

SENATE FLOOR SUBSTITUTE FOR
SENATE BILL 225

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

AN ACT

RELATING TO FINANCIAL INSTITUTIONS; ENACTING THE DEFERRED
DEPOSIT LOAN ACT; REQUIRING LICENSURE; PROVIDING POWERS AND
DUTIES; REQUIRING RECORDS AND REPORTS; LIMITING CHARGES FOR
LOANS; PRESCRIBING CRIMINAL AND CIVIL PENALTIES; AMENDING AND
ENACTING SECTIONS OF THE NMSA 1978.

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 "Deferred Deposit
Loan Act".

Section 2. [NEW MATERIAL] DEFINITIONS. -- As used in the
Deferred Deposit Loan Act:

A. "check" means a negotiable instrument, as
defined in Section 55-3-104 NMSA 1978, that is drawn on a
financial institution and is to be payable on demand at

1 maturity of a deferred deposit loan;

2 B. "consumer" means a natural person who,
3 individually or jointly with another natural person, enters
4 into a deferred deposit loan;

5 C. "deferred deposit loan" means a transaction in
6 which a person lends money to a consumer by:

7 (1) accepting a check dated on the date it was
8 written and agreeing to hold it for a specific period of days
9 prior to deposit or presentment; or

10 (2) accepting a check dated subsequent to the
11 date it was written and agreeing to hold the check for deposit
12 until the date written on the check;

13 D. "division" means the financial institutions
14 division of the regulation and licensing department;

15 E. "facilitator" means a person that is exempt from
16 licensing and that facilitates, enables or acts as a conduit
17 for another person to make a deferred deposit loan, including:

18 (1) banks;
19 (2) savings and loan associations;
20 (3) credit unions; and
21 (4) other state-regulated or federally
22 regulated financial institutions;

23 F. "licensee" means a person licensed to make
24 deferred deposit loans or a facilitator; and

25 G. "person" means a natural person, firm,

1 partnership, association or corporation, or other entity that
2 makes a deferred deposit loan in this state.

3 Section 3. [NEW MATERIAL] LICENSING REQUIREMENTS AND
4 FEES-- NUMBER AND PLACE OF BUSINESS. --

5 A. A person shall not engage in the business of
6 deferred deposit lending without a license issued by the
7 division. The division shall not issue or renew a license
8 until determining:

9 (1) that authorizing the applicant to engage
10 in deferred deposit lending promotes the convenience and
11 advantage of the community in which the applicant proposes to
12 engage in business;

13 (2) that the applicant has unencumbered assets
14 of at least twenty-five thousand dollars (\$25,000) per license;
15 and

16 (3) other information the division deems
17 necessary.

18 B. A license shall not be issued for longer than
19 one year, and a license shall not be renewed if the licensee
20 has violated the Deferred Deposit Loan Act.

21 C. A licensee shall post a bond in the amount of
22 fifty thousand dollars (\$50,000) per license, which shall
23 continue in effect for five years after the licensee ceases
24 operation in the state. The bond shall be available to pay
25 damages and penalties to consumers harmed by any violation of

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1 the Deferred Deposit Loan Act.

2 D. A licensee shall pay the following fees:

3 (1) an application fee of seven hundred fifty
4 dollars (\$750);

5 (2) a renewal fee of seven hundred fifty
6 dollars (\$750), plus an additional seventy-five cents (\$.75)
7 for each one thousand dollars (\$1,000) of outstanding loans;
8 and

9 (3) an investigative fee of five hundred
10 dollars (\$500).

11 E. More than one place of business shall not be
12 maintained under the same license, but the division may issue
13 more than one license to the same licensee.

14 F. A licensee shall not make deferred deposit loans
15 within an office, suite, room or place of business in which any
16 other business is solicited or engaged in, unless the division
17 finds that the other business is not contrary to the best
18 interest of consumers and is authorized by the division in
19 writing.

20 G. By accepting the license, the applicant agrees
21 that he will not use the criminal process to collect the
22 payment of deferred deposit loans.

