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SENATE BILL 449

46TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2003

INTRODUCED BY

Manny M. Aragon

AN ACT

RELATING TO HOME LOANS; ENACTING THE HOME LOAN PROTECTION ACT;
PROHIBITING CERTAIN PRACTICES BY CREDITORS; PROVIDING CIVIL
REMEDIES.

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

Section 1. [NEW MATERIAL] SHORT TITLE. -- Sections 1
through 13 of this act may be cited as the "Home Loan
Protection Act".

Section 2. [NEW MATERIAL] FINDINGS. -- The legislature
finds that:

A. abusive mortgage lending has become an
increasing problem in New Mexico, exacerbating the loss of
equity in homes and causing the number of foreclosures to
increase in recent years;

B. one of the most common forms of abusive lending

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1 is the making of loans that are equity-based, rather than
2 income-based;

3 C. the financing of points and fees in these loans
4 provides immediate income to the originator and encourages
5 creditors to repeatedly refinance home loans; and

6 D. while the marketplace appears to operate
7 effectively for conventional mortgages, too many homeowners
8 find themselves victims of overreaching creditors who provide
9 loans with high costs and terms that are unnecessary to secure
10 repayment of the loan.

11 Section 3. [NEW MATERIAL] DEFINITIONS. --As used in the
12 Home Loan Protection Act:

13 A. "annual percentage rate" means the annual
14 percentage rate for a home loan calculated at closing pursuant
15 to the procedure established in 15 USCA 1606;

16 B. "bona fide discount points" means loan discount
17 points that are knowingly paid by the borrower for the express
18 purpose of reducing, and which in fact do result in a bona fide
19 reduction of, the annual percentage rate otherwise applicable
20 to the home loan; provided, however that discount points are
21 not "bona fide discount points" if the annual percentage rate
22 otherwise applicable to the home loan exceeds the conventional
23 mortgage rate by more than:

24 (1) one and one-half percentage points for a
25 home loan secured by a first lien; or

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1 (2) three percentage points for a home loan
2 secured by a junior lien;

3 C. "borrower" means a natural person obligated to
4 repay a home loan, including a co-borrower, cosigner or
5 guarantor;

6 D. "conventional mortgage rate" means the most
7 recently published annual yield on conventional mortgages
8 published by the board of governors of the federal reserve
9 system as of the fifteenth day of the month immediately
10 preceding the month in which the application for the extension
11 of credit is received by the creditor;

12 E. "creditor" means a person who makes a home loan;

13 F. "high-cost home loan" means a home loan in
14 which:

15 (1) the annual percentage rate exceeds the
16 rates threshold; or

17 (2) the total points and fees exceed the total
18 points and fees threshold;

19 G. "home loan" means a loan, including an open-end
20 credit plan, other than a reverse mortgage transaction, where
21 the loan is secured by:

22 (1) a mortgage or deed of trust on real estate
23 in this state upon which there is located or there is to be
24 located a structure:

25 (a) designed principally for occupancy

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1 by one to four families; and

2 (b) that is or will be occupied by a
3 borrower as the borrower's principal residence; or

4 (2) a security interest on a manufactured home
5 that is or will be occupied by a borrower as the borrower's
6 principal residence;

7 H. "manufactured home" means a movable or portable
8 housing structure that exceeds either a width of eight feet or
9 a length of forty feet, constructed to be towed on its own
10 chassis and designed to be installed with or without a
11 permanent foundation for human occupancy;

12 I. "points and fees" means:

13 (1) all amounts payable by a borrower at or
14 before the closing of a home loan, exclusive of any time-price
15 differential due at closing on the loan proceeds, including:

16 (a) loan discount points or other
17 discounts;

18 (b) service or carrying charges;

19 (c) loan fees, finder's fees or similar
20 charges;

21 (d) fees for investigation or credit
22 reports;

23 (e) fees or premiums for title
24 examination, title insurance or similar purposes;

25 (f) fees for preparation of loan-related

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1 documents;

2 (g) escrows for future payments of taxes
3 and insurance;

4 (h) fees for notarizing deeds and other
5 documents;

6 (i) appraisal fees, including fees
7 related to any pest infestation or flood hazard inspections
8 conducted prior to closing; and

