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# New York Enacts TILA-Like Disclosure Law for Business Loans and Purchases of Receivables

***Krista Cooley, Jeffrey P. Taft, and Daniel B. Pearson****

*The authors provide an overview of a new law in New York and the entities and transactions to which it applies, and discuss the legislation's disclosure and signature requirements, the exemptions provided, and how the law will be enforced.*

New York Governor Andrew M. Cuomo has signed S.B. 5470[1] into law, which will impose a range of Truth in Lending Act-like disclosure requirements on providers of a broad range of commercial financing arrangements.

S.B. 5470 was quickly followed by S.B. 898,[2] which amends the law's scope, exemptions, and other provisions.

Under the new "New York Law," which now takes effect January 1, 2022, non-exempt "providers" of "commercial financing" in amounts of $2.5 million or less must disclose key transaction terms to borrowers and obtain a borrower's signature prior to consummating a transaction.[3]

The New York Law follows in the footsteps of a similar law enacted in California in 2018.[4]

Both state laws impose disclosure requirements on commercial purpose loans similar to those that the federal Truth in Lending Act ("TILA") and Regulation Z impose on consumer (e.g., personal, family, or household purpose) loans. This article provides an overview of the New York Law and the entities and

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1 https://www.nysenate.gov/legislation/bills/2019/s5470.

2 https://www.nysenate.gov/legislation/bills/2021/S898.

3 The New York Law was slated to take effect June 21, 2021 before S.B. 898 pushed back the effective date.

4 https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1235. Since the enactment, California has undertaken several proposed rulemakings to clarify the law and implement the disclosure requirements. Comments on the most recently proposed rules were due on October 28, 2020, and a public hearing was held on November 9, 2020.

transactions to which it applies and discusses the legislation's disclosure and signature requirements, the exemptions provided, and how the law will be enforced.

## OVERVIEW AND APPLICABILITY

In signing the original bill, S.B. 5470, Governor Cuomo noted in the memorandum filed with the bill that he had "secured an agreement with the legislature to make certain technical changes to this bill to better provide clarity and align to existing requirements under federal laws, including the Truth in Lending Act."[5] Accordingly, S.B. 5470 was amended by the enactment of S.B. 898, resulting in changes to the law's scope, exemptions, penalties, and other provisions. Of particular interest, the coverage for individual transactions was raised from $500,000 to $2.5 million.

The New York Law requires providers of commercial financing to provide certain disclosures to recipients at the time of extending a specific offer of commercial financing in a format to be prescribed by the New York State Department of Financial Services ("DFS"). It will have a significant impact on providers beyond traditional commercial lenders, as it broadly defines "commercial financing" to include the providers, and third-party solicitors, of sales-based financing,[6] closed-end commercial financing,[7] open-end commercial financing,[8] factoring transactions,[9] and other forms of commercial financing as the DFS may provide by rulemaking.

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[5] Memorandum #65 (Dec. 23, 2020), https://www.sfnet.com/docs/default-source/tsl-tslexpress/tslexpress_ny19rsb05470app.pdf?sfvrsn=7ac96eab_2.

[6] "Sales-based financing" means "a transaction that is repaid by the recipient to the provider, 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 by the recipient. Sales-based financing also includes a true-up mechanism where the financing is repaid as a fixed payment but provides for a reconciliation process that adjusts the payment to an amount that is a percentage of sales or revenue." N.Y. Fin. Serv. § 801(j).

[7] "Closed-end financing" means "a closed-end extension of credit, secured or unsecured, including equipment financing that does not meet the definition of a lease under section 2-A-103 of the uniform commercial code, the proceeds of which the recipient does not intend to use primarily for personal, family or household purposes. 'Closed-end financing' includes financing with an established principal amount and duration." *Id.* Section 801(d).

[8] "Open-end financing" means "an agreement for one or more extensions of open-end credit, secured or unsecured, the proceeds of which the recipient does not intend to use primarily for personal, family or household purposes. 'Open-end financing' includes credit extended by a provider under a plan in which: (i) the provider reasonably contemplates repeated transactions; (ii) the provider may impose a finance charge from time to time on an outstanding unpaid

"Recipients" include both individuals and business entities, meaning that commercial financing transactions are subject to the New York Law whether the "borrower" is a natural person or a business association.[10] The term "commercial financing" does not cover arrangements where the proceeds are primarily used for personal, family, or household purposes.[11]

Given these provisions, the New York Law will impact a broad range of nonbank and fintech companies offering commercial financing. Because commercial financing is defined broadly to include purchases of accounts receivable and factoring, the law will require providers of merchant cash advances or traditional factoring arrangements to provide the required disclosures, along with traditional commercial lenders.

