

Insights

New York DFS Issues Final Commercial Lending Disclosure Regulation

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The New York Department of Financial Services (“NYDFS”) finalized the New York Commercial Finance Disclosure Law (“NYCFDL”) regulation on February 1, 2023. The NYCFDL disclosure rule (“NY Disclosure Rule”) is effective on August 1, 2023, and with few exceptions, closely tracks disclosure regulations adopted by the California Department of Financial Protection and Innovation to the California Commercial Lending law late last year.

The NYCFDL (and the NY Disclosure Rule) apply to closed and open-end commercial loans, factoring transactions, asset based loans, and lease financing transactions. The NY Disclosure Rule applies to any non-exempt “Provider” of a commercial loan. The term “Provider” is defined to include any person extending a specific offer of commercial financing to a recipient including a person soliciting and presenting offers of commercial financing to a recipient on behalf of a third party. i.e. – a broker.

The NY Disclosure Rule requires commercial lenders to provide detailed disclosures similar to those provided by consumer lenders under the federal Truth in Lending Act (“TILA”) and Regulation Z, to counterparties. For example, details required to be disclosed in connection with a factoring transaction include:

- Funding Provided
- Estimated Annual Percentage Rate (“APR”)
- Finance Charge
- Payment Amount
- Estimated Term
- Repurchase Costs
- Collateral Requirements
- Avoidable Fees and Charges

While the structure of commercial loan transactions like an asset based loan or a factoring transaction may seem impossible to disclose using terms like annual percentage rate, the NY Disclosure Rule, like its California counterpart, provides a mechanism for lenders to do so. Commercial lenders using brokers to source transactions will also be required to provide copies of compliant disclosures to the broker for use in connection with each commercial loan, maintain evidence of those disclosures being given to the broker in connection with each transaction, develop procedures to ensure borrowers receive compliant disclosures from brokers, and inform the borrower of how, and by whom, the loan broker will be compensated in connection with the transaction.

While the NYCFDL contains a handful of exemptions for certain lenders (banks, credit unions, etc.), and some transactions (those greater than \$2.5 million, secured by real property, some leases, or transactions involving auto dealers), most lenders extending commercial credit to New York borrowers will have to develop complex disclosures in the coming months. Commercial lenders should pay careful attention to every facet of the NY Disclosure Rule when developing their disclosures. Attention to everything from the correct method of calculation for APR, to the permitted font size and prominence of certain terms, is critical to ensure compliance. Penalties for non-compliance with the NY Disclosure Rule range from \$2,500 for unintentional violations to \$10,000 for willful violations, in addition to potential restitution to the borrower for knowing violations.

Krieg DeVault's **Financial Services** lawyers are closely monitoring developments in the commercial finance industry, and able to provide guidance to commercial lenders on complying with the NY Disclosure Rule, and other similar regulatory requirements across the country.

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