EQUIPMENT LEASING AND FINANCE ASSOCIATION
1625 Eye Street NW
Suite 850
Washington, DC 20006
P 202.238.3400
F 202.238.3401
www.elfaonline.org

October 27, 2022

Adrienne A. Harris
Superintendent of Financial Services

STATE OF NEW YORK
DEPARTMENT OF FINANCIAL SERVICES
NEW YORK FINANCIAL SERVICES LAW ARTICLE 8 – COMMERCIAL FINANCING

Equipment Leasing and Finance Association Comments for Proposed Regulations

Scott Riehl
Vice President, State Government Relations
Equipment Leasing and Finance Association

Dear Superintendent Harris:

I want to thank you for the wonderful opportunity your team has presented me/ELFA to discuss our views and limited concerns related to the enacted enhanced disclosure requirements and your department's development of rules to implement. On behalf of the Equipment Leasing and Finance Association ("ELFA"), please find below our second round of comments, which we hope you will find useful in developing final regulations with respect to that law. Once again, we really appreciate the opportunity to provide comments to the Department of Financial Services (the "Department") concerning this law and look forward to a productive dialogue on matters that we believe will add clarity, result in better disclosures to equipment leasing and finance customers and facilitate more uniform disclosures across the equipment finance and leasing industry.

Who We Are

We are the Equipment Leasing and Finance Association (ELFA). This New York flyer highlights the significant economic impact of our industry, which finances leases of commercial equipment to businesses, cities, and municipalities in New York and why the final rules will be important to continued growth in the commercial sector in New York which continues to be ranked only behind California in the amount of equipment financed. As the flyer indicates, last year alone New York

business received financing of more than $85 billion for capital equipment. A $20 billion increase since 2018. The importance of the final rules, we believe, will be critical to the continued growth in the New York commercial sector.

Equipment Lease Finance Should Continue to be Protected

California, in being the first state to enact these disclosure protections, did so understanding the need to protect Equipment Lease transactions. For reference and historical context, please view CA Senator Glazer Explains Need to Exempt Equipment Financing. We greatly appreciate the Department's willingness to review our second round of comments and hope you find these comments helpful. Please know we stand ready to answer any and all questions you may have.

Our Comments

****

Applicability of the CFDL

While we appreciate the Department addressing multiple commenters' request to include a jurisdictional nexus, we believe the nexus should be limited to a recipient whose business is principally managed or directed from New York, or, in the case of a natural person, is a legal resident of the state of New York. We believe this is consistent with the Department's recent Regulatory Impact Statement for the Revised Proposed Amendment to 23 NYCRR Part 600 ("SAPA"), where in citing the needs and benefits of the amended regulations, it was noted that small businesses make up 99.8% of all New York businesses, which we believe are the intended beneficiaries of the New York commercial finance disclosure law ("CFDL").

An expansive scope that includes variables based on the provider's headquarters location or whether the provider "negotiated" the commercial financing from a location in New York introduces additional operational complexity into a provider's implementation of these already complex regulations. For example, a commercial lender who prepares financing documents out of state would now need to check with New York colleagues to determine whether negotiation for the subject transaction occurred in a New York location. It is also unclear what constitutes negotiation from a location in New York. For example, would it include an inquiry with a credit officer in New York on one particular document provision or use of a New York-based professional advisor to provide advice or assistance in structuring or documenting a transaction such as a New York lawyer, accountant or appraiser? If this negotiation criteria is included in the nexus provisions, commercial lenders will be required to make additional inquiries and subjective determinations regarding the location of negotiations on every transaction which will slow down the financing process and add costs that lenders will likely pass on to customers. This criteria will also disincentivize commercial lenders from locating employees in New York, establishing New York offices, or using New-York based professional advisors.

A nexus that is based on a commercial lender's New York headquarters is equally problematic. A transaction that is credit approved, documented and funded outside of New York with a non-New York customer should not be subject to disclosure requirements simply because the lender is

principally managed and directed out of New York based on its executive leadership team being located in New York.

Further, the CFDL and regulations impose significant new reporting burdens on providers, most notably the annual reporting to the superintendent required under Section 600.22. The expansive applicability requirements will substantially increase compliance costs and administrative overhead not only for providers, but also for the superintendent who would now receive reporting and process mass quantities of data wholly unrelated to commercial financing transactions with New York recipients.

