Dear Governor Cuomo:

Thank you for the opportunity to provide comments on Assembly Bill 10118-A/Senate Bill 5470-B, a bill passed by the legislature that requires prescriptive new disclosures in small business financing, which has been transmitted to your office and is awaiting executive action. PayPal believes in and supports the bill’s objective of providing transparency and meaningful disclosures. However, there are, respectfully, several key areas of concern with the legislation, including a lack of Truth in Lending Act (TILA)/Regulation Z type tolerances, an extremely short effective date window, and the potential inclusion of unusually restrictive fee caps in a possible chapter amendment.

As background, PayPal is a leading online payments company, empowering more than 360 million consumers and merchants in more than 200 markets to join and thrive in the global economy. PayPal is also a servicer, through an arrangement with WebBank, an FDIC insured state-chartered bank, for three small business lending products: PayPal Working Capital (PPWC), PayPal Business Loan (PPBL), and LoanBuilder, A PayPal Service (LB). In 2019 alone, these three products provided over $345 million in financing to more than 7,700 New York small businesses. Additionally, PayPal, in conjunction with WebBank, participated in the SBA’s Paycheck Protection Program (PPP), nationally facilitating $2.1 billion in loans for approximately 76,000 small businesses, and in New York specifically, more than 7,000 loans, equating to approximately $199 million, with an average loan size of $27,800.

These business financing products serviced by PayPal are unique and transparent products that provide fast, flexible, and fair access to credit for small businesses that otherwise may not receive funding. PPWC is primarily based on a business’ PayPal account history and is structured to be repaid through a chosen percentage of the business’ PayPal sales, with a minimum payment required every 90 days. The PPWC application and funding can take just minutes. PPBL and LB are short, fixed-term loans, ranging from 13-52 weeks, with fixed weekly payments. For PPBL and LB, small businesses will typically receive funding within 24-48 hours of approval. The cost for these loan products is structured as a single, fixed fee that the borrower knows in advance, without any periodic interest charges, late fees, or prepayment fees.

Inclusion of Regulation Z Tolerances

Although the legislation draws on concepts from the Truth in Lending Act (TILA) and Regulation Z, the legislation does not incorporate three key concepts related to disclosure accuracy that are found in TILA and Regulation Z.
First, Regulation Z provides that certain numerical disclosures that are not precisely accurate do not violate the law unless they are inaccurate by more than a specified amount (e.g., by more than 0.125 or 0.25 for an APR disclosure and by more than $5 or $10 for a finance charge).\(^1\)

Second, TILA provides that a creditor that has made an inaccurate disclosure may “cure” any violation resulting from such disclosure if, within 60 days of discovery and before any action is instituted against the creditor for such violation, the creditor notifies the consumer of the inaccuracy and makes any correction necessary to assure that the consumer will not be required to pay an amount in excess of the charge actually disclosed.\(^2\)

Third, TILA provides for no liability if a creditor can show that a violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.\(^3\)

If these long-standing concepts are reasonable as applied to consumer transactions, they are even more so as applied to commercial transactions. Additionally, the tolerance ranges under Regulation Z were adopted for consumer loans, which are generally smaller than business loans. As such, we believe the bill should include more liberal tolerances and we have provided suggested statutory language below:

**Suggested Bill Language:**

**Add an “Errors” Section:**

**Errors. The following provisions apply to the disclosures made under this article.**

(a) A provider has no liability under this article for any failure to comply with any requirement imposed under this article, if within sixty days after discovering an error, whether pursuant to a final written examination report or notice by the superintendent, or through the provider’s own procedures, and prior to the receipt of a written notice of the error from the recipient, the provider notifies the receipt of the error and makes whatever adjustments in the appropriate account are necessary to assure that the recipient will not be required to pay an amount in excess of the amounts actually disclosed.

(b) A provider may not be held liable for a violation of this article if the provider shows by a 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 programing, and printing errors, except that an error of legal judgment with respect to a person’s obligations under this subchapter is not a bona fide error.

(c) An error in disclosure of the annual percentage rate or finance charge shall not, in itself, be considered a violation of this part if: (i) The error resulted from a corresponding error in a calculation tool used in good faith by the provider; and (ii) Upon discovery of the error, the provider promptly corrects that tool or discontinues use of that calculation tool for disclosure purposes and notifies the superintendent in writing of the error in the calculation tool.

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\(^1\) See 12 C.F.R. § 1026.22(a)(2)-(3) (setting forth APR tolerances for regular and irregular transactions, respectively); 12 C.F.R. § 1026.18(d)(2) (establishing finance charge tolerances for non-mortgage consumer transactions equal to $5 where amount financed of $1,000 or less and $10 for transactions involving an amount financed of more than $1,000).


