

Commercial Financing Disclosure Act; SB 345

SB 345 creates the Commercial Financing Disclosure Act (Act), pertaining to certain commercial financing transactions between a provider and a business. The bill requires the disclosure of certain commercial financing product transaction information, provides for civil penalties for violations of the Act, and authorizes the Attorney General to enforce the Act.

Definitions

The bill defines multiple terms used in the Act, including:

- “Account,” which includes:
 - A right to payment of a monetary obligation, whether or not earned by performance, for:
 - Property that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of;
 - Services rendered or to be rendered;
 - A policy of insurance issued or to be issued;
 - A secondary obligation incurred or to be incurred;
 - Energy provided or to be provided;
 - The use or hire of a vessel under a charter or other contract;
 - Arising out of the use of a credit card or charge card or information contained on or for the use of such card; or
 - Winnings in a lottery or other game of chance operated or sponsored by a state, governmental unit of a state, or person licensed or authorized to operate such lottery or game by a state or governmental unit of a state; and
 - Health care insurance receivables;

“Account” does not include:

- Rights to payment evidence by chattel paper or an instrument;
- Commercial tort claims;
- Deposit accounts;
- Investment property;
- Letter-of-credit rights or letters of credit; or

- Rights to payment of moneys advanced or sold other than rights arising out of the use of a credit card or charge card or information contained on or for use with such card;
- “Accounts receivable purchase transaction” means any transaction in which a business forwards or otherwise sells to a provider all or a portion of accounts of such business, cash receipts, or payment intangibles at a discount to the expected value of such accounts or payment intangibles. The provider’s characterization of an accounts receivable purchase transaction as a purchase is conclusive that such accounts receivable transaction is not a loan or a transaction for the use, forbearance, or detention of money;
- “Broker” means any person who, for compensation, or the expectation of compensation:
 - Arranges for a commercial financing product transaction between a third party that, if executed, such transaction is binding upon such third party; and
 - Communicates such transaction to a business in this state;

“Broker” does not include a provider or any individual or entity whose compensation is not based or dependent upon the terms of the specific commercial financing product obtained or offered;

- “Business” means an individual, group of individuals, sole proprietorship, corporation, limited liability company, trust, estate, cooperative, association, limited partnership, or general partnership engaged in a business activity;
- “Commercial financing facility” means a provider’s plan for purchasing multiple accounts receivable from the recipient over a period of time pursuant to an agreement that sets forth the terms and conditions governing the use of the facility;
- “Commercial financing transaction” means any commercial loan, accounts receivable purchase transaction, and commercial open-end credit plan when the transaction is a business purpose transaction; and
- “Provider” means a person who consummates more than five commercial financing transactions to a business located in the state in a calendar year. “Provider” does not include a person that enters into a written agreement with a depository institution to arrange for the extension of a commercial financing transaction by such depository institution to a business through an online lending platform administered by such person.

The bill also defines “business purpose transaction,” “commercial loan,” “commercial open-end credit plan,” “depository institution,” “general intangible,” “payment intangible,” and “person.”

Required Commercial Financing Transaction Disclosures

Before, or at the time of, consummating a commercial financing transaction, the bill requires a provider to disclose to the business the terms of such transaction. Only one disclosure is required for each commercial financing transaction. Disclosure is not required when a modification, forbearance, or change to a consummated commercial financing transaction occurs.

The bill requires a provider to disclose the following with each commercial financing transaction, with each disclosure labeled using the terms in quotation marks below:

- The “total amount of funds provided”;
- The “total amount of funds disbursed,” if less than the total amount of funds provided;
- The “total of payments” to such provider;
- The “total dollar cost of financing,” determined by subtracting the total amount of funds provided from the total of payments and includes any fees or charges deducted by the provider from the total amount of funds provided;
- The manner, frequency, and amount of each of the “payments,” and, if such payments vary, the provider is required to instead disclose the manner, frequency, and estimated amount of the initial payment and label such disclosure as “estimated payments.” The bill requires a description of the methodology for calculating any variable payment and the circumstances for when payments may vary to be included in the commercial financing transaction agreement; and
- A statement of whether any costs or discounts are associated with prepayment of such commercial financing transaction, including a reference to the paragraph in the agreement that creates a contractual right to “prepayment.”

Commercial Financing Facility Disclosures

The bill allows a provider that consummates a commercial financing facility to provide disclosures required by the Act that are based on an example of a transaction that may occur under the agreement. The bill requires the example to be based on an account receivable total face amount owed of \$10,000. Only one disclosure is required for each commercial financing facility. Disclosure is not required when a modification, forbearance, or change to the facility occurs. A new disclosure is not required each time accounts receivables are purchased under the facility.

Exemptions from the Act

The bill provides that the Act does not apply to:

- A provider that is a depository institution or its parent company or a subsidiary or service corporation that is:
 - Owned and controlled by a depository institution; and
 - Regulated by a federal banking agency;
- A provider that is a lender regulated under the federal Farm Credit Act;
- A commercial financing transaction that is:
 - Secured by real property;
 - A lease; or
 - A purchase money obligation that is incurred as all or part of the price of the collateral or for value given to enable the business to acquire rights in or the use of such collateral if such value is so used;
- A commercial financing transaction in which the recipient is a motor vehicle dealer or a vehicle rental company, or an affiliate of a motor vehicle dealer or a vehicle rental company, or an affiliate of such company pursuant to a commercial loan or commercial open-end credit plan of at least \$50,000 or a commercial financing transaction offered by a person in connection with the sale or lease of products or services that such person manufactures, licenses, or distributes or whose parent company or any of such parent company's directly or indirectly owned and controlled subsidiaries manufactures, licenses, or distributes;
- A provider that is licensed as a money transmitter in accordance with the Kansas Money Transmitter Act or the law of any other state, district, territory, or commonwealth of the United States;
- A provider that consummates not more than five commercial financing transaction transactions in Kansas in a 12-month period; or
- A commercial financing transaction of more than \$500,000.

Broker Prohibitions

The bill prohibits a broker from:

- Assessing, collecting, or soliciting an advance fee from a business to provide broker services. This does not preclude a broker from soliciting a potential business to pay for, or preclude a potential business from paying for, actual services necessary to apply for a commercial financing transaction. Actual services may include, but not be limited to, a credit check or an appraisal of security, where such payment is made by check or money order payable to a party independent of the broker;

- Making or using any false or misleading representations or omitting any material fact in the offer or sale of broker services or engaging, directly or indirectly, in any act that operates or would operate as fraud or deception upon any person in connection with the offer or sale of broker services, regardless of the absence of reliance by the buyer; or
- Making or using any false or deceptive representation in its business dealings.

Civil Penalties for Violations of Act

The bill requires violations of the Act to be punishable by a civil penalty of \$500 per violation, but not to exceed \$20,000 for all aggregated violations. Any person who receives written notice of a prior violation from the Attorney General and subsequently violates the Act is punishable by a civil penalty of \$1,000 per violation, but not to exceed \$50,000 for all aggregated violations.

The bill provides that the enforceability or validity of an underlying agreement is not affected by violations of the Act. The bill also provides that the Act does not create a separate right of action against any person based upon compliance or noncompliance with the provisions of the Act.

The bill vests the authority to enforce compliance with the Act exclusively with the Attorney General.