23 Section 4. [NEW MATERIAL] REVOCATION AND SUSPENSION OF
24 LICENSE. --If the division finds, after due notice and hearing
25 or opportunity for hearing, that a licensee or officer, agent,

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1 employee or representative of the licensee has violated any of
 2 the provisions of the Deferred Deposit Loan Act or rules
 3 promulgated pursuant to that act, failed or refused to make its
 4 reports to the division or furnished false information to the
 5 division, the division may issue an order suspending or
 6 revoking the license. Revocation, suspension or surrender of a
 7 license shall not relieve the licensee from civil or criminal
 8 liability.

9 Section 5. [NEW MATERIAL] DUTIES. --

10 A. The division shall:

- 11 (1) maintain a list of licensees that is
 12 available to interested persons and the public;
 13 (2) establish a complaint process whereby an
 14 aggrieved consumer or other person may file a complaint against
 15 a licensee; and
 16 (3) compile annual reports of deferred deposit
 17 lending in this state from the information provided pursuant to
 18 Section 6 of the Deferred Deposit Loan Act and provide copies
 19 to the governor and the legislature. Annual reports shall be
 20 available to the public.

21 B. The division may promulgate rules to carry out
 22 the provisions of the Deferred Deposit Loan Act.

23 Section 6. [NEW MATERIAL] RECORDS AND REPORTS. --

24 A. A licensee shall keep books, accounts and
 25 records required by the division that enable the division to

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1 determine if the licensee is complying with the provisions of
2 the Deferred Deposit Loan Act. The division may examine the
3 records at any reasonable time. All records required by this
4 section shall be kept for four years following the last entry
5 on a loan.

6 B. A licensee shall file an annual report with the
7 division on or before the last day of March for the preceding
8 calendar year ending December 31 on forms prescribed by the
9 division. The report shall disclose in detail and under
10 appropriate headings:

11 (1) the resources, assets and liabilities of
12 the licensee at the beginning and end of the time period;

13 (2) the income, expense, gain and loss and a
14 reconciliation of surplus or net worth with the balance sheets;
15 and the ratios of the profits to the assets reported;

16 (3) the total number of deferred deposit loans
17 made during the time period;

18 (4) the total number of deferred deposit loans
19 outstanding as of the last day of the time period;

20 (5) the minimum, maximum and average dollar
21 amount of checks that were deferred during the time period;

22 (6) the average annual percentage rate and the
23 average number of days a deposit of a check is deferred during
24 the time period;

25 (7) the total of returned checks, the total of

1 checks recovered and the total of checks charged off during the
2 time period; and

3 (8) verification that the licensee has not
4 used the criminal process in the collection of any deferred
5 deposit loan during the time period.

6 C. Information about other business conducted on
7 the same premises as that of deferred deposit loans shall be
8 provided as required by the division.

9 D. A licensee shall file a copy of the deferred
10 deposit loan contract and fee schedule with the division prior
11 to commencement of business and annually upon renewal of the
12 license. These documents shall be available to interested
13 parties and to the general public.

14 Section 7. [NEW MATERIAL] REQUIRED ACTS. --

15 A. A check written by a consumer for a deferred
16 deposit loan shall be made payable to the licensee.

17 B. Upon receipt of a check from a consumer for a
18 deferred deposit loan, the licensee shall immediately stamp the
19 back of the check with an endorsement that states: "This check
20 is being negotiated as part of a deferred deposit loan, and any
21 holder of this check takes it subject to all claims and
22 defenses of the maker.". A subsequent holder or assignee of a
23 check written by a consumer for a deferred deposit loan takes
24 the instrument subject to all claims and defenses of the
25 consumer.

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1 C. The minimum term for a deferred deposit loan is
2 two weeks for each fifty dollars (\$50.00) owed on the loan.

3 D. The minimum amount of a deferred deposit loan is
4 fifty dollars (\$50.00).

5 E. The maximum amount of a deferred deposit loan is
6 three hundred dollars (\$300).

7 F. A consumer may make partial payments of not less
8 than five dollars (\$5.00) on a deferred deposit loan at any
9 time without charge.

10 G. After each payment made on a deferred deposit
11 loan, the licensee shall give to the consumer a signed, dated
12 receipt showing the amount paid and the balance due on the
13 loan.

