American Factoring Association

November 22, 2021

VIA Email (regulations@dfpi.ca.gov)

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

Re: Comment on Proposed Rulemaking/Commercial Financing Disclosure Regulations (PRO 01-18)

Dear Ms. Sandoval:

I write you on behalf of the International Factoring Association and the American Factoring Association with respect to the proposed rulemaking implementing SB 1235 (Chapter 1011, Statutes of 2018).

The Department continues to ignore the distinction between recourse factors and non-recourse factors. Since non-recourse factors are clearly and simply purchasers, and, therefore, in no way lenders, we fail to understand the Department's continued insistence on including non-recourse factors as lenders in the proposed regulations. Non-recourse factors are simply purchasers in the same way one purchases a car or a house. Would the Department characterize a purchase of an automobile from a small business as being covered by this regulation? The answer is surely not. Thus, why is a simple purchase of an account receivable not similarly deemed excluded from coverage? As a result, we strongly urge the Department to recognize this distinction and make it clear that non-recourse factors will not be covered in the regulations. Similarly, the Department should state that factoring agreements in states in which there are true sale statutes are not covered by the disclosure regulations in question.

While we appreciate the Department's efforts to adapt SB 1235 with respect to factoring, the inherent distinctions between factoring and the lending of money to borrowers continues to make the application of SB 1235 to factoring difficult, if not impossible. Furthermore, factors remain uncertain as to how to include various fee charges into a seller's total transaction costs for purposes of stating an Annual Percentage Rate (APR). Fees, such as factor commissions, international surcharges, term charges, etc., are impossible to predict. Similarly, unless certain assumptions are made by drawing on data related to such data points as annual factoring volume and total days until collection occurs, a factor cannot accurately predict the APR disclosure for the total cost of the accounts receivable sale.

Given the complexities involved in attempting to comply with the proposed regulations, we again urge the Department to consider providing a safe harbor for factors purchasing accounts

receivable from small businesses. As noted in our letter of January 22, 2019, the Federal Truth-In-Lending Act ("TILA") provides two safe harbors, one for the corrections of errors and another for unintentional violations which are *bona fide* errors. See 15 U.S.C. & 1640(b) and (c). We appreciate the Department including a safe harbor for the correction of errors which is similar to TILA. However, we strongly believe that this safe harbor alone is not sufficient to protect factors who use good faith efforts to comply with the regulations but are alleged to be in violation due to the complexities previously noted. We request that the Department also include a safe harbor for unintentional violations which are *bona fide* errors.

Factors operating in total good faith might be afraid of exposing themselves to significant liability for making a totally innocent error as a result of the uncertainties created by applying traditional loan concepts to a totally different transaction that is inherently subject to unknowns. Failure to take this step could lead to factors in other states refusing to do business in California, which would result in the perverse effect of reducing the availability of funds for California small businesses. This was clearly not what the author of this legislation intended.

We would hope, therefore, the Department would revisit the safe harbor issue and provide for targeted needed safe harbors that would insulate factors for innocent mistakes, particularly given the difficulties in applying the disclosure intended for a lending transaction to the sale and purchase of accounts receivable. The IFA and AFA believe the statute provides the Department with the authority to provide for this.

Finally, in addition to the issues highlighted above, I would refer you to our previous comment letters outlining the factoring industry's additional concerns.

We would appreciate the Department taking our concerns and comments into consideration as it continues to evaluate the proposed rulemaking. We would be happy to elaborate on the issues set forth above in a telephone call if the Department would find it helpful.

Sincerely,

cc: Charles Carriere (Charles.carriere@dfpi.ca.gov)
Jesse Mattson (jesse.mattson@dfpi.ca.gov)