STATE OF NEW YORK

6778--A

2021-2022 Regular Sessions

IN SENATE

May 17, 2021

Introduced by Sen. COONEY -- read twice and ordered printed, and when printed to be committed to the Committee on Banks -- recommitted to the Committee on Banks in accordance with Senate Rule 6, sec. 8 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the banking law, in relation to earned wage access services

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 article 9-B to read as follows:

ARTICLE 9-B

EARNED WAGE ACCESS SERVICES

Section 374-aa. Definitions.
374-bb. Registration requirements for earned wage access service providers.
374-cc. Other requirements for earned wage access services provided in this state.
374-dd. Annual report.
374-ee. Authority of the superintendent.

§ 374-aa. Definitions. As used in this article, the following terms shall have the following meanings:

1. "Consumer" means a natural person residing in the state of New York.

2. "Earned but unpaid income" means funds that are based on wages, compensation, or income that a consumer has represented, and that the provider has reasonably determined have been earned or have accrued to the benefit of the consumer but have not, at the time of the remittance of proceeds, been paid to the consumer by an obligor.

3. "Earned wage access services" means the business of delivering proceeds to a consumer prior to the next date on which an obligor is

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

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obligated to pay salary, wages, or other monetary benefits to the consumer.

4. "Non-recourse" means that a provider cannot compel or attempt to compel repayment by a consumer of outstanding proceeds or non-mandatory payments owed by such consumer to such provider through any of the following means:

(a) a civil suit against such consumer in a court of competent jurisdiction;

(b) use of a third-party to pursue collection of outstanding proceeds or non-mandatory payments on the provider's behalf; and

(c) sale of outstanding proceeds to a third-party collector or debt purchaser. Such term does not preclude the use by a provider of any of the foregoing methods to compel or attempt to compel repayment of outstanding amounts incurred by a consumer through fraudulent means.

5. "Obligor" means an employer or another person, including an independent contractor, who is contractually or legally obligated to pay a consumer any sum of money on an hourly, project-based, piecework, or other basis. Such term does not include the customer of an obligor or another third-party that has an obligation to make any payment to a consumer based solely on the consumer's agency relationship with the obligor.

6. "Outstanding proceeds" means proceeds remitted to a consumer by a provider but have not yet been repaid to such provider.

7. "Mandatory payment" means an amount determined by a provider which must be paid by a consumer to such provider as a condition of receiving proceeds.

8. "Non-mandatory payment" means an amount paid by a consumer or an obligor to a provider for earned wage access services, which does not meet the definition of a mandatory payment. For purposes of this article, such term includes, but is not limited to, the following:

(a) a fee imposed by a provider for delivery or expedited delivery of proceeds to a consumer, provided that such provider offers the consumer at least one option of receiving proceeds at no cost;

(b) an amount paid by an obligor to a provider on the consumer's behalf, which entitles the consumer to receive proceeds at no cost to such consumer;

(c) a subscription or membership fee imposed by a provider for a group of services that includes earned wage access services, provided that such provider offers the consumer at least one option of receiving proceeds at no cost; and

(d) a tip or gratuity paid by a consumer to a provider, provided that such provider offers the consumer at least one option of receiving proceeds at no cost.

9. "Proceeds" means the amount of earned but unpaid income that has been remitted to the consumer by a provider.

10. "Provider" means a person who is in the business of offering and providing earned wage access services to consumers.

§ 374-bb. Registration requirements for earned wage access service providers. 1. No person shall provide earned wage access services in the state unless such person is registered as a provider with the department.

2. An application to become registered as an earned wage access service provider shall be in writing, under oath, in such form as shall be prescribed by the superintendent. Notwithstanding article three of the state technology law or any other law to the contrary, the superintendent may require that an application for, or renewal of, a regis-

tration be made or executed by electronic means, including through the National Mortgage Licensing System and Registry or other entities designated by the National Mortgage Licensing System and Registry if he or she deems it necessary to ensure the efficient and effective administration of this article. Such application shall contain the name and complete business address or addresses of the applicant. Such application shall also include an affirmation of financial solvency noting such capitalization requirements and access to such credit as may be required by the superintendent, and such descriptions of the business activities, financial responsibility, and general character and fitness of the applicant as may be required by the superintendent.

