

# STATE OF NEW YORK

5470

2019-2020 Regular Sessions

## IN SENATE

May 1, 2019

Introduced by Sen. THOMAS -- read twice and ordered printed, and when printed to be committed to the Committee on Banks

AN ACT to amend the financial services law, in relation to commercial financing disclosures

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. Purchase and sale disclosure requirements.

##### 704. Closed-end commercial financing disclosure requirements.

##### 705. Open-end commercial financing disclosure requirements.

##### 706. Additional information.

##### 707. Estimates.

##### 708. Penalties.

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

14 (a) "Accounts receivable purchase" means a purchase and sale transaction in which one or more designated accounts are assigned to the purchaser by the seller at a specified discount rate. For purposes of this article, "account" shall have the meaning assigned to that term in paragraph two of subsection (a) of section 9-102 of the Uniform Commercial Code. An accounts receivable purchase includes, but is not limited to, a factoring transaction.

21 (b) "Commercial financing" means an accounts receivable purchase, future receivables purchase, commercial line of credit or commercial loan, 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

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

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

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

20 (d) "Commercial loan" means a closed-end extension of credit, secured  
21 or unsecured, the proceeds of which the recipient does not intend to use  
22 primarily for personal, family or household purposes.

23 (e) "Creditor" means the person to which the financing obligation  
24 under a commercial line of credit or commercial loan is initially owed.  
25 For purposes of this article, a creditor may also be a provider.

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

37 (g) "Future receivables purchase" means a purchase and sale trans-  
38 action in which the purchaser acquires the right to receive all or a  
39 portion of future accounts generated by a seller at a specified discount  
40 rate. For purposes of this article, "account" shall have the meaning  
41 assigned to that term in paragraph two of subsection (a) of section  
42 9-102 of the Uniform Commercial Code. A future receivables purchase  
43 includes, but is not limited to, a merchant cash advance transaction.

44 (h) "Offer" means the specific terms of a commercial financing agree-  
45 ment which, if accepted by a recipient, shall be binding on the creditor  
46 or purchaser, as applicable, subject to any specific requirements stated  
47 in such terms.

48 (i) "Person" means an individual, corporation, partnership, limited  
49 liability company, joint venture, association, joint stock company,  
50 trust or unincorporated organization including, but not limited to, a  
51 sole proprietorship.

52 (j) "Provider" means a person who extends an offer of commercial  
53 financing to a recipient. A provider may include a creditor or purchas-  
54 er. Unless otherwise exempt, "provider" also includes a person that is  
55 not a creditor or purchaser but who solicits and offers commercial  
56 financing on behalf of a third party. For the avoidance of doubt, the

1 extension of an offer or providing disclosures for a commercial financ-  
2 ing, in and of itself, shall not be construed to mean that a provider is  
3 originating, making, funding or providing commercial financing.

4 (k) "Purchaser" means the person that initially acquires the right to  
5 receive payments on current or future receivables from the seller in an  
6 accounts receivable purchase or future receivables purchase transaction.  
7 For purposes of this act, a purchaser may also be a provider.

8 (l) "Recipient" means a person who is presented an offer of commercial  
9 financing by a provider. A recipient may be a borrower or seller (or  
10 its authorized representative).

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

14 (a) a financial institution;

15 (b) a person acting in its capacity as a technology services provider,  
16 such as licensing software and providing support services, to an entity  
17 exempt under this section for use as part of the exempt entity's commer-  
18 cial financing program;

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

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

22 (e) any person who makes no more than one commercial financing trans-  
23 action in this state in a twelve-month period; or any person who makes  
24 commercial financing transactions in this state that are incidental to  
25 the business of the person relying upon the exemption.

26 § 703. Purchase and sale disclosure requirements. A provider subject  
27 to this article shall provide the following disclosures to a recipient  
28 at the time of extending an offer in an accounts receivable purchase or  
29 future receivables purchase transaction:

30 (a) The purchase price;

31 (b) The disbursement amount, after any fees deducted or withheld at  
32 disbursement;

33 (c) The total amount of current or future receivables sold, which is  
34 the disbursement amount plus the total cost of the financing;

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

38 (e) The estimated annual percentage rate:

39 (i) when calculating repayment costs dependent on the recipient's  
40 receivables, whether currently owed or projected, the estimated annual  
41 percentage rate, calculated with all fees and charges included, provided  
42 as a range, with at least three different repayment times provided and a  
43 narrative explanation of how each rate was derived. Any estimated annual  
44 percentage rate provided pursuant to this subparagraph shall be (A)  
45 calculated using the value of purchased accounts receivable or the  
46 projected volume of future receivables based on the recipient's average  
47 historical sales, or the sales projections relied on by the provider in  
48 underwriting; and (B) accompanied by a disclosure stating that the esti-  
49 imated annual percentage rate is intended as a good faith estimate, and  
50 may not be accurate if the recipient repays more quickly or slowly than  
51 the estimated term; or

52 (ii) when calculating repayment costs as a fixed payment, the annual  
53 percentage rate, expressed as a nominal yearly rate, inclusive of any  
54 fees and finance charges, and calculated in accordance with the federal  
55 Truth in Lending Act, Regulation Z, 12 C.F.R. § 1026.22;

