

# STATE OF NEW YORK

10118--A

## IN ASSEMBLY

March 12, 2020

Introduced by M. of A. ZEBROWSKI, MOSLEY, STERN, GALEF, D'URSO, GRIFFIN, JAFFEE, THIELE, GOTTFRIED, COLTON, SEAWRIGHT, SIMON, O'DONNELL, McMAY, HON, ENGLEBRIGHT, CAHILL, BRONSON, OTIS, BUTTENSCHON, McDONALD, FAHY, DICKENS, DARLING, ORTIZ, LIFTON -- read once and referred to the Committee on Banks -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the financial services law, in relation to requiring certain providers that extend specific terms of commercial financing to a recipient to disclose certain information about the offer to the recipient

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. The financial services law is amended by adding a new article 8 to read as follows:

2  
3 ARTICLE 8  
4 COMMERCIAL FINANCING

5 Section 801. Definitions.

6 802. Exemptions.

7 803. Sales-based financing disclosure requirements.

8 804. Closed-end commercial financing disclosure requirements.

9 805. Open-end commercial financing disclosure requirements.

10 806. Factoring transaction disclosure requirements.

11 807. Other forms of financing disclosure requirements.

12 808. Disclosure requirements for renewal financing.

13 809. Required signature.

14 810. Additional information.

15 811. Rules and regulations.

16 812. Penalties.

17 § 801. Definitions. For the purposes of this article:

18 (a) "Factoring transaction" means an accounts receivable purchase  
19 transaction that includes an agreement to purchase, transfer, or sell a  
20 legally enforceable claim for payment held by a recipient for goods the  
21 recipient has supplied or services the recipient has rendered that have  
22 been ordered but for which payment has not yet been made.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD15642-05-0

1 (b) "Commercial financing" means open-end financing, closed-end  
2 financing, sales-based financing, factoring transaction, or other form  
3 of financing, the proceeds of which the recipient does not intend to use  
4 primarily for personal, family or household purposes. For purposes of  
5 determining whether a financing is a commercial financing, the provider  
6 may rely on any statement of intended purposes by the recipient. The  
7 statement may be a separate statement signed by the recipient; may be  
8 contained in the financing application, financing agreement, or other  
9 document signed or consented to by the recipient; or may be provided  
10 orally by the recipient so long as it is documented in the recipient's  
11 application file by the provider. Electronic signatures and consents are  
12 valid for purposes of the foregoing sentence. The provider shall not be  
13 required to ascertain that the proceeds of a commercial financing are  
14 used in accordance with the recipient's statement of intended purposes.

15 (c) "Open-end financing" means an agreement for one or more extensions  
16 of open-end credit, secured or unsecured, the proceeds of which the  
17 recipient does not intend to use primarily for personal, family or  
18 household purposes. "Open-end financing" includes credit extended by a  
19 provider under a plan in which: (i) the provider reasonably contemplates  
20 repeated transactions; (ii) the provider may impose a finance charge  
21 from time to time on an outstanding unpaid balance; and (iii) the amount  
22 of credit that may be extended to the recipient during the term of the  
23 plan (up to any limit set by the provider) is generally made available  
24 to the extent that any outstanding balance is repaid.

25 (d) "Closed-end financing" means a closed-end extension of credit,  
26 secured or unsecured, including equipment financing that does not meet  
27 the definition of a lease under section 2-A-103 of the uniform commer-  
28 cial code, the proceeds of which the recipient does not intend to use  
29 primarily for personal, family or household purposes. "Closed-end  
30 financing" includes financing with an established principal amount and  
31 duration.

32 (e) "Finance charge" means the cost of financing as a dollar amount.  
33 It includes any charge payable directly or indirectly by the recipient  
34 and imposed directly or indirectly by the provider as an incident to or  
35 a condition of the extension of financing. It includes all charges that  
36 would be included under 12 C.F.R. part 1026.4 as if the transaction were  
37 subject to 12 C.F.R. part 1026.4. In addition, the finance charge shall  
38 include any charges as determined by the superintendent. For the  
39 purposes of an open-end financing, the finance charge shall assume the  
40 maximum amount of credit available to the recipient, in each case, is  
41 drawn and held for the duration of the term or draw period. For the  
42 purposes of a factoring transaction, the finance charge includes the  
43 discount taken on the face value of the accounts receivable.