With respect to the conflicts of law provision, this is only necessary because of the overreach of the newly proposed applicability provisions and it will do nothing to resolve conflicts if another state has a similarly broad applicability standard and a provider is doing business with a recipient in a state that does not have a CFDL. For example if a provider falls within the applicability requirements of states A and B but is making a specific offer to a recipient in state C which does not have commercial finance disclosure laws, does the provider provide the disclosures required by state A or state B? We believe that this is a primary reason that there are jurisdictional limits to the exercise by states of control over citizens of another state.

As the Department noted in its latest Assessment of Public Comments, consistency with the comparable California regulations may not be possible in all respects. However, on this particular issue, we see no reason preventing the Department from following the same jurisdictional nexus adopted by the California Department of Financial Protection & Innovation (DFPI), applicability based solely on the recipient's headquarters or residence. Appreciating that the Department cannot anticipate future revisions the DFPI might make in the future, we see no reason to adopt an approach at the outset that differs from California on this issue.

Broker Fee Disclosure

The required disclosures for each commercial financing product type now require an additional "Broker Fee Disclosure", with one of three alternative sentences. We have several concerns with this new requirement, particularly the listed alternatives that providers must include on the disclosure form.

1. The alternatives fail to account for transactions where a broker may receive compensation from both the provider and from the recipient (customer). As drafted, the provider is instructed to include only one of the three alternative sentences, which will not accurately reflect all broker compensation arrangements.
2. The required statement for broker compensation being paid by the provider assumes that only transaction size and profitability dictate the compensation amount, and do not account for other alternatives such as fixed fee arrangements. The criteria for compensating the broker when the compensation is paid by the provider should be irrelevant as it does nothing to help the recipient understand the cost of the financing.
3. The required statement for broker compensation being paid by the recipient (customer) incorrectly assumes that all broker payments are part of the amount financed – a fee that is invoiced to the recipient and not due at the time of closing would not be part of the amount financed. It would be a finance charge that is already disclosed on the product specific disclosure form but would not be included on the Itemization of Amount Financed.

4. The additional disclosures will create unnecessary confusion for customers who may not understand that there is a broker involved in the transaction based solely on the regulations' expansive definition of broker. For example, an equipment supplier or retailer who does nothing more than interface with a lender in regards to the customer's credit application and transaction documents would likely be a broker under the regulations, but not a party that the customer would ever consider to be a broker. Assuming that the broker compensation is part of the amount financed, does the Department anticipate that the Itemization of Amount Financed identify the supplier as a broker? Does the Department anticipate that the amount paid to a supplier in satisfaction of the customer's payment obligation to the supplier for the constitute broker compensation?
5. The party paying the broker compensation and the amount of such compensation provide no value to the customer from a disclosure perspective, when the items already disclosed, such as amount financed, APR, finance charges, total payments, etc. provide more than sufficient information for the customer to make an informed decision on whether to proceed.

We would suggest that the Department remove the new Broker Fee Disclosure requirements. If the Department believes that such additional disclosure is necessary, we would suggest that the alternative sentences listed in each product type disclosure be revised as follows:

(i) Broker compensation is being paid by the provider.
(ii) Broker compensation is being paid by you.
(iii) Broker compensation is being paid by you and the provider.
(iv) The broker is not being compensated.

We would further suggest that the Department revise the definition of broker to exclude dealers, manufacturers, and distributors ("Suppliers") whose primary role is providing the customer with the equipment or other goods that the customer is financing, even if such parties secondarily serve any of the roles referenced in the broker definition. We believe that treating such Suppliers as brokers adds no value to the disclosure form and instead will likely create customer confusion.

Notice of Transfer of Servicing

The new section 600.23 appears entirely inconsistent with the purpose of the CFDL, which was to require "certain providers that extend specific terms of commercial financing to a recipient to disclose certain information about the offer to a recipient. The Department's recent SAPA noted that "[t]he Legislature considered it vital that business owners are afforded as much transparency as possible on how a commercial financing product will impact their business. The comprehensive disclosures required by FSL Article 8 provide business owners with necessary information to make an informed, financially responsible decision. Standardized disclosures will also allow borrowers to compare the pricing and costs of a commercial financing among several providers." The notice required by section 600.23 has no relationship to the legislative intent with respect to the CFDL.

Requiring such a notice 15 days prior to the effective date of the servicing transfer is unnecessary and will operate as an unreasonable restriction on the assignability of commercial transactions. As a practical matter, a commercial lender that wants a customer to make payment to a new address will provide a notice with new payment instructions, but such a notice should only be required after the change is effective. A 15-day advance notice requirement would not allow equipment Suppliers to provide financing directly to their customers and simultaneously assign such financing transactions to a third-party financing source that also acts as servicer, eliminating an important source of financing

for commercial customers and an important source of liquidity for Suppliers. Many Suppliers have no ability to service financing transactions with their customers and they may not know which third party financing source will be the assignee for a given transaction 15 days in advance, making it impossible to comply with a 15-day advance notice requirement.

