a sequential relationship

(a relationship in time) and because is used when the two ideas or events have no sequential relationship. In section 914(a)(3)(B) (this actually should be labeled (b) as described above), the disclosure includes the phrase "[s]ince your actual income may vary from . . . ." However, the logical connection is not based on time so the better conjunction to use is because. Accordingly, we suggest this disclosure be amended to state "[b]ecause your actual income may vary from . . . ."

As stated above, these are just a few examples of clear drafting errors and mistakes that should be fixed. Many of these are not apparent until draft disclosures are created and compared to various alternatives. That takes time and the truncated comment period simply does not permit that to be done in a thorough manner for every disclosure.

C. General Requirements

(i) Section 901(a)(4)(A) (as stated above this should be 901(4)(A)) provides that if the term or estimated term is one year or less, the term or estimated term must be disclosed in days. However, there is no guidance how to calculate days. The refusal to address this issue will create material confusion for providers and recipients. Should the day the transaction is consummated be included or should you start counting days on the day after consummation? Does the day of the final payment count as a day in the calculation? The definition of term does not address these issues. Additionally, the disclosure of terms greater than one year is going to create significant confusion. The Regulations require that such transactions with terms with partial months be disclosed as a portion of a month to the nearest two decimal points. This means that a transaction with a term of 465 days must be disclosed as having a term of "1 year and 3.33 months."[2] Small business owners do not think in terms of .33 months and demanding months be disclosed as decimals will simply create confusion. It would be much less confusing to require the disclosure to be 1 year, 3 months and 10 days.

(ii) Section 901(a)(6) (as stated above this should be 901(6)) provides that the disclosures shall be presented to the recipient as a separate document. However, there is no guidance on what is meant by the phrase "separate document." The Regulations make it clear that the disclosures can be provided in the same package as long as they are separate. However, the

[2] Although the .33 will vary as each provider can come up with its own assumptions on how many days are in a month according to Section 901(a)(16)(C) (as stated above this should be 901(16)(C)). The Regulations must create uniformity for these types of assumptions or disclosures will not be comparable or reliable.

Regulations do not address this issue in connection with electronic disclosures (which is odd as the vast majority of these disclosures will be provided electronically). How are disclosures "separate" from other documents when provided electronically? Do the disclosures have to be a separate attachment or link or can they be included in the same attachment or link as long as they are separated by a page break or some other break? Note that for disclosures provided other than the final version that must be signed, it is likely that an attachment will not even be reviewed if it is not part of the overall document package that is emailed to the recipient.

(iii) Section 901(a)(7) (as stated above this should be 901(7)) addresses font requirements and provides that a provider shall not use "colors and fonts that make any enumerated terms required by section 22802, subdivision (b), of the code more clear or conspicuous than any other term required by that subdivision." The problem with this is that the Regulations require disclosures that are not enumerated in 22802, subdivision (b). So any disclosure not enumerated in 22802, subdivision (b) can be more clear and conspicuous than those enumerated. This means that disclosures like the average monthly payment disclosure for daily or weekly payment products can be more clear and conspicuous than the items enumerated in 22802, subdivision (b) as it is not included in 22802, subdivision (b). Rather, it only appears in the Regulations. Accordingly, this may result in the enumerated terms being hidden by a highlighted or oversized monthly payment disclosure. We suggest this section be amended to state that a provider shall not use "colors and fonts that make any disclosure required in this subchapter more clear or conspicuous than any other term required by that subdivision."

(iv) Section 901(a)(8) (as stated above this should be 901(8)) provides guidance on how wide the columns for each disclosure should be. However, the "3:3:7" ratio is too prescriptive. While we agree that there should be limits on the ratio, something that is more flexible should be used. We suggest this be amended to state "the approximate ratio of 3:3:7." Requiring an exact ratio will be impossible to comply with as the ratios will always be off by very small amounts. Failure to address this will make the safer harbor provision in Section 901(a)(8) ineffective as no disclosure form will have an exact ratio of "3:3:7."

(v) We suggest that somewhere in the disclosure language you add a statement that all disclosures assume and are based on timely payments and no default. This will reduce confusion in situations where a recipient defaults. Section 900(a)(4)(B) provides that there is no need to re-disclose in event of a default but nothing in the disclosure alerts the recipient that the disclosures

assume there is no default and that additional charges may be imposed in an event of default. We suggest this be added to the disclosure form.

D. Funding Provided, Amount Financed and Recipient Funds

The various disclosures of the phrases "funding provided," "amount financed" and "recipient funds" are inconsistent, confusing and conflict with the statutory requirements. We will address the issues associated with each phrase and then propose revisions that believe will make the disclosures more clear and avoid confusion.