44 (f) "Financial institution" means any of the following: (i) a bank,  
45 trust company, or industrial loan company doing business under the  
46 authority of, or in accordance with, a license, certificate or charter  
47 issued by the United States, this state or any other state, district,  
48 territory, or commonwealth of the United States that is authorized to  
49 transact business in this state; (ii) a federally chartered savings and  
50 loan association, federal savings bank or federal credit union that is  
51 authorized to transact business in this state; or (iii) a savings and  
52 loan association, savings bank or credit union organized under the laws  
53 of this or any other state that is authorized to transact business in  
54 this state.

55 (g) "Person" means an individual, corporation, partnership, limited  
56 liability company, joint venture, association, joint stock company,

1 trust or unincorporated organization including, but not limited to, a  
2 sole proprietorship.

3 (h) "Provider" means a person who extends a specific offer of commer-  
4 cial financing to a recipient. Unless otherwise exempt, "provider" also  
5 includes a person who solicits and presents specific offers of commer-  
6 cial financing on behalf of a third party. For the avoidance of doubt,  
7 the extension of a specific offer or provision of disclosures for a  
8 commercial financing, in and of itself, shall not be construed to mean  
9 that a provider is originating, making, funding or providing commercial  
10 financing.

11 (i) "Recipient" means a person who applies for commercial financing  
12 and is made a specific offer of commercial financing by a provider. A  
13 recipient may also be an authorized representative of such person. A  
14 person acting as a broker cannot be a recipient.

15 (j) "Sales-based financing" means a transaction that is repaid by the  
16 recipient to the provider, over time, as a percentage of sales or reven-  
17 ue, in which the payment amount may increase or decrease according to  
18 the volume of sales made or revenue received by the recipient. Sales-  
19 based financing also includes a true-up mechanism where the financing is  
20 repaid as a fixed payment but provides for a reconciliation process that  
21 adjusts the payment to an amount that is a percentage of sales or reven-  
22 ue.

23 (k) "Specific offer" means the specific terms of commercial financing,  
24 including price or amount, that is quoted to a recipient, based on  
25 information obtained from, or about the recipient, which, if accepted by  
26 a recipient, shall be binding on the provider, as applicable, subject to  
27 any specific requirements stated in such terms.

28 § 802. Exemptions. This article shall not apply to, and shall not  
29 place any additional requirements or obligations upon, any of the  
30 following:

31 (a) a financial institution;

32 (b) a person acting in its capacity as a technology services provider,  
33 such as licensing software and providing support services, to an entity  
34 exempt under this section for use as part of the exempt entity's commer-  
35 cial financing program, provided such person has no interest, or  
36 arrangement or agreement to purchase any interest in the commercial  
37 financing extended by the exempt entity in connection with such program;

38 (c) a lender regulated under the federal Farm Credit Act (12 U.S.C.  
39 Sec. 2001 et seq.);

40 (d) a commercial financing transaction secured by real property;

41 (e) a lease as defined in section 2-A-103 of the uniform commercial  
42 code;

43 (f) any person or provider who makes no more than five commercial  
44 financing transactions in this state in a twelve-month period; or

45 (g) an individual commercial financing transaction in an amount over  
46 five hundred thousand dollars.

47 § 803. Sales-based financing disclosure requirements. A provider  
48 subject to this article shall provide the following disclosures to a  
49 recipient at the time of extending a specific offer of sales-based  
50 financing according to formatting prescribed by the superintendent:

51 (a) The total amount of the commercial financing, and the disbursement  
52 amount, if different from the financing amount, after any fees deducted  
53 or withheld at disbursement.

54 (b) The finance charge.