9 (j) all compensation paid directly or
10 indirectly to a mortgage broker, including a broker that
11 originates a loan in its own name in a table-funded
12 transaction; and

13 (2) for open-end loans, the points and fees
14 included in Paragraph (1) of this subsection that are known at
15 or before closing plus the minimum additional fees the borrower
16 would be required to pay to draw down an amount equal to the
17 total credit line;

18 J. "rate threshold" means:

19 (1) for a first lien mortgage home loan, a
20 rate equal to six percentage points over the weekly average
21 yield on five-year United States treasury securities on the
22 fifteenth day of the month immediately preceding the month in
23 which the loan is made; and

24 (2) for a subordinate mortgage lien or a
25 mortgage secured solely by a security interest in a

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1 manufactured home, a rate equal to eight percentage points over
2 the weekly average yield on five-year United States treasury
3 securities on the fifteenth day of the month immediately
4 preceding the month in which the loan is made;

5 K. "total points and fees" means the result
6 obtained by subtracting the bona fide discount points paid from
7 the sum of the points and fees, except that if the number of
8 bona fide discount points paid exceeds two points, then only
9 the amount that represents two bona fide discount points shall
10 be subtracted; and

11 L. "total points and fees threshold" means:

12 (1) for a home loan in which the total
13 principal loan amount is thirty thousand dollars (\$30,000) or
14 more, an amount equal to five percent of the total principal
15 loan amount; and

16 (2) for a home loan in which the total
17 principal loan amount is less than thirty thousand dollars
18 (\$30,000), an amount equal to the lesser of one thousand
19 dollars (\$1,000) or eight percent of the total principal loan
20 amount. "

21 SECTION 4. [NEW MATERIAL] PROHIBITED PRACTICES AND
22 PROVISIONS REGARDING HOME LOANS. --

23 A. No creditor shall finance, directly or
24 indirectly, credit life, credit disability, credit unemployment
25 or credit property insurance, or any other life or health

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1 insurance, or any payments directly or indirectly for any debt
2 cancellation or suspension agreement or contract, provided that
3 nothing in this subsection prohibits the payment or receipt of
4 insurance premiums or debt cancellation or suspension fees
5 calculated on the unpaid balance of a home loan and paid on a
6 monthly basis. As used in this subsection, "credit property
7 insurance" means property insurance written in connection with
8 credit transactions under which the creditor is the primary
9 beneficiary.

10 B. No creditor shall engage in the practice of
11 flipping a home loan. As used in this subsection, "flipping a
12 home loan" means the making of a home loan to a borrower that
13 refinances an existing home loan when the new loan does not
14 have reasonable, tangible net benefit to the borrower
15 considering all of the circumstances, including the terms of
16 both the new and refinanced loans, the cost of the new loan and
17 the borrower's circumstances. A creditor making a home loan
18 shall be presumed to be engaged in flipping a home loan if:

19 (1) the primary tangible benefit to the
20 borrower is an interest rate lower than the interest rate on
21 debts satisfied or refinanced in connection with the original
22 home loan, and it will take more than five years for the
23 borrower to recoup the costs of the points and fees through
24 savings resulting from the lower interest rate; or

25 (2) the new loan refinances an existing home

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1 loan that is a special mortgage originated, subsidized or
2 guaranteed by or through a state, tribal or local government,
3 or nonprofit organization, that either bears a below-market
4 interest rate at the time the loan is originated, or has
5 nonstandard payment terms beneficial to the borrower, including
6 terms under which payments vary with income payments are
7 limited to a percentage of income or no payments are required
8 under specified conditions, and where, as a result of the
9 refinancing, the borrower will lose a benefit of the special
10 mortgage.

11 C. No creditor shall recommend or encourage default
12 on an existing loan or other debt prior to and in connection
13 with the closing or planned closing of a home loan that
14 refinances all or any portion of the existing loan or debt.

