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New York's "Small Business" Commercial Financing Disclosure Law

By Leonard A. Bernstein, Bob Jaworski and Richard Smith*

In this article, the authors discuss a new regulation issued by the New York State Department of Financial Services to implement the New York Commercial Financing Disclosure Law.

The New York State Department of Financial Services (Department) recently adopted a final regulation (Regulation) to implement the New York Commercial Financing Disclosure Law (Act), for which compliance becomes mandatory after August 1, 2023. The new law applies to nonbank commercial lenders that make small business loans of up to $2.5 million.

According to the Act, certain providers of "specific offers of commercial financing" must provide Truth in Lending-like written disclosures to any recipient of such an offer at the time it is extended.

Other states have enacted or are considering similar laws.

WHY ENACT A DISCLOSURE LAW FOR "SMALL" BUSINESS LOANS? HOW DID WE GET HERE?

There has been a growing concern expressed over the last several years, by state and federal legislators alike, that small businesses needed some governmental protections when seeking commercial credit. One recent example is the following statement in November 2021 by Rep. Nydia M. Velázquez (D-N.Y.), then-Chairwoman of the House Small Business Committee, upon her introduction, along with Sen. Robert Menendez (D-N.J.), of the bicameral federal Small Business Lending Disclosure Act:

> Prior to the COVID-19 pandemic immoral lenders sought to prey on small businesses with unfair and unsustainable loans. . . . Once we were in the midst of the worst public health crisis in over a century these predatory lenders would take aim at business and entrepreneurs trying to stay afloat. This legislation is a critical step in extending many of the protections in consumer lending law to small firms, bringing needed transparency to small business credit markets and ensuring entrepreneurs understand their obligations and rights when they sign up for a

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loan.[1]

Both before and after introduction of the Velázquez-Menendez bill, which has not been passed, numerous states have either passed laws or introduced legislation aimed at addressing concerns similar to those expressed by Rep. Velázquez.

HOW DID NEW YORK LEGISLATORS RESPOND TO THE PERCEIVED "UNFAIRNESS?"

In 2020, the state of New York enacted the Act,[2] requiring certain providers of "specific offers of commercial financing" to provide Truth in Lending-like written disclosures to any recipient of such an offer at the time it is extended. The Act also required the Department to adopt an implementing regulation before the Act would become operative.

After a lengthy rulemaking process, the Department adopted the final regulation (Regulation)[3] on February 1, 2023, compliance with which becomes mandatory on August 1, 2023. Because of the complexity and granularity of the Regulation, providers subject to the Regulation would be well-advised to begin compliance preparations as soon as possible.

WHO IS SUBJECT TO THE REGULATION?

The Regulation applies to nonbank "providers" of commercial financing and defines a "provider" to mean any person who extends a "specific offer of commercial financing" (Offer) to a recipient, including a person who solicits and presents such Offers on behalf of a third party.[4] An Offer is defined to mean "a written communication to a recipient, based upon information from, or about, the recipient, of a (i) periodic payment amount, irregular payment amount, or financing amount, and (ii) any rate, price, or cost of financing

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[1] Press Release (Nov. 18, 2021), available at https://velazquez.house.gov/media-center/press-releases/vel-zquez-and-menendez-introduce-bicameral-bill-stop-predatory-small.

[2] N.Y. Fin. Services. Law § 800 et seq. On Dec. 23, 2020, then-Gov. Andrew Cuomo signed into law NY CLS Fin Serv §§ 801-812 with the intended purpose of "requiring certain providers that extend specific terms of commercial financing to a recipient to disclose certain information about the offer to the recipient."

[3] 23 NYCRR Part 600.1.

[4] 23 NYCRR § 600.1(ad) (referencing the definition in N.Y. Fin. Services. Law § 801(h)). Note that a Provider can also be a "financer," i.e., "the person who provides or will provide the commercial financing to the recipient," if the financer "communicates a specific offer of commercial financing, either directly to a recipient or to a recipient's agent or broker, with the expectation that the information will be shared with a recipient." Id. and 23 NYCRR § 600.1(q).

