HOUSE BILL

51ST LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2013

INTRODUCED BY

DISCUSSION DRAFT

AN ACT

RELATING TO FINANCIAL INSTITUTIONS; REQUIRING REGISTRATION OF CERTAIN INCOME TAX RETURN PREPARERS; REQUIRING LICENSING OF PERSONS ENGAGED IN THE BUSINESS OF MAKING LOANS SECURED BY PROCEEDS OF AN INCOME TAX REFUND OR TAX CREDITS; REQUIRING DISCLOSURES OF FEES AND INTEREST ASSOCIATED WITH TAX REFUND ANTICIPATION LOANS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. SHORT TITLE.--This act may be cited as the "Refund Anticipation Loan Act".

SECTION 2. DEFINITIONS.--As used in the Refund Anticipation Loan Act:

A. "attorney" means an attorney admitted to practice law in New Mexico or one or more of the other states or jurisdictions of the United States;

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B. "certified public accountant" means a person certified by this state pursuant to the 1999 Public Accountancy Act, or a similar law of another state or jurisdiction of the United States, to practice public accountancy and use the designation "certified public accountant";

C. "commercial tax return preparer" means a tax return preparer who:

(1) prepared ten or more returns for compensation in the preceding calendar year and will prepare at least one return for compensation during the current calendar year; or

(2) prepared fewer than ten returns in the preceding calendar year but will prepare ten or more returns for the current calendar year;

D. "commercial tax return preparation business" means an entity that employs tax return preparers and that meets the thresholds of a commercial tax return preparer;

E. "creditor" means any person who makes a refund anticipation loan or refund anticipation check or who takes an assignment of a refund anticipation loan or refund anticipation check;

F. "director" means the director of the financial institutions division of the regulation and licensing department;

G. "division" means the financial institutions

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division of the regulation and licensing department;

H. "facilitator":

(1) 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) in any other manner, facilitates the making of a refund anticipation loan or refund anticipation check; but

(2) does not include an employee who only provides clerical or other comparable support services;

I. "electronic" means computer technology;

J. "enrolled agent" means an agent enrolled to practice before the federal internal revenue service pursuant to Section 10.4 of Subpart A of Part 10 of Title 31 of the Code of Federal Regulations;

K. "refund anticipation check" means a check, stored value card or other payment mechanism:

(1) that represents the proceeds of a tax refund;

(2) that was issued by a depository institution or other person that received a direct deposit of

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the tax refund or tax credits; and

(3) for which a fee or other consideration is paid;

L. "refund anticipation loan" means a loan that is secured by or that the creditor arranges to be repaid, directly or indirectly, from the proceeds of any income tax refund or tax credits, including any sale, assignment or purchase of a 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 taxation and revenue department denies or reduces the amount of the tax refund;

M. "refund anticipation loan fee" means the charges, fees or other consideration charged or imposed, directly or indirectly, by the creditor for the making of or in connection with a refund anticipation loan or refund anticipation check, including any charge, fee or other consideration for a deposit account if the deposit account is used for receipt of the tax refund to repay the amount owed on the loan;

N. "refund anticipation loan interest rate" means the interest rate for a refund anticipation loan or refund anticipation check calculated as the total amount of refund anticipation loan fees divided by the loan amount, minus any loan fees, then divided by the number of days in the loan term, then multiplied by three hundred sixty-five and expressed as a

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percentage. If no deposit account is established or maintained for the repayment of the loan, the maturity of the loan for the purpose of determining the refund anticipation loan interest rate shall be assumed to be the estimated date when the tax refund is received by the creditor. If a deposit account is established or maintained in whole or in part for the purpose of receiving the consumer's tax refund to repay the amount owed on a refund anticipation loan:

(1) the maturity of the loan for the purpose of determining the refund anticipation loan interest rate shall be assumed to be the estimated date when the tax refund will be deposited in the deposit account; and

(2) any fee charged to the consumer for such deposit account shall be considered a loan fee and shall be included in the calculation of the refund anticipation loan interest rate;

