

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, McMAHON, 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:

ARTICLE 8

COMMERCIAL FINANCING

Section 801. Definitions.

802. Exemptions.

803. Sales-based financing disclosure requirements.

804. Closed-end commercial financing disclosure requirements.

805. Open-end commercial financing disclosure requirements.

806. Factoring transaction disclosure requirements.

807. Other forms of financing disclosure requirements.

808. Disclosure requirements for renewal financing.

809. Required signature.

810. Additional information.

811. Rules and regulations.

812. Penalties.

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

(a) "Factoring transaction" means an accounts receivable purchase transaction that includes an agreement to purchase, transfer, or sell a legally enforceable claim for payment held by a recipient for goods the recipient has supplied or services the recipient has rendered that have 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.

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

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

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

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

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

(g) "Person" means an individual, corporation, partnership, limited 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-

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

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

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

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

§ 807. Other forms of financing disclosure requirements. The superintendent may require disclosure by a provider extending a specific offer of commercial financing which is not open-end financing, closed-end financing, sales-based financing, or factoring transaction but otherwise meets the definition of commercial financing as provided in this article. Subject to such rules and regulations by the superintendent, a provider subject to this article shall provide the following disclosures to a recipient at the time of extending a specific offer of other forms of 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 finance charge.

(c) The annual percentage rate, using only 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 relevant sections of the federal Truth in Lending Act, Regulation Z or this article.

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

(e) The term of the financing.

(f) The payment amounts:

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

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

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

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

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

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

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

§ 808. Disclosure requirements for renewal financing. If, as a condition of obtaining the commercial financing, the provider requires the recipient to pay off the balance of an existing commercial financing from the same provider, the provider must disclose:

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

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

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

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

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

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

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

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

(c) Such rules and regulations as may define the terms used in this article and as may be necessary and appropriate to interpret and implement the provisions of this article.

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

§ 812. Penalties. (a) Upon a finding by the superintendent that a 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.