

4827

2009-2010 Regular Sessions

I N S E N A T E

April 27, 2009

Introduced by Sen. FARLEY -- read twice and ordered printed, and when printed to be committed to the Committee on Banks

AN ACT to amend the banking law, in relation to the enforcement of provisions relating to unlicensed operations

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

1 Section 1. The banking law is amended by adding a new section 44-b to  
2 read as follows:

3 S 44-B. CIVIL ENFORCEMENT PROCEEDINGS AND CIVIL PENALTIES. 1. ISSU-  
4 ANCE OF CEASE AND DESIST ORDER. WHENEVER THE DEPARTMENT HAS REASONABLE  
5 CAUSE TO BELIEVE THAT ANY PERSON HAS VIOLATED ANY PROVISION OF THIS  
6 CHAPTER BY OPERATING WITHOUT THE REQUIRED AUTHORIZATION OF THE SUPER-  
7 INTENDENT, THE DEPARTMENT MAY ISSUE AND SERVE UPON SUCH PERSON A NOTICE  
8 TO CEASE AND DESIST FROM SUCH VIOLATION. SUCH CEASE AND DESIST ORDER  
9 SHALL BE SERVED PERSONALLY BY THE DEPARTMENT. IF PERSONAL SERVICE CAN  
10 NOT BE MADE AFTER DUE DILIGENCE AND SUCH FACT IS CERTIFIED UNDER OATH, A  
11 COPY OF THE ORDER SHALL BE MADE BY CERTIFIED MAIL, RETURN RECEIPT  
12 REQUESTED, TO THE PERSON'S LAST KNOWN ADDRESS BY THE DEPARTMENT.

13 2. CONTENTS OF CEASE AND DESIST ORDER. THE CEASE AND DESIST ORDER  
14 SHALL BE IN WRITING AND SHALL DESCRIBE WITH PARTICULARITY THE NATURE OF  
15 THE VIOLATION, INCLUDING A REFERENCE OF THE SPECIFIC PROVISION OR  
16 PROVISIONS OF LAW ALLEGED TO HAVE BEEN VIOLATED AND AN ORDER TO THE  
17 RESPONDENT TO CEASE ANY UNLAWFUL ACTIVITY. THE CEASE AND DESIST ORDER  
18 SHALL ADVISE THE RESPONDENT (A) OF THE RIGHT TO CONTEST THE ORDER BY  
19 REQUESTING A HEARING WITHIN THIRTY DAYS OF THE SERVICE OF THE CEASE AND  
20 DESIST ORDER BEFORE A HEARING OFFICER DESIGNATED BY THE DEPARTMENT (B)  
21 OF THE RIGHT TO REQUEST A STAY OF THE CEASE AND DESIST ORDER AT THE TIME  
22 A HEARING IS REQUESTED AND (C) SHALL SET FORTH THE RESPONDENT'S RIGHTS  
23 AT SUCH A HEARING PURSUANT TO SUBDIVISION FIVE OF THIS SECTION.

24 3. CIVIL PENALTIES. CIVIL PENALTIES UP TO FIVE THOUSAND DOLLARS PER  
25 DAY MAY BE IMPOSED FOR EACH VIOLATION AND THE RESPONDENT MAY BE ORDERED

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

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1 TO MAKE RESTITUTION TO ANY PERSON WHO HAS AN INTEREST IN ANY MONEY OR  
2 PROPERTY, EITHER REAL OR PERSONAL, ACQUIRED BY THE RESPONDENT AS A  
3 RESULT OF A VIOLATION. WHENEVER THE DEPARTMENT CONCLUDES THAT CIVIL  
4 PENALTIES AND/OR RESTITUTION MAY BE WARRANTED BECAUSE OF THE EGREGIOUS-  
5 NESS OF THE UNLAWFUL ACTIVITY, IT MAY SERVE, ALONG WITH THE CEASE AND  
6 DESIST ORDER, A NOTICE OF A HEARING ON THE ALLEGATIONS OF UNLAWFUL  
7 ACTIVITY AND THE DEPARTMENT'S INTENTION TO ORDER THE RESPONDENT TO MAKE  
8 RESTITUTION AND/OR IMPOSE A CIVIL PENALTY. THE NOTICE SHOULD SPECIFY THE  
9 CIVIL PENALTY SOUGHT FOR EACH VIOLATION.

