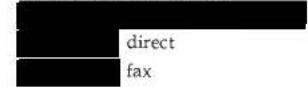




CHRISTINA J. GRIGORIAN



August 5, 2022

Via Email and FedEx

Department of Financial Protection
and Innovation
Attn: Sandra Navarro
2101 Arena Boulevard
Sacramento, California 95834

Re: Notice of Proposed Action – California Consumer Protection Law
Regarding Commercial Financial Products and Services PRO 02-21

Dear Ms. Navarro:

The comments set forth below are provided in connection with the *Notice of Proposed Action Under the California Consumer Financial Protection Law Regarding Commercial Financial Products and Services PRO 02-21* (the “Comment Request”), published by the California Department of Financial Protection and Innovation (“DFPI”). As described in the agency’s published materials, the Comment Request was issued by the DFPI as part of its effort to implement the provisions set forth in the California Consumer Financial Protection Law (the “CCFPL”).¹

The Comment Request consists of two components: (i) provisions which make it unlawful to engage in unfair, deceptive, or abusive acts or practices in connection with the provision of commercial financing or other financial products or services to covered small businesses; and (ii) a reporting obligation requiring the provision of detailed credit market characteristics and transactions on an annual basis to the DFPI. This letter provides comments solely with respect

¹ CA Fin. Code §§ 90000 et seq.

to (ii) and the reporting requirements set forth at Title 10 CCR § 1062(b)(1)-(4) for providers of “small business”² credit (the “Proposed Reporting Requirements”).

This letter is submitted on behalf of a firm client that is primarily engaged in providing credit programs, as a retail installment seller, to professional individuals in order for them to acquire products and services in connection with such individual’s business or trade (much like the photographer who buys commercial-grade camera equipment or the carpenter who buys commercial-grade building materials, in each case, to further their trade and not for personal, family or household purposes). To the extent that the buyer operates as a “small business” as defined in the Comment Request, our client facilitates credit programs to support these purchases³ (“Trade Credit”). Based upon our review of the Comment Request, we believe that the exemptions from the reporting obligations set forth in proposed Title 10 CCR § 1062(a)⁴ should extend to Trade Credit that is extended at a cost that corresponds to a rate that is below

² For purposes of the Comment Request, the term “small business” is defined by reference to the definition of such term at CA Civil Procedure Code § 1028.5 which defines the term as follows: “a business activity that is all of the following: (1) Independently owned and operated. (2) Not dominant in its field of operation. (3) Not exceeding the following annual gross receipts or other criteria in the categories of: (A) Agriculture, one million dollars (\$1,000,000). (B) General construction, nine million five hundred thousand dollars (\$9,500,000). (C) Special trade construction, five million dollars (\$5,000,000). (D) Retail trade, two million dollars (\$2,000,000). (E) Wholesale trade, nine million five hundred thousand dollars (\$9,500,000). (F) Services, two million dollars (\$2,000,000). (G) Transportation and warehousing, one million five hundred thousand dollars (\$1,500,000). (H) A manufacturing enterprise not exceeding 250 employees. (I) A health care facility not exceeding 150 beds or one million five hundred thousand dollars (\$1,500,000) in annual gross receipts. (J) Generating and transmitting electric power not exceeding 4,500 megawatt hours annually.”

³ As described in further detail below, although these transactions involve a “time price differential” rather than an interest rate, all rates imposed in the client’s sales financing transactions with California commercial customers are below 36% APR. In many cases, the programs are at 0-1% APR.

⁴ As proposed, the provision reads as follows: “This section does not apply to any of the following: (1) A covered provider who makes no more than one commercial financing transaction to covered consumers in a 12-month period or any covered provider who makes five or fewer commercial financing transactions to covered consumers in a 12-month period that are incidental to the business of the covered provider relying on this exemption. (2) A covered provider who, during the preceding calendar year, did not engage in any transactions with covered consumers involving commercial financing or ‘extending credit and servicing extensions of credit’ as defined in Financial Code section 90005, subdivision (k)(1).”

