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October 31, 2022

TO: The Department of Financial Services of the State of New York
Attn: George Bogdan, Esq.
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Email: George.Bogdan@dfs.ny.gov

RE: Comments to the Revised Proposed Regulations to New York State's Commercial Finance Disclosure Law ("CFDL") (I.D. No. DFS-42-21-00011-RP)

As you may remember from our prior comments to the initial draft of the proposed regulations (Part 600 to Title 23 NYCRR); the Secured Finance Network, Inc. ("SFNet") www.sfnet.com is the international trade association, founded in 1944, representing the asset-based lending, factoring, trade and supply chain finance industries, with over 280 member organizations throughout the State of New York, the U.S., Canada and around the world.

We have previously communicated to the Department of Financial Services ("DFS") that SFNet and its membership are supportive of providing as much information as possible to small businesses in order to assist them in making as an informed a decision as possible regarding which financing products or proposals are best suited for them.

We wish to thank the DFS for considering our prior comments to the initial draft of the proposed regulations, as well as the comments of the various other parties who also have a vital interest in the final form of the proposed regulations. The changes that were made by DFS to the initial draft of the proposed regulations in response to these comments were meaningful and are very much appreciated.

Nevertheless, SFNet and its members still strongly object to some of the provisions of the revised proposed regulations of Part 600 to Title 23 NYCRR ("Proposed Revised Regulations") and urge DFS to take these second set of comments and suggested solutions into account when finalizing these Revised Proposed Regulations.

DFS has made it clear in its commentary to the Proposed Revised Regulation that certain of our suggested revisions, which were addressed in the earlier round of comments, have been considered and rejected. Accordingly, we will limit our comments to the provisions of the Proposed Revised Regulations for which comments are still being solicited.

Although the CFDL and the Proposed Revised Regulations have implications with respect to many forms of financial products, we specifically direct you to the implications with regard to factoring and asset-based lending transactions.

Calculation of APR

In our comments to the initial draft of the proposed regulation we identified the calculation of the annual percentage rate ("APR") (12 C.F.R. 1026.22) as being the most difficult disclosure imposed by the CFDL. We expressed at that time how extremely challenging we anticipated it would be for a commercial finance provider to apply the definitions and methodology of a consumer disclosure statute (the federal Truth in Lending Act, Regulation Z, 12 C.F.R. Sec. 1026 "TILA") which requires a "closed-end" calculation of APR (Appendix J to Part 1026) to an open-ended commercial finance transaction.

Since making these comments last November, SFNet has spent tens of thousands of dollars engaging professionals to advise SFNet in the preparation of a 60+ page guide designed to assist our members in complying with the new California commercial disclosure laws and regulations as they relate solely to the calculation of APR. As noted by DFS, the California disclosure legislation and regulations as they relate to the calculation of APR are strikingly similar to the CFDL and the Proposed Revised Regulations. We have included a copy of the Guide for your reference.

In creating this Guide SFNet hired a nationally recognized law firm with expertise in TILA in an effort to better understand which fees and expenses routinely charged by our members would be considered "Finance Charges" under TILA. We also engaged the services of a well-recognized compliance consulting firm with expertise in implementing Appendix J in order to better understand the actual calculations that would be necessary to determine APR and provide examples of how these calculations would be arrived at. Finally, we worked with a California law firm in developing a set of forms for the necessary disclosures as neither the California legislation nor the related regulations provide such a form.

What we learned and what we wish to impart to DFS is that even after obtaining the advice of third-party experts, SFNet was still unable to formulate the precise guidance necessary for our members to accurately and consistently calculate APR under the California disclosure laws and regulations and by inference, will experience the same challenges with the New York CFDL.

In preparing the Guide, we came to the realization that the majority of the fees and expenses typically charged to recipients by asset-based lenders and factors were not defined by either TILA (Regulation Z) or the California disclosure laws and regulations. As a result, we were uncertain as to which of these fees and expenses should be included in the California definition of Finance Charges. We were therefore forced to make arbitrary but, what we believed to be, well- reasoned-decisions as to whether fees and expenses such as application or origination fees, renewal fees, collateral

monitoring fees, early termination fee and certain servicing fees, to name just a few, were to be included in the calculation of the Finance Charge.

When it came to the actual calculation of APR we also learned that the calculations required by Appendix J were difficult to apply to various types of commercial finance transactions and did not take into account such calculation issues as (i) whether, in a factoring transaction the face amount of the invoice or the amount actually advanced was to be used in the calculation of APR, (ii) whether fees were to be split evenly if a single asset-based loan or factoring facility covered multiple types of commercial financing transactions, (iii) which fees and expenses were to be considered prepaid when it comes to calculating APR and (iv) is it permissible to estimate fees and expenses for calculation purposes if not specifically known at the time the proposal is transmitted to the recipient.