(including, without limitation, any total repayment amount), in connection with a commercial financing," which, if accepted by a recipient, is binding upon the provider.[5]

ARE ALL "PROVIDERS" COVERED?

Not all providers are covered. The Act and Regulation exempt providers that fall into any of the following categories:

- Financial institutions, including federal and state-chartered banks, industrial loan companies, savings banks, savings and loan associations, and credit unions authorized to transact business in New York;
- Subsidiaries of financial institutions, defined as any entities "of which a majority of the voting power of the voting equity securities or equity interest is owned, directly or indirectly, by a financial institution"[6] (bank nonsubsidiary affiliates do not appear to be expressly exempted from the Act);
- Technology service providers to exempt entities for use as part of the entity's commercial financing program (provided they have no arrangement or agreement to purchase an interest in any commercial financing provided by the entity in connection with the program);
- Lenders regulated under the federal Farm Credit Act; and
- Persons who make no more than five commercial financing transactions in New York in a 12-month period.[7]

WHAT KINDS OF "COMMERCIAL FINANCING" ARE COVERED BY THE REGULATION?

"Commercial financing" is broadly defined in the Act to refer to financing the proceeds of which the recipient does not intend to use primarily for personal, family or household purposes, including specifically any of the following types of commercial financing:

- Open-end financing;
- Closed-end financing;
- Sales-based financing;
- Factoring transactions; and
- Other forms of business-purpose financing (including asset-based

[5] 23 NYCRR § 600.1(ai).

[6] See 23 NYCRR § 600.1(r)(def'n of "financial institution").

[7] N.Y. Fin. Services. Law § 802(a)-(c), (f).

lending transactions and lease financing).[8]

"Open-end financing" and "closed-end financing" are defined in the Act in a manner operationally similar to the definitions given those terms in the federal Truth in Lending Act (TILA) and its implementing regulation, Regulation Z.[9] However, the other types of commercial financing covered by the Act have no definitional analogs in TILA and are not the type of financings for which TILA-like disclosures were designed. For example, the Act applies to "factoring transactions," which it defines to mean accounts receivable purchase transactions.[10] The Act also applies to "sales-based financing," which it defines to mean any:

> 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."[11]

The Regulation also expands the covered types of commercial financing to include "asset-based lending transactions," in which "advances are made from time to time contingent on the recipient forwarding payments . . . received from one or more third parties for goods that the recipient has supplied or services the recipient has rendered to that third party or parties."[12]

Finally, the Regulation covers "lease financing," which means "providing a lease for goods if the lease creates a security interest in the goods leased," but not a "true lease" as defined in Article 2A of the New York Uniform Commercial Code (NY-UCC).[13]

WHAT TYPES OF COMMERCIAL FINANCING TRANSACTIONS ARE EXCLUDED?

The Act exempts the following types of commercial financing transactions:

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[8] N.Y. Fin. Services. Law § 801(b); 23 NYCCR § 601(e)(w). For purposes of determining whether a financing is a "commercial financing," providers are permitted to rely on any statement of intended purposes by the recipient (including even oral statements made by the recipient that are documented in the recipient's application file by the provider).

[9] 15 U.S.C. 1601 *et. seq.*; 12 CFR Part 1026.

[10] N.Y. Fin. Services. Law § 801(a).

[11] N.Y. Fin. Services. Law § 801(j).

[12] 23 NYCRR § 600.0(e).

[13] 23 NYCRR § 600.0(w).

- Real-estate-secured commercial financing transactions;
- True leases (as defined in the NY-UCC);
- Commercial financing transactions in which the aggregate amount the recipient can receive (not the amount of any particular advance) exceeds $2.5 million; [14] and
- Commercial financing transactions (including open-end credit plans, such as floor-plan financings) with a motor vehicle dealer, a motor vehicle rental company or an affiliate of either, in amounts of $50,000 or more. [15]

DETERMINING WHETHER AN OFFER'S AMOUNT IS EQUAL TO OR LESS THAN $2.5 MILLION?