Funding Provided and Amount Financed – The phrase "funding provided" is not defined anywhere in the Regulations. Instead, the phrase "amount financed" is defined (although the definition appears out of order) and appears to be used to simply replace the phrase "funding provided" everywhere except the label in the one specific column and row in the various disclosures. It is unclear why this was done as this will create material confusion. The Regulations don't actually include a disclosure labeled "amount financed." Rather, the "amount financed" is the dollar amount disclosed for the "financing provided" disclosure. However, the third column for this disclosure then has various references to the "amount financed" as if that phrase has been defined or used elsewhere in the disclosures. So the recipient is forced to assume the "amount financed" means the "funding provided." It makes no sense to require these types of assumptions be made by recipients. This problem is made worse by the fact that there is a separate disclosure of the "Itemization of Amount Financed" despite the fact there is actually no disclosed dollar figure called the "amount financed."[3] The inconsistent use of terminology is confusing, unnecessary and detracts from the intent of the statute. Additionally, the statute does not permit the disclosures to use the phrase "funding provided." Rather, the statute requires disclosure of the "total amount of funds provided." Specifically, 22802, subdivision (b), of the Code provides that a provider "shall disclose . . . the total amount of funds provided." For certain limited transactions (factoring or asset based lending), the statute permits alternative phrases to be used such as "amount financed." However, the statute does not permit an alternative phrase to be used for other products. The fact

[3] Note that TILA has an express disclosure called the "Amount Financed." Beneath that phrase in every TILA disclosure is the dollar amount of the amount financed. So there is no doubt that the amount financed is that dollar amount. Accordingly, when TILA requires an Itemization of Amount Financed, it is clear what dollar amount is being itemized. In the proposed Regulations, there is a dollar amount disclosure called "funding provided" but then recipients are forced to magically know that this is actually the "amount financed." The issue is then made worse by the fact that the Itemization of Amount Financed never refers to the "funding provided" disclosure. This issue is easily resolved by replacing all references to "amount financed" with "funding provided" (although we believe the statute requires the phrase be Total Amount of Funds Provided).

the Legislature addresses alternative phrasing for factoring and asset based lending but not for other types of transactions is clear evidence of legislative intent that no other phrases should be used for other transactions. Accordingly, the amount of funds provided to a recipient in a non-factoring or non-asset based lending transactions must be identified in the disclosures as "The total amount of funds provided."

Section 22804 of the Code grants the DFPI the authority to issue implementing regulations. However, that authority is expressly limited by the statute. Section 22804(a)(1) permits the DFPI to adopt regulations governing the disclosures and that the regulations "shall include . . . definitions . . . for each of the disclosure items set forth in . . . subdivision (b) of Section 22802 . . . ." Nowhere does the statute authorize DFPI to come up with its own disclosure terms or to use its own judgment to replace the judgment of the Legislature as to what the labels should be used for each disclosure label. Simply put, the California State Legislature ("Legislature") mandated that providers disclose "the total amount of funds provided" and did not give the DFPI the authority to change this label. Rather, DFPI can only define the phrase, provide what should be included with the disclosure and provide the calculation for the amount. The Legislature did not employ open-ended statutory language to give the DFPI broad authority to replace its judgement for the judgement of the Legislature in labeling the disclosures. Accordingly, we suggest the label "Funding Provided" be changed to "Total Amount of Funds Provided" to match the statutory phrase and that this phrase be defined (which would be the current definition for amount financed). Additionally, the Itemization of Amount Financed must be changed to be the Itemization of Total Amount of Funds Provided. These changes will make the Regulations consistent with the statutory requirements and make the disclosures less confusing to recipients as well as providers who must decipher and implement the Regulations.

Recipient Funds – The various disclosure forms make it clear that recipient funds is intended to be the amount of money actually provided to the recipient after all deductions and third-party payments. However, the definition of recipient funds is confusing. The first sentence refers to the amount of funds given directly to the recipient but the very next sentence states it excludes amounts paid to third parties. If an amount is paid to a third party it is not "given directly" to the recipient. As an entity that will be required to provide these disclosures we remain uncertain about what amount you intend to be disclosed here. Providers can't be expected to make assumptions about basic disclosures like this and the Regulations should leave no doubt about

what amount is to be disclosed as recipient funds. Additionally, the definition has numerous technical issues that are confusing (*e.g.,* referring to other financing amounts known to the provider but knowledge of an amount is irrelevant as all that is relevant is if any amount will be deducted from the Funding Provided to pay-off another balance, assuming a provider always knows the actual balance owed to a third-party, etc.). We suggest the definition of recipient funds be amended to state:

> "Recipient funds" means the amount given directly to the recipient by a provider in the form of cash, check, or electronic funds transfer to an account identified by the recipient. Recipient funds is calculated by taking the Funding Provided and deducting funds paid by the provider to third parties (including brokers), any portion of the Funding Provided used to pay off an outstanding balance of a pre-existing financing (either with the same provider or a third-party) and any other amounts deducted from the Funding Provided other than pre-paid finance charges. For the purpose of calculating recipient funds, if the provider does not know the actual amount to be paid to a third-party, the provider may rely on the amount the recipient identifies as being owed. Where the balance owed on an obligation may change over time, a provider may ignore a change in the balance that occurs after the initial disclosure is provided.[4]

