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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:

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

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

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

3. CIVIL PENALTIES. CIVIL PENALTIES UP TO FIVE THOUSAND DOLLARS PER 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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TO MAKE RESTITUTION TO ANY PERSON WHO HAS AN INTEREST IN ANY MONEY OR PROPERTY, EITHER REAL OR PERSONAL, ACQUIRED BY THE RESPONDENT AS A RESULT OF A VIOLATION. WHENEVER THE DEPARTMENT CONCLUDES THAT CIVIL PENALTIES AND/OR RESTITUTION MAY BE WARRANTED BECAUSE OF THE EGREGIOUSNESS OF THE UNLAWFUL ACTIVITY, IT MAY SERVE, ALONG WITH THE CEASE AND DESIST ORDER, A NOTICE OF A HEARING ON THE ALLEGATIONS OF UNLAWFUL ACTIVITY AND THE DEPARTMENT'S INTENTION TO ORDER THE RESPONDENT TO MAKE RESTITUTION AND/OR IMPOSE A CIVIL PENALTY. THE NOTICE SHOULD SPECIFY THE CIVIL PENALTY SOUGHT FOR EACH VIOLATION.

4. REQUEST FOR HEARING. IF THE RESPONDENT TO A CEASE AND DESIST ORDER CONTESTS THE CEASE AND DESIST ORDER, THE RESPONDENT SHALL REQUEST A HEARING CONDUCTED BY THE DEPARTMENT WITHIN THIRTY DAYS OF THE RECEIPT OF THE CEASE AND DESIST ORDER. SUCH A HEARING SHALL BE SCHEDULED, AND THE REQUESTING PARTY NOTIFIED OF THE DATE, WITHIN FIFTEEN DAYS OF THE RECEIPT OF THE REQUEST FOR A HEARING. IF THE RESPONDENT REQUESTS A STAY OF THE CEASE AND DESIST ORDER, THE HEARING OFFICER SHALL DETERMINE WHETHER THE CEASE AND DESIST ORDER SHOULD BE STAYED IN WHOLE OR IN PART WITHIN FIVE WORKING DAYS OF THE REQUEST FOR A STAY. THE RESPONDENT MAY FILE A WRITTEN ANSWER TO THE CEASE AND DESIST ORDER PRIOR TO THE HEARING. A STENOGRAPHIC RECORD OF THE HEARING SHALL BE MADE.

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

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

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

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

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

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

S 2. This act shall take effect immediately.