For open-end financings, one looks to the approved credit limit. However, for asset-based lending and factoring transactions, this determination may be different. To demonstrate that the amount of an Offer in connection with such transactions is not equal to or less than $2.5 million, the parties to the transaction, in addition to offering the recipient an agreement that describes the general terms and conditions of the commercial financing transaction with an approved credit limit exceeding $2.5 million, must agree in writing that an amount exceeding $2.5 million is reasonably expected to be advanced to the recipient and outstanding at some point during the term of the financing agreement. Such a written agreement needs to be entered into before execution of the financing agreement, any amendment to an agreement entered into before the effective date of the Act, or any amendment increasing the approved credit limit for a consummated financing agreement to an amount exceeding $2.5 million. Providers should prepare a short form of such an agreement now that can be used with recipients of an Offer to demonstrate that the transaction is exempt from the Regulation. If the provider and recipient do not enter into such a written agreement, then the Offer will be considered less than or equal to $2.5 million and, therefore, subject to the requirements of the Regulation.[16]

ARE THERE TERRITORIAL LIMITATIONS?

The Regulation only covers commercial financing transactions in which (1) the recipient's business is "principally directed or managed from the state of

[14] Rules to determine the "aggregate amount the recipient will receive" in connection with different types of commercial financing are set forth in §19 of the Regulation (23 NYCRR § 600.19).

[15] N.Y. Fin. Services. Law § 802(d), (e), (g), (h).

[16] 23 NYCRR § 600.19.

New York," or (2) in the case of a recipient that is a natural person, the recipient is a legal resident of the state of New York.[17] It does not matter from where the *provider's* business is "principally directed or managed," so long as the recipient has the required New York connection. And similar to California's commercial financing disclosure law, the Regulation allows providers to rely on the recipient's written representation in this regard, or the business address listed on the recipient's financing application or other financing document (if it is an entity), or the address shown on the recipient's driver's license or other form of government-issued identification document (if the recipient is a natural person).

WHEN MUST THE NEW DISCLOSURES BE GIVEN?

Providers are required to give recipients or their agents (including a broker) a document labeled "OFFER SUMMARY" in bold font. In certain cases, providers must deliver a separate document, which must appear directly following the Offer Summary, labeled "Itemization of Amount Financed."[18]

According to the Act, these disclosures must be given "at the time of extending a specific offer. . . ."[19] The Act defines a "specific offer" to mean the "specific terms. . ..quoted to a recipient, based on information obtained from, or about the recipient, which, if accepted by a recipient, shall be binding on the provider. . . ."[20] Practically speaking, the intent seems to be that the delivery of a detailed commercial loan offer (which is binding on the provider if accepted by the recipient) triggers the disclosure requirement. The Regulation confirms that a specific offer arises only from a communication based on recipient information "that informs the provider's quote to the recipient, such as the recipient's financial or credit information, but not the recipient's name, address or general interest in financing."[21]

Note that if a provider allows a recipient to select from multiple differing offer options, the time of extending a specific offer occurs only when the

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[17] 23 NYCRR § 600.24.

[18] Detailed discussion of when the Itemization is triggered is found later in this article.

[19] N.Y. Fin. Services. Law § 803, 804, 805, 806 and 807; 3 NYCRR § 600.0(a). The Regulation provides details as to when this time will be considered to occur in specific circumstances, including in certain instances in which the specific offer is to change the terms of an existing commercial financing agreement or is in connection with individual draws on an open-end commercial financing. Id.

[20] N.Y. Fin. Services. Law § 801(k).

[21] 23 NYCRR § 600.0(n),(ai).

recipient selects an option. In such cases, the disclosures the provider must give are limited to the specific offer of commercial financing the recipient elects to pursue.[22]

WHAT ACTIVITY MAY NOT OCCUR BEFORE A RECIPIENT'S WRITTEN ACKNOWLEDGMENT OF RECEIPT OF THE REQUIRED DISCLOSURES HAS BEEN OBTAINED?

