STATE OF NEW YORK

8959

2009-2010 Regular Sessions

IN ASSEMBLY

June 17, 2009

Introduced by M. of A. FARRELL -- read once and referred to the Committee on Ways and Means

AN ACT to amend the tax law and the general business law, in relation to tax return preparers and refund anticipation loans

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Paragraphs 6, 10 and 11 of subdivision (a) of section 32 of the tax law, as added by section 2 of part VV of chapter 59 of the laws of 2009, are amended to read as follows:

(6) "Facilitator" means a person who individually or in conjunction or cooperation with another person: (a) [solicits the execution of,] processes, receives, or accepts an application or agreement for a refund anticipation loan [or refund anticipation check, (b) serves or collects upon a refund anticipation loan or refund anticipation check]; or [(c)] (B) in any other manner facilitates the making of a refund anticipation loan [or refund anticipation check]. This term excludes any employees of a facilitator who provide only clerical or other comparable support services to such facilitator. THIS TERM ALSO EXCLUDES A PERSON WHO MAKES A REFUND ANTICIPATION LOAN OR A REFUND ANTICIPATION CHECK, AN AFFILIATE THAT IS A SERVICER FOR SUCH A PERSON, OR ANY PERSON WHO DOES NOT HAVE DIRECT CONTACT WITH A TAXPAYER IN CONNECTION WITH APPLYING FOR OR OBTAINING A REFUND ANTICIPATION LOAN OR A REFUND ANTICIPATION CHECK.

(10) "Refund anticipation check" means a check, stored value card, or other payment mechanism [which: (a) represents the proceeds of a tax refund; (b) was issued by a depository institution or other person that received a direct deposit of the tax refund or tax credits; and (c) a fee or other consideration is paid for such payment mechanism] (A) CONTAINING THE PROCEEDS OF A TAX REFUND DEPOSITED OR ISSUED BY THE IRS OR STATE TAXING AUTHORITY INTO AN ACCOUNT NOT OWNED BY THE TAXPAYER; (B) WHICH WAS ISSUED BY A DEPOSITORY INSTITUTION OR OTHER PERSON THAT RECEIVED A DIRECT DEPOSIT OF THE TAX REFUND OR TAX CREDITS DIRECTLY FROM

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

LBD14396-01-9

THE IRS OR STATE TAXING AUTHORITY; AND (C) FOR WHICH A FEE OR OTHER CONSIDERATION HAS BEEN PAID FOR SUCH PAYMENT MECHANISM. NOTWITHSTANDING ANY OTHER PROVISIONS OF THIS PARAGRAPH, A DEPOSIT OF TAX REFUND PROCEEDS FROM THE IRS OR STATE TAXING AUTHORITY DIRECTLY TO A CHECK, STORED VALUE CARD, OTHER PAYMENT INSTRUMENT, OR BANK ACCOUNT OWNED BY THE TAXPAYER IS NOT A REFUND ANTICIPATION CHECK.

(11) "Refund anticipation loan" means a loan that is secured by [or] AND that the creditor arranges to be repaid directly or indirectly from the proceeds of an income tax refund or tax credits. A refund anticipation loan also includes any sale, assignment, or purchase of tax refund at a discount or for a fee, whether or not the amount is required to be repaid to the buyer or assignee if the internal revenue service or the department denies or reduces the amount of the tax refund.

S 2. Paragraphs 1 and 2 of subdivision (b) of section 32 of the tax law, as added by section 2 of part VV of chapter 59 of the laws of 2009, are amended to read as follows:

(1) Each tax return preparer, who will prepare at least one return in a calendar year, and each facilitator, who will facilitate the making of a refund anticipation loan [or refund anticipation check], must register electronically with the department for that calendar year, in accordance with instructions prescribed by the commissioner.

(2)(A) Upon completion of the registration process, each tax return preparer and facilitator will be issued a tax preparer or facilitator registration certificate. If an individual acts as both a tax return preparer and a facilitator, one registration certificate shall indicate both activities.

(B) In accordance with instructions prescribed by the commissioner, each tax return preparer and facilitator will also be assigned a unique identification number by the department, which must be used by the tax return preparer and facilitator on each return which the tax return preparer is required to sign and each refund anticipation loan [and refund anticipation check] the facilitator is required to sign.

