

## New York DFS Releases Proposed Commercial Finance Disclosure Regulations

September 30, 2022 | [Katherine C. Fisher](#)

On September 14, 2022, the New York Department of Financial Services (the "DFS") released proposed regulations implementing the New York Commercial Finance Disclosure Law (the "CFDL"). The proposed regulations are open to public comment until October 31, 2022.

The CFDL was signed by then-governor Cuomo on December 23, 2020, and authorized the DFS to adopt regulations to implement the disclosures, including rules regarding calculation of required disclosures such as an "APR" disclosure for factoring and sales-based financing transactions. The proposed regulations include the following:

**Applicability.** The CFDL requires providers of most commercial financing transactions in amounts of \$2.5 million or less to give detailed cost disclosures to applicants. Under the proposed regulations, New York-specific disclosure requirements would be required in all three of the following scenarios:

- The borrower or merchant receiving the financing (the "recipient" of such financing) is principally directed or managed from New York, or, in the case of a sole proprietor, is a legal resident of New York. To determine whether a business entity is principally directed or managed from New York, a financing provider may rely on the business address provided in the application for financing or any other financing documents. For a sole proprietor, a financing provider may rely upon the person's address as shown on their driver's license or other government-issued ID.
- The provider of the commercial financing is principally directed or managed from New York. Unlike the rules regarding the location of financing recipients, the proposed regulations do not provide any clear standard to determine whether a financing provider is principally directed or managed from New York.
- The provider of the commercial financing "negotiated the commercial financing from a location in New York." Under the CFDL, the term "provider" includes a person who solicits and presents specific offers of commercial financing on behalf of a third party. Accordingly, the proposed regulations appear to require New York-specific disclosures whenever a broker who "negotiated" the transaction is located in New York, even if the transaction has no other connection to New York. The only exception is when the recipient's state also requires standardized disclosures for the commercial financing (which as of now is limited to California, Utah, and for sales-based financing transactions, Virginia).

As justification for this position, the DFS stated in its "Assessment of Public Comments" released with the proposed regulations that "[t]he Department believes this approach is consistent with New York caselaw," without citing to any specific case. The DFS also stated that, "[t]he Department believes the home state of the recipient of financing has the greatest interest in protecting its own businesses." This rationale supports the first trigger for the provision of disclosures discussed above. However, it also appears to undercut the DFS's position that New York-specific disclosures should be provided if the other two trigger scenarios (involving the jurisdictional location of the commercial financing provider) are met. As currently drafted, the proposed regulations would result in the provision of the New York CFDL disclosures to commercial financing recipients on almost a nationwide basis.

**Broker Fee Disclosure.** The CFDL's disclosure requirements do not include a disclosure of broker fees. However, the proposed regulations require a commercial financing provider to include one the following statements in the disclosure:

- "The broker's compensation in this transaction is being paid by the provider, and may be based upon the transaction size and profitability to the provider."
- "The broker's compensation is paid by you, and the amount of compensation is disclosed in the Itemization of Amount Financed."
- "The broker is not being compensated."

**"Double-Dipping Disclosure."** The CFDL's disclosure requirements include a so-called disclosure of "double-dipping" in a renewal or refinance. The proposed regulations require a commercial financing provider to include the following statement:

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

If the financing being satisfied features a fixed finance fee that does not vary based on the repayment period, the financing provider is required to consider the amount that is used to pay unpaid finance charges or fees to be the pro rata portion of the finance fee based upon the fraction of the original total amount financed of the previous financing already repaid by the recipient.

**Proposed Compliance Date.** The DFS has proposed that the "compliance date" for the disclosures would be six months after the date of publication of the Notice of Adoption of the final regulations in the *New York State Register*. Accordingly, the earliest these disclosures could go into effect would be May 2023.

The proposed regulations are available [here](#).

DFS's Assessment of Public Comments for the Revised Proposed New Part 600 to 23 NYCRR is available [here](#).

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