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## FISCAL IMPACT REPORT

SPONSOR: SJC DATE TYPED: 03/15/03 HB \_\_\_\_\_

SHORT TITLE: Home Loan Protection Act SB CS/449/aSFI#1

ANALYST: Gilbert

### APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY03	FY04	FY03	FY04		
			\$0.1 See Narrative	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

Response Received From

Regulation and Licensing Department (RLD)  
New Mexico Mortgage Finance Authority (NMMFA)

### SUMMARY

Synopsis of SFI Amendment

Senate Floor Amendment to Senate Judiciary Committee Substitute to Senate Bill 449 stipulates the applicability of the Home Loan Protection Act to be January 1, 2004, and makes the following substantive changes:

- Adds new definitions for “affiliate” and “conventional prepayment penalty”.
- Changes the definitions for “home loan”, and “points and fees”.
- Section 4. [new material] prohibited practices and provisions regarding home loans is amended as follows

B. No creditor shall **knowingly and intentionally** engage in the **unfair act or** practice of flipping a home loan. As used in this subsection, "flipping a home loan" means the making of a home loan to a borrower that refinances an existing home loan when the new loan does not have reasonable, tangible net benefit to the

borrower considering all of the circumstances, including the terms of both the new and refinanced loans, the cost of the new loan and the borrower's circumstances.

~~C. No creditor shall fail to provide access to the same loan products at the same rates to similarly situated borrowers, without regard to which affiliate, broker or lender the borrower approaches or is approached by.~~

- Section 5. [new material] limitations and prohibited practices for high-cost home loans is amended as follows:

~~F. No creditor shall make a high cost home loan that may be subject to a mandatory arbitration clause that limits in any way the right of the borrower to seek relief through the judicial process for any and all claims and defenses the borrower may have against the creditor, broker or other party involved in the loan transaction.~~

**"F. Without regard to whether a borrower is acting individually or on behalf of others similarly situated, a provision of a high-cost home loan agreement that allows a party to require a borrower to assert any claim or defense in a forum that is less convenient, more costly or more dilatory for the resolution of a dispute than a judicial forum where the borrower may otherwise properly bring a claim or defense or limits in any way any claim or defense the borrower may have is unconscionable and void."**

G. ~~No~~ **After April 1, 2004,** no creditor shall make a high-cost home loan without first receiving certification from a **third party non-profit** counselor approved by the United States department of housing and urban development, the New Mexico mortgage finance authority or the director of the financial institutions division of the regulation and licensing department that the borrower has received counseling on the advisability of the loan transaction.

- Section 7 is amended as follows:

Section 7. [NEW MATERIAL] CLAIMS AGAINST CERTAIN SELLERS.-- Notwithstanding any other provision of law, if a home loan is made, arranged or assigned by a person selling a manufactured home to a borrower or selling home improvements on the residence of a borrower, the borrower may assert all affirmative claims and defenses that the borrower may have against the seller or home improvement contractor against a creditor or a holder or service of the home loan, in any capacity; **provided, however, that any claim brought by a borrower pursuant to this section shall be limited to amounts required to reduce or extinguish the borrower's liability under the home loan plus the total amount paid by the borrower in connection with the transaction plus amounts required to recover costs, including reasonable attorney fees.**

- Section 9 is amended as follows:

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

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

(2) statutory damages equal to ~~the finance charges agreed to in the home loan agreement, plus ten percent of the amount financed~~ **two times the finance charge paid under the loan and forfeiture of the remaining interest under the loan;**

(4) costs and reasonable attorney fees; **and**

(5) injunctive, declaratory and such other equitable relief as the court deems appropriate in an action to enforce compliance with the Home Loan Protection Act.