14 H. A licensee shall provide each consumer with a
15 copy of all loan documents prior to the consummation of the
16 loan.

17 Section 8. [NEW MATERIAL] REQUIRED DISCLOSURES. --

18 A. A licensee shall deliver to a consumer before
19 entering into a deferred deposit loan a pamphlet prepared by
20 the division that explains, in simple English and Spanish, all
21 of the consumer's rights and responsibilities in a deferred
22 deposit loan transaction. The pamphlet shall inform consumers
23 that the division can provide information about whether a
24 lender is licensed and whether any complaints against a lender
25 have been filed with the division.

1 B. A licensee shall provide a consumer with a
2 contract that may be kept by the consumer and that includes the
3 following information in English and Spanish:

4 (1) the name, address and telephone number of
5 the licensee making the deferred deposit loan and the name and
6 title of the individual employee who signs the agreement on
7 behalf of the licensee;

8 (2) an itemization of the fees and interest
9 charges to be paid by the consumer;

10 (3) disclosures required by the federal Truth
11 in Lending Act, regardless of whether the Truth in Lending Act
12 applies to the particular deferred deposit loan;

13 (4) disclosures required pursuant to state
14 law;

15 (5) a clear description of the consumer's
16 payment obligations pursuant to the loan; and

17 (6) in a manner that is more conspicuous than
18 the other information provided in the contract and in at least
19 fourteen-point bold typeface located immediately preceding the
20 signature of the consumer, the statement "You cannot be
21 prosecuted in criminal court to collect this loan.".

22 C. A notice in simple English and Spanish shall be
23 conspicuously posted by a licensee in each location of a
24 business providing deferred deposit loans. The notice shall:

25 (1) inform consumers that it is illegal for

1 the licensee to use the criminal process against a consumer to
2 collect on any deferred deposit loan; and

3 (2) display the schedule of all interest and
4 fees to be charged on a deferred deposit loan, with an example
5 of the amounts that would be charged on a three hundred dollar
6 (\$300) loan payable in fourteen days and thirty days and giving
7 the corresponding annual percentage rate.

8 D. Facilitators that make deferred deposit loans
9 and are exempt from the fee limitations of the Deferred Deposit
10 Loan Act and that charge fees, interest and charges greater
11 than those authorized in the Deferred Deposit Loan Act shall
12 post in a conspicuous place in the branch in which deferred
13 deposit loans are transacted the following notice: "WARNING:
14 The fees and interest charged on deferred deposit loans made at
15 this institution may be higher than those charged at other
16 financial institutions."

17 Section 9. [NEW MATERIAL] PERMITTED CHARGES AND FEES. --

18 A. A licensee shall not charge or receive, directly
19 or indirectly, any interest, fees or charges except those
20 specifically authorized by this section.

21 B. A licensee may charge an administrative fee of
22 no more than ten dollars (\$10.00) for each deferred deposit
23 loan entered into with a consumer.

24 C. In addition to the administrative fee, a
25 licensee may charge interest on the amount of cash delivered to

1 the consumer in a deferred deposit loan in an amount no greater
 2 than forty-four percent a year. The rate charged on the
 3 outstanding balance after maturity shall not be greater than
 4 the rate charged during the loan term. Charges on deferred
 5 deposit loans shall be computed and paid only as a percentage
 6 of an unpaid principal balance. As used in this section,
 7 "principal balance" means the balance due and owed exclusive of
 8 any interest, service charges or other loan-related charges.

9 D. If there are insufficient funds to pay a check
 10 on the date of presentment, a licensee may charge a fee of
 11 fifteen dollars (\$15.00). Only one such fee may be collected
 12 with respect to a particular check even if it has been
 13 redeposited and returned more than once. A fee charged
 14 pursuant to this subsection shall be a licensee's exclusive
 15 charge for late payment.

16 E. When a loan is repaid before its due date,
 17 unearned interest charges shall be rebated to the consumer
 18 based on a method at least as favorable to the consumer as the
 19 actuarial method.