We would suggest that this new section be removed and instead addressed as part of the legislative process. While we respectively disagree with the Department's statement that 600.23 is "reasonably related to the purpose of the [CFDL] and [the regulations]," if the Department believes that this section is necessary to include in these regulations, then in lieu of mandating a servicing transfer notice before the effective date of transfer, we would instead suggest customer protections similar to those provided by 9-406 of the UCC, making clear that a recipient under a commercial financing transaction has a right to pay the current provider or servicer and can satisfy its obligations under the transaction until such time as the recipient receives a servicing transfer notice directing the recipient to pay a different party. This is a less restrictive but equally effective method of addressing whatever concerns the Department identified that led to the addition of this new section.

Disclosure for Lease Financing

In Section 600.14(c)(3), the Department deleted "and the anticipated cost for you to acquire the property at the end of the term" from the required text following the Annual Percentage Rate. We believe that the deletion makes the disclosure inaccurate, as the end of term purchase option price would not be a periodic payment under 600.1(z) (it is not a scheduled payment to be made at regular intervals), but is a finance charge under section 600.2(a)(4) and would therefore be included in the APR calculation required by section 600.3(c). We would recommend that the deleted text be reinserted.

Exemption for Operating Bank Subsidiaries

We recognize that the Department was unwilling to make a blanket exemption for all "subsidiaries of federally-chartered banks or foreign banks" to the disclosure requirements of Part 600; however, the proposed regulations should be modified to exempt bank operating subsidiaries that are authorized to engage in activities in the State of New York and are subject to oversight and/or compliance requirements from the Department or other regulatory authority based upon their close association with an exempt bank. Sections 201 and 811 of Financial Services Law authorize the Department to establish regulations and more explicitly define terms as may be necessary and appropriate to interpret and implement provisions of Article 8, which necessarily includes providing for appropriate exemptions that are consistent with Article 8 even if not explicitly provided for in the statute. The proposed regulations, without such exemption, would place certain banks (which are otherwise exempt from Article 8) at a competitive disadvantage solely because of the use of a common legal structure. In this regard, many banks conduct portions of their business through and in conjunction with operating subsidiaries in an effort to, among other things, promote and enhance safe and compliant operations at the bank level by limiting exposure to potential liabilities associated with commercial financing activities. The bank operating subsidiaries are often subject to oversight/review from various regulatory agencies, including the Department, and are included in compliance reporting by the bank. These entities include operating subsidiaries of New York State chartered banks, which are well known to the Department and are required to notify the Department prior to engaging in any activity within New York. Should the bank exemption not be extended to include bank operating subsidiaries, the proposed regulations will impose undue risks and burdens on the commercial lending operations of those banks that utilize such legal structures, while

providing no offsetting benefit to recipients. Extending the bank exemption to these operating entities is entirely consistent with Article 8 and certainly within the regulatory authority of the Department.

Note Regarding Captive Finance Company Transactions

We wish to note the following in regard to non-bank, captive finance companies* ("Captives"). The CFDL requirements are expected to result in complexities and costs that will prevent Captives from offering as wide an array of financial products and services as they might otherwise offer in the State of New York, many of which permit the delivery of relief or address challenges faced by an industry segment or an individual borrower (the recent Covid relief and inclement weather programs offered by Captives come to mind). Given that online digital closing tools are commonly used by Captives, offers by Captives of services or add on products made at the virtual closing table will be much more limited as a result of the CDFL, since the required disclosures cannot be adjusted once they are in flight to a customer for signature. The result will likely be less financing of services offered after the initial equipment sale for customers in New York. This raises the question of whether increased regulation of the captive finance business yields a commensurate reward for New York borrowers. The fact that Captives are focused on long-term relationships with borrowers and maintaining a customer's commitment to the Captive's brand means that the CFDL regulations do not contribute in a meaningful way to keeping the commercial borrower/customer of a Captive safer than if Captives were exempted from the CDFL. For these reasons, it is hoped that the State of New York will reconsider its position with regard to Captives and the CFDL requirements.

*Persons that offer financing in connection with the sale of products or services that such person manufactures, licenses or distributes, or whose parent or ultimate parent company or any of its directly or indirectly owned subsidiaries manufactures, licenses or distributes.