O. "registered public accountant" means an accountant licensed pursuant to the 1999 Public Accountancy Act, or a similar law of another state or jurisdiction of the United States, to practice public accountancy and use the designation "registered public accountant"; and

P. "tax return preparer":

(1) means an individual who prepares a substantial portion of any tax return for compensation:

(2) includes:

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(a) an employee of a commercial tax return preparer or commercial tax return preparation business who prepares a tax return for a client of that preparer or preparation business; and

(b) a partner who prepares a tax return for a client of a partnership engaged in a commercial tax return preparation business; but

(3) does not include:

(a) attorneys, certified public accountants, enrolled agents, registered public accountants and employees of an attorney, certified public accountant, enrolled agent, registered public accountant or firm thereof preparing tax returns under the supervision of an attorney, certified public accountant, enrolled agent or registered public accountant;

(b) volunteer tax return preparers;

(c) employees of a business or partners in a partnership whose job responsibilities include preparation of only the business' or partnership's tax returns; or

(e) employees of a tax return preparer or a commercial tax return preparation business who provide only clerical or other comparable services.

SECTION 3. LICENSE AND REGISTRATION--BOND--APPLICABILITY.--

A. Without first having obtained a license from the

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director, a person shall not:

(1) solicit the execution of, process, receive or accept an application or agreement for a refund anticipation loan or refund anticipation check;

(2) serve or collect upon a refund anticipation loan or refund anticipation check; or

(3) in any other manner, facilitate the making of a refund anticipation loan or refund anticipation check.

B. A facilitator shall post a bond in the amount of fifty thousand dollars ($50,000) and keep the bond available to pay damages and penalties resulting from a violation of the Refund Anticipation Loan Act for five years after the facilitator ceases operation in New Mexico.

C. A commercial tax return preparer and commercial tax return preparation business shall register with the division. The commercial tax return preparer and commercial tax return preparation business shall provide the division with the preparer tax identification number issued by the federal internal revenue service.

D. A banking corporation, savings and loan association or credit union operating under the laws of the United States or of a state shall be exempt from the licensing and bonding requirements of this section.

SECTION 4. APPLICATION--FEES--AGENT FOR SERVICE OF PROCESS--INVESTIGATION--QUALIFICATIONS.--

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A. Application for a license and annual license renewal shall be in writing under oath and in the form prescribed by the director, shall give the exact location where the business is to be conducted and shall contain such other relevant information as the director may require, including identification of all parties in interest and the names and addresses of all the partners, officers, directors, trustees and beneficiaries of any trust and of the principal owners and members. The application shall also include a statement accepting the license, if granted, as a privilege to be enjoyed and exercised pursuant to the provisions of the Refund Anticipation Loan Act and rules promulgated pursuant to that act.

B. At the time of making an application for an original license, an applicant shall pay to the director the sum of one thousand dollars ($1,000). Additionally, at the time of issuance of the original license and at each annual renewal, the licensee for each licensed office shall pay to the director a license fee for the period covered of five hundred dollars ($500). In the event that the application for annual renewal of the license is delinquent, the licensee shall also pay a delinquency fee of ten dollars ($10.00) per day for each day the licensee is delinquent in filing the application for renewal.

C. The application shall be accompanied by, and

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every licensee shall at all times maintain on file with the director, an appointed agent for service of process. In case of noncompliance with this subsection, such service, including service of all notices, may be made on the manager or person in charge of the registered office or place of business of the licensee, and the director may by order suspend the license pending compliance with this section.

D. Upon the filing of an application, whether it is an original or a renewal, the director shall investigate the facts concerning the application and the requirements provided in this section. An applicant for license, upon written notice to do so by the director, shall, within twenty days after service of the notice, furnish in writing, under oath, to the director all additional information required by the director that may be relevant or, in the opinion of the director, helpful in conducting the investigation.

E. Failure to comply with the director's requirement for supplemental information or the willful furnishing of false information is sufficient grounds for denial of a license. False or misleading information willfully and intentionally furnished to the director prior to the issuance of any license is grounds for suspension or revocation.

