

Lenders Receive Additional Time to Comply With New York State Commercial Finance Disclosure Law

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On December 31, 2021, the New York Department of Financial Services (Department) announced that commercial finance providers doing business in New York state will receive additional time to comply with the New York State Commercial Finance Disclosure Law (CFDL).[1] Although the CFDL became effective on January 1, recent Department guidance makes clear that CFDL compliance will not be required until the implementing regulations are final, expected to occur later this year.

Traditionally, federal law has not regulated disclosures for financings that are primarily for a business or commercial purpose. The CFDL will require certain commercial finance providers to give standardized, consumer-like disclosures to borrowers in connection with financings in an amount equal to or less than \$2,500,000. Initial regulations were proposed on October 20, 2021, however, the Department received extensive comments from many stakeholders that will be addressed in the final regulations. Once finalized, commercial finance providers under CFDL compliance will need to disclose specific terms of the financing being offered, such as the cost of the financing (as a dollar amount) and the annual percentage rate or estimated APR.

Initially enacted on December 23, 2020, the CFDL applies generally to commercial finance providers of open-end financing, closed-end financing, sales-based financing, factoring transactions, and other types of financings. There are exceptions to both the types of commercial finance providers and types of financings that fall within the CFDL's scope. Some commercial finance providers, such as banks, trust companies, and other lenders doing business under a New York state license or certificate are exempt from CFDL compliance. There also is a de minimis exception for commercial finance providers, which provides an exemption for commercial finance providers that transact five or less financing transactions in New York state in a 12-month period. The CFDL does not apply to financings secured by real property, certain leases, and financings to car dealers and rental vehicle companies. For additional background on the CFDL as initially enacted, see Troutman Pepper's article, "New York State Legislature Adopts Substantial Disclosure Requirements in Certain Commercial Finance Transactions, Including for the Merchant Cash Advance Industry and Others." [2]

Takeaways

For Lenders:

- Commercial finance providers should continue to monitor CFDL regulations to ensure timely compliance and avoid civil penalties (up to \$10,000 for willful violations of the CFDL and up to \$2,500 for other violations).

- Knowing violations of the CFDL may result in injunctive relief.
- Commercial finance providers can comply with the CFDL by making disclosures required by the Truth and Lending Act.^[3] Commercial finance providers should ensure required disclosures are made in a consistent and standardized fashion.
- Other states may follow New York state and enact more robust disclosure requirements for financings. California already enacted a similar law.

For Borrowers:

- While a goal of the CFDL is to provide higher quality information and greater transparency to allow small companies to better evaluate financing options, companies should beware that differences in calculating fees can result in comparisons that are not apples-to-apples.
- Commercial finance providers may decide that cost of compliance with the CFDL is prohibitive and cease offering financings in New York state that would be subject to the CFDL. This could result in fewer financing options available to small companies.

[1] See here.

[2] See here.

[3] See 15 U.S.C. §§ 1601 to 1667f.

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