E. Broker Fees

In order to truly have the recipient understand the cost of the financing, it is important to include the amount of commission or fee that a broker is paid. Although the Regulations require certain broker commissions to be disclosed, they fail to address the manner in which the vast majority of broker commissions are paid. The majority of the time the financer pays the broker out of the financer's fees – not from the proceeds. The proposed Regulations only address the scenario where the broker is paid from the proceeds (which is not how it is done most of the time). Therefore, the disclosures as currently drafted are ineffective in identifying to recipients what a broker is getting paid in the majority of transactions. Because broker commissions are usually included in the cost of the financing, recipients do not know what a broker is being paid. The

[4] While we use the phrase "funding provided" throughout our proposed definition, it is only being used for consistency purposes to match the phrasing in the proposed Regulations. If the DFPI takes our comments and amends the phrase "funding provided" to "total amount of funds provided," our proposed definition should also be amended to change the phrase "funding provided" to "total amount of funds provided."

broker fee is typically the most expensive third-party fee associated with a transaction and would be valuable information for a recipients to know. Accordingly, it should be separately itemized and disclosed. For a recipient to truly understand the full cost of the financing, it is imperative that the provider be required to disclose the broker commission to the client. We suggest that this be included in the final Regulations. Please see the additional discussion of broker compensation below. Alternatively, at least permit it to be disclosed as it is currently prohibited from being itemized.

F. Closed-end Transaction Disclosures (Section 910)

(i) Funding Provided (Section 910(a)(2)(C)(ii)) – The section provides that if the amount financed is greater than the recipient funds, the provider must state the following: "Due to deductions or payments to others . . . ." However, the amount financed may be greater than the recipient funds due to payments made to the provider and not to others. So if there is an outstanding balance with the provider that the recipient must satisfy, that is an amount deducted from the amount financed but not paid to others as the provider is not an "other" in this scenario. We suggest the reference to "others" be deleted. If you are concerned about how to handle prepaid finance charges, it can be reworded to state: "Due to deductions or payments other than prepaid finance charges . . . ."

(ii) Finance Charge (Section 910(a)(4)(C)(i)) – In various places in the Regulations, different phrases are used for loans and sales based financing when there is no justification for the difference. These wording inconsistencies will create confusion as recipients will compare disclosures for both products and not understand why different wording is used when not necessary. They will imply some reason for it when there is none. This issue arises when a loan and sales-based financing product has a fixed finance charge (not an accruing rate). For the sales-based financing disclosures, the Regulations permit the provider to include the following statement: "Your finance charge will not increase if you take longer to pay off what you owe."[5] This phrase is not permitted for closed-end loans when there is a fixed finance charge. This discrepancy will cause confusion and make recipients believe the sales-based financing product is

[5] As we have said elsewhere and previously, the disclosure form should have a disclaimer that says all disclosures assume payments are made as agreed and that there is no violation of the financing agreement. The disclosure of a fixed finance charge is a perfect example of why this disclaimer is needed. It is a false statement you are requiring providers to make as the cost associated with the transaction will increase if there is a default (default fees, penalty rate, pre or post judgment rates, etc.).

a better choice as finance charges cannot increase for that transaction and they will believe they can for the closed-end loan when in fact they will not under this scenario. The disclosures may literally push the recipient to select the more expensive product due to this confusion.[6]

(iii) Payment (Section 910(a)(6)) – Our comments above regarding irregular payments are relevant to this section as well (please see comments above). It is important to provide clarification as to how make-up payments should be handled so that providers know how to accurately give the disclosures. Once again if a provider is to assume that it can collect on all bank holidays, when in actuality it cannot, it knows that the payment after the holiday will be for two days. That should not be a variable payment under the Regulations.

(iv) Prepayment (Section 910(a)(8)(9)(10)) – Section 22802(b)(5) of the Financial Code only requires a "description of prepayment policies." The Regulations require substantially more than the statute permits. The statute was modeled off of certain parts of TILA and one of those parts was the one relating to prepayment. TILA requires only a simple statement about prepayment penalties as opposed to requiring disclosure of amounts, because doing so creates confusion. This was a matter of discussion with Senator Glazer during the drafting process. Some people argued specific amounts for prepayment should be discussed and others argue TILA's lead should be followed and just a simple statement about prepayment penalties should be provided. After much debate, the Legislature adopted the language that requires only that there be a description of prepayment policies – not that prepayment amounts be calculated and disclosed. In this regard, the Legislature followed TILA's lead. This was prudent as requiring amounts to be disclosed creates confusion. For example, the proposed Regulations refer to prepayment fees being fees other than accrued interest. What is accrued interest? There is no definition or guidance as to what constitutes "accrued interest." In an environment such as commercial lending where there is no applicable maximum rate, no rate calculation restrictions or state prepayment calculation requirements, the parties are free to contract when "interest" accrues. In a fixed fee transaction, the contract can clearly state that all fees are earned on day one and therefore accrue immediately

[6] A similar inconsistency, although not as substantive, arises with respect to the Total Payment Amount and Estimated Total Payment Amount. The Total Payment amount disclosure references the "total dollar amount of payments you will make during the term of the agreement." However, the Estimated Total Payment Amount disclosure references the total dollar amount of payments we estimate you will make under the contract." Why does one use the phrase "you will make during the term of the agreement" and the other uses the phrase "you will make under the contract." If they mean the exact same thing, the same wording should be used. Basic principles of statutory or regulatory interpretation provide that if different wording is used, the drafter intended to convey a different meaning. We do not think a different meaning was intended here.

upon closing of the transaction. In this scenario, all "interest" has accrued as of the end of day one and there is no prepayment penalty. As such, under the proposed Regulations, a provider could legally disclose that there are no prepayment fees if the contract provides all fees are earned on day one. The recipient is then further misled by the disclosures when the next row provides that there are no additional fees for prepayment. In this scenario the disclosures make it appear as if there is a discount for repaying early when there is in fact no such discount.