F. The director shall enter an order granting the original application, file the director's findings and, upon

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payment of the license fee, issue and deliver a license to the applicant if the director finds that:

(1) the financial responsibility, character and general fitness of the applicant for a license and of the individual members, officers or directors of the applicant are such as to command the confidence of the public and to warrant belief that the business will be operated lawfully, honestly, fairly and efficiently pursuant to the provisions of the Refund Anticipation Loan Act; and

(2) allowing the applicant to engage in business will promote the convenience and advantage of the community in which the business of the applicant is to be conducted.

G. If the director does not make the findings for the original application enumerated in Subsection F of this section, the director shall enter an order denying the application, notify the applicant of the denial and retain the application fees. Within thirty days after the entry of the order, the director shall prepare written findings and deliver a copy to the applicant.

H. A written application for license renewal shall be filed on or before August 31 of each year. The director shall investigate the facts and review the files of the applicant made by the director and of complaints filed by consumers, if any. The director shall deliver a renewal

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license to the applicant if the director finds that:

(1) no valid complaints of violations or abuses of the Refund Anticipation Loan Act or of the rules promulgated pursuant to that act have been filed by consumers;

(2) investigation of the affairs of the applicant indicates that the business has been conducted and operated lawfully and efficiently pursuant to the provisions of the Refund Anticipation Loan Act; and

(3) the experience and general fitness and character of the applicant remain such as to command the confidence of the public and to warrant the belief that the business will continue to be operated lawfully and efficiently pursuant to the provisions of the Refund Anticipation Loan Act.

I. If the director does not make the findings for a renewal application enumerated in Subsection H of this section, the director may grant a temporary extension of the license not exceeding sixty days pending a hearing, shall enter an order fixing a date for a hearing upon the application, shall notify the licensee, specifying the particular complaints, violations or abuses or other reasons for the director's contemplated refusal to renew the license and shall afford to the applicant an opportunity to be heard. At the hearing, the director shall produce evidence to establish the truth of the charges of violation or other grounds specified in the notice, and the applicant shall be accorded the right to produce evidence or

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other matters of defense. If, after the hearing, the director finds that the complaints of violations or other grounds specified in the notice are not well-founded, the director shall issue the renewal license. If the director finds that the complaints of violations or other grounds are well-founded, the director shall enter an order denying the renewal application, notify the applicant of the denial and retain the renewal license fee tendered with the application. Within thirty days after the entry of such an order, the director shall prepare written findings and shall deliver a copy of the findings to the applicant.

J. The division shall maintain a list of licensees, registered commercial tax return preparers and commercial tax return preparation businesses and establish a complaint process whereby an aggrieved consumer or other person may file a complaint against a licensee, a registered commercial tax return preparer or a commercial tax return preparation business.

K. In determining the fitness and character of an applicant pursuant to the provisions of this section, the fact that the applicant is a member of, interested financially in or connected or affiliated with, controls or is controlled by or owns or is owned by any other corporation, partnership, trust, association or other legal entity engaged in tax return preparation or the lending of money whose policies and

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practices as to rates of interest, charges and fees and general dealing with borrowers are questionable or would constitute violation of law shall be given such consideration and weight as the director determines.

SECTION 5. JUDICIAL REVIEW.--Any licensee or any person aggrieved by any act or order of the director pursuant to the Refund Anticipation Loan Act may file an appeal in the district court pursuant to the provisions of Section 39-3-1.1 NMSA 1978.

SECTION 6. TAX RETURN PREPARER--PREPARATION SERVICES--DISCLOSURES.--

A. A commercial tax return preparer and commercial tax return preparation business shall prominently and conspicuously post on the business premises an identification and qualification statement. The statement shall include the name of the tax return preparer, an address and phone number at which the tax return preparer can be contacted throughout the year and a statement of any qualifications possessed by the tax return preparer, which may include a statement of satisfactory completion of an educational or training program in income tax law, theory or practice by the tax return preparer. A commercial tax return preparer or commercial tax return preparation business shall not intentionally misstate or misrepresent any information relating to the education, training or experience on an identification and qualification statement. Records to substantiate all of the information

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contained on that statement shall be maintained and kept on file on the business premises and shall be presented on demand for inspection by a consumer or the division.