~~(6) rescission of the home loan. If rescinded, the home loan agreement shall be void, and the creditor or the creditor's assignee shall have no right to collect, receive or retain any principal, interest or other charges whatsoever with respect to the loan, and the borrower may recover any payments made under the agreement.~~

Section 11 is amended as follows:

Section 11. [NEW MATERIAL] ACTIONS BASED ON HOME LOANS.--

A. Notwithstanding any other provision of law, any person who purchases or is otherwise assigned a high-cost home loan shall be subject to all affirmative claims and any defenses with respect to the loan that the borrower could assert against the original creditor of the loan; provided that this section shall not apply if the purchaser or assignee demonstrates by a preponderance of the evidence that a reasonable person exercising reasonable due diligence could not determine that the mortgage was a high-cost home loan. ~~It shall be presumed that a~~ **A** purchaser or assignee has exercised such due diligence if the purchaser or assignee:

(1) has in place at the time of the acquisition of the subject loan, policies that expressly prohibit its purchase or acceptance of an assignment of any high-cost home loan;

(2) requires by contract that a seller or assignor of the home loan to the purchaser or assignee represents and warrants to the purchaser or assignee that either:

(a) the seller or assignor will not sell or assign any high-cost home loan to the purchaser or assignee; or

(b) that such seller or assignor is the beneficiary of such a representation and warranty from a previous seller or assignor; and

(3) exercises reasonable due diligence at the time of the acquisition of the home loan, or within a reasonable period of time thereafter, intended to ~~determine that the home loan is not a~~ **prevent the acquisition of any** high-cost home loan; or

(4) satisfies the requirements in Paragraphs (1) and (2) of this subsection and establishes that a reasonable person exercising ordinary due diligence could not determine, based on the documentation ~~received in the normal course of business~~ **required by the Federal Truth in Lending Act** and the itemization of the amount financed and other disclosure disbursements, that the loan was a high-cost home loan.

B. Notwithstanding any other law to the contrary, a borrower acting only in an individual capacity may assert against the creditor or any subsequent holder or assignee of the home loan:

~~(1) within six years of the closing of a home loan, a violation of the Home Loan Protection Act in connection with the loan as an original action or as a defense, claim or counterclaim after an action to collect on the home loan or foreclose on the collateral securing the home loan has been initiated or the debt arising from the home loan has been accelerated or the home loan has become sixty days in default; or~~

~~(2) at any time during the term of a high-cost home loan, a violation of the Home Loan Protection Act in connection with the loan as a defense, claim or counterclaim after an action to collect on the home loan or foreclose on the collateral securing the home loan has been initiated or the debt arising from the home loan has been accelerated or the home loan has become sixty days in default.~~

**(1) within six years of the closing of a high-cost home loan, a violation of the Home Loan Protection Act in connection with the loan as an original action;**

**(2) at any time during the term of a high-cost home loan, any defense, claim or counterclaim, or action to enjoin foreclosure or to preserve or obtain possession of the dwelling that secures the loan, including but not limited to a violation of the Home Loan Protection Act, after an action to collect on the home loan or foreclose on the collateral securing the home loan has been initiated or the debt arising from the home loan has been accelerated or the home loan has become sixty days in default; or**

**(3) within three years of the closing of a home loan, a violation of Subsection B of Section 4 of the Home Loan Protection Act as a defense, claim or counterclaim or as an action to enjoin foreclosure or to preserve or obtain possession of the dwelling that secures the loan, after an action to collect on the home loan or foreclose on the collateral securing the home loan has been initiated or the debt arising from the home loan has been accelerated or the home loan has become sixty days in default.**

C. In an action, claim or counterclaim brought pursuant to Subsection B of this section, the borrower may recover only amounts required to reduce or extinguish the borrower's liability under the home loan plus amounts required to recover costs and reasonable attorney fees.

D. Nothing in this section shall limit the substantive rights, remedies or proce-

dural rights available to a borrower against a creditor, assignee or holder that are otherwise provided by law.

Synopsis of Bill

House Business and Industry Committee substitute for Senate Bill 449 enacts the Home Loan Protection Act to prohibit abusive mortgage lending practices, includes civil remedies, specifies enforcement provisions, and removes the exemption of consumer finance companies from the Mortgage Loan Company and Loan Broker Act.

The purpose of this bill is to address abusive mortgage lending practices in New Mexico. Such practices have exacerbated the loss of equity in homes and caused the number of foreclosures to increase in recent years.