Finally, it became abundantly clear that the forms dictated by the California disclosure laws and regulations were not, in many instances reflective of our members' real-world business transactions. As an example: It is typical for our members to offer recipients several types of financing products, such as factoring and an inventory advance, in a single agreement. Unfortunately, the forms promulgated under the California disclosure laws and regulations do not contemplate such a multi-product proposal and we were left to conclude, but without any clarity from the California regulators, that multiple disclosure forms would be necessary for such a financing proposal.

Based upon our experience with the California disclosure laws and regulations, we believe that the comment contained in DFS' Revised Regulatory Impact Statement at:
Point 4. Costs: "The Department believes the vast majority of these businesses (meaning providers) already have the experience, resources and systems to comply with these requirements" and at
Point 6. Paperwork: "It is not anticipated that providers will need additional professional services other than those used in the normal course of their business to comply with the new required disclosures" are not credible.

We believe that the cost of compliance will be material and will involve recurring expenses given the multi-jurisdictional reach of the Proposed Revised Regulations. It is also our view that, having experienced the process in California, providers in New York will need professional assistance in both understanding the specifics of the CFDL and the Proposed Revised Regulations, as well as in calculating the Finance Charge and APR in accordance with Appendix J. These compliance-related expenses will inevitably be passed on to the recipients, resulting in higher financing costs for small businesses.

We would welcome the opportunity to share with DFS what we have learned from our California experience in order to demonstrate our concerns about the challenges associated with arriving at an accurate APR calculation.

In substance, we submit that not only will it be extremely difficult for our members to accurately comply with the calculation of APR as set forth in the CFDL and the Revised Proposed Regulations given the vagueness of applying TILA to commercial lending transactions, it will be equally as difficult, for the same reasons, for the DFS to enforce the CFDL and the Revised Proposed Regulations in a fair and transparent way.

It is therefore suggested that DFS, while maintaining the APR methodology, provide greater definition with regard to the components of the Finance Charge and the calculation of APR by creating a series of detailed examples that demonstrate the APR calculation for each of the four types of commercial financing provided for under the CFDL and the Proposed Revised Regulations.

Disclosures Requirements For Out of State Recipients

Proposed Section 600.24 (a)(2) of the Proposed Revised Regulations should be considered for deletion as it is fundamentally unfair to New York based providers.

While we echo the position of various of the other commenters that this provision appears to extend beyond the reach of the enabling legislation and is violative of the Commerce Clause of the U.S. Constitution, we also wish to highlight how disadvantageous this proposed section is to New York based providers.

The proposed Section would put the New York based provider at an economic disadvantage if the New York based provider proposes financing to an out of state recipient headquartered in a state where there is no legislation requiring an alternative, non-New York based provider, to make such financial disclosures to the proposed recipient. In this situation the New York bases provider must comply with the NY disclosure requirements and provide the out of state recipient with the disclosures contemplated by the CFDL. However, the competing provider who is not NY based does not have to provide this recipient with any disclosures whatsoever. This seems patently unfair to the New York based provider. The unintended consequences of applying the Proposed Revised Regulation to out-of-sate transactions will be the creation of an incentive for New York based providers to move their operations elsewhere, a risk that is non-trivial in the era of working remotely.

Furthermore, proposed Section 600.24 (a)(2) is internally inconsistent with the CFDL. If a New York based provider engages in fewer than five transaction the provider is exempt from the CFDL and its regulations. However, if that same provider makes just one proposal to an out of state recipient, then the CFDL and its regulations are operative. This application seems to us to be inherently unfair and results in totally inconsistent treatment for New York providers.

Safe Harbor

SFNet appreciates that the Proposed Regulations at Sec. 600.04 (1) and (2) Allowed Tolerances provides the asset-based lender or factor with a limited margin of error for inaccurately disclosing the APR being charged by the provider. However, because of the numerous estimates and assumptions that are required to be provided for the APR calculation even the most diligent attempts at calculating the APR could easily result in a margin of error greater than the tolerance level provided by this section.

SFNet also recognizes and appreciates that the Proposed Revised Regulations also provide for a 60-day grace period to correct the provider’s prior disclosures upon discovery by the provider of what is referred to in the Proposed Regulations as an “inadvertent” error, assuming the “inadvertent” error, which term is undefined by the Proposed Revised Regulations, is discovered prior to any action being brought against the provider.

SFNet believes that these saving clauses, while helpful, do not adequately insulate or protect the provider. Therefore, SFNet requests the following changes to the Proposed Revised Regulations:

(1) Include in Section 600.04 (2)(b) a limited safe harbor for providers of commercial financing limited solely to the extent that the calculation of APR is made in good faith. This suggested change to the Proposed Revised Regulations would not be inconsistent with the various "safe harbor" and "good faith" provisions contained TILA in general and Regulation Z in particular.
(2) Provide that the APR calculation disclosed by the provider shall not serve as either a basis for any claim against the provider or evidence of criminal or civil usury.

Thank you for you for the opportunity to provide our comments on the Proposed Revised Regulations. If you have any questions raised by this comment letter, please do not hesitate to contact me.

Respectfully,

Richard D. Gumbrecht
Chief Executive Officer
Secured Finance Network