55 (c) The estimated annual percentage rate, using the words annual  
56 percentage rate or the abbreviation "APR", expressed as a yearly rate,

1 inclusive of any fees and finance charges, and calculated in accordance  
2 with the federal Truth in Lending Act, Regulation Z, 12 C.F.R. §  
3 1026.22, based on the estimated term of repayment and the projected  
4 periodic payment amounts. The estimated term of repayment and the  
5 projected periodic payment amounts shall be calculated based on the  
6 projection of the recipient's sales, called the projected sales volume.  
7 The projected sales volume may be calculated using the historical method  
8 or the opt-in method. The provider shall provide notice to the super-  
9 intendent on which method they intend to use across all instances of  
10 sales-based financing offered in calculating estimated annual percentage  
11 rate pursuant to this section.

12 (i) The provider using the historical method shall use an average  
13 historical volume of sales or revenue by which the financing's payment  
14 amounts are based and the estimated annual percentage rate is calcu-  
15 lated. The provider shall fix the historical time period used to calcu-  
16 late the average historical volume and use such period for all disclo-  
17 sure purposes for all sales-based financing products offered. The fixed  
18 historical time period shall either be the preceding time period from  
19 the specific offer or, alternatively, the provider may use average sales  
20 for the same number of months with the highest sales volume within the  
21 past twelve months. The fixed historical time period shall be no less  
22 than one month and not exceed twelve months.

23 (ii) The provider using the opt-in method shall determine the esti-  
24 imated annual percentage rate, the estimated term, and the projected  
25 payments, using a projected sales volume that the provider elects for  
26 each disclosure, provided, that they participate in a review process  
27 prescribed by the superintendent. A provider shall, on an annual basis,  
28 report data to the superintendent of estimated annual percentage rates  
29 disclosed to the recipient and actual retrospective annual percentage  
30 rates of completed transactions. The report shall contain such informa-  
31 tion as the superintendent, by rule or regulation, may prescribe as  
32 necessary or appropriate for the purpose of making a determination of  
33 whether the deviation between the estimated annual percentage rate and  
34 actual retrospective annual percentage rates of completed transactions  
35 was reasonable. The superintendent shall establish the method of report-  
36 ing and may, upon a finding that the use of projected sales volume by  
37 the provider has resulted in an unacceptable deviation between estimated  
38 and actual annual percentage rate, require the provider to use the  
39 historical method. The superintendent may consider unusual and extraor-  
40 ordinary circumstances impacting the provider's deviation between esti-  
41 imated and actual annual percentage rate in the determination of such  
42 finding.

43 (d) The total repayment amount, which is the disbursement amount plus  
44 the finance charge.

45 (e) The estimated term is the period of time required for the periodic  
46 payments, based on the projected sales volume, to equal the total amount  
47 required to be repaid.

48 (f) The payment amounts, based on the projected sales volume:

49 (i) for payment amounts that are fixed, the payment amounts and  
50 frequency (e.g., daily, weekly, monthly), and, if the payment frequency  
51 is other than monthly, the amount of the average projected payments per  
52 month; or

53 (ii) for payment amounts that are variable, a payment schedule or a  
54 description of the method used to calculate the amounts and frequency of  
55 payments, and the amount of the average projected payments per month.

1 (g) A description of all other potential fees and charges not included  
2 in the finance charge, including, but not limited to, draw fees, late  
3 payment fees, and returned payment fees.

4 (h) Were the recipient to elect to pay off or refinance the commercial  
5 financing prior to full repayment, the provider must disclose:

6 (i) whether the recipient would be required to pay any finance charges  
7 other than interest accrued since their last payment. If so, disclosure  
8 of the percentage of any unpaid portion of the finance charge and maxi-  
9 mum dollar amount the recipient could be required to pay; and

10 (ii) whether the recipient would be required to pay any additional  
11 fees not already included in the finance charge.

12 (i) A description of collateral requirements or security interests, if  
13 any.