10 4. REQUEST FOR HEARING. IF THE RESPONDENT TO A CEASE AND DESIST ORDER  
11 CONTESTS THE CEASE AND DESIST ORDER, THE RESPONDENT SHALL REQUEST A  
12 HEARING CONDUCTED BY THE DEPARTMENT WITHIN THIRTY DAYS OF THE RECEIPT OF  
13 THE CEASE AND DESIST ORDER. SUCH A HEARING SHALL BE SCHEDULED, AND THE  
14 REQUESTING PARTY NOTIFIED OF THE DATE, WITHIN FIFTEEN DAYS OF THE  
15 RECEIPT OF THE REQUEST FOR A HEARING. IF THE RESPONDENT REQUESTS A STAY  
16 OF THE CEASE AND DESIST ORDER, THE HEARING OFFICER SHALL DETERMINE  
17 WHETHER THE CEASE AND DESIST ORDER SHOULD BE STAYED IN WHOLE OR IN PART  
18 WITHIN FIVE WORKING DAYS OF THE REQUEST FOR A STAY. THE RESPONDENT MAY  
19 FILE A WRITTEN ANSWER TO THE CEASE AND DESIST ORDER PRIOR TO THE HEAR-  
20 ING. A STENOGRAPHIC RECORD OF THE HEARING SHALL BE MADE.

21 5. CONDUCT OF HEARING. THE EVIDENCE IN SUPPORT OF THE CEASE AND DESIST  
22 ORDER SHALL BE PRESENTED BY AN ATTORNEY FOR THE DEPARTMENT. THE RESPOND-  
23 ENT MAY APPEAR PERSONALLY AND MAY BE REPRESENTED BY COUNSEL AT THE HEAR-  
24 ING, MAY PRODUCE WITNESSES AND EVIDENCE IN HIS OR HER BEHALF AT THE  
25 HEARING, MAY CROSS-EXAMINE WITNESSES AND EXAMINE EVIDENCE PRODUCED  
26 AGAINST HIM OR HER AT THE HEARING, AND MAY ISSUE SUBPOENAS IN ACCORDANCE  
27 WITH SECTION THREE HUNDRED FOUR OF THE STATE ADMINISTRATIVE PROCEDURE  
28 ACT. THE HEARING OFFICER SHALL NOT BE BOUND BY THE RULES OF EVIDENCE,  
29 BUT HIS OR HER DETERMINATION THAT A VIOLATION OF THIS CHAPTER HAS  
30 OCCURRED SHALL BE BASED ON A PREPONDERANCE OF THE EVIDENCE. A HEARING  
31 WHICH HAS BEEN INITIATED SHALL NOT BE DISCONTINUED BECAUSE OF THE DEATH  
32 OR INCAPACITY OF THE HEARING OFFICER. IN THE EVENT OF A HEARING OFFI-  
33 CER'S DEATH OR INCAPACITY TO SERVE, A NEW HEARING OFFICER SHALL BE  
34 DESIGNATED BY THE DEPARTMENT TO CONTINUE THE HEARING. THE NEW HEARING  
35 OFFICER SHALL AFFIRM IN WRITING THAT HE OR SHE HAS READ AND CONSIDERED  
36 EVIDENCE AND TRANSCRIPTS OF THE PRIOR PROCEEDINGS.

37 6. RESULTS OF HEARING. THE HEARING OFFICER DESIGNATED BY THE DEPART-  
38 MENT SHALL RENDER A WRITTEN REPORT WHICH SHALL INCLUDE (A) FINDINGS OF  
39 FACT, (B) A DETERMINATION ON EACH VIOLATION ALLEGED IN THE CEASE AND  
40 DESIST ORDER, (C) A DETERMINATION AS TO WHETHER TO ACCEPT, REJECT, OR  
41 MODIFY ANY OF THE TERMS OF THE CEASE AND DESIST ORDER IN WHOLE OR IN  
42 PART, AND (D) THE CIVIL PENALTY IMPOSED, IF ANY. A COPY OF THE HEARING  
43 OFFICER'S WRITTEN REPORT SHALL BE SERVED UPON THE RESPONDENT WITH A  
44 NOTICE SETTING FORTH THE RESPONDENT'S RIGHTS TO AN ADMINISTRATIVE APPEAL  
45 WITHIN TEN DAYS OF THE CONCLUSION OF THE HEARING.