3. As a condition for the issuance and retention of a registration, and subject to such regulations as the superintendent shall prescribe, applicants for a registration shall file with the superintendent a surety bond or make a deposit in an amount and form prescribed by regulations of the superintendent. Such regulations shall provide for a varying bond amount based upon a registrant's volume of business and any other relevant factors as determined by the superintendent, but in no case shall such bond be less than ten thousand dollars nor more than fifty thousand dollars; provided however that if the superintendent determines, in his or her sole discretion, that a registrant has engaged in a pattern of conduct resulting in bona fide consumer complaints of misconduct, the superintendent may require such registrant to post a surety bond, or keep on deposit as provided in this subdivision, twice the amount of such bond or deposit as is required consistent with such regulations. In the event of the insolvency, liquidation or bankruptcy of such registrant, or the surrender or revocation of such provider's registration, or where the superintendent takes possession of such registrant, the proceeds of each bond or deposit shall constitute a trust fund to be used exclusively to reimburse consumer fees or other charges determined by the superintendent to be improperly charged or collected and to pay past due department of financial services examination costs and assessments charged to the registrant, unpaid penalties, or other obligations of the registrant. The superintendent is authorized to promulgate such regulations as are necessary and desirable to define and implement the provisions of this subdivision. Persons and entities registered prior to the effective date of any regulations of the superintendent implementing or modifying the bonding requirement authorized by this subdivision shall file such bond or establish such deposit within six months of the effective date of such regulations.

4. Upon the filing of an application for registration, if the superintendent shall find that the financial responsibility, experience, character, and general fitness of the applicant, and of the members thereof if the applicant is a co-partnership or association, and of the officers and directors thereof if the applicant is a corporation, are such as to command the confidence of the community and to warrant belief that the business will be operated honestly, fairly, and efficiently within the purpose of this article, the superintendent shall thereupon register the applicant as an earned wage access service provider on a roll maintained for that purpose at the department, and issue a certificate attesting to such registration in duplicate. If the superintendent shall not so find, the superintendent shall not register such applicant, and shall notify the applicant of the denial. The superintendent shall transmit one copy of such certificate to the applicant and file another in the office of the department. Upon receipt of such certificate an earned wage access service provider shall be authorized to engage in the

business of providing earned wage access services. Such registration shall remain in full force and effect until it is surrendered by the registrant or revoked or suspended as hereinafter provided, except that such registration shall expire upon the registrant's failure to pay the required assessment thirty days after the date or dates such payment or payments are due. If the registrant fails to pay such charged assessment by the date or dates such payment or payments are due, then the registrant shall be required to pay, in addition, a late fee in the amount of one hundred dollars. Such registration shall be reinstated if the registrant pays such assessment charged and any applicable late fees and/or interest within sixty days of such expiration. The superintendent shall approve or deny every application for registration hereunder within ninety days from the filing of a complete application provided, however, that failure to act within the prescribed period shall not be deemed approval of any such application.

5. The superintendent may refuse to issue a certificate pursuant to this article if he or she shall find that the applicant, or any person who is a director or officer of the applicant: (a) has been convicted of a crime involving an activity which is a felony under this chapter or under article one hundred fifty-five, one hundred seventy, one hundred seventy-five, one hundred seventy-six, one hundred eighty, one hundred eighty-five, one hundred eighty-seven, one hundred ninety, two hundred, two hundred ten or four hundred seventy of the penal law or any comparable felony under the laws of any other state or the United States, provided that such crime would be a felony if committed and prosecuted under the laws of this state; or (b) has had a license or registration revoked by the superintendent; or (c) has been a director or officer of an entity which has had a license or registration revoked by the superintendent.

6. Each certificate issued to a registered earned wage access service provider under this article shall state the address or addresses at which the business is to be conducted, or shall state that all business of the applicant is conducted online, and shall state fully the name of the registrant, and the date and place of its incorporation if applicable. A copy of such certificate shall be prominently posted in each place of business of the registrant or available online via a link on the homepage of the registrant. Such certificate shall not be transferable or assignable. In the event the location at which the business is to be conducted shall be changed, the registrant shall forthwith notify the superintendent who shall thereupon without charge attach to the certificate an amendment certificate setting forth such changed location.