Given the above, we believe the better approach with respect to prepayment penalties is to have a more definitive statement about them rather than a calculation and a disclosure amount that can be easily manipulated. We suggest you follow TILA's lead here and simply require the following disclosure: "There is no discount or rebate for paying early," "Paying off early will save you fees" or "Please review your contract carefully to better understand the benefits, if any, of paying off early." This is clearly what the Legislature intended for the DFPI to include and not a misleading disclosure about actual amounts that may or may not be charged or saved for prepaying. When the Legislature intended for a specific amount to be disclosed it knew what words to use to make sure an amount was disclosed. That is why they use the words "amount," "total dollar cost" and "total amount of funds" in connection with other disclosures. However, when it came to prepayment penalties, the Legislature expressly stated they only wanted a "description of prepayment policies." If the Legislature intended for prepayment amounts to be calculated and disclosed, they could have easily required providers to include the prepayment penalty amounts and a description of the policies. But they did not do that. In fact, the statute does not refer to prepayment amounts anywhere. Conversely, the Legislature did not state that they wanted a description of the total amount of funds provided. Rather, when they wanted an amount to be disclosed they used the word amount or a similar word clearly indicating a dollar amount must be disclosed.

(v) Average Monthly Cost (Section 910(a)(11)) – As we have reiterated numerous times in past comment letters, the "average monthly cost" for a non-monthly pay product should not be required. The disclosure of the monthly cost for a non-monthly pay product does not implement, interpret, or make specific any provision of Section 22802(b)(5) of the Code. The legislative history makes it clear that this disclosure should not be provided. When the disclosure bill was first introduced in the California State Assembly, it included a clause that made providers disclose the monthly amount paid even for daily or weekly pay products. This provision was

removed in subsequent versions. Additionally, this language was subject to various discussions with Senator Glazer through the process and it was determined this disclosure should not be included as it would be confusing (actual payment amounts are more valuable than fictional amounts that are never paid). Not only does the legislative history make it clear the Legislature did not intend for a monthly payment disclosure be required for non-monthly pay products, it was never included in any of the model forms Senator Glazer prepared for the hearings and debates on the bill. Simply put, this disclosure was considered and rejected according to the legislative history. In addition to this disclosure not being permitted under the statute, adding it would frustrate the purpose of SB 1235 as it detracts from other disclosures that the Legislature deemed to be more meaningful. Section 22802(b)(5) of the Code requires only the "method, frequency and amount of payments," and a disclosure of a monthly cost for a non-monthly pay product is not the actual amount of the payment or the frequency of the payment per the financing contract. The addition of this disclosure frustrates the purpose of the statute.

When the Legislature was unsure of what specific disclosure would be more meaningful, it gave express authority to DFPI to make that decision. For example, in connection with what metric should be used to disclose the annualized cost of the financing, the statute expressly gave the DFPI the authority decide what annualized metric should be used. *See* Section 22804(b)(1). This clearly indicates that when the Legislature intended for DFPI to make a decision as to what disclosure to include or not include, it knew exactly how to grant DFPI that authority. Nowhere does the statute grant the DFPI the authority to mandate a new monthly payment amount disclosure not addressed in the statute. But that is what DFPI has done with the monthly payment amount disclosure. When there is no monthly payment for a financing product (as payments are made daily or weekly), the Regulations will require that a monthly payment amount be calculated and disclosed as well as the actual payment amount and frequency. The statute requires only that the actual payment amount and frequency be disclosed and not some contrived amount that the recipient will never pay as the product does not have a monthly payment product.[7] Additionally,

[7] It is clear that DFPI is attempting to make the disclose form as consistent as possible with a similar New York disclosure law. However, the applicable New York law expressly requires average monthly amounts be disclosed even for daily pay products. *See* N.Y. Fin. Serv. Law § 804(f)(i). There is simply no such requirement in the California law. The DFPI cannot simply manufacture this requirement so that the California disclosure is similar to New York's disclosure. Nor can they create this disclosure because they think it is a valuable disclosure when the Legislature concluded it was not valuable (by not including it). There is good reason for the Legislature to not include this disclosure as they did not want it to detract from the other disclosures they expressly required and deemed more valuable.

the disclosure seems likely to cause confusion given that the information would conflict with the written terms of the commercial financing agreement. Moreover, the disclosure of the average monthly cost is disclosed before the actual payment frequency in the proposed disclosures. This is problematic because the first payment amount disclosed is not the actual payment amount.