The Act prohibits providers from "proceed[ing] further with the commercial financing transaction application" until it has received the recipient's written acknowledgment of receipt of the required disclosures.[23] The Regulation restates this prohibition by indicating that "prior to consummating a commercial financing, a provider shall obtain the recipient's signature (including an electronic signature) on all disclosures required to be presented to the recipient by the Act."[24] Consequently, it seems that following delivery of the disclosures triggered by a provider's extension of a "specific offer," further activity in connection with the financing must cease until the required signatures are obtained. Policies and procedures that implement this limitation are essential.

WHAT FORMATTING REQUIREMENTS APPLY TO THE OFFER SUMMARY?

Section 5 of the Regulation imposes general formatting requirements for the Offer Summary that apply to all commercial financings. These rules are very detailed. They include minutiae such as to how many decimal points of the annual percentage rate (APR) should be disclosed, how to disclose the "term" of the transaction, what "Times New Roman" font-size should be used for different parts of the Offer Summary, how to express numerical values and more. Among these formatting rules are the following:

1. The words "Offer Summary" must appear, in bold print, at the top and center of page (or other display medium), followed by a one- to five-word description of the type of product offered (e.g., "Merchant Cash Advance"), which can include the provider's branding terminology.[25]

2. The following statement, followed by a space for the recipient to sign the form (labeled "Recipient Signature") and a space in which the recipient can insert the date (labeled "Date"), must appear at the bottom of the disclosure, below any other information required by the

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[22] 23 NYCRR § 600.1(f).

[23] N.Y. Fin. Services. Law §809.

[24] 23 NYCRR § 600.18(a).

[25] 23 NYCRR § 600.5(a).

Act and Regulation: "Applicable law requires this information to be provided to you to help you make an informed decision. By signing below, you are confirming that you received this information."[26]

3. The disclosures must be in a "separate document" but may be transmitted as part of a package of other documents. If provided electronically, the documents must be in a format "that can be saved indefinitely for future reference." [27]
4. The Regulation requires providers to include, along with several of the specific items of information that must be included in an Offer Summary, a "short explanation" concerning the item; any such "short explanation" may not exceed 60 words in length. [28]

WHAT ARE THE CONTENT REQUIREMENTS FOR THE OFFER SUMMARY?

The Offer Summary must include specified items of information concerning the details of the Offer, as specifically prescribed, for each different type of covered commercial financing. While the Offer Summary may be presented to the recipient or the recipient's agent or broker, it must be signed by the recipient.[29] Some of the most significant components of the Offer Summary are the "annual percentage rate," the "amount financed" and the "recipient's funds."

Annual Percentage Rate

The APR must be "determined in accordance with either the United States Rule method or the actuarial method, as both are set forth in Appendix J [of Regulation Z]"[30] It must include all "finance charges," which are defined to

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[26] 23 NYCRR § 600.5(b). Note that a Provider need only obtain the recipient's signature on the final disclosure that corresponds to the consummated transaction. Also, electronically transmitted disclosures and digital signatures affixed by any means that is compliant with the New York Electronic Signatures and Records Act, N.Y. State Technology Law §§103-109, including an "Accept" button or checking a digital box acknowledging agreement, are acceptable, so long as the Provider gives the recipient a date stamp and receipt, as required by section 5(j).

[27] 23 NYCRR § 600.5(e), (j).

[28] 23 NYCRR § 600.5(h).

[29] 23 NYCRR § 600.18. If multiple Offer Summaries are provided to the recipient during negotiations, only the final disclosure corresponding to the consummated transaction must be signed by the recipient. Id.

