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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:

1 Section 1. The financial services law is amended by adding a new arti-
2 cle 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 ordinary 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 sures 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.