(C) If a tax return preparer or facilitator is an employee or prospective employee of a tax return preparer, a commercial tax return preparation business, or a facilitator, the tax return preparer, commercial tax return preparation business or facilitator must ensure that the employee or prospective employee is properly registered with the department and possesses a valid tax preparer or facilitator registration certificate. If an individual acts as both a tax return preparer and a facilitator one registration certificate shall indicate both activities.

S 3. Subdivisions (f), (g) and (g) of section 32 of the tax law, as added by section 2 of part VV of chapter 59 of the laws of 2009, are amended to read as follows:

(f) (1) A tax return preparer or facilitator shall not: (A) charge or impose any fee, charge or other consideration in the making or facilitating of a refund anticipation loan or refund anticipation check apart from the fee charged by the creditor or bank that provided the loan or check;

(B) Engage in unfair or deceptive acts or practices in the facilitating of a refund [anticipation check or a refund] anticipation loan, including making any oral statements contradicting any of the information required to be disclosed under the Taxpayer Bill of Rights as set forth in sections three hundred seventy-one through three hundred seventy-three of the general business law;

(C) [Directly or indirectly arrange for a third party to charge any interest, fee or charge related to a refund anticipation loan or refund anticipation check;

(D)] Include any of the following provisions in any documents provided or signed to obtain a refund anticipation loan [or refund anticipation check], including the loan application or agreement: (i) a hold harmless clause; (ii) a confession of judgment clause; (iii) [a waiver of the right to a jury trial; (iv)] any assignment of or order for payment of wages or other compensation for services; [(v)] OR (IV) a waiver of any provision of the Taxpayer Bill of Rights, as set forth in sections three hundred seventy-one through three hundred seventy-three of the general business law[; or (vi) a waiver of the right to injunctive, declaratory, other equitable relief, or relief on a classwide basis]. Any aforementioned waivers shall be deemed null, void and of no effect;

[(E)] (D) Take or arrange for a creditor to take a security interest in any property interest of the taxpayer other than the proceeds of the tax refund OR THE ACCOUNT INTO WHICH THE REFUND IS DEPOSITED to secure payment of a refund anticipation loan;

[(F) Directly or indirectly, individually or in conjunction or cooperation with another person, engage in the collection of an outstanding or delinquent refund anticipation loan for any creditor or assignee;

(G)] (E) Refer, facilitate, solicit consumers or conduct business on behalf of, in conjunction with or on the same premises as a third party engaged in check cashing for a fee, WHEN SUCH THIRD PARTY RECEIVES AT LEAST TEN PERCENT OF ITS ANNUAL REVENUE FROM CASHING CHECKS FOR A FEE;

[(H)] (F) Make a misrepresentation of fact in obtaining or attempting to obtain a registration; or

[(I)] (G) Engage in any other action prohibited by rules promulgated by the commissioner.

(2) If a tax return preparer violates any one of the provisions provided for in this subdivision, then the tax return preparer must pay a penalty of five hundred dollars for each such violation, in addition to any other penalties provided for in this section.

(g) (1) If a tax return preparer or facilitator is required to register or re-register with the department pursuant to paragraph one or three of subdivision (b) of this section, as applicable, and fails to do so in accordance with the terms of this section, then the tax return preparer [of] OR facilitator must pay a penalty of two hundred fifty dollars. Provided, however, that if the tax return preparer or facilitator complies with the registration requirements of this section within ninety calendar days after notification of assessment of this penalty is sent by the department, then this penalty must be abated. If the tax return preparer or facilitator continues to fail to register or re-register after the ninety calendar day period, the tax return preparer or facilitator must pay an additional penalty of five hundred dollars if the failure is for not more than one month, with an additional five hundred dollars for each additional month or fraction thereof during which the failure continues. Once the ninety calendar days specified in this paragraph have expired, the penalty can be waived only for good cause shown by the tax return preparer or facilitator.

(2) If a commercial tax return preparer fails to pay the fee as required in paragraph one of subdivision (c) of this section, for a calendar year, then the commercial tax return preparer must pay a penalty of fifty dollars for each return the commercial tax return preparer has filed with the department in that calendar year. Provided however, that if the commercial tax return preparer complies with the payment

requirements of paragraph one of subdivision (c) of this section, within ninety calendar days after notification of the assessment of this penalty is sent by the department, then this penalty must be abated. The maximum penalty that may be imposed under this paragraph on any commercial tax return preparer during any calendar year must not exceed five thousand dollars. Once the ninety calendar days specified in this paragraph have expired, the penalty can be waived only for good cause shown by the commercial tax return preparer.

