

STATE OF NEW YORK

10118

IN ASSEMBLY

March 12, 2020

Introduced by M. of A. ZEBROWSKI -- read once and referred to the Committee on Banks

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 7 to read as follows:

ARTICLE 7

COMMERCIAL FINANCING

Section 701. Definitions.

702. Exemptions.

703. Sales-based financing disclosure requirements.

704. Closed-end commercial financing disclosure requirements.

705. Open-end commercial financing disclosure requirements.

706. Accounts receivable transaction disclosure requirements.

707. Other forms of financing disclosure requirements.

708. Disclosure requirements for renewal financing.

709. Required signature.

710. Additional information.

711. Rules and regulations.

712. Penalties.

§ 701. Definitions. For the purposes of this article:

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

24 (b) "Commercial financing" means a commercial line of credit, closed-
25 end credit, sales-based financing, accounts receivable transaction, or
26 other form of financing, the proceeds of which the recipient does not

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

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

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

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

30 (e) "Creditor" means the person to which the financing obligation
31 under a commercial line of credit or closed-end credit is initially
32 owed. For purposes of this article, a creditor may also be a provider.

33 (f) "Financial institution" means any of the following: (i) a bank,
34 trust company, or industrial loan company doing business under the
35 authority of, or in accordance with, a license, certificate or charter
36 issued by the United States, this state or any other state, district,
37 territory, or commonwealth of the United States that is authorized to
38 transact business in this state; (ii) a federally chartered savings and
39 loan association, federal savings bank or federal credit union that is
40 authorized to transact business in this state; or (iii) a savings and
41 loan association, savings bank or credit union organized under the laws
42 of this or any other state that is authorized to transact business in
43 this state.

44 (g) "Person" means an individual, corporation, partnership, limited
45 liability company, joint venture, association, joint stock company,
46 trust or unincorporated organization including, but not limited to, a
47 sole proprietorship.

48 (h) "Provider" means a person who extends a specific offer of commer-
49 cial financing to a recipient. A provider may include a creditor or
50 purchaser. Unless otherwise exempt, "provider" also includes a person
51 that is not a creditor or purchaser but who solicits and presents
52 specific offers of commercial financing on behalf of a third party. For
53 the avoidance of doubt, the extension of a specific offer or provision
54 of disclosures for a commercial financing, in and of itself, shall not
55 be construed to mean that a provider is originating, making, funding or
56 providing commercial financing.

(i) "Purchaser" means the person that initially acquires the right to receive payments on receivables from the seller in an accounts receivable purchase. For purposes of this article, a purchaser may also be a provider.

(j) "Recipient" means a person who is presented an offer of commercial financing by a provider. A recipient may be a borrower or seller or the authorized representative of a buyer or seller.

(k) "Sales-based financing" means a transaction where there is an extension of financing to a recipient that is repaid by the recipient to the provider, over time, as a percentage of sales or revenue, in which the payment amount may increase or decrease according to the volume of sales made or revenue received by the recipient.

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

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

(a) a financial institution;

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

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

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

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

(f) any person or provider who:

(i) makes no more than five commercial financing transactions in this state in a twelve-month period;

(ii) makes commercial financing transactions in this state that are incidental to the business of the person relying upon the exemption; or

(iii) makes specific offers exclusively on behalf of persons described in paragraphs (i) and (ii) of this subsection.

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

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

(b) The total cost of the financing, expressed as a dollar cost, including any and all fees, expenses and charges that are to be paid by the recipient and that cannot be avoided by the recipient.

(c) The estimated annual percentage rate, using the words annual percentage rate or the abbreviation "APR", expressed as a yearly rate, inclusive of any fees and finance charges, and calculated in accordance with the federal Truth in Lending Act, Regulation Z, 12 C.F.R. § 1026.22, based on the estimated term of repayment and the projected periodic payment amounts. The estimated term of repayment and the projected periodic payment amounts shall be calculated based on the

1 projection of the recipient's sales, called the projected sales volume.
2 The projected sales volume may be calculated using the historical method
3 or the opt-in method. The provider shall provide notice to the super-
4 intendent on which method they intend to use in calculating estimated
5 annual percentage rate pursuant to this section.

6 (i) The provider using the historical method shall use an average
7 historical volume of sales or revenue by which the financing's payment
8 amounts are based and the estimated annual percentage rate is calcu-
9 lated. The provider shall fix the historical time period used to calcu-
10 late the average historical volume and use such period for all disclo-
11 sure purposes for all sales-based financing products offered. The
12 average historical volume shall be no less than one month and not exceed
13 twelve months.