1 (f) The factor rate, expressed as a decimal, and the factoring commis-  
2 sion rate, expressed as a percentage of sales or claims, including any  
3 minimum or maximum payment amounts;

4 (g) The term or the estimated term of the financing. An estimated term  
5 provided pursuant to this subsection shall be the term relied on by the  
6 provider in underwriting;

7 (h) The payment amounts:

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

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

14 (i) A description of all other potential fees and charges that can be  
15 avoided by the recipient, including, but not limited to, draw fees, late  
16 payment fees, and returned payment fees;

17 (j) Prepayment charges, or a description of any fees, expenses or  
18 charges due when purchase price is paid in full; and

19 (k) A description of the current or future receivables purchased.

20 § 704. Closed-end commercial financing disclosure requirements. A  
21 provider subject to this article shall provide the following disclosures  
22 to a recipient at the time of extending an offer of a commercial loan:

23 (a) The amount financed (e.g., the principal amount);

24 (b) The disbursement amount, after any fees deducted or withheld at  
25 disbursement;

26 (c) The total repayment amount, which is the disbursement amount plus  
27 the total cost of the financing;

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

34 (e) The annual percentage rate, expressed as a nominal yearly rate,  
35 inclusive of any fees and finance charges, and calculated in accordance  
36 with the federal Truth in Lending Act, Regulation Z, 12 C.F.R. §  
37 1026.22;

38 (f) The term of the financing;

39 (g) The payment amounts:

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

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

46 (h) A description of all other potential fees and charges that can be  
47 avoided by the recipient, including, but not limited to, late payment  
48 fees and returned payment fees;

49 (i) Prepayment charges, or a description of any fees, expenses or  
50 charges due when the financing amount is paid in full; and

51 (j) A description of any collateral requirements or security inter-  
52 ests.

53 § 705. Open-end commercial financing disclosure requirements. A  
54 provider subject to this article shall provide the following disclosures  
55 to a recipient at the time of extending an offer of a commercial line of  
56 credit:

1     (a) The maximum amount of credit available to the recipient (e.g., the  
2     credit line amount);

3     (b) The amount scheduled to be drawn by the recipient at the time the  
4     offer is extended, if any, less any fees deducted or withheld at  
5     disbursement;

6     (c) The total repayment amount, which is the draw amount, less any  
7     fees deducted or withheld at disbursement, plus the total cost of the  
8     financing. The total repayment amount shall assume the amount scheduled  
9     to be drawn by the recipient at the time the offer is extended, or if no  
10    amount is scheduled to be drawn at such time, the maximum amount of  
11    credit available to the recipient, in each case, if drawn and held for  
12    the duration of the term or draw period;

13    (d) The total cost of the financing, expressed as a dollar cost,  
14    including all required periodic and non-periodic fees and charges that  
15    cannot be avoided by a recipient, including any interest expense. The  
16    total cost of financing shall assume the amount scheduled to be drawn by  
17    the recipient at the time the offer is extended, or if no amount is  
18    scheduled to be drawn at such time, the maximum amount of credit avail-  
19    able to the recipient, in each case, if drawn and held for the duration  
20    of the term or draw period;

21    (e) The annual percentage rate, expressed as a nominal yearly rate,  
22    inclusive of any fees and finance charges, and calculated in accordance  
23    with the federal Truth in Lending Act, Regulation Z, 12 C.F.R. §  
24    1026.14;

25    (f) The term of the plan, if applicable, or the period over which a  
26    draw is amortized;

27    (g) The payment amounts:

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

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

34    (h) A description of all other potential fees and charges that can be  
35    avoided by the recipient, including, but not limited to, draw fees, late  
36    payment fees, and returned payment fees;

37    (i) Prepayment charges, or a description of any fees, expenses or  
38    charges due when the draw amount is paid in full or the line is closed;  
39    and

40    (j) A description of any collateral requirements or security inter-  
41    ests.

42    § 706. Additional information. Nothing in this article shall prevent a  
43    provider from providing or disclosing additional information on a  
44    commercial financing being offered to a recipient.

45    § 707. Estimates. If any information necessary for an accurate disclo-  
46    sure is unknown to the provider at the time of a commercial financing  
47    offer, the provider shall make the required disclosure based on the best  
48    information reasonably available at the time the disclosure is provided  
49    and shall state clearly that the disclosure is an estimate. If the  
50    provider is required to make any assumptions to provide the required  
51    disclosure, such assumptions shall be clearly and conspicuously  
52    described to the recipient in writing at the time of the offer.

53    § 708. Penalties. (a) A provider that knowingly violates any provision  
54    of this article, as determined by the superintendent, shall be liable  
55    for an aggregate civil penalty of not more than ten thousand dollars for  
56    such violation, regardless of the number of recipients affected by the

1 violation. The penalty shall be collected by the superintendent in the  
2 name of the state pursuant to existing authority available to the super-  
3 intendent under state law.

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

9 § 2. This act shall take effect immediately.