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NY DFS Publishes Final Regulation Implementing Article 8, New York State's Commercial Finance Disclosure Law

By: [Melissa Richards](#)

Superintendent of Financial Services Adrienne A. Harris announced on February 1, 2023 that the New York State Department of Financial Services has adopted a final regulation relating to early disclosure requirements on commercial financing offers equal to or less than \$2,500,000, pursuant to sections 801 to 811 of the New York Financial Services Law (the "Commercial Finance Disclosure Law" or "CFDL"). The CFDL disclosure requirements apply to commercial lending, lease financing, and factoring clients that are not depository institutions or their majority owned subsidiaries and affiliates. The CFDL disclosure requirements include Truth In Lending Act/Regulation Z consumer credit disclosure terms, most notably Amount Financed, Annual Percentage Rate, and Finance Charge. The final CFDL Regulation, found at 23 NYCRR 600 and [HERE](#), became effective February 1st with mandatory compliance date following six months thereafter (August 1, 2023).

The CFDL requires certain defined "Providers" of commercial financing in amounts of up to \$2,500,000 to provide **standardized disclosures** to potential defined "Recipient" borrowers at the time a "specific offer of commercial financing" is extended. "**Provider**" under the CFDL's Section 801(h) and the implementing regulation includes both commercial lenders that provide the financing being offered (termed "Financers"), as well as persons who solicit and present specific offers of commercial financing on behalf of a third party without engaging in originating, making, funding or providing commercial financing. "**Recipient**" under the CFDL's Section 801(i) means a person or their authorized representative who is not acting as a broker, who applies for commercial financing and is made a specific offer of commercial financing by a Provider. The Final Regulation clarifies that natural person Recipients must be a New York resident and Recipient business entities must be principally directed or managed from a New York location; the specific offer of commercial financing need not be made from a Provider's location in New York. CFDL Section 809 requires the Provider to obtain the Recipient's signature on the early disclosure before proceeding further with the commercial financing application.

The final CFDL Regulation defines "**specific offer of commercial financing**" as a written communication to a Recipient that is based on information from our about the Recipient such as financial or credit information, of a (i) periodic payment amount, irregular payment amount, or financing amount, and (ii) any rate, price, or cost of financing (including total repayment amount) in connection with a commercial financing which offer, if accepted, shall be binding upon the Provider.

Notably, Section 802 of the CFDL does exempt the following commercial lenders and financing transactions from the new early disclosure requirement and these Final regulations:

1. **“Financial Institutions”**, defined in Section 801(f) to include any state or federally chartered bank, savings association, trust company, or industrial loan company. The CFDL Regulation expands this definition to also include “any corporation, limited liability company, partnership, joint venture, trust or other entity of which a majority or the voting power of the voting equity securities or equity interest is owned, directly or indirectly by a financial institution.”
2. Lenders regulated under the **federal Farm Credit Act** (12 U.S.C. Sec. 2001 et seq.).
3. A person acting in its capacity as a **technology services provider**, such as licensing software and providing support services, to an entity exempt under CDFL 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.
4. A commercial financing transaction **secured by real property**.
5. A lease as defined in section 2-A-103 of the Uniform Commercial Code.
6. Any person or provider who **makes no more than five** commercial financing transactions in New York **in a twelve-month period**.
7. An individual commercial financing transaction in an amount **over \$2,500,000**. The CFDL Regulation provides additional guidance on **how to apply this threshold to specific types of commercial financings**: factoring, open-end financing, asset-based lending. For all other transactions, use the Amount Financed.
8. A commercial financing transaction in which the recipient is a “Dealer” as defined in the NY Vehicle and Traffic Law Section 415, or an affiliate of such a Dealer, or a “Rental Vehicle Company” as defined in NY General Business Law Section 396-z, or an affiliate of such a company, pursuant to a commercial financing agreement or commercial open-end credit plan of at least \$50,000, including any commercial loan made pursuant to such a commercial financing transaction.

Under the CFDL, these standardized disclosures are meant to help small businesses and individuals understand and compare the terms of different commercial financing offers. The CFDL Regulation provides both general disclosure instructions as well as instructions that are specific to the following categories of commercial financing transactions:

- Sales-based financing;
- Factoring transaction;
- Closed-end commercial financing;
- Open-end commercial financing; and
- All other commercial financing transactions.

In addition, the Final Regulations adopt **Truth-in-Lending Act/Regulation Z type disclosures** including:

- **Amount Financed**;
- **Itemization of Amount Financed** (if Amount Financed is greater than the funding directly given to the Recipient);

- **Annual Percentage Rate or “APR”** (with TILA/Reg Z tolerance levels, 1/8 or ¼ of a percent above or below);
- **Finance Charge** (included in the APR calculation) - both Total and Itemized (with TILA/Reg Z tolerance allowing for over-disclosure of the actual aggregate Finance Charge amount). Of note, while the Final Regulation does follow TILA/Regulation Z definition of “Finance Charge” under 12 CFR 1026.4, NY DFS does characterize certain additional charges as Finance Charges in these types of commercial financings:
 - Factoring transaction – the difference between the face value on the invoice and the amount paid directly to the Recipient upon assignment to the financier.
 - Any accounts receivable purchase transaction that is not a factoring transaction – the discount taken on the face value of the accounts receivable.
 - Lease financing transaction – the sum of lease payments and the price of the purchase option that the lessee may pay to acquire the leased goods at the end of the lease, less the amount financed.
- Payments - method, frequency and terms for both fixed and variable rate financing;
- Estimated Term of the proposed transaction;
- Loan Prepayment terms.

As the CFDL disclosures are designed to be early (pre-consummation) disclosures, the CFDL Regulation allows for estimated disclosures that are “based on the best information reasonably available to the Provider at the time of the disclosure” with the label “estimate” appearing next to the disclosure.

While the CFDL Section 812 authorizes civil money penalty enforcement by NY DFS against Providers and their assignees for disclosure violations, the CFDL Regulation does provide a “cure” provision to avoid liability for any “bona fide errors” found in a disclosure to a Recipient that results in under-disclosure from the actual required amount to be disclosed. If within 60 days of discovering the error through the Provider’s or Financer’s own procedures (making quality control audits a must) and prior to the institution of an action against the Provider or Financer for such error, the Financer or its assignee notifies the Recipient of the error and makes whatever adjustments in the appropriate account are necessary to assure that the Recipient will not be required to pay more in Finance Charges than what was actually disclosed, or the dollar equivalent of the APR actually disclosed, whichever is lower. A Provider or Financer is not to be held liable under Section 812 for inadvertently over-disclosing a Finance Charge, APR, Scheduled Payment, Average Monthly Cost, Maximum Non-Interest Finance Charge, or Prepayment Fee/Charge that exceeds the actual required amount to be disclosed.

Providers are to retain their disclosure records for a minimum of 4 years following the date that the disclosure is presented to the Recipient, and are to submit to annual reporting requirements concerning their disclosure data in the previous calendar year, starting April 30, 2025.

Finally, the CFDL Regulation imposes duties on brokers that deliver the early CFDL disclosures to Recipients, including the duty to provide evidence of transmission of the disclosures to the financier, including the time of transmission. The CFDL Regulation also direct Providers to inform Recipients in writing of how, and by whom, the broker will be compensated for their role in the transaction.

Please reach out to any of the Buchalter's Commercial Finance Group members below for assistance in understanding how the Final New York CFDL Regulation impacts your financial services company, as well as for readying your company for the CFDL Regulation's mandatory compliance date, August 1, 2023.



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