36% APR (as calculated in accordance with Regulation Z⁵) (“Reasonable Trade Credit”). Alternatively, we believe that providers of Reasonable Trade Credit could be expressly excluded from the definition of “covered provider” set forth at Title 10 CCR § 1060(d).

While we understand the DFPI’s interest in the commercial credit market in California, the imposition of the costs to be imposed upon providers of Reasonable Trade Credit in California in connection with the reporting obligations set forth in the Proposed Reporting Requirements will outweigh any [significant] benefit to the DFPI in connection with the receipt of such information. Reasonable Trade Credit Programs raise none of the indicia of “higher cost” credit programs found in certain other “smaller” commercial credit programs offered more broadly to California businesses (such as merchant cash advance and factoring transaction) as Retail Trade Credit Programs are designed by manufacturers/vendors as a means to provide “small businesses” with the physical products necessary to support a trade or profession at rates that are consistently described by the federal banking regulators and consumer advocacy groups as non-objectionable.⁶ As such, the reporting of information about the terms of Reasonable Trade Credit Programs will be of little use in analyzing the commercial credit market in California given that the definition of such term encompasses both a limitation on the rate offered (sub 36% APR) and a definitive framework of the credit offered (as in, credit offered by manufacturers of products used in the performance of a trade).

We believe the DFPI should include an exemption from the Proposed Reporting Requirements because the costs involved in complying with the Reporting Requirements will be significant and not offset by the provision of information that will be useful to the DFPI: namely, “covered providers” will need to use personnel to design, implement, and test systems to track and

⁵ 12 CFR Part 1026.

⁶ Federal banking regulators and community organizations have long recognized that credit offered at terms lower than 36% APR do not present to the market terms that are predatory or problematic from a public policy perspective. See Comment Letter provided by the Honorable Sheila C. Bair, Former Chair, Federal Deposit Insurance Corporation, to the Honorable Jelena McWilliams, Jan. 22, 2019 (“Indeed, a maximum 36% rate has become the norm for most reputable bank and nonbank lenders in that [the small dollar credit] market.”) <https://www.fdic.gov/resources/regulations/federal-register-publications/2018/2018-small-dollar-lending-3064-za04-c-049.pdf> See also Statement by the National Consumer Law Center, *Advocates Applaud Bill to Cap Interest Rates at 36%*, Nov. 12, 2019 (“The 36% interest rate cap goes back more than a century and is widely supported by the American public on a bipartisan basis. Reasonable interest rate caps are the simplest most effective protection against predatory lending.”) <https://www.nclc.org/media-center/advocates-applaud-bill-to-cap-interest-rates-at-36.html?print=pdf>

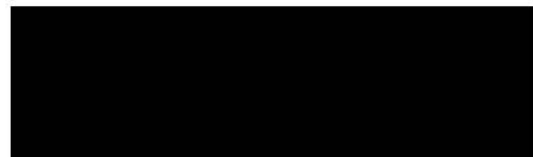
Ms. Sandra Navarro
California Department of Financial
Protection and Innovation
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gather the prescribed information.⁷ In addition, personnel will need to be trained to gather the information required by the DFPI and ensure that reporting obligations are satisfied. While these types of costs may be necessary in connection with “small business” credit that exceeds a 36% APR, such costs imposed upon entities that are committed to fair commercial credit terms in connection with the offering of credit to California create a burden that is not outweighed by the benefits of providing such information. In many cases, these costs of compliance would then be borne by the small businesses and sole proprietors that sell or otherwise provide the products and services via trade credit to other businesses, further stretching their business costs (which are already pressured by the various market impacts today that have arisen from inflation, energy, supply chain, and other disruptions).

* * *

We appreciate the opportunity to provide the information set forth above in connection with the Comment Request. If you have any questions upon your review of the information contained in this comment letter, please do not hesitate to contact me at the number listed above.

Sincerely,

A large black rectangular redaction box covering the signature area.

Christina J. Grigorian

⁷ We also note that this approach is consistent with CA Fin. Code § 22054 which exempts “bona fide conditional contracts of sale” from the scope of the California Financing Law, CA Fin. Code §§ 22000 et seq.