

# STATE OF NEW YORK

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2019-2020 Regular Sessions

## IN SENATE

May 1, 2019

Introduced by Sens. THOMAS, CARLUCCI, KAPLAN, RAMOS -- 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 -- 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:

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:

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

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

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

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

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

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

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

1 loan association, savings bank or credit union organized under the laws  
2 of this or any other state that is authorized to transact business in  
3 this state.

4 (g) "Person" means an individual, corporation, partnership, limited  
5 liability company, joint venture, association, joint stock company,  
6 trust or unincorporated organization including, but not limited to, a  
7 sole proprietorship.

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

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

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

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

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

36 (a) a financial institution;

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

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

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

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

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

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

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

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

4 (b) The finance charge.

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

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

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

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

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

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

55 (i) for payment amounts that are fixed, the payment amounts and  
56 frequency (e.g., daily, weekly, monthly), and, if the payment frequency

1 is other than monthly, the amount of the average projected payments per  
2 month; or

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

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

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

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

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

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

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

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 finance charge.

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

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

35 (e) The term of the financing.

36 (f) The payment amounts:

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

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

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

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

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

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

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



1     § 805. Open-end commercial financing disclosure requirements. A  
2 provider, subject to this article, shall provide the following disclo-  
3 tures to a recipient at the time of extending a specific offer for open-  
4 end financing according to formatting prescribed by the superintendent:

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

9     (b) The finance charge.

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

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

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

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

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

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

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

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

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

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

52    (b) The finance charge.

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

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

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

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 § 807. 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 open-end financing, closed-  
17 end financing, sales-based financing, or factoring transaction but  
18 otherwise meets the definition of commercial financing as provided in  
19 this article. Subject to such rules and regulations by the superinten-  
20 dent, a provider subject to this article shall provide the following  
21 disclosures to a recipient at the time of extending a specific offer of  
22 other forms of financing according to formatting prescribed by the  
23 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 finance charge.

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

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

35 (e) The term of the financing.

36 (f) The payment amounts:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

3 § 812. Penalties. (a) Upon a finding by the superintendent that a  
4 provider has violated the provisions of this article or the rules or  
5 regulations promulgated hereunder, the provider shall be ordered to pay  
6 to the people of this state a civil penalty for each violation of this  
7 article or any regulation or policy promulgated hereunder a sum not to  
8 exceed two thousand dollars for each violation or where such violation  
9 is willful ten thousand dollars for each violation.

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

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