15 D. No creditor shall make a home loan that provides
16 for a late payment fee except as follows:

17 (1) the late payment fee shall not be in
18 excess of five percent of the amount of the payment past due;

19 (2) the late payment fee shall only be
20 assessed for a payment past due for fifteen days or more;

21 (3) the late payment fee shall not be imposed
22 more than once with respect to a single late payment and no
23 late payment fee shall be charged with respect to a subsequent
24 payment that would have been a full payment but for the
25 previous default or the imposition of the previous late payment

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1 fee;

2 (4) no late payment fee shall be charged
3 unless the creditor notifies the borrower within forty-five
4 days following the date the payment was due that a late payment
5 fee has been imposed for a particular late payment. A late
6 payment fee that the creditor has collected shall be reimbursed
7 if the borrower presents proof of having made a timely payment;
8 and

9 (5) a creditor shall treat each payment as
10 posted on the same business day as it was received by the
11 creditor, service, creditor's agent or at the address provided
12 to the borrower by the creditor, service or the creditor's
13 agent for making payments.

14 E. No creditor shall make a home loan that contains
15 a provision that permits the creditor, in its sole discretion,
16 to accelerate the indebtedness, provided that this provision
17 does not prohibit acceleration of a loan in good faith due to a
18 borrower's failure to abide by the material terms of the loan.

19 F. No creditor shall make a home loan that contains
20 a provision that requires a penalty or premium for prepayment
21 of the balance of the indebtedness.

22 SECTION 5. [NEW MATERIAL] LIMITATIONS AND PROHIBITED
23 PRACTICES FOR HIGH-COST HOME LOANS. --

24 A. No creditor making a high-cost home loan shall
25 directly or indirectly finance any points or fees.

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1 B. No creditor shall make a high-cost home loan
2 that contains a scheduled payment that is more than twice as
3 large as the average of earlier scheduled payments, provided
4 that this provision does not apply when the payment schedule is
5 adjusted to the seasonal or irregular income of a borrower.

6 C. No creditor shall make a high-cost home loan
7 that includes payment terms under which the outstanding
8 principal balance will increase at any time over the course of
9 the loan because the regular periodic payments do not cover the
10 full amount of interest due.

11 D. No creditor shall make a high-cost home loan
12 that contains a provision that increases the interest rate
13 after default, provided that this provision does not apply to
14 interest rate changes in a variable rate loan otherwise
15 consistent with the provisions of the loan documents if the
16 change in the interest rate is not triggered by the event of
17 default or the acceleration of the indebtedness.

18 E. No creditor shall make a high-cost home loan
19 that includes terms under which more than two periodic payments
20 required under the loan are consolidated and paid in advance
21 from the loan proceeds provided to the borrower.

22 F. No creditor shall make a high-cost home loan
23 that may be subject to a mandatory arbitration clause that
24 limits in any way the right of the borrower to seek relief
25 through the judicial process for any and all claims and

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1 defenses the borrower may have against the creditor, broker or
2 other party involved in the loan transaction.

3 G. No creditor shall make a high-cost home loan
4 without first receiving certification from a counselor approved
5 by the United States department of housing and urban
6 development, the New Mexico mortgage finance authority or the
7 director of the financial institutions division of the
8 regulation and licensing department that the borrower has
9 received counseling on the advisability of the loan
10 transaction.

11 H. No creditor shall make a high-cost home loan
12 without due regard to repayment ability. A creditor who
13 follows debt-to-income ratios and the residual income
14 guidelines established by rule of the attorney general shall
15 benefit from a rebuttable presumption that the creditor made
16 the loan with due regard to repayment ability.

17 I. No creditor shall pay a contractor under a home-
18 improvement contract from the proceeds of a high-cost home loan
19 unless:

20 (1) the creditor is presented with a signed
21 and dated completion certificate showing that the home
22 improvements have been completed; and

23 (2) the instrument is payable jointly to the
24 borrower and the contractor, or, at the election of the
25 borrower, through a third-party escrow agent in accordance with

1 terms established in a written agreement signed by the
2 borrower, the creditor and the contractor prior to the
3 disbursement.

4 J. No creditor shall charge a borrower any fees or
5 other charges to modify, renew, extend or amend a high-cost
6 home loan.

7 K. No creditor shall charge a borrower more than
8 seventy-five dollars (\$75.00) to defer any payment due under
9 the terms of a high-cost home loan.