Marketplace lenders and bank partnership arrangements are specifically within the scope of the legislation, as the New York Law applies broadly to entities that "extend" specific offers of commercial financing or that "solicit and present" specific offers of commercial financing on behalf of a third party.[12]

Thus, even if the entity that makes a commercial loan or other commercial financing transaction is exempt from the New York Law's requirements, a typical online lending platform would still have to comply. As such, fintech companies operating commercial lending platforms are required to comply with the new law even if they rely on a bank partner arrangement and the bank is exempt.[13]

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balance; and (iii) the amount of credit that may be extended to the recipient during the term of the plan (up to any limit set by the provider) is generally made available to the extent that any outstanding balance is repaid." *Id.* Section 801(c).

[9] "Factoring transaction" means "an accounts receivable purchase transaction that includes an agreement to purchase, transfer, or sell a legally enforceable claim for payment held by a recipient for goods the recipient has supplied or services the recipient has rendered that have been ordered but for which payment has not yet been made." *Id.* Section 801(a).

[10] *Id.* Section 801(i) (defining a "recipient" as a "person"); 801(g) (defining a "person" as "an individual, corporation, partnership, limited liability company, joint venture, association, joint stock company, trust or unincorporated organization including, but not limited to, a sole proprietorship").

[11] *Id.* Section 801(b) (defining "commercial financing").

[12] *Id.* Section 801(h) (defining "provider" in relevant part as "a person who extends a specific offer of commercial financing to a recipient. Unless otherwise exempt, 'provider' also includes a person who solicits and presents specific offers of commercial financing on behalf of a third party.").

[13] The New York Law expressly declines to challenge the "true lender" status of such bank partnership arrangements by stating that, "[f]or the avoidance of doubt, the extension of a specific offer or provision of disclosures for a commercial financing, in and of itself, shall not be construed

As discussed below, the New York Law exempts commercial mortgage loans. The legislation does not impose any new usury limits or licensing obligations, although it expressly provides that making the required disclosures does not exempt a company from other applicable laws such as those relating to licensing (or usury, implicitly).[14] New York requires a license to make certain commercial loans of $50,000 or less under its Licensed Lenders Law, and imposes a 16 percent civil usury cap (subject to various exemptions) and a 25 percent criminal usury cap for certain transaction amounts under its usury laws.[15]

## DISCLOSURE AND SIGNATURE REQUIREMENTS

While the required disclosures vary slightly depending on the type of commercial financing involved, a provider would generally need to disclose the following information:

- The total amount of the commercial financing (or maximum amount of available credit) and, if different, the disbursement amount;
- The finance charge;[16]
- The annual percentage rate or APR, calculated largely in accordance with TILA and Regulation Z;[17]
- The total repayment amount;
- The term of the financing;
- The amounts and frequency of payments;
- A description of all other potential fees and charges;
- A description of any prepayment charges; and
- A description of any collateral requirements or security interests.[18]

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to mean that a provider is originating, making, funding or providing commercial financing." *Id.*

[14] N.Y. S.B. 898 § 2 (N.Y. 2021) ("Nothing in this act shall authorize transactions in this state which are otherwise illegal or allow an entity or individual to operate in this state without a license where a license would otherwise be required.").

[15] *See* N.Y. Banking Law §§ 340; 14-a(1); N.Y. Gen. Oblig. Law § 5-501(1),(6)(b).

[16] "Finance charge" is defined to include all charges included in a finance charge under Regulation Z, in addition to any other charges as determined by the DFS. N.Y. Fin. Serv. § 801(e).

[17] S.B. 898 expressly reinforced that APRs must be calculated according to TILA and Regulation Z even though commercial-purpose financing transactions are not subject to the TILA regime, possibly to preempt arguments by commercial financing providers seeking an "out" from the New York Law.

[18] *See* N.Y. Fin. Serv. §§ 803 through 807.

Alternative disclosures for factoring and sales-based lending are provided. Moreover, a provider that requires a recipient to pay off an existing commercial financing commitment to that provider as a condition of renewal must disclose the amount of the new financing that will be applied to prepayment charges or interest under the financing being renewed and the dollar amount by which the new disbursement will be reduced to pay down any unpaid portion of the outstanding balance.[19] Providers may disclose additional information but not as part of the disclosures required by the New York Law.[20]

"Rates" and "interest" must be disclosed as annual interest rates or APRs, and finance charges must be stated also as APRs.[21]

While this type of disclosure is relatively easy for traditional commercial loans, the legislation recognizes that other types of commercial financing, such as factoring and sales-based lending, will require alternative disclosures. This may ultimately limit the ability of small businesses to compare various types of commercial financing.