14 (ii) The provider using the opt-in method shall determine the esti-
15 imated annual percentage rate, the estimated term, and the projected
16 payments, using a projected sales volume that the provider elects for
17 each disclosure, provided, that they participate in a review process
18 prescribed by the superintendent. A provider shall, on an annual basis,
19 disclose data to the superintendent of estimated annual percentage rates
20 disclosed to the recipient and actual retrospective annual percentage
21 rates of completed transactions. The report shall contain such informa-
22 tion as the superintendent, by rule or regulation, may prescribe as
23 necessary or appropriate for the purpose of making a determination of
24 whether the deviation between the estimated annual percentage rate and
25 actual retrospective annual percentage rates of completed transactions
26 was reasonable. The superintendent shall establish the method of disclo-
27 sure and may, upon a finding that the use of projected sales volume by
28 the provider has resulted in an unacceptable deviation between estimated
29 and actual annual percentage rate, require the provider to use the
30 historical method.

31 (d) The total repayment amount, which is the disbursement amount plus
32 the total cost of the financing.

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

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

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

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

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

47 (h) In the event that a recipient elects to pay off or refinance the
48 commercial financing prior to full repayment, the provider must
49 disclose:

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

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

1 (i) A description of collateral requirements or security interests, if
2 any.

3 § 704. Closed-end commercial financing disclosure requirements. A
4 provider, subject to this article, shall provide the following disclo-
5 sures to a recipient at the time of extending a specific offer for
6 closed-end credit according to formatting prescribed by the superinten-
7 dent:

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

11 (b) The total cost of the financing, expressed as a dollar cost,
12 including any and all fees, expenses and charges that are to be paid by
13 the recipient and that cannot be avoided by the recipient. The total
14 cost of financing shall assume the recipient repays the total repayment
15 amount, according to the original agreed upon payment schedule.

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

21 (d) The total repayment amount, which is the disbursement amount plus
22 the total cost of the financing.

23 (e) The term of the financing.

24 (f) The payment amounts:

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

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

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

35 (h) In the event that a recipient elects to pay off or refinance the
36 commercial financing prior to full repayment, the provider must
37 disclose:

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

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

44 (i) A description of collateral requirements or security interests, if
45 any.

46 § 705. Open-end commercial financing disclosure requirements. A
47 provider, subject to this article, shall provide the following disclo-
48 sures to a recipient at the time of extending a specific offer for a
49 commercial line of credit according to formatting prescribed by the
50 superintendent:

51 (a) The maximum amount of credit available to the recipient (e.g., the
52 credit line amount), and the amount scheduled to be drawn by the reci-
53 ent at the time the offer is extended, if any, less any fees deducted or
54 withheld at disbursement.

55 (b) The total cost of the financing, expressed as a dollar cost,
56 including all required periodic and non-periodic fees and charges that

1 cannot be avoided by the recipient, including any interest expense. The
2 total cost of financing shall assume the maximum amount of credit avail-
3 able to the recipient, in each case, is drawn and held for the duration
4 of the term or draw period.

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

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

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

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

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

30 (h) In the event that a recipient elects to pay off or refinance the
31 commercial financing prior to full repayment, the provider must
32 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 § 706. Accounts receivable transaction disclosure requirements. A
42 provider, subject to this article, shall provide the following disclo-
43 tures to a recipient at the time of extending a specific offer for an
44 accounts receivable transaction according to formatting prescribed by
45 the superintendent:

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

49 (b) The total cost of financing, expressed as a dollar cost, which is
50 the difference between the value of the purchased receivables and the
51 purchase price paid to the recipient.

52 (c) The estimated annual percentage rate, using that term, calculated
53 according to the federal Truth in Lending Act, Regulation Z, 12 C.F.R. §
54 1026 Appendix J, as a "single advance, single payment transaction". To
55 calculate the estimated annual percentage rate, the purchase amount is
56 considered the financing amount, the purchase amount minus the total

1 cost of financing is considered the payment amount, and the term is
2 established by the payment due date of the receivables. As an alternate
3 method of establishing the term, the provider may estimate the term for
4 an account receivable transaction as the average payment period, its
5 historical data over a period not to exceed the previous twelve months,
6 concerning payment invoices paid by the party owing the accounts receiv-
7 able in question.

8 (d) The total repayment amount, which is the purchase amount plus the
9 total cost of the financing.