20 Section 10. [NEW MATERIAL] PROHIBITED ACTS. -- The
 21 following acts are prohibited:

22 A. engaging in deferred deposit lending without
 23 first obtaining a license;

24 B. threatening to use or using the criminal process
 25 in this or any other state to collect on a loan;

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1 C. altering the date or any other information on a
2 check accepted for a deferred deposit loan;

3 D. using a device or agreement that would have the
4 effect of charging or collecting more fees, charges or interest
5 than allowed by the Deferred Deposit Loan Act, including
6 entering into a different type of transaction with the
7 consumer;

8 E. engaging in unfair, deceptive or fraudulent
9 practices in the making or collecting of a deferred deposit
10 loan;

11 F. entering into a deferred deposit loan when the
12 amount of the loan exceeds twenty-five percent of the
13 consumer's net income for the term of the loan;

14 G. charging to cash a check representing the
15 proceeds of a deferred deposit loan;

16 H. using or attempting to use a check provided by a
17 consumer for a deferred deposit loan as security for purposes
18 of any state or federal law;

19 I. making more than one deferred deposit loan to a
20 consumer at a time;

21 J. entering into another deferred deposit loan with
22 the same consumer for at least thirty days after termination of
23 a deferred deposit loan through the payment of a consumer's
24 check by the drawee financial institution, the return of a
25 check to a consumer who redeems it for consideration or any

1 other method of termination of the loan; provided that a
2 licensee may extend the term of the loan beyond the due date
3 without charge;

4 K. accepting collateral for a deferred deposit
5 loan;

6 L. charging interest, fees or charges other than
7 those specifically authorized by the Deferred Deposit Loan Act,
8 including:

9 (1) charges for insurance; and

10 (2) attorney fees or other collection costs;

11 M threatening to take action against a consumer
12 that is prohibited by the Deferred Deposit Loan Act or making
13 misleading or deceptive statements regarding the deferred
14 deposit loan or any consequence thereof;

15 N. making a misrepresentation of a material fact in
16 obtaining or attempting to obtain a license;

17 O. including any of the following provisions in
18 contracts required by the Deferred Deposit Loan Act:

19 (1) a hold harmless clause;

20 (2) a confession of judgment clause;

21 (3) a waiver of the right to a jury trial, if
22 applicable, in any action brought by or against a consumer;

23 (4) a mandatory arbitration clause;

24 (5) an assignment of or order for payment of
25 wages or other compensation for services;

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1 (6) a provision in which a consumer agrees not
2 to assert any claim or defense arising out of the contract; or

3 (7) a waiver of any provision of the act; or

4 P. selling insurance of any kind, whether sold or
5 not sold in connection with the making or collection of a
6 deferred deposit loan.

7 Section 11. [NEW MATERIAL] CIVIL PENALTIES AND
8 REMEDIES. --

9 A. A violation of the Deferred Deposit Loan Act,
10 except as the result of accidental or bona fide error of
11 computation, renders the loan void, and the licensee shall have
12 no right to collect, receive or retain any principal, interest
13 or other charges whatsoever with respect to the loan.

14 B. A person found to have violated the Deferred
15 Deposit Loan Act shall be liable to a consumer for actual,
16 consequential and punitive damages plus statutory damages of
17 one thousand dollars (\$1,000) for each violation, plus costs
18 and attorney fees.

19 C. A consumer may sue for injunctive and other
20 appropriate equitable relief to stop a person from violating
21 provisions of the Deferred Deposit Loan Act.

22 D. A consumer may bring a class action suit to
23 enforce the Deferred Deposit Loan Act.

24 E. The remedies provided in this section are not
25 intended to be exclusive remedies available to a consumer nor

1 shall the consumer exhaust any administrative remedies provided
2 pursuant to the Deferred Deposit Loan Act or any other
3 applicable law.

4 Section 12. [NEW MATERIAL] CRIMINAL PENALTIES. -- A

5 licensee, including members, officers and directors of the
6 licensee, that knowingly violates the Deferred Deposit Loan Act
7 is guilty of a petty misdemeanor and, on conviction, is subject
8 to imprisonment not to exceed six months and a fine of not more
9 than one thousand dollars (\$1,000) or both.