(3) If a tax return preparer fails to sign his or her name to any return that requires the tax return preparer's signature, or a facilitator fails to sign his or her name to any refund anticipation loan or refund anticipation check facilitation documentation, then the tax return preparer or facilitator must pay a penalty in the amount of two hundred fifty dollars for each failure to so sign. Provided, however, that this penalty can be waived only for good cause shown by the tax return preparer or facilitator.

The maximum penalty imposed under this paragraph on any tax return preparer with respect to returns filed during any calendar year by the tax return preparer, or on any facilitator with respect to any refund anticipation loan [or refund anticipation check] facilitation documentation completed during any calendar year by the facilitator must not exceed ten thousand dollars. Provided, however, that if a tax return preparer or facilitator has been penalized under this paragraph for a preceding calendar year and again fails to sign his or her name on any return that requires the tax return preparer's signature or again fails to sign his or her name on any refund anticipation loan [or refund anticipation check] facilitation documentation during a subsequent calendar year, then the penalty under this paragraph for each failure will be five hundred dollars[, and no annual cap will apply] AND AN ANNUAL CAP OF TWENTY-FIVE THOUSAND DOLLARS SHALL APPLY.

(4) If a tax return preparer or a facilitator fails to include the unique identification number assigned by the department pursuant to subparagraph (B) of paragraph two of subdivision (b) of this section on any return, or any return anticipation loan [or return anticipation check] facilitation documentation that requires his or her signature, then the tax return preparer or facilitator must pay a penalty of one hundred dollars for each failure to include his or her unique identification number. Provided, however, that this penalty can be waived only for good cause shown by the tax return preparer or facilitator. The maximum penalty imposed under this paragraph on any tax return preparer or facilitator with respect to returns filed during any calendar year must not exceed two thousand five hundred dollars; provided, however, that if a tax return preparer or facilitator has been penalized under this paragraph for a preceding calendar year and again fails to include the unique identification number on one or more returns during a subsequent calendar year, then the penalty under this paragraph for each failure will be two hundred fifty dollars[, and no annual cap will apply] AND AN ANNUAL CAP OF FIVE THOUSAND DOLLARS SHALL APPLY.

(5) If a tax return preparer, facilitator or a commercial tax return preparation business employs an individual to prepare tax returns who is not registered with the department and does not possess a valid tax preparer or facilitator registration certificate, then the tax return preparer, facilitator or commercial tax return preparation business, as applicable, will be subject to a penalty of five hundred dollars per occurrence. This penalty can be waived only for good cause shown.

(6) The penalties provided for by this subdivision must be paid upon notice and demand and will be assessed, collected and paid in the same manner as taxes under article twenty-seven of this chapter.

[(g)] (H) The provisions of this section will apply exclusively to the registration of tax return preparers and facilitators with the department, payment of the registration fee if required by commercial tax return preparers, the signing of returns and use of the unique identification numbers assigned by the department upon registration. Other provisions of this chapter or any other provision of law prescribing additional requirements applicable to tax return preparers or facilitators will not be affected by the provisions of this section except as set forth expressly herein, and will remain in full force and effect.

S 4. Subdivisions (a) and (c) of section 371 of the general business law, subdivision (a) as amended and subdivision (c) as added by section 5 of part VV of chapter 59 of the laws of 2009, are amended to read as follows:

(a) "Facilitator" means a person who individually or in conjunction or cooperation with another person[: (i) solicits the execution of,] processes, receives, or accepts an application or agreement for a refund anticipation loan [or refund anticipation check; (ii) serves or collects upon a refund anticipation loan or refund anticipation check; or (iii) in any other manner that facilitates the making of a refund anticipation loan or refund anticipation check]. This term excludes any employees of a facilitator who provide only clerical or other comparable support services to such facilitator. THIS TERM ALSO EXCLUDES A PERSON THAT MAKES A REFUND ANTICIPATION LOAN OR A REFUND ANTICIPATION CHECK, AN AFFILIATE THAT IS A SERVICER FOR SUCH A PERSON, OR ANY PERSON WHO DOES NOT HAVE DIRECT CONTACT WITH A TAXPAYER IN CONNECTION WITH APPLYING FOR OR OBTAINING A REFUND ANTICIPATION LOAN OR A REFUND ANTICIPATION CHECK.