Because the average monthly payment disclosure requirement (when the product does not require monthly payments) is inconsistent with the statute, it violates the APA Consistency standard.[8] The regulation also violates the APA Necessity standard[9] and is not within the scope of authority granted by the statute, in violation of section 11342.1 of the APA. Additionally, it is not reasonably necessary to effectuate the purpose of the statute, in violation of section 11342.2 of the APA.[10] The disclosure alters or amends the governing statute and enlarges or impairs its scope and should be removed. *See Samantha C. v. State Department of Development Services* (2010) 185 Cal.App. 4th 1462.

G. Open-End Credit Plan Disclosures (Section 911)

(i) Funding Provided (Section 911(a)(3)(A), (B) and (C)) - Please see our comments above on closed-end transactions on the same topic.

(ii) Estimated Payment (Section 911(a)(7)) – Please see our comments above on closed-end transactions on the same topic.

(iii) Prepayment (Section 911(a)(10), (11) and (12)) - Please see our comments above on closed-end transactions on the same topic.

(iv) Average Monthly Cost (Section 911(a)(13)) - Please see our comments above on closed-end transactions on the same topic.

H. Sales-Based Financing Disclosures (Section 2065)

(i) Funding Provided (Section 914(a)(2)(A), (B) and (C)) - Please see our comments above on closed-end transactions on the same topic.

(ii) Estimated Annual Percentage Rate (Section 914(a)(3)(C)(this section mislabeled and should be Section 914(a)(3)(D) as explained above)) – The form disclosure language requires the provided to identify themselves ("... is based on fees charged by [financer] . . . ."). However, in an almost identical disclosure for closed-end loans, the financer is not required to identify

[8] CA Government Code § 11349(d)
[9] CA Government Code § 11349(a)
[10] CA Government Code § 11349(a)

themselves. Section 910(a)(3)(iv) addresses the scenario in a closed–end loan transaction if no part of the finance charge is based upon an interest rate and does not require the identification of the financer. It makes no sense to have the disclosures be different in this context. Reviewing the two sections side by side highlights the needless discrepancy:

> Section 910(a)(3)(iv) – Your APR is not an interest rate. The cost of this financing is based upon fees charged rather than interest that accrues over time.
>
> Section 914(a)(3)(C) - APR is not an interest rate. The cost of this financing is based upon fees charged by [financer] rather than interest that accrues over time.

There is no logical basis to have the disclosures worded differently. In fact, doing so will create confusion. The goal of the disclosures and the statute is to facilitate a comparison of different commercial financing products by recipients. When a recipient compares the disclosure for the two products, they will be confused as they will not understand why the disclosures are different. There is no difference in meaning so why are they different? We suggest Section 914(a)(3)(C) be amended to mirror Section 910(a)(3)(iv) and state: "Your APR is not an interest rate. The cost of this financing is based upon fees charged rather than interest that accrues over time."

(iii) Estimated Total Payment Amount (Section 914(a)(5)) – Practically all sales-based financing transactions are structured so that the total amount to be paid by a recipient is known at the time of funding (except when there is a default in some cases). However, the proposed Regulations only permit a provider to disclose an "Estimated Total Payment Amount" for a sales-based financing transaction and prohibits them from disclosing the actual "Total Payment Amount." This is inconsistent with the disclosures required for closed-end transactions (Section 910(a)(5)) which permit a disclosure of either a "Total Payment Amount" or an "Estimated Total Payment Amount" depending on whether it "is possible to calculate with certainty the total payments the recipient will make during the contract's term." If calculable at the time of funding, providers should be permitted to disclose a "Total Payment Amount" for a sales-based financing transaction. This section should be revised to permit such disclosure and avoid confusion as the underlying legal agreement will have a total payment amount and not an estimate in the vast majority of instances.

(iv) Estimated Payment (Section 914(a)(6)) - Please see our comments above on payments for closed-end transactions. Additionally, while Section 914(a)(6)(B)(ii) refers financers to Section 942 to calculate the average amount of estimated periodic payments, Section 942 actually does not help with that. Section 942 simply requires financers to use the estimated monthly sales calculations provided for in Section 930 or 931 as applicable. These Sections in turn create rules for financers to use when estimating a recipient's average monthly sales or revenue. None of these Sections address how to calculate a daily payment amount based on the average monthly sales volume calculated pursuant to these Sections. Therefore, there is an entire step missing from the estimated payment amount calculation. So the Regulations provide no guidance on how to go from an average monthly sales amount to a payment amount. Payments could be daily, weekly, bi-weekly or monthly. The Regulations provide no guidance on how to calculate a daily, weekly, or bi-weekly payment amount. This is a critical matter for the Regulations to address as different providers make different assumptions. For example, with respect to daily payment products, some providers assume 19 payments per month and others assume 22 payments per month. Because APR is a calculation that takes into account the frequency of payments and number of payments made, these assumption will impact the APR calculation. In previous version of the Regulations, you addressed this issue but did so incompletely. Your remedy for that was to delete all references to this issue. That simply creates other issues. Just as the TILA APR calculations require provides to make assumptions about payment amount and frequency to have a consistent APR disclosure, the Regulations must also address these issues so that APR is calculated consistently from one provider to the next.