14 § 804. Closed-end commercial financing disclosure requirements. A  
15 provider, subject to this article, shall provide the following disclo-  
16 sures to a recipient at the time of extending a specific offer for  
17 closed-end financing according to formatting prescribed by the super-  
18 intendent:

19 (a) The total amount of the commercial financing, and the disbursement  
20 amount, if different from the financing amount, after any fees deducted  
21 or withheld at disbursement.

22 (b) The finance charge.

23 (c) The annual percentage rate, using only the words annual percentage  
24 rate or the abbreviation "APR", expressed as a yearly rate, inclusive of  
25 any fees and finance charges that cannot be avoided by a recipient, and  
26 calculated in accordance with the federal Truth in Lending Act, Regu-  
27 lation Z, 12 C.F.R. § 1026.22.

28 (d) The total repayment amount, which is the disbursement amount plus  
29 the finance charge.

30 (e) The term of the financing.

31 (f) The payment amounts:

32 (i) for payment amounts that are fixed, the payment amounts and  
33 frequency (e.g., daily, weekly, monthly), and, if the term is longer  
34 than one month, the average monthly payment amount; or

35 (ii) for payment amounts that are variable, a full payment schedule or  
36 a description of the method used to calculate the amounts and frequency  
37 of payments, and, if the term is longer than one month, the estimated  
38 average monthly payment amount.

39 (g) A description of all other potential fees and charges that can be  
40 avoided by the recipient, including, but not limited to, late payment  
41 fees and returned payment fees.

42 (h) Were the recipient to elect to pay off or refinance the commercial  
43 financing prior to full repayment, the provider must disclose:

44 (i) whether the recipient would be required to pay any finance charges  
45 other than interest accrued since their last payment. If so, disclosure  
46 of the percentage of any unpaid portion of the finance charge and maxi-  
47 mum dollar amount the recipient could be required to pay; and

48 (ii) whether the recipient would be required to pay any additional  
49 fees not already included in the finance charge.

50 (i) A description of collateral requirements or security interests, if  
51 any.

52 § 805. Open-end commercial financing disclosure requirements. A  
53 provider, subject to this article, shall provide the following disclo-  
54 sures to a recipient at the time of extending a specific offer for open-  
55 end financing according to formatting prescribed by the superintendent:

1 (a) The maximum amount of credit available to the recipient (e.g., the  
2 credit line amount), and the amount scheduled to be drawn by the recipi-  
3 ent at the time the offer is extended, if any, less any fees deducted or  
4 withheld at disbursement.

5 (b) The finance charge.

6 (c) The annual percentage rate, using only the words annual percentage  
7 rate or the abbreviation "APR", expressed as a nominal yearly rate,  
8 inclusive of any fees and finance charges that cannot be avoided by a  
9 recipient, and calculated in accordance with the federal Truth in Lend-  
10 ing Act, Regulation Z, 12 C.F.R. § 1026.22 and based on the maximum  
11 amount of credit available to the recipient and the term resulting from  
12 making the minimum required payments term as disclosed.

13 (d) The total repayment amount, which is the draw amount, less any  
14 fees deducted or withheld at disbursement, plus the finance charge. The  
15 total repayment amount shall assume a draw amount equal to the maximum  
16 amount of credit available to the recipient if drawn and held for the  
17 duration of the term or draw period.

18 (e) The term of the plan, if applicable, or the period over which a  
19 draw is amortized.

20 (f) The payment frequency and amounts, based on the assumptions used  
21 in the calculation of the annual percentage rate, including a  
22 description of payment amount requirements such as a minimum payment  
23 amount, and if the payment frequency is other than monthly, the amount  
24 of the average projected payments per month. For payment amounts that  
25 are variable, the provider should include a payment schedule, or a  
26 description of the method used to calculate the amounts and frequency of  
27 payments, and the estimated average monthly payment amount.

28 (g) A description of all other potential fees and charges that can be  
29 avoided by the recipient, including, but not limited to, draw fees, late  
30 payment fees, and returned payment fees.