10 SECTION 6. [NEW MATERIAL] DEFAULT--NOTICE--RIGHT TO
11 CURE.--

12 A. Before an action is filed to foreclose or
13 collect money due pursuant to a home loan or before other
14 action is taken to seize or transfer ownership of property
15 subject to a home loan, the creditor or creditor's assignee of
16 the loan shall deliver to the borrower a notice of the right to
17 cure the default informing the borrower of:

18 (1) the nature of the default;

19 (2) the borrower's right to cure the default
20 by paying the sum of money required, provided that a creditor
21 or assignee shall accept any partial payment made or tendered
22 in response to the notice. If the amount necessary to cure the
23 default will change within thirty days of the notice, due to
24 the application of a daily interest rate or the addition of
25 late fees, as allowed by the Home Loan Protection Act, the

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1 notice shall give sufficient information to enable the borrower
2 to calculate the amount at any point within the thirty-day
3 period;

4 (3) the date by which the borrower may cure
5 the default to avoid a court action, acceleration and
6 initiation of foreclosure or other action to seize the
7 property, which date shall not be less than thirty days after
8 the date the notice is delivered, and the name and address and
9 telephone number of a person to whom the payment or tender
10 shall be made;

11 (4) that if the borrower does not cure the
12 default by the date specified, the creditor or assignee may
13 file an action for money due or take steps to terminate the
14 borrower's ownership in the property by requiring payment in
15 full of the home loan and commencing a foreclosure proceeding
16 or other action to seize the property; and

17 (5) the name and address and the telephone
18 number of a person whom the borrower may contact if the
19 borrower disagrees with the assertion that a default has
20 occurred or the correctness of the calculation of the amount
21 required to cure the default.

22 B. If a creditor or assignee asserts that grounds
23 for acceleration exist and requires the payment in full of all
24 sums secured by the home loan, the borrower, or anyone
25 authorized to act on the borrower's behalf, may, at any time

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1 prior to the time title is transferred by means of foreclosure,
2 by judicial proceeding and sale or otherwise, cure the default,
3 and reinstate the home loan. Cure of the default shall
4 reinstate the borrower to the same position as if the default
5 had not occurred and shall nullify, as of the date of the cure,
6 an acceleration of any obligation under the home loan arising
7 from the default.

8 C. To cure a default under this section, a borrower
9 shall not be required to pay any charge, fee or penalty
10 attributable to the exercise of the right to cure a default,
11 other than the fees specifically allowed by this subsection.
12 The borrower shall not be liable for any attorney fees relating
13 to the default that are incurred by the creditor or assignee
14 prior to or during the thirty-day period set forth in
15 Subsection A of this section, nor for any such fees in excess
16 of one hundred dollars (\$100) that are incurred by the creditor
17 or assignee after the expiration of the thirty-day period but
18 prior to the time the creditor or assignee files a foreclosure
19 or other judicial action or takes other action to seize or
20 transfer ownership of the real estate. After the creditor or
21 assignee files a foreclosure or other judicial action or takes
22 other action to seize or transfer ownership of the real estate,
23 the borrower shall only be liable for attorney fees that are
24 reasonable and actually incurred by the creditor or assignee,
25 based on a reasonable hourly rate and a reasonable number of

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1 hours.

2 D. If a default is cured prior to the initiation of
3 any action to foreclose or to seize the residence, the creditor
4 or assignee shall not institute a proceeding or other action
5 for that default. If a default is cured after the initiation
6 of any action, the creditor or assignee shall take such steps
7 as are necessary to terminate the action.

8 E. A creditor or a creditor's assignee of a home
9 loan that has the legal right to foreclose shall, in a
10 foreclosure, use the judicial foreclosure procedures provided
11 by law. In such a proceeding, the borrower may assert the
12 nonexistence of a default and any other claim or defense to
13 acceleration and foreclosure, including any based on a
14 violation of the Home Loan Protection Act, though no such claim
15 or defense shall be deemed a compulsory counterclaim.

16 Section 7. [NEW MATERIAL] CLAIMS AGAINST CERTAIN
17 SELLERS. --Notwithstanding any other provision of law, if a home
18 loan is made, arranged or assigned by a person selling a
19 manufactured home to a borrower or selling home improvements on
20 the residence of a borrower, the borrower may assert all
21 affirmative claims and defenses that the borrower may have
22 against the seller or home improvement contractor against a
23 creditor or a holder or service of the home loan, in any
24 capacity.

