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October 31, 2022

Superintendent Adrienne Harris
New York State Department of Financial Services
1 Commerce Plaza
Albany, NY 12257

Via Electronic Mail to: George.bogdan@dfs.ny.gov

Re: Comments on Disclosure Requirements for Certain Providers of Commercial Financing Transactions (23 NYCRR 600)

Superintendent Harris,

On behalf of the Electronic Transactions Association ("ETA"), the leading trade association for the payments industry, we appreciate the opportunity to provide the comments below on the Department of Financial Services' ("DFS") proposed regulations regarding commercial financial disclosure.

COMMENTS

1) The ETA requests that the exemption threshold be lowered to $500,000 since commercial customers who apply for larger loans have the practical knowledge and the ability to make good judgments about the commercial financing products they are seeking for their businesses.

2) The proposed regulation requires the disclosure of a monthly estimated payment even if the payment frequency is not monthly. This is confusing to small businesses because they may not understand why there are receiving a disclosure of a hypothetical monthly payment when the contract requires payments of a different frequency. In fact, it may cause small businesses to provide a different payment than is required under the contract. Furthermore, there is no guidance for how providers should calculate this monthly estimate, which means that different providers may disclose different amounts because they are using different methods of calculation. Therefore, additional guidance is required so that recipients are being given disclosures that use the same calculations.

3) Section 600.21(d) states that "A **provider** shall maintain a copy of each disclosure that it **generates** pursuant to this section for a period of at least four years following the date that the disclosure is presented to the recipient or provided to a broker." However, the Title of Section 600.21 is "Duties of financers and brokers" and there is no reference in this Section to "provider" other than in subsection (d). Please confirm whether 600.21(d) is in fact intended to apply to providers rather than financers and/or brokers as the Section heading suggests. If subsection (d) was intended to apply to providers, please confirm that the intent is for providers to maintain a copy only of those disclosures it generates that are **signed** by the recipient, and please also consider including clarifying language in the rule if that is the case.

4) The draft regulation includes a requirement to disclose prepayment fees, but the proposal does not allow for the disclosure of a prepayment discount. ETA members have expressed that with this provision in place, providers would be unable to offer a discount to the finance charge for customers who repay faster than expected because the regulations would prohibit it from being included in the offer summary.

5) The addition of the "Broker Fee Disclosure" as a separate line item in the main disclosures, together with the DFS's Assessment of Public Comments, reflect DFS's intent to require complete disclosure of all broker fees. While addition of the "Brokerage Fee Disclosure" line item is a step in the right

direction, the current regulation still does not disclose all fees where a recipient is paying more fees because of fees being paid to a broker.

a) The proposed regulations provide three options for disclosure of broker's fees: (i) the broker's compensation is being paid by the provider, (ii) the broker's fees are paid by the recipient and are disclosed in the Itemization of Amount Financed; or (iii) the broker is not being compensated. In certain commercial financing transactions, brokers are paid through an increase to the finance charge that the broker negotiates, however, the proposed regulations do not appear to have an option for this. ETA requests clarification as to how broker's fees under this arrangement should be disclosed.

b) In its Assessment of Public Comments, DFS noted that in some instances broker compensation may be impossible to correctly calculate for each transaction, given its dependance on other variables that are not yet known (such as the volume of broker's monthly or annual transactions), and for that reason declined to require disclosure of all funds paid to brokers in dollar terms. There appears, however, to be a misunderstanding. In instances where a broker fee is paid in connection with a specific transaction, that broker fee can be calculated, and the dollar amount of that fee should be disclosed. Disclosure of such fees is necessary because, although the fees are paid by the provider, the fees are (i) directly tied to a specific transaction, (ii) increase the cost of financing to the recipient, and (iii) as a result, are paid by the recipient, albeit indirectly.

c) In order to provide complete disclosure of all broker fees so that small businesses can fully understand the cost of the financing and its various components, we recommend that DFS clarify that the broker compensation disclosed in the Itemization of Amount Financed should include not just the fees that a merchant pays directly to a broker, but also the fees that a merchant pays indirectly to a broker, through a provider.

d) The proposed regulations require the Offer Summaries to have a row entitled "Broker Fee Disclosure", however, not all commercial financing transactions have a broker. ETA requests that providers be permitted to eliminate this row if no broker is involved or, alternatively, add a fourth option for this disclosure such as "This transaction does not have a broker and no broker's fees are being paid." The DFS should clarify whether disclosure lines must be included when they are zero. Sections 600.10(k), 600.10(l), and 600.10(m) require adding lines in the disclosure chart related to Collateral Requirements, Avoidable Fees and Charges, and Broker Fees, respectively. ETA respectfully requests that the DFS add a line to each of these sections clarifying whether these sections must be included when there is no collateral, no avoidable fees and charges, and/or no broker fees.

6) Section 600.17(a)(3) requires inclusion in the Itemization of Amount Financed of amounts paid to others. We respectfully request the DFS clarify whether this line must be included if it is zero.

7) We ask that the DFS clarify the separateness requirement for the Itemization of Amount Financed. Section 600.17(c)(1) states the Itemization disclosure shall appear as document separate from the Sections 600.6 - 600.16 disclosures. We respectfully request the DFS clarify this separateness requirement in the electronic context by changing the wording to "separate document" and referring this section to Section 600.5(e.) for reference. For example, changing the line to read: *"(1) shall appear as a separate document from the disclosures required by sections 600.6 through 600.16 of this Part, in accordance with §600.5(e)."*

8) The latest draft of proposed regulations changed the requirement from collecting a minimum of one month to a minimum of four months of bank statements. We request that the regulations be amended to require a minimum of three months because, among other reasons, this is the industry standard.

9) The proposed regulations expand the applicability of the CFDL to all businesses, inside and outside of New York, if the provider is "principally directed or managed from New York or negotiated the commercial financing from a location in New York." Although New York has an interest in protecting its businesses, we believe the regulation is overreaching because it attempts to assert control over the citizens of other states. The regulators of every state should have the option and ability to decide whether and how to pass laws impacting their own citizens. The carve-out in the regulation for a potential conflict of laws does not fix the problem because again, each state has the power to determine whether and how to pass regulations that impact its citizens. Simply because a state has not passed legislation on this issue does not give New York the right to expand its authority to those states. In fact, this could be considered a violation of the Dormant Commerce Clause, which prohibits one state passing legislation to interfere with interstate commerce.

    a) If, however, the DFS will not limit the applicability of the CFDL as proposed, we ask for DFS to clarify when a provider would be deemed to be "principally directed or managed from New York." For example, would a provider with offices in multiple states (including New York) and employees working remotely in multiple states fall within this definition? What is a sufficient nexus to New York to fall within this definition? Are there certain types or numbers or seniority of employees that would cause a provider to fall within this definition?

10) Section 600.5(b) requires the inclusion of signature language below the disclosures which include the words "by signing below." Section 600.5(j) and Section 600.18(a) allows for electronic signature, which is commonly captured via a check box or button. In an online commercial financing experience, since the electronic signature will commonly be captured by a checkbox that may appear to the left of the language, we ask that the DFS consider adding flexibility to the signature placement language in Section 600.5(b). For example, by adding a line, "In the case of electronically transmitted disclosures, this signature language may be placed below the attachment or link to the disclosures and shall direct the recipient to the space for signature."

We appreciate you taking the time to consider these important issues. If you have any questions or wish to discuss any aspect of our comments, please contact me or ETA Senior Vice President of Government Affairs Scott Talbott at Stalbott@electran.org.

Respectfully Submitted,

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