STATE OF NEW YORK

898

2021-2022 Regular Sessions

IN SENATE

(Prefiled)

January 6, 2021

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

AN ACT to amend the financial services law, in relation to exempting certain commercial financing transactions from certain disclosure requirements; and to amend a chapter of the laws of 2020 amending the financial services law relating to requiring certain providers that extend specific terms of commercial financing to a recipient to disclose certain information about the offer to the recipient, as proposed in legislative bills numbers S.5470-B and A.10118-A, in relation to the effectiveness thereof

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Sections 802, 803, 804, 805, 806, 807 and 812 of the financial services law, as added by a chapter of the laws of 2020 amending the financial services law relating to requiring certain providers that extend specific terms of commercial financing to a recipient to disclose certain information about the offer to the recipient, as proposed in legislative bills numbers S.5470-B and A.10118-A, are amended to read as follows:

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

(a) a financial institution;

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

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

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

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

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

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

(g) an individual commercial financing transaction in an amount over **two million** five hundred thousand dollars[~~.~~]**; or**

(h) a commercial financing transaction in which the recipient is a dealer as defined in section four hundred fifteen of the vehicle and traffic law, or an affiliate of such a dealer, or a rental vehicle company as defined in section three hundred ninety-six-z of the general business law, or an affiliate of such a company pursuant to a commercial financing agreement or commercial open-end credit plan of at least fifty thousand dollars, including any commercial loan made pursuant to such a commercial financing transaction.

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

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

(b) The finance charge.

(c) The estimated annual percentage rate, using the words annual percentage rate or the abbreviation "APR", expressed as a yearly rate, inclusive of any fees and finance charges, and calculated in accordance with the federal Truth in Lending Act, Regulation Z, 12 C.F.R. § 1026.22, based on the estimated term of repayment and the projected periodic payment amounts**, regardless of whether such act or such regulation would require such a calculation**. The estimated term of repayment and the projected periodic payment amounts shall be calculated based on the projection of the recipient's sales, called the projected sales volume. The projected sales volume may be calculated using the historical method or the opt-in method. The provider shall provide notice to the superintendent on which method they intend to use across all instances of sales-based financing offered in calculating estimated annual percentage rate pursuant to this section.

(i) The provider using the historical method shall use an average historical volume of sales or revenue by which the financing's payment amounts are based and the estimated annual percentage rate is calculated. The provider shall fix the historical time period used to calculate the average historical volume and use such period for all disclosure purposes for all sales-based financing products offered. The fixed historical time period shall either be the preceding time period from the specific offer or, alternatively, the provider may use average sales for the same number of months with the highest sales volume within the past twelve months. The fixed historical time period shall be no less than one month and not exceed twelve months.

(ii) The provider using the opt-in method shall determine the estimated annual percentage rate, the estimated term, and the projected payments, using a projected sales volume that the provider elects for each disclosure, provided, that they participate in a review process prescribed by the superintendent. A provider shall, on an annual basis, report data to the superintendent of estimated annual percentage rates

disclosed to the recipient and actual retrospective annual percentage rates of completed transactions. The report shall contain such information as the superintendent, by rule or regulation, may prescribe as necessary or appropriate for the purpose of making a determination of whether the deviation between the estimated annual percentage rate and actual retrospective annual percentage rates of completed transactions was reasonable. The superintendent shall establish the method of reporting and may, upon a finding that the use of projected sales volume by the provider has resulted in an unacceptable deviation between estimated and actual annual percentage rate, require the provider to use the historical method. The superintendent may consider unusual and extraordinary circumstances impacting the provider's deviation between estimated and actual annual percentage rate in the determination of such finding.

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

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

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

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

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

§ 804. Closed-end commercial financing disclosure requirements. A provider, subject to this article, shall provide the following disclosures to a recipient at the time of extending a specific offer for closed-end 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 that cannot be avoided by a recipient, and calculated in accordance with the federal Truth in Lending Act, Regulation Z, 12 C.F.R. § 1026.22**, regardless of whether such act or such regulation would require such a calculation**.

(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, if the term is longer than one month, the average monthly payment amount; or

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

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

(a) The maximum amount of credit available to the recipient (e.g., the credit line amount), and the amount scheduled to be drawn by the recipient at the time the offer is extended, if any, less 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 nominal yearly rate, inclusive of any fees and finance charges that cannot be avoided by a recipient, and calculated in accordance with the federal Truth in Lending Act, Regulation Z, 12 C.F.R. § 1026.22 and based on the maximum amount of credit available to the recipient and the term resulting from making the minimum required payments term as disclosed**, regardless of whether such act or such regulation would require such a calculation**.

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

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

(f) The payment frequency and amounts, based on the assumptions used in the calculation of the annual percentage rate, including a description of payment amount requirements such as a minimum payment amount, and if the payment frequency is other than monthly, the amount of the average projected payments per month. For payment amounts that are variable, the provider should include 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, draw fees, 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.

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

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

(b) The finance charge.

(c) The estimated annual percentage rate, using that term, calculated according to the federal Truth in Lending Act, Regulation Z, 12 C.F.R. § 1026 Appendix J, as a "single advance, single payment transaction"**, regardless of whether such act or such regulation would require such a calculation**. To calculate the estimated annual percentage rate, the purchase amount is considered the financing amount, the purchase amount minus the finance charge is considered the payment amount, and the term is established by the payment due date of the receivables. As an alternate method of establishing the term, the provider may estimate the term for a factoring 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**, regardless of whether such act or such regulation would require such a calculation**.

(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.

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

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

§ 2. Section 2 of a chapter of the laws of 2020, amending the financial services law relating to requiring certain providers that extend specific terms of commercial financing to a recipient to disclose certain information about the offer to the recipient, as proposed in legislative bills numbers S.5470-B and A.10118-A, is amended to read as follows:

§ 2. **Nothing in this act shall authorize transactions in this state which are otherwise illegal or allow an entity or individual to operate in this state without a license where a license would otherwise be required.**

§ 3. This act shall take effect [~~on the one hundred eightieth day after it shall have become a law~~] **January 1, 2022. Effective immediately, the addition, amendment and/or repeal of any rule or regulation, necessary for the implementation of this act on its effective date are authorized to be made and completed by the superintendent of financial services on or before such effective date**.

§ 3. This act shall take effect immediately; provided, however, that the amendments to sections 802, 803, 804, 805, 806, 807 and 812 of the financial services law made by section 1 of this act shall take effect on the same date and in the same manner as a chapter of the laws of 2020 amending the financial services law relating to requiring certain providers that extend specific terms of commercial financing to a recipient to disclose certain information about the offer to the recipient, as proposed in legislative bills numbers S.5470-B and A.10118-A.