According to this bill, the most common form of abusive lending is the making of loans that are equity-based, rather than income-based. The financing of points and fees in these loans provides immediate income to originators of these loans and encourages creditors to repeatedly refinance home loans.

While the marketplace appears to operate effectively for conventional mortgages, too many homeowners find themselves victims of creditors who provide loans with high costs and terms that are unnecessary to secure repayment of the loan.

SB 449/SJCSC provides that a creditor shall not make a high-cost home loan unless the creditor has given the following notice to the borrower, or a substantially similar notice:

**NOTICE TO BORROWER**

You should be aware that you might be able to obtain a loan at a lower cost. You should shop around and compare loan rates and fees. Mortgage loan rates and closing costs and fees vary based on many factors, including your particular credit and financial circumstances, your employment history, the loan-to-value requested and the type of property that will secure your loan. The loan rate and fees could also vary based on which creditor or broker you select.

If you accept the terms of this loan, the creditor will have a mortgage lien on your home. You could lose your home and any money you put into it if you do not meet your payment obligations under the loan.

You should consult an attorney-at-law and a qualified independent credit counselor or other experienced financial advisor regarding the rate, fees and provisions of this mortgage loan before you proceed. A list of qualified counselors is available by contacting the New Mexico regulation and licensing department.

You are not required to complete this loan agreement merely because you have received this disclosure or have signed a loan application. Remember, property taxes and homeowner's insurance are your responsibility. Not all creditors provide escrow services for these payments. You should ask your creditor about these services.

Also, your payments on existing debts contribute to your credit ratings. You should not accept any advice to ignore your regular payments to your existing creditors.

### Significant Issues

According to the New Mexico Mortgage Finance Authority (NMMFA), opponents of the original SB449 warn that its provisions could cause New Mexico loans to be undesirable for investment and purchase in the secondary market. By making creditors and creditor's assignees subject to all the defenses of the borrower, SB449 would make a lender and a subsequent investor liable for actions it did not commit and from which it had no ability to protect itself. **The main difference between the original SB449 and this substitute bill is that this bill limits liability of downstream mortgage assignees and investors in Section 11.**

SB 449/SJCSC increased the rate thresholds and changed the benchmark security in Section 3.J from 6 percentage points over the weekly average yield on five-year treasury bills to 7 percentage points over the weekly average yield on "comparable United States treasury securities" on first lien mortgages. Similarly, SB 449/SJCSC increased the rate from 8 to 9 percentage points over the weekly average yield on "comparable United States treasury securities" on subordinate mortgage liens. The SJC substitute modified the total points and fees threshold such that the threshold shall be 5% of the total principal loan amount for home loans in which the loan amount is \$20,000 or more (as opposed to \$30,000), and the lesser of \$1,000 or 8% of the principal when the total loan amount is less than \$20,000.

SB 449/SJCSC has also moved a number of limitations and prohibited practices from Section 4, "Prohibited Practices and Provisions Regarding Home Loans" to Section 5, "Prohibited Practices and Provisions Regarding High-Cost Home Loans," such that the specific limitations and prohibitions apply only to high-cost home mortgage lending practices. The revised Section 4 now allows for "bona fide credit property insurance required by the federal housing administration or the United States department of agriculture to be paid in a single premium to the respective federal agency." This is essential for the many borrowers of government-insured mortgages in New Mexico.

SB 449/SJCSC also added Section 10, which prohibits local governments (including home rule counties and municipalities) from enacting their own ordinances regulating financial or lending activities or imposing any obligations on creditors regarding home loans that are subject to the Home Loan Protection Act.

### **FISCAL IMPLICATIONS**

SB 449/SJCSC requires that all high-cost home loan borrowers receive homebuyer counseling from a HUD, MFA, or Financial Institutions Division-approved counseling agency. Currently, the number of approved agencies that can provide this service is very limited. Significant funding and recruiting of agencies to undertake this activity may be necessary.