B. A commercial tax return preparer and commercial tax return preparation business shall prominently and conspicuously post on the business premises a fee schedule. A commercial tax return preparer and commercial tax return preparation business shall provide a written estimate of the total amount due for tax return preparation services.

C. A commercial tax return preparer and commercial tax return preparation business shall provide a consumer with a receipt containing:

(1) an address and telephone number at which the tax return preparer can be contacted throughout the year;

(2) the tax return preparer tax identification number issued by the federal internal revenue service;

(3) the telephone numbers of the division for information and complaints; and

(4) itemized fees charged for the tax return preparation.

SECTION 7. FACILITATOR--REFUND ANTICIPATION PRODUCTS--DISCLOSURES.--

A. A facilitator shall prominently and conspicuously post on the business premises the license issued by the division and a fee schedule showing the current fees and

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charges for a refund anticipation loan or refund anticipation check facilitated at that location. The fee schedule shall prominently and conspicuously display:

(1) a legend, centered, in bold, capital and one-inch letters stating: "NOTICE CONCERNING REFUND ANTICIPATION LOANS. YOU CAN GET YOUR REFUND IN 8 TO 15 DAYS WITHOUT PAYING ANY EXTRA FEES AND TAKING OUT A LOAN.";

(2) the following verbatim statement: "When you take out a refund anticipation loan, you are borrowing money against your tax refund. If your tax refund is less than expected, you will still owe the entire amount of the loan. If your refund is delayed, you may have to pay additional costs. You can have your tax return filed electronically and your refund direct deposited into your own bank account without obtaining a loan or paying fees for an extra product."; and

(3) examples of the refund anticipation loan interest rates for a refund anticipation loan and refund anticipation check in at least three different amounts.

B. Before a consumer enters into a refund anticipation loan or refund anticipation loan check agreement, the facilitator shall accurately complete a disclosure form as provided in Subsection C of this section, shall provide the required point-by-point oral explanation in the language primarily used by the consumer and shall ensure that the completed disclosure form is signed by the consumer before

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entering into the refund anticipation loan or refund anticipation check agreement.

C. The disclosure form shall be in substantially the following form:

"• you are not required to take a refund anticipation loan or refund anticipation check.

• if you do sign a contract for a refund anticipation loan product, **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 you **do not** take this refund anticipation loan or refund anticipation check, you are eligible to receive a gross tax refund of approximately $ [insert amount].

• if you do take this refund anticipation loan or refund anticipation check, you will be responsible to pay $ [insert amount] in fees and interest for the loan. After these fees and interest are paid, you will receive approximately $ [insert amount] as your loan.

• the refund anticipation loan interest rate of your refund anticipation loan or refund anticipation check is [insert amount]%. This is based on the actual amount of time you will be lent money through this refund anticipation loan product.

• if you do take this refund anticipation loan, you can

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expect to receive your loan within approximately two business days of [insert date].

• if you **do not** take 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]."

SECTION 8. PROHIBITED ACTS.--A facilitator shall not:

A. directly or indirectly, represent a refund anticipation loan or refund anticipation check as a refund;

B. 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 provides the loan or check;

C. require a consumer to enter into a loan agreement in order to complete a tax return;

D. engage in a transaction, practice or course of business that operates a fraud upon a consumer in connection with a refund anticipation loan or refund anticipation check, including making oral statements contradicting any of the

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information required to be disclosed pursuant to the Refund Anticipation Loan Act;

E. directly or indirectly, arrange for any third party to charge interest, a fee or any other charge related to a refund anticipation loan or refund anticipation check, other than the refund anticipation loan or refund anticipation check fee imposed by the creditor, including, without limitation, charges for insurance, attorney fees, other collection costs or check cashing;

F. misrepresent a material fact or condition of a refund anticipation loan or refund anticipation check;

G. fail to process the application for a refund anticipation loan promptly after the client applies for the loan;

H. take or arrange for a creditor to take possession of or a security interest in any property of the consumer other than the proceeds of the consumer's tax refund to secure payment of a refund anticipation loan or refund anticipation check;

I. make or facilitate a refund anticipation loan or refund anticipation check for which the refund anticipation loan interest rate is greater than forty percent; or

J. make or facilitate a refund anticipation loan or refund anticipation check for an amount greater than one thousand five hundred dollars ($1,500).