[30] 23 NYCRR § 600.3(b); 12 CFR Appendix J to Part 1026. Note also that, besides having to disclose the APR in an Offer Summary, a Provider, whenever stating a rate of finance charge or a financing amount to a recipient "during an application process for commercial financing and after the quotation of a specific commercial financing offer," must also state the rate as an "annual percentage rate," using that term or the abbreviation "APR." Id.

include all charges that would be considered to be finance charges under Regulation Z (if Regulation Z were applicable),[31] plus, unless it would result in the charge being counted twice, certain other specified charges depending upon whether the transaction is:

(1) An accounts receivable purchase transaction that is not a factoring transaction;

(2) A factoring transaction; or

(3) A lease financing transaction. [32]

When calculating the APR in connection with a commercial open-end financing, the provider must assume the recipient draws down the credit limit at origination, makes no subsequent draws and makes minimum on-time payments pursuant to the contract.[33] Most important, the APR "disclosed at the time of extending the specific offer of commercial financing" must be "accurate" – i.e., within the APR tolerances set forth in the Regulation or not more than 2.5 percent below the actual APR.[34]

Amount Financed

The Regulation includes separate and slightly different definitions for the term "amount financed" depending upon whether the transaction is a sales-based financing, a closed-end financing, an open-end financing, a factoring transaction, an asset-based lending transaction or a lease financing transaction.[35] Providers will need to consult the applicable definition for the type of financing transaction contemplated.

Recipient Funds

The Regulation defines recipient funds essentially as "the net amount to be given directly to the recipient." The term "recipient funds," however, does not include funds paid to third parties (including brokers) or any part of the amount financed used to pay off or pay down other amounts owed by the recipient, if known by the provider at the time the disclosure is provided.[36]

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[31] 12 CFR 1026.4.

[32] 23 NYCRR § 600.2(a).

[33] 23 NYCRR § 600.3(d). These assumptions could generate a very high APR.

[34] 23 NYCRR § 600.4(a).

[35] 23 NYCRR § 600.1(a).

[36] 23 NYCRR § 600.1(af).

DOES THE REGULATION INCLUDE A MODEL FORM OF OFFER SUMMARY THAT PROVIDES A SAFE HARBOR FROM LIABILITY?

Unfortunately, no. Instead, it provides detailed individualized lists of specific formatting, informational and other requirements for sales-based financing (including asset-based lending that meets the definition of sales-based financing),[37] closed-end financing (that does not meet the definition of sales-based financing or lease financing),[38] commercial open-end financing,[39] factoring transactions,[40] lease financing transactions,[41] general asset-based lending transactions[42] and "all other commercial financing transactions."[43]

For example, a closed-end commercial financing disclosure must consist of 10 (or 11) rows, with each row relating to individual elements of the offered financing. Rows 1 to 10 relate to the following financing elements:

Row 1: funding provided and "amount financed"
Row 2: APR
Row 3: finance charge
Row 4: total payments amount
Row 5: payments and payment schedule
Row 6: term
Rows 7 and 8 (combined): prepayment notice re additional finance charge
Row 9: collateral requirements
Row 10: avoidable fees and charges

The 11th row is required only in the event periodic payments are NOT monthly. It must be inserted between rows 4 and 5 identified above and include information relating to "Average Monthly Cost."

For each of these 10 (or 11) rows, there are three columns, with each column containing specific items of information pertaining to that row. For example, with respect to Row 2 (APR): the first column must include only the phrase "Annual Percentage Rate (APR)" or, if the contract provides for an adjustable interest rate or rates that is not predetermined, "Estimated Annual Percentage

[37] 23 NYCRR §§ 600.6-600.9.

[38] 23 NYCRR § 600.10.

[39] 23 NYCRR § 600.11.

[40] 23 NYCRR §§ 600.12, .13.

[41] 23 NYCRR § 600.14.

[42] 23 NYCRR § 600.15.

[43] 23 NYCRR § 600.16.

Rate (APR)"; the second column must show the APR calculated in accordance with § 600.3 of the Regulation; and the third column must include one of four prescribed descriptions of the meaning of APR, depending upon whether the contract provides for (i) a single fixed interest rate, (ii) multiple pre-determined interest rates; (iii) an adjustable interest rate or rates that are not predetermined, or (iv) finance charges that are not based on an interest rate.