§ 374-cc. Other requirements for earned wage access services offered in this state. 1. Any provider that offers earned wage access services to a consumer in this state shall comply with the following:

(a) A provider shall provide all proceeds on a non-recourse basis and shall treat non-mandatory payments as non-recourse payment obligations;

(b) Before providing proceeds to a consumer, a provider shall inform the consumer, in writing, of any non-mandatory payments that may be associated with the provision of earned wage access services by that provider;

(c) Every time a provider provides proceeds to a consumer, the provider shall inform the consumer when the provider will make its first attempt to seek repayment of those proceeds from the consumer; and

(d) A provider that seeks repayment of proceeds from a consumer's depository institution account shall comply with applicable National Automated Clearinghouse Association rules.

2. A provider that is registered in the state shall not:

(a) require a consumer to make a mandatory payment;

(b) charge a late fee or any other penalty charge for failure to repay outstanding proceeds;

(c) condition the amount of proceeds provided to a consumer on the amount of a non-mandatory payment made by such consumer to such provider. This prohibition shall not be construed to prohibit a non-mandatory payment equal to a percentage of proceeds provided, as long as the percentage applied does not vary based on the amount of proceeds provided;

(d) condition the frequency with which proceeds are provided to a consumer on the amount of a non-mandatory payment made by such consumer to such provider. This prohibition shall not be construed to prohibit a non-mandatory payment equal to a percentage of proceeds provided, as long as the percentage applied does not vary based on the amount of proceeds provided;

(e) report a consumer's payment or failed repayment of proceeds to a consumer credit reporting agency or a debt collector;

(f) require a credit report or credit score to determine a consumer's eligibility for earned wage access services; or

(g) provide, sell, or otherwise disclose to any third party, including an obligor, any non-public personal information collected from or about a consumer, except as necessary to provide earned wage access services to the consumer and as allowed by applicable federal and state law.

3. Proceeds provided to a consumer by a provider in accordance with this article shall not be considered credit, the provider of those proceeds shall not be considered a creditor, and non-mandatory payments paid to such provider shall not be considered finance charges, for purposes of the federal Truth in Lending Act.

4. Proceeds provided to a consumer by a provider in accordance with this article shall not be considered wage deductions for purposes of section one hundred ninety-three of the labor law and shall not be subject to regulation by the superintendent under article nine of this chapter. Further, the provider of those proceeds shall not be required to obtain a license under article nine of this chapter.

§ 374-dd. Annual report. 1. On or before the first day of April of each year, a provider shall submit an annual report to the superintendent that includes all of the following information for earned wage access services provided by such provider during the prior calendar year:

(a) gross revenue attributable to earned wage access services;

(b) the total number of transactions in which proceeds were remitted to consumers;

(c) the total number of unique consumers to whom proceeds were remitted;

(d) the total dollar amount of proceeds the provider remitted to consumers;

(e) the total dollar amount of non-mandatory payments the provider received from consumers;

(f) the total number of transactions in which proceeds were remitted to consumers for which the provider did not receive repayment of any outstanding proceeds, and the total dollar amount of such transactions;

(g) the total number of transactions in which proceeds were remitted to consumers, for which the provider received partial repayment of outstanding proceeds, the total dollar amount of such transactions, and

the total dollar amount of outstanding proceeds attributable to such transactions; and

(h) the total number of transactions in which outstanding proceeds were repaid after the original, scheduled repayment date, and the total dollar amount of such transactions.

2. Failure of a provider to submit a report on a timely basis in accordance with this article may constitute grounds for disciplinary action by the superintendent.

§ 374-ee. Authority of the superintendent. 1. The superintendent is hereby authorized and empowered to make such general rules and regulations, and such specific rulings, demands, and findings as may be necessary for the proper conduct of the business authorized and registered under and for the enforcement of this article, in addition hereto and not inconsistent herewith.

2. The superintendent shall have the power to make such investigations and conduct such hearings as he or she shall deem necessary to determine whether any registrant or any other person has violated any of the provisions of this article, or whether any registrant has conducted itself in such manner as would justify the suspension or revocation of its registration.

3. In making any investigation or conducting any hearing pursuant to the provisions of this article, the superintendent, or any person duly designated by him or her, shall have the power at all times to subpoena witnesses; to take depositions of witnesses residing without the state, in the manner provided for in civil actions in courts of record; to pay such witnesses the fees and mileage for their attendance provided for witnesses in civil actions in courts of record; and to administer oaths. He or she shall also have the power to compel by order or subpoena the production of and to examine all relevant books, records, accounts and other documents. Any person who fails to obey the command of the subpoena without reasonable excuse, or refuses without reasonable cause to be served or to be examined or to answer a question or to produce a book or paper when ordered so to do, or fails to perform any act required hereunder to be performed, shall be subject to the compulsions in such cases made and provided by law, and if the person be registered hereunder, the superintendent shall have the right to suspend or revoke the registration.

4. The superintendent may require of any registrant such reports, under oath or otherwise, concerning the registrant's business in this state, as he or she may deem necessary for the enforcement of this article.

5. All reports of investigations and other reports rendered pursuant to this section, and all correspondence and memoranda concerning or arising out of such investigations or reports, including any duly authenticated copy or copies thereof in the possession of any registrant or the department, shall be confidential communications, shall not be subject to subpoena and shall not be made public unless, in the judgment of the superintendent, the ends of justice and the public advantage will be subserved by the publication thereof, in which event the superintendent may publish or authorize the publication of a copy of any such report or other material referred to in this subdivision, or any part thereof, in such manner as may be deemed proper. For purposes of this subdivision, "reports of investigations, and other reports rendered pursuant to this section and all correspondence and memoranda concerning or arising out of such investigations or reports" shall have the same

meaning as such terms are defined pursuant to subdivision ten of section thirty-six of this chapter.

6. Without limiting any power granted to the superintendent under any other provision of this chapter, the superintendent may, in a proceeding after notice and a hearing, impose penalties on earned wage access providers who violate this article or any rules promulgated hereunder. Section forty-four of this chapter shall govern the amount and nature of those penalties.

§ 2. Subdivision 10 of section 36 of the banking law, as amended by section 2 of part L of chapter 58 of the laws of 2019, is amended to read as follows:

10. All reports of examinations and investigations, correspondence and memoranda concerning or arising out of such examination and investigations, including any duly authenticated copy or copies thereof in the possession of any banking organization, bank holding company or any subsidiary thereof (as such terms "bank holding company" and "subsidiary" are defined in article three-A of this chapter), any corporation or any other entity affiliated with a banking organization within the meaning of subdivision six of this section and any non-banking subsidiary of a corporation or any other entity which is an affiliate of a banking organization within the meaning of subdivision six-a of this section, foreign banking corporation, licensed lender, licensed casher of checks, licensed mortgage banker, registered mortgage broker, licensed mortgage loan originator, licensed sales finance company, registered mortgage loan servicer, licensed student loan servicer, licensed insurance premium finance agency, licensed transmitter of money, licensed budget planner, **registered earned wage access service provider,** any other person or entity subject to supervision under this chapter, or the department, shall be confidential communications, shall not be subject to subpoena and shall not be made public unless, in the judgment of the superintendent, the ends of justice and the public advantage will be subserved by the publication thereof, in which event the superintendent may publish or authorize the publication of a copy of any such report or any part thereof in such manner as may be deemed proper or unless such laws specifically authorize such disclosure. For the purposes of this subdivision, "reports of examinations and investigations, and any correspondence and memoranda concerning or arising out of such examinations and investigations", includes any such materials of a bank, insurance or securities regulatory agency or any unit of the federal government or that of this state any other state or that of any foreign government which are considered confidential by such agency or unit and which are in the possession of the department or which are otherwise confidential materials that have been shared by the department with any such agency or unit and are in the possession of such agency or unit.

§ 3. This act shall take effect on the one hundred twentieth day after it shall have become a law. Effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized to be made and completed on or before such effective date.