

January 22, 2019

Department of Business Oversight, Legal Division
ATTN: Mark Dyer, Regulations Coordinator
1515 K Street, Suite 200
Sacramento, CA 95814-4052

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

Dear Mr. Dyer:

This comment is being filed on behalf of the International Factoring Association (“IFA”) and the American Factoring Association (“AFA”).

As a general observation, the Department of Business Oversight (“DBO”) is charged under the provisions of SB 1235 (Chapter 1011, Statutes of 2018) with the responsibility of drafting regulations requiring “provider” of offers of commercial financing to disclose specified information when the provider extends the offer. The IFA and AFA do not concede that factoring constitutes “commercial financing.” Depending on the particular circumstances and the jurisdiction, factoring should not be considered as commercial financing, as has been held by numerous courts. In this regard, the IFA and AFA refer the DBO to the thoughtful discussion of factoring found at pp. 114-115 in *American Factoring Law*. In particular, we refer you to the case authority cited. (*American Factoring Law*, David B. Tatge, David Flaxman & Jeremy B. Tatge, BNA Books, *A Division of BNA*, Arlington, VA, 2009). Nevertheless, we understand that DBO must follow the language found in SB 1235.

The IFA and the AFA would also note that merchant cash advance companies are not factors and should not be treated as such. Factors purchase verified existing invoices/receivables, rather than lending money on potential future sales. Factors look to the account debtors for payment. Merchant cash advance companies, on the other hand, are lenders, and during the debate over SB 1235, it was clear that their activities gave rise to this legislation. Treating them as if they were factors would be inappropriate.

Though, as is noted above, the IFA and AFA object to the treatment of factoring as lending, attached is a proposed format that factors could use to comply with SB 1235. The IFA and AFA believe it is important to have a standard format. Thus, the DBO is encouraged in promulgating regulation to provide a standard format.

This will be useful to factors in complying with California law and also useful to businesses selling accounts receivable to factors as a result of this standardization.

As the Department will know, the Federal Truth-in-Lending Act (“TILA”), covering consumer lending, provides liability for violations of the Act; however, TILA provides two safe harbors, one for the correction of errors and another for unintentional violations which are bona fide errors.

“A creditor or assignee has no liability under this section or sections 1607 of this title or 1611 of this title any failure to comply with any requirement imposed under this part or part E of this subchapter if within sixty days after discovering an error, whether pursuant to a final written examination report or notice issued under Section 1607(e)(1) of this title or through the creditor’s assignee’s own procedures and prior to the institution of an action under this section or the receipt of written notice of the error from the obligor, the creditor or assignee notifies the person concerned of the error and makes whatever adjustments in the appropriate account are necessary to assure that the person will not be required to pay an amount in excess of the charge actually disclosed, or the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower.”

15 U.S.C. § 1640(b).

The safe harbor for unintentional violation in TILA reads as follows:

“A creditor or assignee may not be held liable in any action brought in this section or Section 1635 of this title for violation of this subchapter if the creditor or assignee shows by preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. Examples of a bona fide error include, but are not limited to, clerical, calculation, computer malfunction and programming, and printing errors, except that an error of legal judgment with respect to a person’s obligation under this subchapter is not a bona fide error.”

15 U.S.C. § 1640(c).

We hope the Department will find these comments useful in the drafting of the regulations in question. We would respectfully ask to be invited to any meetings with stakeholders that might be called to discuss the proposed regulations.

As the Department is aware, factors purchase accounts receivable as opposed to extending loans (in many cases, these purchases are made without recourse). As a result, the disclosure forms for factors will by necessity differ from the forms used by those extending credit. It is hoped that the attached proposed disclosure format will be helpful to the Department in crafting appropriate regulations.

Sincerely,



Bert Goldberg
Executive Director
International Factoring Association

Also supported by the following California based IFA members

Stephen Perl	1st PMF Bancorp	Los Angeles
John McLean	Abington Emerson Capital, LLC	Los Angeles
John Cummings	ACS Factors	Upland
Stephen Troy	Aerofund Holdings Inc. dba Aerofund Financial	San Jose
Mark Crittenden	American Financial Center, Inc.	Sherman Oaks
Gary Gilligan	Bank of Internet Federal Bank	San Diego
Dimitri Koroslev	Bay Business Credit	Walnut Creek
Glen Shu	Bay View Funding	Santa Clara
Eyal Lifshitz	BlueVine Capital Inc.	Redwood City
Jennifer Lopez	Camel Financial, Inc.	Tustin
Daniel Jordan	CJ Financing LLC	Rowland Heights
Matt Begley	Continental Business Credit	Sherman Oaks
Tom Neiger	DHN Capital, LLC	Irvine
Tracy Groves	eCapital LLC	Carlsbad
Harold Lee	Fast Pay Partners, LLC	Los Angeles
Tom Novembrino	FCFS, Inc. dba Gateway Trade Funding	Brea
Kee Kim	Finance One, Inc.	Los Angeles
Steven Capper	Flexible Funding	San Francisco
Ken Wengrod	FTC Commercial Corp.	Los Angeles
Robert Curtis	Gateway Acceptance Company	Pleasant Hill
Richard Ellis	GemCap	Malibu
Justin Cha	General Business Credit	Los Angeles
Lorraine Julius	Gerber Finance Inc.	Carlsbad
Jim Miller	Global Trading Partners, Inc.	Solana Beach
Steve Johnson	J D Factors	Palos Verdes
Steve Hedin	Laguna Commercial Capital, LLC	Laguna Beach
Melissa Donald	LDI Growth Partners, LLC	Walnut Creek
Chris Ratigan	Monterey Financial Services, LLC	Oceanside

Nick Bradford	Nash Financial	Visalia
Adam Lomax	Oxygen Funding, LLC	Lake Forest
Neerav Berry	Payplant	Palo Alto
Crystal Han	Pipeline Financial Services	Downey
Jason Severson	Primary Funding Corporation	San Diego
Juan Estrada	Quickpay Funding, LLC	San Diego
Liz Roberts	Resource Business Partners, Inc.	San Jose
Daylenis Aleaga	REV Finance Group, Inc.	Rancho Cucamonga
Jacquelyn Wright	Riviera Finance	Redondo Beach
Denise Messang	United California Discount Corp dba UC Factors	Glendora
Charles Bush	Winston Financial Group	Santa Fe Springs