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

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

14 § 707. Other forms of financing disclosure requirements. The super-
15 intendent may require disclosure by a provider extending a specific
16 offer of commercial financing which is not a commercial line of credit,
17 closed-end credit, sales-based financing, or accounts receivable trans-
18 action but otherwise meets the definition of commercial financing as
19 provided in this article. Subject to such rules and regulations by the
20 superintendent, a provider subject to this article shall provide the
21 following disclosures to a recipient at the time of extending a specific
22 offer of other forms of financing according to formatting prescribed by
23 the superintendent:

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

27 (b) The total cost of the financing, expressed as a dollar cost,
28 including any and all fees, expenses and charges that are to be paid by
29 the recipient and that cannot be avoided by the recipient, including any
30 interest expense. The total cost of financing shall assume the recipient
31 repays the commercial financing in its entirety according to the agreed
32 upon original payment schedule.

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

38 (d) The total repayment amount, which is the disbursement amount plus
39 the total cost of the financing.

40 (e) The term of the financing.

41 (f) The payment amounts:

42 (i) for payment amounts that are fixed, the payment amounts and
43 frequency (e.g., daily, weekly, monthly), and the average monthly
44 payment amount; or

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

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

51 (h) In the event that a recipient elects to pay off or refinance the
52 commercial financing prior to full repayment, the provider must
53 disclose:

54 (i) whether the recipient would be required to pay any finance charges
55 other than interest accrued since their last payment. If so, disclosure

1 of the percentage of any unpaid portion of the finance charge and maxi-
2 mum dollar amount the recipient could be required to pay; and

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

5 (i) A description of collateral requirements or security interests, if
6 any.

7 § 708. Disclosure requirements for renewal financing. If, as a condi-
8 tion of obtaining the commercial financing, the provider requires the
9 recipient to pay off the balance of an existing commercial financing
10 from the same provider, the provider must disclose:

11 (a) The amount of the new commercial financing that is used to pay off
12 the portion of the existing commercial financing that consists of
13 prepayment charges required to be paid and any unpaid interest expense
14 that was not forgiven at the time of renewal. For financing for which
15 the total repayment amount is calculated as a fixed amount, the prepay-
16 ment charge is equal to the original finance charge multiplied by the
17 amount of the renewal used to pay off existing financing as a percentage
18 of the total repayment amount, minus any portion of the total repayment
19 amount forgiven by the provider at the time of prepayment. If the amount
20 is more than zero, such amount shall be the answer to the following
21 question:

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

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

28 § 709. Required signature. The provider shall obtain the recipient's
29 signature, which may be fulfilled by an electronic signature, on all
30 disclosures required to be presented to the recipient by this article
31 before authorizing the recipient to proceed further with the commercial
32 financing transaction application.

33 § 710. Additional information. Nothing in this article shall prevent a
34 provider from providing or disclosing additional information on a
35 commercial financing being offered to a recipient, provided however,
36 that such additional information shall not be disclosed as part of the
37 disclosure required by this article. If other metrics of financing cost
38 are disclosed or used in the application process of a commercial financ-
39 ing, these metrics shall not be presented as a "rate" if they are not
40 the annual interest rate or the annual percentage rate. The term "inter-
41 est", when used to describe a percentage rate, shall only be used to
42 describe annualized percentage rates, such as the annual interest rate.
43 When a provider states a rate of finance charge or a financing amount to
44 a recipient during an application process for commercial financing, the
45 provider shall also state the rate as an "annual percentage rate", using
46 that term or the abbreviation "APR".

47 § 711. Rules and regulations. The superintendent is hereby authorized
48 and empowered to promulgate such rules and regulations as may in the
49 judgment of the superintendent be consistent with the purposes of this
50 article, or appropriate for the effective administration of this arti-
51 cle, including, but not limited to:

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

54 (b) Such rules and regulations as necessary to develop and prescribe
55 disclosure formatting to be used by providers that allows for recipients
56 to easily compare financing options in a clear and conspicuous manner.

1 Such rules and regulations shall include the designation and method for
2 disclosing the information required in this article, or approving
3 adequate forms and methods already used by providers.

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

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

9 § 712. Penalties. (a) Upon a finding by the superintendent that a
10 provider has violated the provisions of this article or the rules or
11 regulations promulgated hereunder, the provider shall be ordered to pay
12 to the people of this state a civil penalty for each violation of this
13 article or any regulation or policy promulgated hereunder a sum not to
14 exceed two thousand dollars for each violation or where such violation
15 is willful ten thousand dollars for each violation.

16 (b) In addition to any penalty imposed pursuant to subsection (a) of
17 this section, upon a finding by the superintendent that a provider has
18 knowingly violated this article, the superintendent may order additional
19 relief, including, but not limited to, a permanent or preliminary
20 injunction on behalf of any recipient affected by the violation.

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