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SECTION 9. RESTRAINT OF PROHIBITED ACTS--REMEDIES FOR VIOLATIONS.--

A. The attorney general may bring an action in the name of the state alleging violations of the Refund Anticipation Loan Act when the attorney general has reasonable belief that proceedings would be in the public interest. The action may be brought in the district court of the county in which the person resides or has the person's principal place of business or in the district court in a county in which the person is, has or is about to violate the Refund Anticipation Loan Act. The attorney general acting on behalf of the state shall not be required to post bond when seeking a temporary or permanent injunction in such action.

B. In an action filed pursuant to the Refund Anticipation Loan Act, the attorney general may petition the district court for temporary or permanent injunctive relief and restitution.

SECTION 10. SETTLEMENTS.--

A. In lieu of beginning or continuing an action pursuant to the Refund Anticipation Loan Act, the attorney general may accept a written assurance of discontinuance of a violation from the person who has engaged in the violation. The attorney general may require an agreement by the person engaged in the violation that, by the date set by the attorney general and stated in the assurance, the person will make

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restitution to all persons of money, property or other things received from them in any transaction related to the violation. All settlements are a matter of public record but are not admissible against a defendant in an action brought by any other person or public body against the defendant under the Refund Anticipation Loan Act and do not constitute a basis for the introduction of the assurance of discontinuance as prima facie evidence against the defendant in an action or proceeding.

B. A person need not accept restitution pursuant to an assurance. Acceptance of restitution bars recovery of damages in an action by the person or on the person's behalf against the same defendant on account of the same violation.

C. A violation of an assurance entered into pursuant to this section is a violation of the Refund Anticipation Loan Act.

SECTION 11. CIVIL PENALTIES.--In any action brought by the attorney general pursuant to the Refund Anticipation Loan Act, if the court finds that a person committed a willful and intentional violation of the Refund Anticipation Loan Act, the attorney general, upon petition to the court, may recover, on behalf of the state, a civil penalty not exceeding five thousand dollars ($5,000) per violation.

SECTION 12. CIVIL INVESTIGATIVE DEMAND.--

A. Whenever the attorney general has reason to

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believe that a person may be in possession, custody or control of an original or copy of a book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription or other tangible document or recording that the attorney general believes to be relevant to the subject matter of an investigation of a probable violation of the Refund Anticipation Loan Act, the attorney general may, prior to the institution of a civil proceeding, execute in writing and cause to be served upon the person a civil investigative demand requiring that person to produce documentary material and permit the inspection and copying of the material. The demand of the attorney general shall not be a matter of public record and shall not be published except by order of the court.

B. Each civil investigative demand shall:

(1) state the general subject matter of the investigation;

(2) describe the classes of documentary material to be produced with reasonable certainty;

(3) prescribe the return date within which the documentary material is to be produced, which in no case shall be less than ten days after the date of service; and

(4) identify the members of the attorney general's staff to whom the documentary material is to be made available for inspection and copying.

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C. A civil investigative demand shall not:

(1) contain a requirement that would be unreasonable or improper if contained in a subpoena duces tecum issued by a court of this state;

(2) require the disclosure of any documentary material that would be privileged or that for any other reason would not be required by a subpoena duces tecum issued by a court of this state; or

(3) require the removal of any documentary material from the custody of the person upon whom the demand is served except in accordance with the provisions of Subsection E of this section.

D. Service of the civil investigative demand may be made by:

(1) delivering a duly executed copy to the agent for service of process;

(2) delivering a duly executed copy to the person to be served;

(3) delivering a duly executed copy to the principal place of business in this state of the person to be served; or

(4) mailing, by registered or certified mail, a duly executed copy of the demand addressed to the person to be served at the person's principal place of business in this state or, if the person has no place of business in this state,

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to the person's principal office or place of business.

