

Gov. Cuomo Signs New York Small Business Finance Disclosure Law

December 31, 2020 | [Katherine C. Fisher](#)

On December 23, 2020, New York Governor Cuomo signed into law [A10118A/S5470B](#) requiring disclosures in various commercial financing transactions, including loans, merchant cash advances ("MCA"), and factoring transactions (the "Disclosure Law"). The Disclosure Law will be effective 180 days from Dec. 23, 2020.

Gov. Cuomo Recognized Near Universal Criticism of the Disclosure Law

Gov. Cuomo released a memo simultaneously with signing the Disclosure Law, recognizing that the disclosure requirements faced criticism from all sides, and stating that the legislature has agreed to make improvements:

Several businesses and consumer groups voiced concerns with this bill. While there is shared recognition, even among those in opposition to this bill, that disclosure in general is crucial in helping small businesses make an informed decision when comparing loan products, it is possible that the information provided could be misleading and give consumers a false sense of security. Small business financing is complex and it is important for small businesses to fully understand the terms and informatively compare products. I also recognize the challenges some small business lenders may face in order to comply with these disclosure requirements. While there is no strong consensus as to the best approach in how to compare various products, I have 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. On the basis of that agreement, I am signing this bill.

Required Disclosures

The Disclosure Law requires different disclosures depending on the type of transaction. However, in each case the provider must disclose an "APR" calculated in accordance with the federal Truth in Lending Act and Regulation Z. The APR disclosure was included over the objection of industry groups and certain legislators who noted that TILA and Regulation Z do not apply to commercial finance. In addition, an APR applied to a transaction with no fixed term, such as factoring and MCA, will be inaccurate and misleading. California has been unable to implement a similar proposed APR disclosure despite years of regulatory effort.

For sales-based financing, which includes MCAs, the disclosure requirements include:

- Total amount of financing;
- Disbursement amount, if different from the total amount of financing;
- Finance charge;
- Estimated "APR" based on the estimated term of repayment and projected periodic payment amounts, which must be based on a calculation of the merchant's projected sales volume;
- Total repayment amount;
- Estimated term;
- Payment amounts, including the projected average payments per month, and differing requirements for fixed and variable payments;
- Description of all fees not included in the finance charge;
- Disclosures relating to payoff or refinancing; and
- Collateral and security interest requirements.

The Disclosure Law specifies two different methods of calculating the projected sales volume and requires the provider to notify the Superintendent of the Department of Financial Services ("DFS") of which method they intend to use for all transactions.

The Disclosure Law also imposes disclosure requirements on repeat financing transactions from the same provider. Under certain circumstances, a statutory disclosure is required, as follows:

"Does the renewal financing include any amount that is used to pay unpaid finance charge or fees, also known as double dipping? Yes [enter amount]. If the amount is zero, the answer would be No."

Industry had objected to the term "double dipping," as the term does not provide any additional clarity and is jargon with negative connotations.

Additional Department of Financial Services Powers

The Disclosure Law authorizes the DFS to promulgate rules and regulations to effectively administer the Disclosure Law. Those regulations will include, at least, rules regarding:

- Calculation of required disclosures;
- Formatting of disclosures, which may include requirements or "approving adequate forms;" and

- Defined terms.

Notably, the authorization to create rules is broad and, arguably, is not limited to disclosures. As a result, the Disclosure Law could have the effect of increasing DFS authority over commercial finance in general.

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