Obviously, even for an uncomplicated product, preparing the form of disclosure takes time and may be challenging. The row and column requirements may be different for each of the types of commercial financing covered by the Regulation. Depending upon the type or types of commercial financing transactions in which a provider typically engages, it will be essential for the provider and its counsel to carefully review the applicable section or sections of the Regulation before drafting the Offer Summary and the required disclosure.

FOR SALES-BASED FINANCING, ARE THERE COMPLICATIONS IN CALCULATING THE APR?

Because sales-based financing is repaid over time as a percentage of sales or revenue, there can only be an estimated APR. The Act says that the estimated APR for sales-based financing transactions can be calculated according to the "historic method" or the "opt-in method."[44] For these transactions, disclosing the APR requires calculating the "average monthly income estimate." That estimate can be derived from an historical average of monthly sales.[45] Alternatively, at the election of the provider, that estimate can be derived using "an internal estimated sales projection" calculated "using the best information reasonably available to the provider."[46] These calculations and disclosures are complicated, and sales-based transaction disclosures need substantial analysis and preparation.

WHAT IS THE ITEMIZATION OF AMOUNT FINANCED?

As indicated above, providers may also need to provide, in addition to the Offer Summary, a separate document titled "Itemization of Amount Financed." This document need be provided, however, only in connection with a financing transaction in which the "amount financed" exceeds the "recipient funds."[47] The "amount financed" typically means the loan amount or credit limit.[48] The

[44] N.Y. Fin. Services Law §803.

[45] 23 NYCRR § 600.8.

[46] 23 NYCRR §§ 600.9(c), (d).

[47] 23 NYCRR § 600.17(a).

[48] 23 NYCRR § 600.1(a).

"recipient funds" typically means the net amount given to the recipient after payments to third parties or payments on a prior loan.[49]

The format of the Itemization of Amount Financed must be substantially similar to the example provided in Section 17(b) of the Regulation. That example is a table, headed "ITEMIZATION OF AMOUNT FINANCED" in bold, followed by a box consisting of at least five or six rows (depending upon whether or not any part of the amount financed is credited to the recipient's account with the financer).

Each row contains a specific numerical value on the right side and a label for that value on the left side, as follows:

(1) The amount of the recipient's funds (labeled, "Amount Given Directly to You");

(2) The amount credited to the recipient's account with the financer, labeled "Amount Paid on your Account with Us," followed by the account number, if applicable;

(3) Any amounts paid to other persons by the financer on the recipient's behalf, each listed on a separate line and identifying the person;

(4) The sum of the amounts disclosed in rows 1 to 3, labeled "Amount Provided to You or on Your Behalf," followed by a reference to how the amount was calculated (e.g. "Sum of Items 1-7.");

(5) The prepaid finance charge, labeled "Prepaid Finance Charge" or "Prepaid Finance Charges," as applicable, followed by a description of the purpose of the charge or charges (e.g. "Brokerage Fee"); and

(6) The amount financed, labeled "Amount Financed," followed by a reference to how the amount was calculated (e.g. "Item 5 minus Item 4.").[50] Providers should consult the Regulation for important details concerning this disclosure.

The Itemization must be a "separate document" from the Offer Summary, but must appear "immediately following" the Offer Summary. There is no signature requirement for the Itemization.

HOW DOES THE REGULATION IMPACT COMMERCIAL FINANCING BROKERS AND/OR FINANCERS AND PROVIDERS WHEN DEALING WITH BROKERS?

The Regulation places certain responsibilities upon brokers, providers and financers in connection with brokered transactions, including the following:

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[49] 23 NYCRR §§ 600.1(a-f).

[50] Id.

- When a financer presents a specific commercial financing offer to a broker, it must provide the broker with a copy of a compliant Offer Summary and (if applicable) Itemization of Amount Financed (Disclosures).
- Upon receipt of the disclosure and before providing the recipient with the specific commercial financing offer, the broker must either (1) transmit the unaltered Disclosures to the recipient and provide the financer with evidence of such transmission, or (2) obtain confirmation from the financer that the Disclosures have been provided directly to the recipient.
- Financers must develop procedures reasonably designed to ensure that each recipient receives the Disclosures before or at the time the broker provides the recipient with the specific commercial financing offer.
- Providers must inform the recipient in writing of how, and by whom, the broker will be compensated for the broker's role in the transaction.[51]

WHAT PENALTIES CAN BE IMPOSED FOR VIOLATIONS?