31 (h) Were the recipient to elect to pay off or refinance the commercial  
32 financing prior to full repayment, the provider must disclose:

33 (i) whether the recipient would be required to pay any finance charges  
34 other than interest accrued since their last payment. If so, disclosure  
35 of the percentage of any unpaid portion of the finance charge and maxi-  
36 mum dollar amount the recipient could be required to pay; and

37 (ii) whether the recipient would be required to pay any additional  
38 fees not already included in the finance charge.

39 (i) A description of collateral requirements or security interests, if  
40 any.

41 § 806. Factoring transaction disclosure requirements. A provider,  
42 subject to this article, shall provide the following disclosures to a  
43 recipient at the time of extending a specific offer for a factoring  
44 transaction according to formatting prescribed by the superintendent:

45 (a) The amount of the receivables purchase price paid to the recipient  
46 and, if different from the purchase price, the amount disbursed to the  
47 recipient after any fees deducted or withheld at disbursement.

48 (b) The finance charge.

49 (c) The estimated annual percentage rate, using that term, calculated  
50 according to the federal Truth in Lending Act, Regulation Z, 12 C.F.R. §  
51 1026 Appendix J, as a "single advance, single payment transaction". To  
52 calculate the estimated annual percentage rate, the purchase amount is  
53 considered the financing amount, the purchase amount minus the finance  
54 charge is considered the payment amount, and the term is established by  
55 the payment due date of the receivables. As an alternate method of  
56 establishing the term, the provider may estimate the term for a factor-

1 ing transaction as the average payment period, its historical data over  
2 a period not to exceed the previous twelve months, concerning payment  
3 invoices paid by the party owing the accounts receivable in question.

4 (d) The total payment amount, which is the purchase amount plus the  
5 finance charge.

6 (e) A description of all other potential fees and charges that can be  
7 avoided by the recipient.

8 (f) A description of the receivables purchased and any additional  
9 collateral requirements or security interests.

10 § 807. Other forms of financing disclosure requirements. The super-  
11 intendent may require disclosure by a provider extending a specific  
12 offer of commercial financing which is not open-end financing, closed-  
13 end financing, sales-based financing, or factoring transaction but  
14 otherwise meets the definition of commercial financing as provided in  
15 this article. Subject to such rules and regulations by the superinten-  
16 dent, a provider subject to this article shall provide the following  
17 disclosures to a recipient at the time of extending a specific offer of  
18 other forms of financing according to formatting prescribed by the  
19 superintendent:

20 (a) The total amount of the commercial financing, and the disbursement  
21 amount, if different from the financing amount, after any fees deducted  
22 or withheld at disbursement.

23 (b) The finance charge.

24 (c) The annual percentage rate, using only the words annual percentage  
25 rate or the abbreviation "APR", expressed as a yearly rate, inclusive of  
26 any fees and finance charges, and calculated in accordance with the  
27 relevant sections of the federal Truth in Lending Act, Regulation Z or  
28 this article.

29 (d) The total repayment amount which is the disbursement amount plus  
30 the finance charge.

31 (e) The term of the financing.

32 (f) The payment amounts:

33 (i) for payment amounts that are fixed, the payment amounts and  
34 frequency (e.g., daily, weekly, monthly), and the average monthly  
35 payment amount; or

36 (ii) for payment amounts that are variable, a payment schedule or a  
37 description of the method used to calculate the amounts and frequency of  
38 payments, and the estimated average monthly payment amount.

39 (g) A description of all other potential fees and charges that can be  
40 avoided by the recipient, including, but not limited to, late payment  
41 fees and returned payment fees.

42 (h) Were the recipient to elect to pay off or refinance the commercial  
43 financing prior to full repayment, the provider must disclose:

44 (i) whether the recipient would be required to pay any finance charges  
45 other than interest accrued since their last payment. If so, disclosure  
46 of the percentage of any unpaid portion of the finance charge and maxi-  
47 mum dollar amount the recipient could be required to pay; and

48 (ii) whether the recipient would be required to pay any additional  
49 fees not already included in the finance charge.

50 (i) A description of collateral requirements or security interests, if  
51 any.