25 Section 8. [NEW MATERIAL] SUBTERFUGE PROHIBITED. -- No

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1 person shall, with the intent to avoid the application or
2 provisions of the Home Loan Protection Act:

- 3 A. divide a loan transaction into separate parts;
4 or
5 B. perform any other subterfuge.

6 Section 9. [NEW MATERIAL] CIVIL ACTION. --

7 A. A borrower harmed by a violation of the Home
8 Loan Protection Act may bring a civil action to recover:

- 9 (1) actual damages, including consequential
10 and incidental damages;
11 (2) statutory damages equal to the finance
12 charges agreed to in the home loan agreement, plus ten percent
13 of the amount financed;
14 (3) punitive damages, when the violation was
15 malicious or reckless;
16 (4) costs and reasonable attorney fees;
17 (5) injunctive, declaratory and such other
18 equitable relief as the court deems appropriate in an action to
19 enforce compliance with the Home Loan Protection Act; and
20 (6) rescission of the home loan. If
21 rescinded, the home loan agreement shall be void, and the
22 creditor or the creditor's assignee shall have no right to
23 collect, receive or retain any principal, interest or other
24 charges whatsoever with respect to the loan, and the borrower
25 may recover any payments made under the agreement.

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1 B. The civil action and remedies provided in this
2 section are not exclusive and are in addition to any other
3 action or remedies available to a borrower under applicable
4 law.

5 C. A creditor is not liable in an action brought
6 pursuant to this section if:

7 (1) within thirty days of the home loan
8 closing and prior to receiving any notice from the borrower of
9 the violation, the creditor has made appropriate restitution to
10 the borrower, and appropriate adjustments are made to the loan;
11 or

12 (2) the violation was not intentional and
13 resulted from a bona fide error in fact notwithstanding the
14 maintenance of procedures reasonably adopted to avoid such
15 errors and within sixty days of the loan closing and prior to
16 receiving any notice from the borrower of the violation, the
17 borrower is notified of the violation, appropriate restitution
18 is made to the borrower and appropriate adjustments are made to
19 the loan.

20 Section 10. [NEW MATERIAL] ACTIONS BASED ON HIGH-COST
21 HOME LOANS. --Notwithstanding any other provision of law, a
22 person who purchases or is otherwise assigned a high-cost home
23 loan shall be subject to all affirmative claims and any
24 defenses with respect to the loan that the borrower could
25 assert against the original creditor or broker of the loan;

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1 provided that this section shall not apply if the purchaser or
2 assignee demonstrates that a reasonable person exercising
3 reasonable due diligence could not determine that the mortgage
4 was a high-cost home loan. It shall be presumed that a
5 purchaser or assignee has exercised such due diligence if the
6 purchaser or assignee demonstrates that it:

7 A. maintains policies that expressly prohibit its
8 purchase or acceptance of assignment of a high-cost home loan;

9 B. requires by contract that a seller or assignor
10 of home loans to the purchaser or assignee represents and
11 warrants to the purchaser or assignee that it will not sell or
12 assign any high-cost home loan to the purchaser or assignee;
13 and

14 C. exercises reasonable due diligence at the time
15 of purchase or assignment of home loans or within a reasonable
16 period of time thereafter intended by the purchaser or assignee
17 to prevent the purchaser or assignee from purchasing or taking
18 assignment of any high-cost home loan.

19 Section 11. [NEW MATERIAL] APPLICATION OF UNFAIR
20 PRACTICES ACT.--A violation of the Home Loan Protection Act
21 constitutes an unfair or deceptive trade practice pursuant to
22 the Unfair Practices Act.

23 Section 12. [NEW MATERIAL] ATTORNEY GENERAL-- ENFORCEMENT
24 OF RULES.--The attorney general shall enforce the provisions of
25 the Home Loan Protection Act and, after consulting with the

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1 director of the financial institutions division of the
2 regulation and licensing department and considering similar
3 rules of the federal housing administration and the federal
4 department of veterans affairs, shall adopt rules required
5 pursuant to Subsection H of Section 5 of the Home Loan
6 Protection Act and such other rules as are necessary to
7 implement that act.

8 Section 13. [NEW MATERIAL] LIBERAL INTERPRETATION. -- The
9 Home Loan Protection Act shall be liberally construed to carry
10 out its purpose.

