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December 9, 2021

The Honorable Rohit Chopra  
Director  
Consumer Financial Protection Bureau 1700 G St. NW  
Washington, DC 20552

**Re: Comments on RIN 3170-AA09  
Small Business Lending Data Collection under the Equal Credit  
Opportunity Act (Regulation B) and Section 1071 of the Dodd-Frank Act  
governing small business lending data collection and reporting  
(the "Proposed Rule")**

Dear Director Chopra:

We are writing in furtherance of our letter dated December 7, 2020 (the "December 7<sup>th</sup> Letter", a copy of which is annexed hereto). This letter supplements our December 7<sup>th</sup> Letter and further provides additional comments from the Secured Finance Network (formerly known as the Commercial Finance Association) ("SFNet") to the Proposed Rule under Section 1071 under Section 1071 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). While SFNet continues to support the Consumer Financial Protection Bureau's (CFPB) interest in implementing public policy to ensure that all small U.S. businesses have equal access to capital, we remain committed to the belief that such polices should not overburden funding providers to the detriment of small businesses in the process.

As noted above and as set forth below, we remain concerned that the Proposed Rule has an exceptionally broad reach that will have a sweeping and burdensome impact on almost every business engaged in the extension of credit. Moreover, beyond the mere burden of collecting the data, there are extensive areas of concern, including, but not limited to, data privacy and anti-competition. In this letter, we wish to further focus the CFPB's attention on our concern that the regulation of Trade Credit under the Proposed Rule is both unduly burdensome and likely unworkable.

## **I. BACKGROUND OF SFNET**

SFNet is the international trade organization founded in 1944 representing the \$4.1T secured finance industry comprised of firms providing asset-based lending, factoring, trade and supply chain finance, leasing and other forms of secured lending, through 280 member organizations in the United States, Canada and around the world. Our network of secured lenders, finance companies, service providers and others do the essential work of providing capital that fuels our nation's economy.

The \$4.1T secured finance industry underpins, either directly or indirectly, about one-fifth of the transaction volume that makes up the \$20 trillion US gross domestic product. We estimate the number of those directly employed in either providing or supporting secured financing activity is approximately 60,000 individuals at over 5,000 commercial banks and another approximately 1,500 non-depository lenders across the US.

Secured transactions provide financing to over 1 million US commercial entities, ranging from single-employee firms to large corporate and public enterprises. Roughly one-third of the approximately 4.6 million firms in the US with at least two employees directly feel the impact of secured finance. And the benefits affect not only the enterprises, but also more broadly their employees, customers, communities and the economy as a whole.

## **II. UNDERSTANDING THE POTENTIAL BURDEN OF SECTION 1071 ON THE REGULATION OF TRADE CREDIT**

Under Section 1071, financial institutions are required to compile, maintain and submit data on the type and purpose of any application for "credit", the census tract for the applicant's principal place of business, as well as the race, sex and ethnicity of the principal owners of the business, along with a number of other data points.

In order to understand the potential burden that Section 1071 would have on small businesses in the secured finance industry, we need to consider the potentially unworkable implications of the requirements of the proposed rules under Section 1071, unless certain measures are implemented and exemptions are applied by the CFPB to the Section 1071 reporting requirements.

### **A. Expansive definition of "Trade Credit"**

#### **i. Factors**

While we were very pleased to see that the CFPB is proposing that trade credit not be covered by Section 1071, we were very dismayed to see that the CFPB's Proposed Rule provides that the extension of business credit by a financial institution (which a factor is) other than a supplier for the financing of [the sale of . . . inventory] is not "trade credit". This means that in this situation, a factor would need to comply with Section 1071. See proposed § 1002.104(b)(1) and proposed comment 104(b)(1)-1. We believe the very nature of non-recourse factoring makes compliance impossible.

In a non-recourse factoring transaction, the factor assumes the credit risk on the receivable that arises when a seller sells product (such as inventory) on terms (such as 30- or 60-day terms) to a buyer and then assigns such receivable to the factor. Typically, the buyer is notified of the

assignment to the factor and is instructed to pay the factor directly when the receivable becomes due. If the buyer fails to pay the receivable when it becomes due, then, unless there is some commercial reason why the buyer did not pay, such as it ordered blue shirts and received red shirts, then the factor absorbs the credit loss since it had assumed the credit risk on the receivable and the seller avoids the loss on the sale. This is a key component of the value proposition in non-recourse factoring.

Non-recourse factoring facilitates the sale of product by sellers, many of whom are small businesses, to buyers, many of whom are also small businesses, that otherwise might not occur but for assumption of the credit risk by the factor and the sale of the product on terms. First, absent the assumption of the credit risk by the factor, the seller may have to forego the sale because it could not absorb the loss if the buyer defaults in payment on the receivable. Second, if the buyer is not able to purchase the product on terms, the buyer may have to forego the purchase because it may not have the working capital (*i.e.*, the cash) to pay for the product at the time of sale.

A factor steps in to solve these problems and facilitate trade. However, it does so without intervening or disrupting the relationship between the seller and the buyer. It is up to the seller and the buyer to negotiate the terms of the sale. Notably, a factor does **not** have any interaction or relationship with the buyer at the time of sale, including having no contractual privity with the buyer and not being part of the negotiation of the terms of sale between the seller and the buyer. Further, while a factor may give the seller some indication pre-sale as to whether it will assume the credit risk on the receivable that arises upon sale of the product, it does **not** take an application from the buyer in making this determination. The factor is simply a “behind the scenes” facilitator of the extension of trade credit to enable the sale to be consummated on terms. Simply put, the factor is not a party to the sale.

It is not an overstatement to say that it is virtually impossible and completely impractical for a factor to comply with the Proposed Rule in a non-recourse factoring arrangement. To give some context as to the burden it would create on the parties, a typical non-recourse factoring client (which is the term used for the “seller” in factoring parlance) of our factoring company members has at least seventy-five (75) active buyer relationships and many more proposed buyer relationships. To ask the factor to obtain the required disclosures unreasonably interferes with both the factor’s relationship with its client, and the client’s relationship with its buyers. It is easy to see where the insertion of the client’s non-recourse factoring arrangement (by virtue of regulatory data collection) would make the buyers, at minimum, curious and, at worst, suspicious of the factor’s client.

As indicated above, the factor is not involved with the sale in any respect and does not take an application from the buyer. Thus, there is no step in the process where a factor could even conceivably directly gather the various data points required by the Proposed Rule in order to comply with same. At best, the factor would have to work through the seller by obligating the seller to collect the various data points on behalf of the factor. This is directly in conflict with, and undermines, the CFPB’s proposal to exclude trade credit in its Proposed Rule and further exclude product sellers from complying with the Proposed Rule in the context of trade credit. Moreover, it would be terribly disruptive to the relationship between the seller and the buyer. While we recognize that a factor as a financial institution is different than a typical product seller, for the reasons stated above, we nevertheless respectfully request that the CFPB clarify the Proposed Rule so that it does **not** apply to factors in the context of non-recourse factoring arrangements.

## ii. Asset-Based Financing

Asset-based lenders that provide credit to sellers of goods, including those that sell on credit, similarly find themselves as an assignee (as collateral) of a seller's receivable. In this vein, an asset-based lender is, in part, indirectly providing trade credit, even though the ultimate account debtor will never have direct interaction with the true credit provider (except in the limited circumstance where there is a notice of assignment). The primary distinction between non-recourse factoring and an asset-based lending facility, for this purpose,<sup>1</sup> is the existence of an intervening full recourse obligor.

If the Proposed Rule should not apply to sellers with respect to their extension of trade credit to facilitate their sales of goods on terms, the Proposed Rule also should not apply to their "behind the scenes" non-recourse factors and asset-based lenders who are simply there to help facilitate those sales.

SFNet wishes to thank the CFPB for the opportunity to provide commentary and insight on the Proposed Rule and its potential effects on the small business lending market. We believe that an in-person meeting with the CFPB to address the concerns in this letter and our December 7th Letter would provide valuable insight to the CFPB in a manner that would make for a set of rules and regulations that are both workable for our constituents and help achieve the original goals of Section 1071. We are available to meet at your convenience.

SFNet looks forward to working with the CFPB on these important issues.

Respectfully submitted,



Richard D. Gumbrecht  
CEO  
Secured Finance Network

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<sup>1</sup> There are, of course, other distinctions between non-recourse factoring and an asset-based lending facility, including, but not limited to, the structure of a factor as a true purchaser of receivables and not a lender.