(c) "Refund anticipation check" means a check, stored value card, or other payment mechanism: (i) [representing] CONTAINING the proceeds of a tax refund DEPOSITED OR ISSUED BY THE IRS OR STATE TAXING AUTHORITY INTO AN ACCOUNT NOT OWNED BY THE TAXPAYER; (ii) which was issued by a depository institution or other person that received a direct deposit of the tax refund or tax credits DIRECTLY FROM THE IRS OR STATE TAXING AUTHORITY; and (iii) for which a fee or other consideration has been paid for such payment mechanism. NOTWITHSTANDING ANY OTHER PROVISIONS OF THIS PARAGRAPH, A DEPOSIT OF TAX REFUND PROCEEDS FROM THE IRS OR STATE TAXING AUTHORITY DIRECTLY TO A CHECK, STORED VALUE CARD, OR OTHER PAYMENT INSTRUMENT, OR BANK ACCOUNT OWNED BY THE TAXPAYER IS NOT A REFUND ANTICIPATION CHECK.

S 5. Paragraph 2 of subdivision (b) and subdivisions (e) and (f) of section 372 of the general business law, paragraph 2 of subdivision (b) and subdivision (e) as amended and subdivision (f) as added by section 6 of part VV of chapter 59 of the laws of 2009, are amended to read as follows:

(2) explanations of some of the commonly offered services and industry jargon, such as preparation of short and long federal forms, refund, electronic filing, express mail, direct deposit, [refund anticipation check,] refund anticipation loan, quick, instant, rapid, fast, fee, and interest;

(e) (1) Any tax preparer who advertises the availability of a refund anticipation loan [or refund anticipation check] may not directly or indirectly represent such a loan as a refund. Any advertisement which mentions a refund anticipation loan must state conspicuously that it is a loan and that a fee or interest will be charged by the lending institution. The advertisement must also disclose the name of the lending institution.

(2) (i) Before any taxpayer enters into a refund anticipation loan, the tax preparer facilitating such loan shall provide the following disclosure to the taxpayer in writing in at least fourteen-point type:

"YOU ARE NOT REQUIRED TO ENTER INTO THIS REFUND ANTICIPATION LOAN AGREEMENT MERELY BECAUSE YOU HAVE RECEIVED THIS INFORMATION.

IF YOU DO SIGN A CONTRACT FOR A REFUND ANTICIPATION LOAN, YOU WILL BE TAKING OUT A LOAN. YOU WILL BE RESPONSIBLE FOR REPAYMENT OF THE ENTIRE LOAN AMOUNT AND ALL RELATED COSTS AND FEES, REGARDLESS OF HOW MUCH MONEY YOU ACTUALLY RECEIVE IN YOUR TAX REFUND. IF YOUR REFUND IS DELAYED, YOU MAY HAVE TO PAY ADDITIONAL COSTS.

IF YOU DO NOT TAKE OUT THIS REFUND ANTICIPATION LOAN, YOU ARE ELIGIBLE TO RECEIVE A GROSS TAX REFUND OF APPROXIMATELY $(insert amount).

IF YOU DO TAKE OUT THIS REFUND ANTICIPATION LOAN, YOU WILL BE RESPONSIBLE TO PAY $(insert amount) IN FEES FOR THE LOAN. AFTER THESE FEES ARE PAID, YOU WILL RECEIVE APPROXIMATELY $ (insert amount) AS YOUR LOAN.

THE ESTIMATED ANNUAL PERCENTAGE RATE OF YOUR REFUND ANTICIPATION LOAN IS (insert amount)%. THIS IS BASED ON THE ACTUAL AMOUNT OF TIME YOU WILL BE LENT MONEY THROUGH THIS REFUND ANTICIPATION LOAN.

IF YOU DO TAKE OUT THIS REFUND ANTICIPATION LOAN, YOU CAN EXPECT TO RECEIVE YOUR LOAN WITHIN APPROXIMATELY TWO BUSINESS DAYS OF (insert date).