There is no appropriation contained in this bill, however Section 13 delegates authority for enforcing the Home Loan Protection Act and promulgating rules related thereto to the Financial Institutions Division of the Regulation and Licensing Department.

## ADMINISTRATIVE IMPLICATIONS

According to the Regulation and Licensing Department (RLD) Financial Institutions Division, verification of compliance with this substituted bill would be on a case-by-case basis, upon the receipt of a complaint regarding a licensee. Therefore, the number of complaints arising from adoption of this bill is unknown, thus making it difficult to determine if there would be administrative impact on RLD.

## CONFLICT/DUPLICATION

Portions of Section 6 on page 14, line 21, through page 18, line 1, may conflict with the New Mexico Uniform Commercial Code.

Page 5, lines 11 and 12; the payment and receipt of “finders fees” may be a violation of the Real Estate Settlement Procedures Act 24 CFR Part 3500.14 “Prohibition against kickbacks and unearned fees.”

This Act prohibits a licensed financial institution (e.g., mortgage lender or broker) from committing fraud or from making a misstatement or omission of a material fact pertaining to a loan and provides civil, administrative, and criminal sanctions for the commission of such prohibited acts. New Mexico’s Unfair Practices Act (Ch. 57, §12-1, NMSA 1978) also prohibits unfair competition, fraudulent business act or practice, and untrue or misleading advertising.

Existing federal law establishes the Home Ownership and Equity Protection Act (HOEPA). This act provides that any purchaser or assignee of a HOEPA loan shall be subject to all claims and defenses the borrower could assert against the original creditor or maker of the loan, with certain limitations and offsets on allowable damages. HOEPA is a federal law designed to protect borrowers of certain high-cost mortgage loans, by requiring additional disclosures to borrowers and restricting improper lending practices. HOEPA does not prohibit loans with high interest rates or fees or cap rates or fees. HOEPA does not apply to loans involving the initial purchase of a home, open-end credit plans, or reverse mortgages.

## TECHNICAL ISSUES

The New Mexico Mortgage Finance Authority recommends the following amendment to this bill:

All subsections of Section 11 pertain to high-cost home loans, so presumably the Section’s title should read “Actions Based on High-Cost Home Loans,” not “Actions Based on Home Loans.” Insert the term “high-cost” in the title.

Section 11.B (2), line 13: delete “a” and insert the words “an original action” before “defense”

Section 11.B (2), line 14: insert the term “high-cost” before “home loan”

Section 11.B (2), line 15: insert the term “high-cost” before “home loan”

Section 11.B (2), line 16: insert the term “high-cost” before “home loan”

Section 11.B (2), line 17: insert the term “high-cost” before “home loan”

Section 11.C, line 18: insert the word “defense” and a comma before “claim”

## **OTHER SUBSTANTIVE ISSUES**

Section 3 no longer contains a definition for “annual percentage rate.” SB 449/SJCSC added a definition of “bridge loan” and significantly expanded the definition of “manufactured home.” SB 449/SJCSC made minor changes to a few other definitions.

The FID listed the following concerns with SB 449/SJCSC:

Page 9 line 8, credit property insurance, although not specifically defined, appears to include private mortgage insurance. It is standard industry practice to require a borrower to make a 20% down payment or have 20% equity in the real estate. Financing of an amount in excess of 80% of the sales price will require private mortgage insurance. This section appears to disallow the financing of the private mortgage insurance.

Page 7 lines 9 through 13, coverage of subordinate liens fail to refer to either “home loan” or “high cost home loan”.

Page 9, lines 13 through 17, would not allow a loan with a balloon payment.

Page 10, lines 15 through 22, a certification curriculum has not been included in SB 499.

Page 12, line 10-15, “A late payment fee may not be charged more than once...” This language is unclear and compliance may prohibit lenders from assessing late fees on loans where the borrower is chronically past due.

Page 13, lines 9 through 11, the language does not contemplate federal preemption.

Page 18, line 11, through line 17, the language is ambiguous.

Page 23 line 9, substitute the words “FINANCIAL INSTITUTIONS DIVISION” for “ATTORNEY GENERAL”