10 Section 13. [NEW MATERIAL] APPLICABILITY. --

11 A. The Deferred Deposit Loan Act applies to any
12 person that, for a fee, service charge or other consideration:

13 (1) makes a deferred deposit loan; or

14 (2) facilitates, enables or acts as a conduit
15 for another person that makes deferred deposit loans.

16 B. The provisions of the Deferred Deposit Loan Act,
17 except the requirements for obtaining a license and the
18 limitations on interest rates and fees where exempt by virtue
19 of other state or federal laws, shall apply to banks, savings
20 and loan associations, credit unions and other state-regulated
21 or federally regulated financial institutions.

22 Section 14. Section 58-15-3 NMSA 1978 (being Laws 1955,
23 Chapter 128, Section 3, as amended) is amended to read:

24 "58-15-3. APPLICABILITY OF ACT-- EXEMPTIONS-- EVASIONS--
25 PENALTY. --

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1 A. No person shall engage in the business of
2 lending in amounts of two thousand five hundred dollars
3 (\$2,500) or less without first having obtained a license from
4 the director. Nothing contained in this subsection shall
5 restrict or prohibit a licensee under the New Mexico Small Loan
6 Act of 1955 from making loans in any amount under the New
7 Mexico Bank Installment Loan Act of 1959 in accordance with the
8 provisions of Section 58-7-2 NMSA 1978.

9 B. Nothing in the New Mexico Small Loan Act of 1955
10 shall apply to a person making individual advances of two
11 thousand five hundred dollars (\$2,500) or less under a written
12 agreement providing for a total loan or line of credit in
13 excess of two thousand five hundred dollars (\$2,500) for which
14 real estate is pledged as collateral.

15 C. Any banking corporation, savings and loan
16 association or credit union operating under the laws of the
17 United States or of New Mexico shall be exempt from the
18 licensing requirements of the New Mexico Small Loan Act of
19 1955, nor shall that act apply to any business transacted by
20 any such person under the authority of and as permitted by any
21 such law, nor to any bona fide pawnbroking business transacted
22 under a pawnbroker's license, nor to a deferred deposit loan
23 business operating pursuant to the Deferred Deposit Loan Act,
24 nor to bona fide commercial loans made to dealers upon personal
25 property held for resale. Nothing contained in the New Mexico

1 Small Loan Act of 1955 shall be construed as abridging the
 2 rights of any of those exempted from the operations of that act
 3 from contracting for or receiving interest or charges not in
 4 violation of any existing applicable statute of this state.

5 D. The provisions of Subsection A of this section
 6 apply to any person owning any interest, legal or equitable, in
 7 the business or profits of any licensee whose name does not
 8 specifically appear on the face of the license, except a
 9 stockholder in a corporate licensee, and to any person who
 10 seeks to evade its application by any device, subterfuge or
 11 pretense whatsoever, including but not thereby limiting the
 12 generality of the foregoing: the loan, forbearance, use or
 13 sale of credit (as guarantor, surety, endorser, comaker or
 14 otherwise), money, goods or things in action; the use of
 15 collateral or related sales or purchases of goods or services
 16 or agreements to sell or purchase, whether real or pretended;
 17 receiving or charging compensation for goods or services,
 18 whether or not sold, delivered or provided; and the real or
 19 pretended negotiation, arrangement or procurement of a loan
 20 through any use or activity of a third person, whether real or
 21 fictitious.

22 E. Any person, copartnership, trust and the
 23 trustees or beneficiaries thereof, association or corporation
 24 and the several members, officers, directors, agents and
 25 employees thereof who violate or participate in the violation

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1 of any provision of Subsection A of this section is guilty of a
2 petty misdemeanor and upon conviction shall be sentenced
3 pursuant to the provisions of Subsection B of Section 31-19-1
4 [~~B~~] NMSA 1978. Any contract or loan in the making or
5 collection of which any act is done that violates Subsection A
6 or D of this section is void and the lender has no right to
7 collect, receive or retain any principal, interest or charges
8 whatsoever. "

9 Section 15. EFFECTIVE DATE. --The effective date of the
10 provisions of this act is July 1, 2003.