Section 901(a)(17) might have been attempt to address this issue by telling providers they may disregard the fact that months have different numbers of days. However, this provision is not enough. There is no guidance in the Regulations as to what assumptions to make regarding payment days and how to calculate the actual payments amounts for products that require payments more frequently than monthly.

We are also concerned about how true-ups are handled in this Section. Most providers do not have scheduled true-ups listed. The majority of providers allow for the flexibility of the recipient to reach out to the provider to request a true-up or for the provider to initiate a true up if they have documented proof of a change in revenue. Because of the flexibility that is built into

most true-up provisions, it would be impossible for a provider to disclose this at consummation as it is unknown.

(v) Prepayment (Section 914 (a)(9)(10)(11)) - Please see our comments above on closed-end transactions on the same topic. Additionally, the form disclosure language in this Section entirely misrepresents the sales-based financing transaction. A sales-based financing transaction does not have a term and the recipient is not required to "pay-off the financing" in a specific period of time. This is exactly why the Regulations require disclosure of an estimated term for these transactions rather than a term. However, the disclosure language in this Section requires a provider to state "If you pay off the financing faster than required . . . ." Not only will this cause confusion it is materially misleading and harmful to recipients. They will be led to believe they must pay off a sales-based financing transaction by a specific date and fail to recognize the benefit of the bargain they negotiated (that the product does not have a fixed term). In effect, this disclosure will force providers to make materially false statements as there is no "required" timeframe to repay the financing.

(vi) Average Monthly Cost (Section 914 (a)(12)) - Please see our comments above on closed-end transactions on the same topic. Additionally, this disclosure is labeled as an Estimated Monthly Cost but it is an average. The label should be Estimated Average Monthly Cost. This would make it more consistent with the closed-end transaction section as that refers to this disclosure as Average Monthly Cost.

I. Estimates – Sales Based Financing – Historical Method (Section 930)

Section 930(b)(2) states that the provider "shall fix the number of months used to calculate the recipient's average monthly historical sales, income, or receipts for all transactions or by recipient industry or financing amount (or both), provided that the period of historical data used by the provider shall not be less than four (4) months or more than twelve (12) months." As stated in previous comment letters, even if a provider requests a certain amount of statements, it does not mean the recipient will provide all months requested. The use of the phrase "shall fix" in this Section appears to require providers to collect statements for a minimum amount of months. This scenario was taken into account in Section 930(b)(4)(B), which allows a provider to be able to calculate the historical monthly sales based on what was provided by the recipient if the recipient fails to provide revenue data for all the requested months. The wording in these two Sections are contradictory. We believe this is just a drafting error and Section 930(b)(2) should simply be

amended to state that the provider "shall request the number of months used to calculate . . . ." As currently written, the contradictory terms create confusion as Section 930(b)(2) clearly requires provides to use a fixed number of months calculate average monthly revenue but Section 930(b)(4)(B) then says that is not necessary if the recipient fails to provide the necessary number of months.

Additionally, there should be no limitations on how many months a provider requests as long as they are consistent and following written underwriting policies. It makes no sense to preclude a provider from asking for 18 months of monthly data as the more data provided the more accurate the pricing can be. The proposed Regulations would also apply the same four (4) or twelve (12) month limit to renewals but in many cases only one (1) month is needed for that (and in some cases no months are needed). For a renewal, the provider already has performance data from the recipient as well as older bank/processing statements and should not be required to ask for more when they will not be used. The provider should be allowed to request whatever amount of statements it deems necessary to underwrite the transaction (no more and no less). Moreover, to insure that a provider is not just picking a random number of statements, this Section should require a provider to request a certain number of statements based on its internal policies and require a provider to have written policies to address this. For example, a provider could state in its policies that it only requires four (4) months bank statements for restaurants but six (6) months for trucking and maybe only one (1) month for all renewals. The language in the current Regulations do not permit this type of flexibility and this will only serve to hurt recipients.

Furthermore, Section 930(b)(4)(A) allows a provider to exclude from the average calculation certain months where there were "less than the average monthly sales . . . ." While we understand the intent is to exclude outlier months, it does not make sense to permit providers to exclude only months that are less than the historical norm. Requiring provides to include only outlier months that are greater than the historical average (and not ones that are lower than the historical average) will cause the provider to take more revenue every day and be more of a burden on the recipient. We suggest that the language be changed to allow a provider to exclude any month that is materially greater or less than the average monthly sales.

