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MEMORANDUM IN OPPOSITION

February 17, 2009

Revenue Budget Bill (S60A/A160A) -- Part BB and Subpart A of Part SS

This memorandum in *opposition* is written on behalf of our client, the New York Bankers Association.

The Association is comprised of the community, regional and money center banks and thrifts doing business in New York State. The members of the Association have assets in excess of \$9 trillion and more than 300,000 New York State employees.

We urge that Part BB, reflecting the private label credit card bad debt provision, and Subpart A of Part SS, establishing a sales tax data match program in the Executive Budget Revenue Bill, not be adopted in the final 2009-2010 State Budget.

Part BB – Repeal Private Label Credit Card (Bad Debt) Provision

In 2006, the Legislature enacted a provision that authorizes lenders that support private label credit cards (such as those offered by Macy's or Home Depot) to apply to the State for a credit on, or refund of, sales taxes paid on accounts financed by or assigned to the lender that are written off or charged off as uncollectible. Prior to the enactment of this provision, the Tax Law restricted the charge-off of uncollectible bad debts on such accounts to the merchants themselves, precluding the financial institutions that financed and managed the private label cards from claiming such a credit or refund, and, in effect, providing no taxpayer with the opportunity to recoup these losses. The 2006 enactment redressed this situation, allowing a refund or tax credit for charge-offs on uncollectible sales taxes to lenders when they manage private label credit card programs for retail merchants.

The New York Bankers Association opposes the repeal of this provision. Repeal would be inequitable, requiring lenders to pay tax on income they have not in fact received. It would be bad tax law, allowing one class of taxpayers (sales tax vendors or retail merchants) to benefit when another class in the same position may not. It encourages inefficiency, by providing an incentive to vendors to continue to manage their own private label credit cards even when third-party financial institutions often provide such services much more cost-effectively. It also would provide disparate and punitive tax treatment for financial institutions at a time when this important New York industry is

already under great stress. Repeal would also limit the predictability of the Tax Law, discouraging taxpayers from being able to engage in business planning based on the provisions of the Law.

Subpart A or Part SS – Sales Tax Data Matching Program

One element of the State’s proposal for a comprehensive new enforcement program would require commercial banks and thrift institutions to report annually the gross amount of all bank final settlements, including cash and check deposits, in the accounts of all registered sales tax vendors. This data match program is intended to allow the State to determine if there is underreporting of sales or income taxes by any of the State’s thousands of retail merchants.

Under the program, the Tax Department would provide financial institutions by December 31 of each year with a list of all registered sales tax vendors (sales tax vendors are defined in the Sale Tax Article of the Tax Law as any person making sales of personal property, the receipts from which are taxed under the Sales Tax Article). By January 31 of the following year, the financial institution must provide the Tax Department with an information return showing the name, address, taxpayer i.d., total settlements into the taxpayer’s account, and, separately, the gross amounts of cash, checks and other funds deposited into the taxpayer’s accounts, for each sales tax vendor itemized on the Department’s list.

The New York Bankers Association strongly opposes this data match program. It differs markedly from previous data match programs that the State has implemented in that, unlike the child support enforcement and delinquent taxpayer programs, there is no court order indicating that these taxpayers in fact owe the State any overdue tax. Rather, it is a comprehensive program involving every retailer in the State.

- The two earlier programs provided liability protection for financial institutions. In fact, the child support enforcement program provided protection under both State and federal law for financial institutions acting in good faith. These new proposed programs provide no such protection, potentially subjecting financial institutions that inadvertently, but in good faith, provide inaccurate data to liability to their own customers for the effects of that inaccuracy.
- The privacy implications of this program are potentially significant. Both federal and State law provide comprehensive privacy protections for bank customers. While state laws are often exempt from those protections (see section 502 (e) (8) of the Gramm-Leach-Bliley Act, for example), those exceptions anticipated States providing greater protection for customer privacy than federal law (see section 507 (b) of the same Act). This provision invades customer privacy without any expectation that the customer whose privacy is being invaded, many of whom are sole proprietorships and “mom and pop” stores, has committed any offense.
- The program will gather information that has little relationship to its goals. Collecting gross settlement data will not show what percentage of settlements are owing as sales tax, will not indicate purchases made on dates that are sales tax

- holidays, will not show what purchases are exempt from tax, will not indicate refunds or credits, and will not show bad debts, all of which are directly relevant to sales tax enforcement.
- As part of the federal Housing and Economic Recovery Act, signed into law last July, all banks and third party settlement organizations will have to report identifying information and the gross amount of reportable payment transactions (i.e., payment card and third party network transactions) to the Internal Revenue Service (IRS). New York State's proposed program is designed to be put in place prior to the IRS program, and may require New York banks to establish a completely different and seemingly duplicative reporting mechanism than that required by the IRS. The Tax Department should piggyback on the IRS program as it does for other tax data match systems. Understanding the difficulty of establishing such a program, Congress made it applicable to returns for 2011 and thereafter.
 - Banks cannot provide this information in the time required by this legislation. The bill would require financial institutions to provide the first data match under the program by January 31, 2010. The data would be required to match merchant information going back to the first of January, 2009. Banks have not put in place systems to capture this data, and cannot do so until implementing regulations are issued by the Department. It will be many months before such regulations are issued, by which time much of the data will have been lost. Merchants will have gone out of business, bank records will have been altered as banks merge with each other and implement unified recordkeeping systems, and the Tax Department has not answered the many questions which this legislation raises.
 - The cost and implementation time required to respond to this legislation are excessive. Most banks have multiple systems to track different types of customer accounts. Demand deposits, NOW accounts, savings accounts and certificates of deposit, credit and debit cards, all of which may be held in the name of retail merchants and all of which may receive final settlements, each have unique systems requirements. When two institutions have merged, this problem is even more complicated. This legislation would require reprogramming of systems applications for multiple accounts and testing of those new applications over time to ensure that they provide accurate information – efforts not reasonably reflected in the currently proposed effective date.

For these reasons, the New York Bankers Association opposes Part BB and Subpart A of Part SS of the Executive Budget's Revenue Bill and urges that they not be included in passage of the final 2009-2010 State Budget.

Respectfully Submitted,

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP