

Locke Lord QuickStudy: Illinois Legislature Introduces Bill to ??Adopt TILA-Style ?Commercial Lending Disclosures ? ?

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On February 10, 2023, the Illinois General Assembly introduced the “Small Business Truth in Lending Act”, which would require lenders to make TILA-like disclosures for small business commercial loans. If passed, Illinois would join a growing number of states requiring such commercial-lending disclosures. The bill, which is subject to regulations by the Department of Financial and Professional Regulation, contains penalties and also makes a violation an unlawful practice under the Illinois Consumer Fraud and Deceptive Business Practices Act. If passed, the bill would apply to transactions occurring on or after January 1, 2024.^[1]

What transactions are covered?

Subject to exceptions discussed below, the bill applies to any type of commercial loan (*i.e.*, loans not primarily used for personal, family, or household purposes)^[2] and mandates specific disclosures for four specific types of commercial loans:

- Open-end financing, *i.e.*, where the lender reasonably contemplates repeated transactions, including loans where the borrower can re-borrow amounts that are re-paid;^[3]
- Closed-end financing, *i.e.*, lump-sum loans, recourse or nonrecourse, including equipment financing that does not meet the definition of a lease under the UCC, or financing with an established amount and duration;^[4]
- Sales-based (a.k.a. revenue-based) financing, *i.e.*, a loan that is repaid over time as a percentage of sales or revenue, in which the payment amount may increase or decrease according to the volume of sales made or revenue received;^[5]
- Factoring transaction, *i.e.*, the purchase of existing accounts receivable.^[6]

The bill exempts commercial loans over \$2.5 million.^[7] The bill also exempts loans made by various regulated entities, including the following: a bank, trust company, industrial loan company, savings and loan association, savings bank, or credit union doing business under a state or federal license or charter.^[8] The bill also exempts loans secured by real property, leases, loans made to auto dealers or car-rental companies, and loans made by a person who “makes no more than 5 commercial financing transactions in this State in a 12-month period.”^[9]

What must be stated in the disclosures?

The specific disclosure requirements vary based on the type of financing, but major disclosures generally include:

- The “total amount of the commercial financing,” which is defined based on the transaction type. For example, for open-end financing, the lender must disclose the maximum amount of available credit.^[10]
- The finance charge, which is defined as any charge payable directly or indirectly as an incident to or a condition of the extension of financing, including all charges that would be included under 12 C.F.R. § 1026.4.^[11]
- The annual percentage rate, using only the words annual percentage rate or the abbreviation “APR”. In each type of transaction, the annual percentage rate is to be calculated according to 12 C.F.R. § 1026.22.^[12]
- The total payment amount.^[13]
- The term of financing (except for factoring transactions).^[14]
- A description of all other fees and charges.^[15]
- A clear and conspicuous notice on how to file a complaint with the Department of Financial and Professional Regulation.^[16]

The lender may give additional information, but the legally mandated disclosures must stand alone.^[17]

The bill authorizes the Department of Financial and Professional Regulation to adopt implementing regulations, including regulations governing how to calculate or format required disclosures.^[18]

What penalties are imposed?

The bill imposes a civil penalty payable to the Department of Financial and Professional Regulation for each violation of no more than \$10,000, or \$20,000 for each willful violation.^[19] The Department is also empowered to order additional relief, such as restitution, refund of moneys or return of real property, or disgorgement.^[20] Additionally, the Department can bring a lawsuit for injunctive relief.^[21]

The bill also allows private lawsuits, but does not authorize statutory damages or define recoverable damages except to say that a prevailing person “other than a provider” may be awarded attorneys’ fees and costs.^[22] Moreover, any violation of the law constitutes an unlawful practice under the Consumer Fraud and Deceptive Business Practices Act.^[23]

What it means for lenders

With this bill, Illinois is poised to join a growing number of states to mandate disclosures for commercial financing, including California^[24], New York^[25], and Utah.^[26] Those states have statutes governing similar transactions like closed-end, open-end, sales-based, and factoring transactions. If regulations in those states are any indication, Illinois regulations could detail the various disclosure formats, including specifying the required columns, rows, calculations, font, and specific word usage. Similar laws are under consideration in Georgia, Kansas, and Missouri. Lenders offering commercial loans to small businesses should ensure compliance with existing laws and follow the progress of the pending bills.

[1] IL 103rd G.A. SB2234 § 3.

[2] *Id.* § 10.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.* § 15(9).

[8] *Id.* §15(1)-(3).

[9] *Id.* § 15(6)-(10).

[10] *Id.* §30(1).

[11] *Id.* § 10.

[12] *Id.* §§ 20(3), 25(3), 30(3), and 35(3).

[13] *Id.* §§ 20(4), 25(4), 30(4), and 35(4).

[14] *Id.* §§ 20(5), 25(5), and 30(5).

[15] *Id.* §§ 20(7), 25(7), 30(7), and 35(5).

[16] *Id.* § 45.

[17] *Id.* § 60.

[18] *Id.* § 65.

[19] *Id.* § 70(a).

[20] *Id.* § 70(b).

[21] *Id.* § 80.

[22] *Id.* § 90.

[23] *Id.* § 95(b).

[24] 10 Cal. Code of Reg. 3 § 900, et seq.

[25] 23 NYCRR 600, et seq.

[26] Utah Code § 7-27-101 et seq.

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