



New York Targets Non-Bank Lenders: Heightened Disclosure Requirements Imposed on Certain Commercial Lenders

The New York Department of Financial Services (“DFS”) recently adopted a final regulation known as New York Commercial Financing Disclosure Law (the “Law”), which requires certain non-bank financial lenders to make consumer-style cost of credit disclosures to the borrower at the time that the specific financing offer is extended. This includes disclosures regarding the amount financed, finance charge, Annual Percentage Rate (“APR”), term, and possible fees and charges. The final rule is codified in Article 8 of the New York Financial Services Law.

New York’s Law sets out to add a layer of protection for small businesses, which were disproportionately impacted by unscrupulous lending practices during the COVID-19 pandemic. In recent years, small businesses in particular have turned to non-bank lenders, such as online lenders and FinTechs, private lenders and finance companies. Non-traditional lenders often offer quicker approval timelines and access to credit for those less likely to qualify for traditional bank loans – albeit typically at higher interest rates and with more unfavorable repayment terms.

As fresh lending options from banks – which for most small businesses are already limited given their lack of credit history and inability to put up meaningful collateral – dry up in light of the tightened protocols adopted or expected to be adopted in response to the recent banking industry crisis, which you can read more about [here](#), the new Law is particularly important for small businesses seeking alternative financing options in today’s economy.

Potential borrowers must be aware of their rights to certain information at the time of offer and non-bank “providers,” defined in the Law as any person or entity that extends a “specific offer of commercial financing” to a recipient, need to understand what is required under the Law in order to begin the compliance process. The Law is currently in effect, but provides for a grace period until August 1, 2023. Providers who fail to comply could face a civil penalties up to \$2,000.00 for each violation, or \$10,000.00 for each willful violation. Notably, the DFS regulation offers a “cure” provision, which allow providers to avoid liability for any “bona fide errors” in disclosures, provided that all corrections are made and recipients are notified, within sixty (60) days of discovery of the error.

I. Coverage and Exemptions

The Law requires disclosure in offers from providers that involve “commercial financing,” which the Law defines as any loan for which proceeds will be used primarily for purposes other than personal, family or household use, and includes, but is not limited to:

1. Open-end financing (e.g., revolving lines of credit);
2. Sales-based financing (e.g., merchant/business cash advances and other transactions that are repaid over time as a percentage of sales or revenue);
3. Closed-end financing (e.g., term loans);
4. Factoring transactions (e.g., A/R based lending);
5. Lease financing (with the exceptions denoted below and in the Law); and
6. General asset-based financing.

However, not all providers or transactions are subject to the Law. The following providers and/or commercial financing transactions are excluded under the Law and thus, are either regulated by laws such as the Federal Trade Commission’s Truth in Lending Act (“TILA”), or are not regulated at all:

- Transactions in which the aggregate amount the recipient can receive exceeds \$2,500,000.00;
- Transactions with “financial institutions,” including federally chartered and state-chartered banks, savings banks, credit unions, trust companies, and industrial loan companies;
- Transactions involving lenders that make no more than five (5) commercial financing transactions in New York within a twelve (12)-month period;
- Real-estate secured financing transactions;
- True leases, as defined in Article 2A of the New York Uniform Commercial Code; and
- Transactions involving a motor vehicle dealer, motor vehicle rental company or an affiliate of either, in amounts of \$50,000.00 or greater.

Further, the Law applies only to commercial financing transactions where the potential borrower is principally directed or managed from New York or is a legal resident of New York. As such, transactions involving potential borrowers located or managed outside of New York will not be covered by the Law.

II. Requirements under the Law

For those subject to the Law, the requirements are summarized in part herein. According to the Law, at the time of extending a specific offer, providers are required to give recipients or their agents (including a broker) a document labeled "OFFER SUMMARY" (in bold font) and, in certain cases, a separate document, which must appear directly following the Offer Summary, labeled "Itemization of Amount Financed." Requirements vary by commercial financing type, but such documentation generally requires the clear disclosure of the:

- Amount being financed;
- Itemization of amount financed (if amount financed is greater than the funding directly given to the recipient);
- APR;
- Finance charge (included in the APR calculation);
- Payments – method, frequency and terms for both fixed and variable rate financing;
- Estimated term of the proposed transaction; and
- Loan prepayment terms.

Providers are required to retain disclosure records for a minimum of four (4) years following the date that the specific offer is presented to the potential borrower. Providers are also required to submit to annual reporting requirements concerning their disclosure data in the previous calendar year, starting April 30, 2025.

This RMF news alert seeks to highlight the key aspects of the Law and its application to providers and potential borrowers. If you currently engage in small business lending or are a business or individual based in New York that intends to seek commercial financing in the near future, it is recommended that you familiarize yourself with New York's new disclosure requirements. Given the nuanced nature of the Law's disclosure requirements, including how to calculate the \$2,500,000.00 threshold, required timeline for disclosure and formatting and language requirements specific to each type of commercial financing offer, non-bank borrowers and potential lending providers should consider consulting with an attorney.

If you have any questions or would like to discuss how this applies to your business, please contact:

Russell H. Stern, Esq.
516.663.6582
rstern@rmfpc.com

Alexandra C. Piscitello, Esq.
516.663.6653
apiscitello@rmfpc.com