J. Estimated Annual Percentage Rate – Sales-based financing (Section 942)

There is a requirement in Section 942(a)(4) and (b)(4) to account for payments required when the timely payments fall below a contacted threshold. The previous version of this Section

referred to penalty payments. We submitted a comment and highlighted the issues this creates. It appears you may have edited this pursuant to our comment but the same issue still exists. Payments that fall below a contacted threshold are in effect breaches of an agreement so any payment in relation to that is a penalty payment. It is unclear to us what you are trying to address here. The wording still needs to be fixed to make it clear that payments related to a default (which would include payments falling below a contracted threshold) are not included in the payments or APR disclosures. It is impossible for the provider to know what "penalty fees" will be charged or how often they will be charged as they have no idea if there will be a default or "penalty" or if there is a default or penalty, how many times it will happen. We suggest that (a)(4) and (b)(4) be deleted as they do not make sense to be used in this calculation and conflict with other provisions of the proposed Regulations.[11]

K. Duties of Financers and Brokers (Section 952)

Section 952(a)(2) requires that a financer maintain a copy of the "evidence of transmission of the disclosure." There is no description as to what would constitute "evidence of transmission." Would a copy of the sent email or facsimile be sufficient or is there something else specifically that the DFPI is looking for the provider to maintain? Moreover, in the event the broker fraudulently creates an "evidence of transmission," is the provider liable for storing that transmission or not being able to determine if it is fraudulent? Just as a waiver of liability is given to brokers for potentially providing recipients with misleading or incorrect disclosures created by a provider, a provider should be provided with a waiver of liability if the broker fraudulently creates the transmission or alters it in anyway.

Section 952(f) provides brokers with certain protections such as not requiring a broker to evaluate the accuracy of any disclosure, nor transfers liability to a broker if the disclosure is not compliant and limits broker liability if a broker makes a statement based on the disclosure that was provided. However, there are absolutely no protections for financers for any wrongdoings of brokers. What happens if a broker creates a false transmission and the financer relies on the transmission? Or what if a broker alters the disclosure that a financer provides to the broker to give

[11] Section 900(a)(4)(B) makes it clear that the disclosure rules do not "apply to changes made to resolve a recipient's default on a financing contract." While this language is directional correct, it is still incomplete. The disclosures should expressly exclude any fees or charges imposed as a result of a recipient's default and not just to changes made to resolve a default as the default may not be able to be resolved but fees could be charged and litigation pursued.

to the recipient? If a financer is not aware of any of these wrongdoings, it should not be held liable. This just invites brokers to not adhere to the requirements because they can potentially shift any blame to the financer. Moreover, it will pull financers into unnecessary litigation when a financer had nothing to do with a broker's wrongdoing. It does not make sense for a broker to obtain protections under the Regulations and a financer to receive no protection. A financer should be given the following protections: (i) a financer should not have to evaluate the accuracy or validity of evidence of transmission by a broker; (ii) a financer should not be liable in the event a broker alters a disclosure or gives a recipient a false or altered disclosure; and (iii) limit any liability for a broker falsely and misleadingly describing a disclosure or the commercial financing to a recipient.

L. Tolerances (Section 955)

Section 955 is confusing. It lists three separate tolerance rules to determine if an APR disclosure is accurate. Between option 1 and 2 there is an "or." However, there is no "or" between option 2 and 3. We believe the intent here is to make it clear that there are three possible scenarios under which an APR will be deemed within the tolerance limit. However, the drafting of this section makes that unclear. It seems that either the "or" between 1 and 2 should be deleted (and the semicolon replaced with a period) or an "or" be added between sections 2 and 3 (and the period be replaced with a semicolon).

Option 3 also appears to totally consume options 1 and 2. In order to determine if a disclosed APR is within the tolerance under option 3, providers must follow the calculation steps provided in option 3. Let's follow those steps for a transaction with a disclosed APR of 30% but an actual APR of 30.2%. The instructions require you to subtract the disclosed APR from the actual APR (30.2 minus 30). This results in .2 (slightly higher than the tolerance permitted under option 1). Then you are instructed to divide that amount by the disclosed APR (.2/30). This results in .006666666. You then multiply that by 100 and the result is in .6666. What this means (we think) is that the disclosed APR in this scenario is understated by .666%.[12] The question this raises is what purpose does option 1 or 2 serve. In our example in this paragraph, the APR was understated in excess of the tolerance limit permitted in option 1 (.125%) but is deemed accurate under option 3. The same issue arises with respect to option 2. So option 3 would always govern

[12] Note that the Regulation does not actually state that after multiplying by 100 the result is then a percentage. It also does not address how to round. These items should be addressed for the formula to be mathematically accurate.

and option 1 and 2 would never be used. We suspect there is a drafting error here as it is unlikely the DFPI intended to have a completely irrelevant option that would never be used for tolerances.

Additionally, option 3 has a typo. The last part of the option provides the "resulting difference shall be divided by rate disclosed pursuant . . . ." However, it should say the "resulting difference shall be divided by the APR disclosed pursuant . . . ."

Furthermore, Section 955(b) only limits provider or financer liability when an inadvertent error is made and the provider or financer catches that error. Once again we would argue that this liability limitation should also be extended if a recipient discovers the inadvertent error, notifies the provider or financer and the provider or financer makes the appropriate adjustments and refunds any overpayments based on that disclosure within 60 days of being notified by the recipient.