A commercial financing provider must obtain the recipient's signature, which may be in electronic format, on all required disclosures before authorizing the recipient to proceed further with its commercial financing transaction application.[22]

## EXEMPTIONS

The New York Law exempts certain entities and transactions.[23] The exempt entities include financial institutions, which are defined to include state or federally chartered depository institutions.[24] Bank holding companies and savings and loan holding companies and their non-bank subsidiaries are not included within the definition of financial institutions. A technology service

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[19] *Id.* Section 808.

[20] *Id.* Section 810.

[21] *Id.*

[22] *Id.* Section 809.

[23] *See id.* Section 802.

[24] "Financial institution" means "any of the following: (i) a bank, trust company, or industrial loan company doing business under the authority of, or in accordance with, a license, certificate or charter issued by the United States, this state or any other state, district, territory, or commonwealth of the United States that is authorized to transact business in this state; (ii) a federally chartered savings and loan association, federal savings bank or federal credit union that is authorized to transact business in this state; or (iii) a savings and loan association, savings bank or credit union organized under the laws of this or any other state that is authorized to transact business in this state." *Id.* Section 801(f).

provider providing software or support services to an exempt entity is exempt so long as the technology service provider has no interest in or agreement to purchase any interest in the commercial financing extended by the exempt entity.

Also exempt are lenders regulated under the federal Farm Credit Act and any person or provider who makes no more than five commercial financing transactions in New York in a 12-month period. S.B. 898 provided an additional exemption for a commercial financing transaction in which the recipient of the financing is an automobile dealer, vehicle rental company, or affiliate of either, if the transaction is in an amount of $50,000 or more.[25] This would generally exclude certain floor plan financing and other credit facilities extended to automobile dealers.

Transactions that are exempt from the New York Law include transactions secured by real property, leases as defined in Article 2A of the New York Uniform Commercial Code and individual transactions in an amount over $2.5 million.[26]

## ADMINISTRATION AND ENFORCEMENT

The New Law creates a new article within the state's Financial Services Law rather than amending an existing statute. The law authorizes, but does not require, the DFS to promulgate rules to implement the law, including in connection with the calculation of metrics that must be disclosed to recipients of commercial financing, the formatting of required disclosures to allow for easy comparison of financing options, the defining of terms and the enforcement of the law's requirements.

The DFS can penalize violations of the provisions of the New York Law by imposing civil penalties not to exceed $2,000 per violation or $10,000 per violation for willful violations.

The DFS may also order additional relief, including but not limited to permanent or preliminary injunctions.[27] These penalties should be imposed

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[25] *Id.* Section 802(h). California has a similar exemption.

[26] The New York Law initially applied only to transactions of $500,000 or less until S.B. 898 broadened the law's scope to transactions of $2.5 million or less. The $2.5 million threshold may have been intended to align with New York's criminal usury law, which caps annual interest at 25 percent for loans of less than $2.5 million and thus covers almost the same nexus of transactions that are covered by the New York Law. This amended coverage threshold is much higher than the $500,000 threshold in the similar law enacted by California in 2018.

[27] *Id.* Section 812. S.B. 898 added restitution to the DFS's available remedies.

only on the provider that failed to make the required disclosures to the recipient or collect the required signatures, whether it be the person who extended a specific offer of commercial financing or an online lending platform that facilitated the offer. There is no express provision for the impairment of a commercial financing transaction's enforceability as the result of a violation.

The New York Law takes effect January 1, 2022, at which time non-exempt entities must be in compliance with the law's disclosure and signature requirements. The DFS will need to issue the required disclosure formats before that time, whether by rulemaking or administrative guidance.

## CONCLUSION

California and now New York, two of the most important financial regulators in the United States, have intensified regulation of providers of business-purpose financing. Other states are already following suit, as the Connecticut legislature introduced its own commercial financing disclosure bill (CT S.B. 745)[28] at the end of January.

It would not be surprising to see additional states follow the lead of these two bellwether states as policymakers increasingly prioritize protections for small businesses across various types of commercial financing arrangements. To the extent that the scope and substantive requirements imposed by these state laws are different, companies engaged in commercial financing transactions will be faced with practical and legal challenges that will likely increase the cost of operating on a multi-state basis.

Furthermore, the exemptions granted by the California, New York, and any additional states could place traditional commercial finance companies at a competitive disadvantage compared to their bank competitors.

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[28] https://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&which_year=2021&bill_num=745.