\(^3\) See 15 U.S.C. § 1640(c) (“Examples of a bona fide error include, but are not limited to, clerical, calculation, computer malfunction and programing, and printing errors....”).
Add to “Finance Charge” definition:
The amount disclosed as the finance charge shall be treated as accurate if, in a transaction involving an
amount financed of $1,000 or less, it is not more than $5 above or below the amount required to be
disclosed; or, in a transaction involving an amount financed of more than $1,000, it is not more than $10
above or below the amount required to be disclosed.

At the end of the references to “APR,” add:
As a general rule, the annual percentage rate shall be considered accurate if it is not more than 1/2 of 1
percentage point above or below the annual percentage rate determined in accordance with this section.

Effective Date / Implementation Timeline

The legislation’s current effective date of 180 days from signature is extremely problematic. The short timeframe
does not seem adequate to allow for the regulatory comment and approval process, as required by the bill, and to
allow providers sufficient time thereafter to make the complex systemic and operational changes required for
compliance with new regulations and disclosures of this complex and de novo nature. We would recommend
lengthening the effective date in a chapter amendment to a minimum of 12 months from signature.

Fee Caps in Potential Chapter Amendment

We understand discussions are ongoing regarding a potential chapter amendment for introduction during the 2021
legislative session. Portions of the chapter amendment may include limitations on “late fees” and “insufficient funds
fees.” As you consider including the placement of caps or prohibitions on late or insufficient fund fees, we ask that
you consider maintaining consistency with existing New York statutes regarding the limits on these fees. Restricting
late or insufficient fund fees to as little as $5 or $10 is disproportionately low in the case of commercial loans and far
below current industry standards, let alone the corresponding fees permitted in the context of consumer credit. To
provide some background, below are several examples of how existing New York statutes treat late fees, and
nonsufficient fund fees.

Examples of Fee Limitations in Existing New York Statutes:
Retail installment contract/obligation (which excludes commercial goods/services) allows for late fee
based on an agreed upon rate.
“A contract or obligation may provide for the payment by the buyer of a delinquency and collection
charge on each instalment in default for a period of not less than ten days in an amount not in excess of the
rate provided for in the contract or obligation on such instalment provided that only one such delinquency
and collection charge may be collected on any such instalment regardless of the period during which it
remains in default.” (N.Y. Pers. Prop. Law § 402(6)).

Under the NY Lenders License statute, which applies to consumer loans $25k or less and business loans of
$50k or less, for pre-computed, closed-end installment loan, a lender can impose a default charge of up to
5% of the installment in default.
“In the event of default of more than ten days in the payment of any scheduled installment, the licensee may
charge and collect a default charge not exceeding five percent of the installment in default. This charge may
not be collected more than once for the same default and may be collected at the time of such default or at
any time thereafter.” (N.Y. Banking Law § 351(5)(b)(i)).

Article 5 of General Obligations laws, “Certain Prohibited Contracts and Provisions of Contracts” allows for
a $20 NSF fee in consumer and non-consumer transactions.
“Notwithstanding the provisions of any law: . . . The holder of a dishonored check given in payment for a consumer transaction or an account may collect from, charge, or add to the outstanding balance of the account of, the person from whom such check was received or to whom such credit was extended, a dishonored check charge of not more than the lesser of the amount agreed upon, if contracted for, or twenty dollars.” . . . “Notwithstanding any other provision of law, any person to whom a check, draft or like instrument, other than a money order, bank cashier's check or certified check, is tendered for any transaction, other than a consumer transaction, may, if such instrument is dishonored charge or collect from the maker or drawer the amount of twenty dollars for the return of such unpaid or dishonored instrument.” (N.Y. Gen. Oblig. Law § 5-328).

In conclusion, PayPal provides innovative solutions with a goal of democratizing financial services and helping small businesses grow. An overly complex and restrictive regulatory framework can further limit access to capital to small businesses, which can be especially detrimental during a difficult economic climate. Access to capital is essential for many small businesses to thrive and support many families. We urge you to consider the issues identified above as deliberations on final enactment and chapter amendments to the legislation continue. This measure will greatly impact small businesses and the small business lending industry in New York.

Thank you for considering PayPal’s comments on AB 10118-A/SB 5470-B. We would be happy to continue a dialogue on the legislation and subsequent chapter amendments and answer any questions you may have.

Sincerely,

Bernardo Martinez
Vice President, Global Merchant Lending

CC: Craig Herskowitz, Assistant Counsel to the Governor
Niall O’Hegerty, Deputy Secretary of Financial Services & Taxation