

STATE OF NEW YORK

5470--A

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 -- recommitted to the Committee on Banks in accordance with Senate Rule 6, sec. 8 -- 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 arti-
2 cle 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

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

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1 payment held by a recipient for goods the recipient has supplied or
2 services the recipient has rendered that have been ordered but for which
3 payment has not yet been made.

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

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

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

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

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

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

54 (h) "Provider" means a person who extends a specific offer of commer-
55 cial financing to a recipient. A provider may include a creditor or
56 purchaser. Unless otherwise exempt, "provider" also includes a person

1 that is not a creditor or purchaser but who solicits and presents
2 specific offers of commercial financing on behalf of a third party. For
3 the avoidance of doubt, the extension of a specific offer or provision
4 of disclosures for a commercial financing, in and of itself, shall not
5 be construed to mean that a provider is originating, making, funding or
6 providing commercial financing.

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

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

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

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

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

27 (a) a financial institution;

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

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

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

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

39 (f) any person or provider who:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9 § 704. Closed-end commercial financing disclosure requirements. A
10 provider, subject to this article, shall provide the following disclo-
11 tures to a recipient at the time of extending a specific offer for
12 closed-end credit according to formatting prescribed by the superinten-
13 dent:

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

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

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

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

29 (e) The term of the financing.

30 (f) The payment amounts:

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

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

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

41 (h) In the event that a recipient elects to pay off or refinance the
42 commercial financing prior to full repayment, the provider must
43 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 § 705. Open-end commercial financing disclosure requirements. A
53 provider, subject to this article, shall provide the following disclo-
54 tures to a recipient at the time of extending a specific offer for a
55 commercial line of credit according to formatting prescribed by the
56 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 total cost of the financing, expressed as a dollar cost,
6 including all required periodic and non-periodic fees and charges that
7 cannot be avoided by the recipient, including any interest expense. The
8 total cost of financing shall assume the maximum amount of credit avail-
9 able to the recipient, in each case, is drawn and held for the duration
10 of the term or draw period.

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

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

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

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

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

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

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

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

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

47 § 706. Accounts receivable transaction disclosure requirements. A
48 provider, subject to this article, shall provide the following disclo-
49 tures to a recipient at the time of extending a specific offer for an
50 accounts receivable transaction according to formatting prescribed by
51 the superintendent:

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

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

4 (c) The estimated annual percentage rate, using that term, calculated
5 according to the federal Truth in Lending Act, Regulation Z, 12 C.F.R. §
6 1026 Appendix J, as a "single advance, single payment transaction". To
7 calculate the estimated annual percentage rate, the purchase amount is
8 considered the financing amount, the purchase amount minus the total
9 cost of financing is considered the payment amount, and the term is
10 established by the payment due date of the receivables. As an alternate
11 method of establishing the term, the provider may estimate the term for
12 an account receivable transaction as the average payment period, its
13 historical data over a period not to exceed the previous twelve months,
14 concerning payment invoices paid by the party owing the accounts receiv-
15 able in question.

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

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

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

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

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

35 (b) 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, including any
38 interest expense. The total cost of financing shall assume the recipient
39 repays the commercial financing in its entirety according to the agreed
40 upon original payment schedule.

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

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

48 (e) The term of the financing.

49 (f) The payment amounts:

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

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

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

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

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

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

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

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

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

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

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

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

55 § 711. Rules and regulations. The superintendent is hereby authorized
56 and empowered to promulgate such rules and regulations as may in the

1 judgment of the superintendent be consistent with the purposes of this
2 article, or appropriate for the effective administration of this arti-
3 cle, including, but not limited to:

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

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

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

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

17 § 712. Penalties. (a) Upon a finding by the superintendent that a
18 provider has violated the provisions of this article or the rules or
19 regulations promulgated hereunder, the provider shall be ordered to pay
20 to the people of this state a civil penalty for each violation of this
21 article or any regulation or policy promulgated hereunder a sum not to
22 exceed two thousand dollars for each violation or where such violation
23 is willful ten thousand dollars for each violation.

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

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