46 7. APPEALS. THE DECISION OF THE HEARING OFFICER SHALL BE FINAL, EXCEPT  
47 THAT IT MAY BE APPEALED TO THE SUPERINTENDENT WITHIN TWENTY DAYS OF THE  
48 RECEIPT OF THE HEARING OFFICER'S REPORT. THE INITIATION OF AN APPEAL  
49 SHALL NOT IN AND OF ITSELF AFFECT THE VALIDITY OR TERMS OF THE CEASE AND  
50 DESIST ORDER. THE REVIEW SHALL BE BASED ON THE TRANSCRIPT AND THE  
51 REPORT OF THE HEARING OFFICER. THE RESPONDENT MAY APPEAR AT THE MEETING,  
52 AND THE SUPERINTENDENT MAY REQUIRE THE RESPONDENT TO APPEAR. THE  
53 RESPONDENT MAY BE REPRESENTED BY COUNSEL. THE DEPARTMENT SHALL NOTIFY  
54 THE RESPONDENT AT LEAST TEN DAYS BEFORE THE MEETING (A) OF THE TIME AND  
55 PLACE OF THE MEETING, (B) OF THE RIGHT TO APPEAR, (C) OF THE RIGHT TO BE  
56 REPRESENTED BY COUNSEL, (D) WHETHER OR NOT THE RESPONDENT IS REQUIRED TO

1 APPEAR, AND (E) OF SUCH OTHER INFORMATION AS MAY BE CONSIDERED APPROPRI-  
2 ATE. AFTER THE MEETING, THE SUPERINTENDENT (I) SHALL CONSIDER THE TRAN-  
3 SCRIPT AND THE REPORT OF THE HEARING OFFICER, (II) SHALL DECIDE WHETHER  
4 THE RESPONDENT HAS VIOLATED EACH CHARGE IN THE CEASE AND DESIST ORDER,  
5 (III) SHALL DECIDE WHAT PENALTIES, IF ANY, TO IMPOSE AS PRESCRIBED IN  
6 THIS SECTION, AND (IV) SHALL ISSUE AN ORDER TO CARRY OUT HIS OR HER  
7 DECISIONS. THE ORDER SHALL BE SERVED UPON THE RESPONDENT PERSONALLY OR  
8 BY CERTIFIED MAIL TO THE RESPONDENT'S LAST KNOWN ADDRESS AND SUCH  
9 SERVICE SHALL BE EFFECTIVE AS OF THE DATE OF THE PERSONAL SERVICE OR  
10 FIVE DAYS AFTER MAILING BY CERTIFIED MAIL. THE DECISIONS OF THE SUPER-  
11 INTENDENT UNDER THIS SECTION MAY BE REVIEWED IN A PROCEEDING PURSUANT TO  
12 ARTICLE SEVENTY-EIGHT OF THE CIVIL PRACTICE LAW AND RULES BROUGHT IN THE  
13 SUPREME COURT, ALBANY COUNTY. SUCH DECISIONS SHALL NOT BE STAYED OR  
14 ENJOINED EXCEPT UPON APPLICATION TO SUCH SUPREME COURT PURSUANT TO ARTI-  
15 CLE SIXTY-THREE OF THE CIVIL PRACTICE LAW AND RULES WITH NOTICE TO THE  
16 DEPARTMENT AND TO THE ATTORNEY GENERAL.