11 Section 14. Section 58-7-9 NMSA 1978 (being Laws 1959,
12 Chapter 327, Section 10, as amended) is amended to read:

13 "58-7-9. CONSTRUCTION. --

14 A. None of the provisions of the New Mexico Small
15 Loan Act of 1955 are amended or repealed by the New Mexico Bank
16 Installment Loan Act of 1959.

17 B. With the exception of precomputed loan
18 transactions, a lender is not bound by the provisions of the
19 New Mexico Bank Installment Loan Act of 1959 in making loans
20 where the loan is made in accordance with the provisions of
21 Sections 56-8-9 through 56-8-14 NMSA 1978.

22 C. None of the provisions of the New Mexico Bank
23 Installment Loan Act of 1959 apply to the assignment or
24 purchase of retail installment contracts originated under the
25 provisions of Sections 58-19-1 through 58-19-14 NMSA 1978 or

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1 originated under the provisions of Sections 56-1-1 through
2 56-1-15 NMSA 1978.

3 D. In the event of a conflict between a requirement
4 of the New Mexico Bank Installment Loan Act of 1959 and a
5 requirement of the Home Loan Protection Act, the requirement of
6 the Home Loan Protection Act shall control.

7 ~~[D.]~~ E. As used in the New Mexico Bank Installment
8 Loan Act of 1959:

9 (1) "year" means three hundred sixty-five
10 days; and

11 (2) "month" means one-twelfth of a year [~~and~~

12 ~~(3) "day" means one-three-hundred-sixty-fifth~~
13 ~~of a year].~~

14 ~~[E.]~~ F. The director of the financial institutions
15 division of the regulation and licensing department [~~is~~
16 ~~empowered and directed to~~] shall issue and file as required by
17 law interpretive regulations to effectuate the purposes of the
18 New Mexico Bank Installment Loan Act of 1959. In issuing,
19 amending or repealing interpretive regulations, the director
20 shall issue the regulation amendment or repeal of the
21 regulation as a proposed regulation amendment or repeal of a
22 regulation and file it for public inspection in the office of
23 the director of the financial institutions division.
24 Distribution thereof shall be made to interested persons, and
25 their comments shall be invited. After the proposed regulation

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1 has been on file for not less than two months, the director may
2 issue it as a final regulation by filing as required by law.
3 Any person who is or may be adversely affected by the adoption,
4 amendment or repeal of a regulation under this section may file
5 an appeal of that action in the district court in Santa Fe
6 county within thirty days after the filing of the adopted
7 regulation, amendment or repeal as required by law.

8 [F-] G. Any person, corporation or association
9 complying with the regulations adopted by the director of the
10 financial institutions division of the regulation and licensing
11 department is deemed to have complied with the provisions of
12 the New Mexico Bank Installment Loan Act of 1959.

13 [G-] H. All loans other than precomputed loan
14 transactions made under the New Mexico Bank Installment Loan
15 Act of 1959 shall be clearly identified on the loan documents
16 as being made under that act. "

17 Section 15. Section 58-21-19 NMSA 1978 (being Laws 1983,
18 Chapter 86, Section 19, as amended by Laws 2001, Chapter 251,
19 Section 12 and by Laws 2001, Chapter 264, Section 12) is
20 amended to read:

21 "58-21-19. COMPLIANCE WITH FEDERAL LAW -- In connection
22 with any loan originated, brokered, negotiated or made by a
23 registrant pursuant to the Mortgage Loan Company and Loan
24 Broker Act, registrants shall comply with:

25 A. applicable federal consumer lending laws; and

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1 B. the provisions of the Home Loan Protection Act. "

2 Section 16. SEVERABILITY. --The provisions of the Home
3 Loan Protection Act are severable, and if any part or
4 application of that act is held invalid, the remainder or its
5 application to other situations or persons shall not be
6 affected. If any provision of the Home Loan Protection Act is
7 declared to be inapplicable to any specific category, type or
8 kind of loan or points and fees, the provisions of that act
9 shall continue to apply with respect to all other loans and
10 points and fees.

11 Section 17. APPLICABILITY. --The Home Loan Protection Act
12 shall apply to all home loans made or entered into after the
13 effective date of that act.