52 § 808. Disclosure requirements for renewal financing. If, as a condi-  
53 tion of obtaining the commercial financing, the provider requires the  
54 recipient to pay off the balance of an existing commercial financing  
55 from the same provider, the provider must disclose:

1 (a) The amount of the new commercial financing that is used to pay off  
2 the portion of the existing commercial financing that consists of  
3 prepayment charges required to be paid and any unpaid interest expense  
4 that was not forgiven at the time of renewal. For financing for which  
5 the total repayment amount is calculated as a fixed amount, the prepay-  
6 ment charge is equal to the original finance charge multiplied by the  
7 amount of the renewal used to pay off existing financing as a percentage  
8 of the total repayment amount, minus any portion of the total repayment  
9 amount forgiven by the provider at the time of prepayment. If the amount  
10 is more than zero, such amount shall be the answer to the following  
11 question:

12 "Does the renewal financing include any amount that is used to pay  
13 unpaid finance charge or fees, also known as double dipping? Yes, {enter  
14 amount}. If the amount is zero, the answer would be No."

15 (b) If the disbursement amount will be reduced to pay down any unpaid  
16 portion of the outstanding balance, the actual dollar amount by which  
17 such disbursement amount will be reduced.

18 § 809. Required signature. The provider shall obtain the recipient's  
19 signature, which may be fulfilled by an electronic signature, on all  
20 disclosures required to be presented to the recipient by this article  
21 before authorizing the recipient to proceed further with the commercial  
22 financing transaction application.

23 § 810. Additional information. Nothing in this article shall prevent a  
24 provider from providing or disclosing additional information on a  
25 commercial financing being offered to a recipient, provided however,  
26 that such additional information shall not be disclosed as part of the  
27 disclosure required by this article. If other metrics of financing cost  
28 are disclosed or used in the application process of a commercial financ-  
29 ing, these metrics shall not be presented as a "rate" if they are not  
30 the annual interest rate or the annual percentage rate. The term "inter-  
31 est", when used to describe a percentage rate, shall only be used to  
32 describe annualized percentage rates, such as the annual interest rate.  
33 When a provider states a rate of finance charge or a financing amount to  
34 a recipient during an application process for commercial financing, the  
35 provider shall also state the rate as an "annual percentage rate", using  
36 that term or the abbreviation "APR".

37 § 811. Rules and regulations. The superintendent is hereby authorized  
38 and empowered to promulgate such rules and regulations as may in the  
39 judgment of the superintendent be consistent with the purposes of this  
40 article, or appropriate for the effective administration of this arti-  
41 cle, including, but not limited to:

42 (a) Such rules and regulations in connection with the calculation or  
43 determination of any metric required to be disclosed to a recipient.

44 (b) Such rules and regulations as necessary to develop and prescribe  
45 disclosure formatting to be used by providers that allows for recipients  
46 to easily compare financing options in a clear and conspicuous manner.  
47 Such rules and regulations shall include the designation and method for  
48 disclosing the information required in this article, or approving  
49 adequate forms and methods already used by providers.

50 (c) Such rules and regulations as may define the terms used in this  
51 article and as may be necessary and appropriate to interpret and imple-  
52 ment the provisions of this article.

53 (d) Such rules and regulations as may be necessary for the enforcement  
54 of this article.

55 § 812. Penalties. (a) Upon a finding by the superintendent that a  
56 provider has violated the provisions of this article or the rules or



1 regulations promulgated hereunder, the provider shall be ordered to pay  
2 to the people of this state a civil penalty for each violation of this  
3 article or any regulation or policy promulgated hereunder a sum not to  
4 exceed two thousand dollars for each violation or where such violation  
5 is willful ten thousand dollars for each violation.

6 (b) In addition to any penalty imposed pursuant to subdivision (a) of  
7 this section, upon a finding by the superintendent that a provider has  
8 knowingly violated this article, the superintendent may order additional  
9 relief, including, but not limited to, a permanent or preliminary  
10 injunction on behalf of any recipient affected by the violation.

11 § 2. This act shall take effect on the one hundred eightieth day after  
12 it shall have become a law.