The Act authorizes the Department to impose a civil penalty of $2,000 or less, payable to the state, for each violation of the Act or Regulation, or $10,000 or less if the violation is willful, and additional relief for knowing violations, including, but not limited to, restitution or a permanent or preliminary injunction on behalf of any recipient affected by the violation.[52] It does not appear that the Act creates a private right of action for recipients or others for any such violations, although a court could be asked to decide whether a failure to comply constitutes an unfair or deceptive act or practice under other state law.

The Regulation provides several defenses to an enforcement action, similar to provisions found in TILA.[53] First, it allows for certain "tolerances" within which a disclosed APR will be considered "accurate" for purposes of the Regulation. Second, it provides that there is no liability in a situation in which a provider, within 60 days of discovering a "bona fide error," notifies the recipient of the error and makes any required adjustments. Third, it shields providers or financers from liability for "inadvertent" disclosures of finance charges, APR, periodic payments or irregular payments, average monthly cost, maximum non-interest finance charge or prepayment fees that exceed the amount that the provider is required to disclose.

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[51] 23 NYCRR § 600. Neither the Act nor the Regulation specifies the form of disclosure that must be made in this regard, nor do they require that it be included in the Offer Summary.

[52] N.Y. Fin. Services. Law § 812.

[53] 23 NYCRR § 600.4.

Questions arise about what will be enforced as a "violation." Will a delay in making the disclosures after the time of extending a specific offer be scrutinized? Will a design flaw in construction of columns and rows merit enforcement? Does an error in any disclosure requirement create a problem, or only an error in the key APR and finance charge elements? Will a covered commercial loan borrower try to use a violation to escape its repayment obligations? If there is a secondary market for covered commercial loans, will investors ask providers to "buy back" loans for which a violation has been asserted?

IS THE ACT PREEMPTED BY TILA?

Not in the view of the Consumer Financial Protection Bureau (CFPB), which responded in the negative to a request from an industry trade association for a determination that the CFDL is preempted by TILA.[54] The CFPB reasoned that since (1) TILA preempts state laws only if the state laws are "inconsistent" with TILA and, even then, only "to the extent of the inconsistency,"[55] and (2) applies only to "consumer credit" (i.e., credit the proceeds of which is intended primarily for a "personal, family or household purpose"), the CFDL, which applies only to "commercial financing" (i.e., financing the proceeds of which "the recipient does not intend to use primarily for personal, family or household purposes"), cannot be "inconsistent" with TILA.

CONCLUSION

There is obviously much more to the Act and the Regulation than is presented above. Providers, financers and brokers need to carefully review the Act and Regulation to be in a position to assess their full impact and develop a plan to achieve compliance before the mandatory compliance date. New York is not alone in its effort to provide a measure of protection to individuals and small businesses seeking commercial financing. California, which set its coverage threshold at $500,000, already has regulations in place that became operative on January 1, 2023.[56] Utah and Virginia have enacted commercial financing disclosure laws (with thresholds of $1 million and $500,000, respectively),[57] but neither appears yet to have proposed regulations to flesh out the details of their required disclosures. And several more states, including most recently Illinois, have introduced bills to regulate small business commercial financing in various respects. It seems likely, therefore, that small business commercial financing industry participants will need to be prepared to address similar state initiatives during the coming months and years.

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[54] 88 Fed. Reg. 19214 (Mar. 31, 2023).

[55] 15 U.S.C. § 1610(a)(1).

[56] Cal. Fin Code § 22800 et seq.; 10 CCR § 900 et seq.

[57] Utah Code § 7-27-101 et seq., -102(11); Va. Code §6.2-2228 et seq., -2229(3).