E. Documentary material demanded pursuant to the provisions of this section shall be produced for inspection and copying during normal business hours at the principal office or place of business of the person served or may be inspected and copied at such other times and places as may be agreed upon by the person served and the attorney general.

F. Documentary material produced pursuant to an investigative demand, or copies thereof, shall not, unless otherwise ordered by the district court in the county in which the person served resides or has the person's principal place of business or where the violation occurred or is about to occur, for good cause shown, be produced for inspection or copying by anyone other than an authorized employee of the attorney general nor shall the contents be disclosed to anyone other than an authorized employee of the attorney general or in court in an action relating to a violation of the Refund Anticipation Loan Act.

G. At any time before the return date of the investigative demand, a petition to set aside the demand, modify the demand or extend the return date on the demand may be filed in the district court in the county in which the person served resides or has the person's principal place of business or where the violation occurred or is about to occur, and the court, upon a showing of good cause, may set aside the

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demand, modify the demand or extend the return date of the demand.

H. After service of the investigative demand upon the person, if the person neglects or refuses to comply with the demand, the attorney general may invoke the aid of the court in the enforcement of the demand. In appropriate cases, the court shall issue its order requiring the person to appear and produce the documentary material required in the demand and may, upon failure of the person to comply with the order, punish the person for contempt.

I. This section shall not be applicable to criminal prosecutions.

SECTION 13. PRIVATE REMEDIES.--

A. A person likely to be damaged by a violation of the Refund Anticipation Loan Act may be granted an injunction against it under the principles of equity and on terms that the court considers reasonable. Proof of monetary damage, loss of profits or intent to deceive or take unfair advantage of a person is not required.

B. A person who suffers loss of money or property, real or personal, as a result of a violation of the Refund Anticipation Loan Act may bring an action to recover actual damages or the sum of one thousand dollars ($1,000), whichever is greater.

C. Where the trier of fact finds that the party

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charged committed a willful and intentional violation of the Refund Anticipation Loan Act, the court may award up to three times actual damages or three thousand dollars ($3,000), whichever is greater, to the complaining party.

D. The court shall award attorney fees and costs to the party complaining of a violation of the Refund Anticipation Loan Act if the party prevails. The court shall award attorney fees and costs to the party charged with a violation of the Refund Anticipation Loan Act if the court finds that the party complaining of the violation brought forth a frivolous claim.

E. The relief provided in this section is in addition to remedies otherwise available against the same conduct under common law, the Unfair Practices Act, the New Mexico Small Loan Act of 1955 or other statutes of this state.

F. In a class action filed under this section, the court may award damages to the named plaintiffs as provided in Subsections B and C of this section and may award members of the class actual damages as were suffered by each member of the class as a result of the violation.

G. A party to a court action for a private remedy pursuant to this section may request in writing during the thirty-day period following service of the summons and complaint on all parties named in the action that the parties attempt to settle the claim in early mediation. If a request for mediation is made, the parties shall choose a mutually

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acceptable mediator and enter into mediation within sixty days of the appointment of an acceptable mediator unless otherwise agreed by the parties. A request for mediation may be rescinded at any time if agreed to by all parties.

H. If the parties do not agree on a mutually acceptable mediator, the court shall appoint the mediator. If the early mediation pursuant to this section is entered into within sixty days following the appointment of the mediator, the parties suing on the basis of a violation of the Refund Anticipation Loan Act shall be required to pay no more than fifty percent or five hundred dollars ($500) toward the cost of the mediation, whichever is less, and the other party shall pay the remainder of such cost, unless otherwise agreed by the parties. If a person is seeking injunctive relief in accordance with Subsection A of this section, the person may pursue the claim for injunctive relief without following the mediation requirements of this subsection and Subsection G of this section.

SECTION 14. CONSTRUCTION--APPLICABILITY OF RELIEF AND PENALTIES.--The relief and penalties provided in the Refund Anticipation Loan Act are in addition to and supplement the remedies and penalties otherwise applicable against the same conduct under common law, the Unfair Practices Act, the New Mexico Small Loan Act of 1955 or other statutes of this state.

SECTION 15. EFFECTIVE DATE.--The effective date of the

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provisions of this act is July 1, 2013.

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