17 8. GENERAL ENFORCEMENT OF CEASE AND DESIST ORDER. IN ANY CASE WHERE  
18 THE CEASE AND DESIST ORDER IS CONFIRMED BY THE SUPERINTENDENT OR WHERE  
19 THE RESPONDENT DOES NOT REQUEST AN ADMINISTRATIVE HEARING WITHIN THE  
20 ALLOTTED TIME OR DOES NOT APPEAL THE DECISION OF THE HEARING OFFICER  
21 WITHIN THE ALLOTTED TIME, AN ACTION OR PROCEEDING MAY BE FILED IN THE  
22 NAME OF THE STATE OF NEW YORK SEEKING A RESTRAINING ORDER, INJUNCTION,  
23 APPROPRIATE WRIT, OR JUDGMENT AGAINST ANY PERSON WHO VIOLATES THE TERMS  
24 OF THE CEASE AND DESIST ORDER.

25 9. SPECIAL ENFORCEMENT OF CIVIL MONETARY PENALTIES. PROVIDED THAT NO  
26 APPEAL IS PENDING ON THE IMPOSITION OF SUCH CIVIL PENALTY, IN THE EVENT  
27 SUCH CIVIL PENALTY IMPOSED BY THE DEPARTMENT REMAINS UNPAID, IN WHOLE OR  
28 IN PART, MORE THAN FORTY-FIVE DAYS AFTER WRITTEN DEMAND FOR PAYMENT HAS  
29 BEEN SENT BY FIRST CLASS MAIL TO THE ADDRESS OF THE RESPONDENT, A NOTICE  
30 OF IMPENDING DEFAULT JUDGMENT SHALL BE SENT BY FIRST CLASS MAIL TO THE  
31 RESPONDENT. THE NOTICE OF IMPENDING DEFAULT JUDGMENT SHALL ADVISE THE  
32 RESPONDENT: (A) THAT A CIVIL PENALTY WAS IMPOSED ON THE RESPONDENT; (B)  
33 THE DATE THE PENALTY WAS IMPOSED; (C) THE AMOUNT OF THE CIVIL PENALTY;  
34 (D) THE AMOUNT OF THE CIVIL PENALTY THAT REMAINS UNPAID AS OF THE DATE  
35 OF THE NOTICE; (E) THE VIOLATIONS FOR WHICH THE CIVIL PENALTY WAS  
36 IMPOSED; AND (F) THAT A JUDGMENT BY DEFAULT WILL BE ENTERED IN THE  
37 SUPREME COURT, ALBANY COUNTY UNLESS THE DEPARTMENT RECEIVES FULL PAYMENT  
38 OF ALL CIVIL PENALTIES DUE WITHIN TWENTY DAYS OF THE DATE OF THE NOTICE  
39 OF IMPENDING DEFAULT JUDGMENT. IF FULL PAYMENT SHALL NOT HAVE BEEN  
40 RECEIVED BY THE DEPARTMENT WITHIN THIRTY DAYS OF MAILING OF THE NOTICE  
41 OF IMPENDING DEFAULT JUDGMENT, THE DEPARTMENT SHALL PROCEED TO ENTER  
42 WITH SUCH COURT A STATEMENT OF THE DEFAULT JUDGMENT CONTAINING THE  
43 AMOUNT OF THE PENALTY OR PENALTIES REMAINING DUE AND UNPAID, ALONG WITH  
44 PROOF OF MAILING OF THE NOTICE OF IMPENDING DEFAULT JUDGMENT. THE FILING  
45 OF SUCH JUDGMENT SHALL HAVE THE FULL FORCE AND EFFECT OF A DEFAULT JUDG-  
46 MENT DULY DOCKETED WITH SUCH COURT PURSUANT TO THE CIVIL PRACTICE LAW  
47 AND RULES AND SHALL IN ALL RESPECTS BE GOVERNED BY THAT CHAPTER AND MAY  
48 BE ENFORCED IN THE SAME MANNER AND WITH THE SAME EFFECT AS THAT PROVIDED  
49 BY LAW IN RESPECT TO EXECUTION ISSUED AGAINST PROPERTY UPON JUDGMENTS OF  
50 A COURT OF RECORD. A JUDGMENT ENTERED PURSUANT TO THIS SUBDIVISION  
51 SHALL REMAIN IN FULL FORCE AND EFFECT FOR EIGHT YEARS NOTWITHSTANDING  
52 ANY OTHER PROVISION OF LAW.

53 S 2. This act shall take effect immediately.