October 28, 2022

VIA EMAIL (george.bogdan@dfs.ny.gov)

Mr. George Bogdan, Esq.
Office of General Counsel
New York State Department of Financial Services
One State Street, 20th Floor
New York, NY 10004

Re: Comment on Proposed Rulemaking - Disclosure Requirements for Certain Providers of Commercial Financing Transactions (23 NYCRR 600)

Dear Mr. Bogdan:

I write you on behalf of the American Factoring Association ("AFA") with respect to the proposed rulemaking implementing S 5470-B (23 NYCRR 600) (Disclosure Requirements for Certain Providers of Commercial Financing Transactions). We appreciate the Department providing the opportunity for further comment on the proposed rulemaking.

The AFA is the trade association that represents factors and their interests in Washington D.C. The AFA was founded in 2009 with the sole purpose of educating the public and policymakers on the availability of working capital for America's small businesses provided by factors and to conduct efforts in support of increasing working capital. In simple terms, the U.S. factoring industry provides a critical financial service to small businesses who need access to cash to make further investments to sustain or grow their business.

As an initial matter, we believe it is important to emphasize that factoring is very different from commercial loans that federal and state regulatory agencies are familiar with as part of their supervision and regulation responsibilities of banks and nonbank lenders. Factoring involves the purchase of account receivables from a business and the factor seeks repayment from the account debtors on the accounts that are purchased. Unlike a loan, factoring is not a credit transaction and there is no interest rate charged on an amount advanced. Further, the services and support that factors provide to small businesses goes beyond simply providing working capital and cash flow enhancement. For many small businesses, factors provide important back office support with respect to various aspects of accounts receivable management (invoicing, auditing, reporting, communications with account debtors, collections, etc.) which allows the small business to focus on its core business.

While we appreciate the Department's efforts to adapt S 5470-B with respect to factoring, the inherent distinctions between factoring and the lending of money to borrowers makes the application of the regulation to factoring difficult, if not impossible. For example, it requires disclosure of the "amount financed" as a dollar amount. Factors often do not know the aggregate dollar amount of the invoices being purchased at the inception of a factoring facility with a client. The factor purchases schedules of invoices over the life of the facility at the request of the client. The dollar amount of each schedule of invoices that is submitted under the factoring facility will be different. This makes calculation of a dollar amount for the "amount financed" at inception of the factoring facility impossible. For the same reason, it is impossible for a factor to know the "finance charge" as a dollar amount at the inception of a factoring facility arrangement. Furthermore, factors are uncertain as to how to include various fees and charges into a client's total transaction costs for purposes of calculating an Annual Percentage Rate (APR) and the finance charge. Fees, such as factor commissions, international surcharges, term charges, etc., are impossible to predict at the inception of the facility. Similarly, unless a number of assumptions are made, a factor cannot accurately predict the APR disclosure for the total cost of the factoring facility. For these reasons, among others, we would ask the Department to work with the AFA in crafting disclosures specific to factors that will enable them to comply with the regulations and that serve as a better source of information for the client. We would be glad to arrange for AFA members and their attorneys who are drafting the disclosure documents to meet with the Department to provide more detail on the implementation issues specific to factors.

We note in the Department's Assessment of Public Comments that many commenters requested that the Department make New York's regulation identical or as consistent as possible with California's disclosure regulation which just became final. The AFA would like to emphasize the importance of uniformity of disclosures to our members who work with clients in multiple states. Many factors, especially smaller factors, have limited resources to devote to compliance implementation and monitoring, and, thus, uniformity among the various states that choose to impose disclosure requirements is important to reduce this compliance burden.

Given the complexities involved in attempting to comply with the proposed regulations, we urge the Department to consider providing an additional safe harbor for factors purchasing accounts receivable from small businesses. 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 from liability for unintentional errors which are made in good faith.

Factors operating in good faith might be afraid of exposing themselves to significant liability for making an innocent error as a result of the uncertainties created by applying traditional loan disclosure concepts to a totally different form of transaction that is inherently subject to unknowns. Failure to take this step could lead to factors in other states refusing to do business in New York, which would have the perverse effect of reducing the availability of working capital for New York small businesses.

We would hope, therefore, that 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 disclosures intended for a lending transaction to the sale and purchase of accounts receivable.

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 or Zoom meeting if the Department would find it helpful. I may be reached at 512-886-3272 or cole@darebizcapital.com.

Sincerely,

Cole Harmonson