



September 29, 2022

NEW YORK REGULATOR RELEASES NEW COMMERCIAL FINANCING DISCLOSURE REGULATIONS

The New York Department of Financial Services released revised regulations implementing the Commercial Finance Disclosure Law. These regulations set forth the precise formatting and calculation methods providers must use to make commercial financing offers in amounts under \$2.5 million. This version was released after 18 comments were submitted to the Department during the public comment period. The revised regulations propose several key changes and clarifications. Two changes most notable for any 50 state financing program are:

- A geographical limitation, whereby a transaction is subject to the CFDL only if the provider or the recipient is principally directed from New York or if the provider negotiated the financing offer from New York.
- A conflict of law rule, where if the transaction is subject to multiple conflicting disclosure requirements (e.g., a New York provider offers financing to a California recipient), the New York law will defer to the home state of the recipient.

Multiple other changes and clarifications are proposed, including:

- Reiterating that the compliance date for the CFDL and the implementing regulations will be six months after final regulations are issued.
- Clarifying that a single transaction that is exempt for being more than \$2.5 million is not subject to the CFDL because it is split into different smaller financing to multiple entities under common control.
- Clarifying that affiliates and subsidiaries of exempt entities are not themselves exempt because of the exempt parent's status.
- Clarifying that brokers who act on behalf of principals that are exempt entities do share in the principal's exempt status.
- Requiring that recipients must be provided notice when the servicing rights of the commercial financing are transferred.
- Reiterating that sales-based financing must use the closed-end APR calculation under Regulation Z and not the open-end APR calculation.

The geographic limitation of the scope of the CFDL and the provision for resolving conflicting disclosure requirements are important changes for any 50 state program. As other states pass their commercial disclosure requirements, each state has taken a slightly different approach. Providers must be mindful of differences between various states' requirements.

The DFS has stated that it is aware of the problem posed by different disclosure obligations. The DFS has stated that it is working with the California Department of Financial Protection and Innovation to harmonize the New York and California disclosure requirements as much as possible, but with two different statutes, the requirements will not be identical. As California has finalized its regulations, other states may look to California as a starting point. See our [ALERT dated June 15, 2022](#). It is unclear what the scope and effect of this regulatory collaboration will be and whether it will include other states with commercial disclosure requirements such as Utah and Virginia. If states can collaborate, there is less need for uniform federal legislation, like the proposed Small Business Disclosure Act currently before the United States House Committee on Financial Services.

The revised regulations are not the final version. Like the previous version, the revised regulations are subject to a 60-day comment period and thus are subject to further change in response to public comments. If you have any questions regarding compliance with various states' requirements or would like assistance in submitting a comment, please let us know. Comments must be submitted before October 31, 2022.

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