M. Funding Recipient Will Receive (Section 956)

Sections 956(c)(1) and (c)(2) could be read to conflict with one another. Section 956(c)(1) requires that the itemization appears in a document separate from the other disclosures. However, Section 956(c)(2) then states the itemization must immediately follow the other disclosures. We presume you mean that it must be in the next page of information provided. If so, that will create problems. Most of these disclosures will be provided electronically. So when the main disclosures are reviewed and then signed, the recipient will likely stop scrolling through the electronic document and submit it. That means they will likely never see the itemization. This issue does not exist in TILA as TILA does not require the disclosures to be signed. We highly recommend you permit the disclosures to be part of the same document with the main disclosures being separated from the itemization (as TILA does) and the signature appearing below the itemization.

N. Calculation of Annual Percentage Rate (Section 940)

As we have argued in the other comment submissions we have provided on this topic, we do not believe APR is the best metric and will actually cause more confusion. We incorporate our prior comments provided to you into this letter. However, given the continued inclusion of APR in proposals, we once again have the following comments on this section.

Section 940 covers the calculation of the APR and states that the APR will be calculated in accordance with Appendix J, 12 C. F. R. Part 1026 (effective December 30, 2011). This reference raises two material points:

1. It does not address amendments. If Appendix J is amended, are providers to ignore any such amendments and follow the language that exists as of December 30, 2011? It seems this section should incorporate amendments after December 30, 2011.

2. Part 1026 specifically covers only closed-end transactions. It does not apply to open-end transactions. This is a material problem as the proposed Regulations will require open-end products to use TILA closed-end calculations. Considering TILA has specific calculations for open-end credit, we suggest the APR for open-end products be calculated in accordance with the open-end sections of TILA (See 12 C.F.R. § 1026.14). Note that consumer advocates have attempted to convince the CFPB to follow a similar APR disclosure rule for open-end credit. However, they have refused to do so for good reasons that are addressed in various notices in the Federal Register. It is not clear why the DFPI has rejected the CFPB's reasoning and doing exactly what the CFPB refused to do in consumer lending transaction.

The manner in which APR is addressed under the proposed Regulations creates inherent conflicts with TILA's APR. You can now have a consumer and a business get the exact same financing offer (one under TILA and one under the proposed Regulations) and the APR will be different. You can also have a business get the exact same product offering but one from a bank and one from a non-bank and the APR will be different (the bank will likely follow TILA's calculations). We believe this will create material confusion.

O. Preemption

As stated in our past comment letters, which are incorporated by reference herein, the proposed Regulations are preempted by TILA. "APR" and "finance charge" are terms of art created by TILA and have different meanings than how they are defined in the Regulations. The goal of SB 1235 is for businesses to be able to compare products, and because APR calculations will differ between consumer and commercial products and even between providers offering commercial products, the goal of SB 1235 is defeated. We once again request that the proposed Regulations not require the disclosure of an APR or Estimated APR. This inconsistency will result in misleading disclosures of credit choices, thwarting Congress' primary objective in enacting TILA. The regulation violates the APA Consistency standard.[13]

[13] CA Government Code § 11349(d)

P. Broker Compensation

It is imperative that the DFPI add broker compensation as a disclosure. We would like to reiterate our prior comments as this is an important disclosure for small businesses. Based on how the Regulations are drafted, it appears the DFPI either (i) has decided to ignore broker compensation that is paid by a financer directly to a broker rather than from recipient funds, or (ii) misunderstands how the majority of financers compensate brokers for referrals. In either case, the Regulations should be revised so that the amount and manner of compensation a broker receives for a commercial financing transaction is clearly disclosed to a recipient.

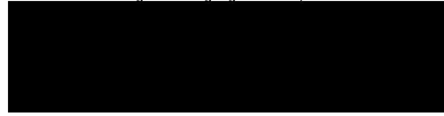
For the majority of commercial financing transactions that occur today, the broker is compensated by receiving a commission that is paid from the provider's funds. Unlike the manner envisioned by the Regulations, the commission payment is not deducted from the recipient's funds and paid to the broker. Rather, the financer pays the commission payment to the broker with its own funds. To recoup the amount paid to the broker, the commission amount is included as part of the finance charge and collected by the financer during the term of the transaction. As a result, as currently drafted, the Regulations do not require a disclosure for this type of broker compensation. Accordingly, the proposed Regulations will not require (or even permit) a provider to disclose a broker fee paid by the provider despite the fact this is an essential disclosure for recipients and something they want to see. By requiring the broker fee payment to be hidden in the finance charge, you are precluding recipients from having the necessary information to negotiate betters terms. Because the broker fee is included in the finance charge, the APR increases and recipients will wrongly believe that the financer is getting all the finance charge, when in actuality the broker is getting a significant portion of the cost of the financing. In order to solve this problem, the Regulations should require the financer to disclose the amount of commission that the financer is paying the broker so that the recipient has a full understanding of the costs of the financing.

III. CONCLUSION

Thank you once again for considering our comments. As always, we remain committed to working with you to implement regulations that provide value to small businesses. Unfortunately, the Regulations continue to include drafting errors, conflicting directives and have various confusing provisions. These issues must be fixed in order for providers to be able to comply with the Regulations. We are motivated to make sure the final regulations work, provide value and

assist small businesses. We would be happy to discuss these matters with you. You may reach me at 240-482-4684.

Very truly yours,



Joseph D. Looney

General Counsel