IF YOU DO NOT TAKE OUT THIS REFUND ANTICIPATION LOAN, YOU CAN STILL RECEIVE YOUR TAX REFUND QUICKLY. IF YOU FILE YOUR TAX RETURN ELECTRONICALLY AND RECEIVE YOUR TAX REFUND THROUGH THE MAIL, YOU CAN EXPECT TO RECEIVE YOUR REFUND WITHIN APPROXIMATELY TWO BUSINESS DAYS OF (insert date). IF YOU FILE YOUR TAX RETURN ELECTRONICALLY AND HAVE YOUR TAX REFUND DIRECTLY DEPOSITED INTO A BANK ACCOUNT, YOU CAN EXPECT TO RECEIVE YOUR REFUND WITHIN APPROXIMATELY TWO BUSINESS DAYS OF (insert date)."

(ii) [Before any taxpayer enters into an agreement to receive a refund anticipation check, the tax preparer facilitating the agreement shall provide the following disclosure to the taxpayer in writing in at least fourteen-point type:

"YOU ARE NOT REQUIRED TO ENTER INTO THIS REFUND ANTICIPATION CHECK AGREEMENT MERELY BECAUSE YOU HAVE RECEIVED THIS INFORMATION. IF YOU DO TAKE OUT THIS REFUND ANTICIPATION CHECK, YOU WILL BE RESPONSIBLE TO PAY $(insert amount) IN FEES FOR THE CHECK TO BE ISSUED BY (insert name of issuer of refund anticipation check). YOU CAN AVOID THIS FEE AND STILL RECEIVE YOUR REFUND IN THE SAME AMOUNT OF TIME BY HAVING YOUR REFUND DIRECTLY DEPOSITED INTO YOUR OWN BANK ACCOUNT. YOU CAN ALSO WAIT FOR THE FEDERAL OR STATE REFUND TO BE MAILED TO YOU.

IF YOU DO ENTER INTO THIS REFUND ANTICIPATION CHECK AGREEMENT, YOU CAN EXPECT TO RECEIVE YOUR CHECK BY APPROXIMATELY TWO BUSINESS DAYS OF (insert date).

IF YOU DO NOT ENTER INTO THIS REFUND ANTICIPATION CHECK AGREEMENT, YOU CAN STILL RECEIVE YOUR TAX REFUND QUICKLY. IF YOU FILE YOUR TAX RETURN ELECTRONICALLY AND RECEIVE YOUR TAX REFUND THROUGH THE MAIL, YOU CAN EXPECT TO RECEIVE YOUR REFUND WITHIN APPROXIMATELY TWO BUSINESS DAYS OF (insert date). IF YOU FILE YOUR TAX RETURN ELECTRONICALLY AND HAVE YOUR TAX REFUND DIRECTLY DEPOSITED INTO A BANK ACCOUNT, YOU CAN EXPECT TO RECEIVE YOUR REFUND WITHIN APPROXIMATELY TWO BUSINESS DAYS OF (insert date)."

(iii)] It shall be the obligation of the tax preparer to complete the required disclosures accurately with all relevant information for each taxpayer and to ensure that the completed disclosure form is signed by the taxpayer before he or she enters into a refund anticipation loan [or a refund anticipation check], with a copy of the same provided to the taxpayer. The name and the unique identification number of the tax return preparer (and facilitator, if different) assigned pursuant to section thirty-two of the tax law must be included on the disclosure form provided to the taxpayer.

(f)[(1)] If a taxpayer applies for a refund anticipation loan, the facilitator must also orally inform the taxpayer in the language primarily used for oral communications between the facilitator and taxpayer:

(i) that the product is a loan that only lasts one to two weeks;

(ii) if the tax refund is less than expected, the taxpayer is liable for the full amount of the loan and must repay any difference;

(iii) if the refund is delayed for any reason, there may be additional costs, such as additional interest, that the taxpayer will have to pay;

(iv) the amount of the refund anticipation loan fee; and

(v) the refund anticipation loan interest rate.

[(2) If a taxpayer applies for a refund anticipation check, the facilitator must also orally inform the taxpayer in the language primarily used for oral communications between the facilitator and taxpayer:

(i) the amount of the refund anticipation check fee; and

(ii) that the taxpayer can receive a refund in the same amount of time without a fee if the tax return is filed electronically, and the consumer chooses direct deposit to their own personal bank account.]

S 6. This act shall take effect immediately.