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HOUSE BILL 364

47TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2005

INTRODUCED BY

Dani ce Pi craux

AN ACT

**RELATING TO FINANCIAL PRIVACY; REQUIRING CONSENT FOR SHARING
CERTAIN FINANCIAL INFORMATION; LIMITING FINANCIAL DISCLOSURES
BETWEEN FINANCIAL INSTITUTIONS; PROVIDING FOR ENFORCEMENT;
ESTABLISHING PENALTIES.**

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

**Section 1. SHORT TITLE.--This act may be cited as the
"Financial Information Privacy Act".**

**Section 2. PURPOSE.--The purpose of the Financial
Information Privacy Act is to ensure that financial
institutions provide consumers notice and meaningful choice
about the use of nonpublic personal information.**

**Section 3. DEFINITIONS.--As used in the Financial
Information Privacy Act:**

A. "affiliate" means an entity that controls, is

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1 controlled by or is under common control with another entity,
2 but does not include a joint employee of the entity and the
3 affiliate. A franchisor, including any affiliate thereof,
4 shall be deemed an affiliate of the franchisee for purposes of
5 the Financial Information Privacy Act;

6 B. "affinity partner" means the relationship
7 established between a financial institution and an organization
8 or business entity that is not a financial institution when the
9 non-financial institution issues a credit card or financial
10 product or service on behalf of the financial institution;

11 C. "annually" means at least once in any period of
12 twelve consecutive months during which a financial relationship
13 exists. The financial institution may define the twelve-
14 consecutive-month period, but shall apply it to a consumer on a
15 consistent basis. If, for example, a financial institution
16 defines the twelve-consecutive-month period as a calendar year
17 and provides the annual notice to the consumer once in each
18 calendar year, it complies with the requirement to send the
19 notice annually;

20 D. "clear and conspicuous" means that a notice is
21 reasonably understandable and designed to call attention to the
22 nature and significance of the information contained in the
23 notice;

24 E. "consumer" means a natural person or that
25 person's personal representative who has obtained a financial

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1 product or service from a financial institution;

2 F. "control" means:

3 (1) ownership or power to vote twenty-five
4 percent or more of the outstanding shares of any class of
5 voting security of a company, acting through one or more
6 persons;

7 (2) command in any manner over the election of
8 a majority of the directors or of persons exercising similar
9 functions; and

10 (3) authority to exercise, directly or
11 indirectly, a controlling influence over the management or
12 policies of a company;

13 G. "financial institution" means any institution
14 that engages significantly in financial activities and does
15 business in New Mexico;

16 H. "financial product or service" means any product
17 or service offered by engaging in an activity that is financial
18 in nature or incidental to a financial activity, and includes a
19 financial institution's evaluation or brokerage of information
20 that the financial institution collects in connection with a
21 request or an application for a financial product or service
22 from a consumer;

23 I. "identity theft" means willfully obtaining,
24 recording or transferring personal identifying information of
25 another person without the authorization or consent of that

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1 person and with the intent to defraud that person or another;

2 J. "necessary to effect, administer or enforce"
3 means the type of information required with consumer
4 disclosures pursuant to the Financial Information Privacy Act;

5 K. "nonaffiliated third party" means an entity that
6 is not an affiliate of or related by common ownership or
7 affiliated by corporate control with the financial institution,
8 but does not include a joint employee of that institution and a
9 third party;

10 L. "nonpublic personal information" means
11 personally identifiable financial information provided by a
12 consumer to a financial institution that results from a
13 transaction with the consumer or from a publicly available
14 list, description or other grouping of consumers;

15 M. "personally identifiable financial information"
16 means information provided by a consumer to a financial
17 institution in order to obtain a product or service from the
18 financial institution. "Personally identifiable financial
19 information" includes information:

20 (1) that a consumer provides to a financial
21 institution on an application to obtain a loan, credit card or
22 other financial product or service;

23 (2) on a consumer's account balance, payment
24 history, overdraft history and credit or debit card purchase
25 information;

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1 (3) indicating that a person is or has been a
2 consumer of a financial institution or has obtained a financial
3 product or service from a financial institution;

4 (4) that a consumer provides to a financial
5 institution or that a financial institution or its agent
6 otherwise obtains in connection with collecting on a loan or
7 servicing a loan;

8 (5) from a consumer report; and

9 (6) that is personally identifiable financial
10 information collected through an internet or information
11 collecting device from a web server; and

12 N. "protected information" means information
13 subject to protections of the Financial Information Privacy
14 Act.

15 Section 4. CONSUMER CONSENT REQUIRED PRIOR TO DISCLOSURE
16 OF NONPUBLIC PERSONAL INFORMATION TO NONAFFILIATED THIRD
17 PARTIES. --

18 A. A financial institution shall not sell, share,
19 transfer or otherwise disclose nonpublic personal information
20 to or with any nonaffiliated third party without the express
21 prior consent of the consumer to whom the nonpublic personal
22 information relates.

23 B. A financial institution shall not discriminate
24 against or deny an otherwise qualified consumer a financial
25 product or a financial service because the consumer has not

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1 consented to allow the financial institution to disclose or
2 share nonpublic personal information pertaining to the consumer
3 with any nonaffiliated third party.

4 Section 5. CONSUMER RIGHT TO OPT OUT OF DISCLOSURES TO
5 AFFILIATES AND NONAFFILIATED THIRD PARTIES FOR MARKETING
6 PURPOSES-- LIMITATIONS ON MARKETING. --

7 A. Unless a consumer has directed a financial
8 institution not to disclose nonpublic personal information, a
9 financial institution may market its own financial products and
10 services or the products and services of affiliates or
11 nonaffiliated third parties to customers of the financial
12 institution as long as:

13 (1) nonpublic personal information is not
14 disclosed in connection with the delivery of the applicable
15 marketing materials; and

16 (2) in cases in which the applicable
17 nonaffiliated third party may extrapolate nonpublic personal
18 information about the consumer responding to those marketing
19 materials, the applicable nonaffiliated third party has signed
20 a contract with the financial institution under the terms of
21 which the nonaffiliated third party is prohibited from using
22 that information for any purpose other than the purpose for
23 which it was provided, as set forth in the contract, and the
24 financial institution has the right by audit, inspections or
25 other means to verify the nonaffiliated third party's

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1 compliance with that contract.

2 B. A financial institution shall not be liable for
3 failing to offer financial products and services to a consumer
4 solely because the consumer failed to consent to disclosure of
5 the consumer's nonpublic personal information, and the consumer
6 failed to provide consent.

7 C. Unless a consumer has directed a financial
8 institution not to disclose nonpublic personal information, a
9 financial institution may share nonpublic personal information
10 on its consumer with a nonaffiliated financial institution for
11 purposes of jointly offering a financial product or service
12 pursuant to a written agreement with the financial institution
13 that receives the nonpublic personal information; provided that
14 the following requirements are met:

15 (1) the financial product or service offered
16 is a product or service of, and is provided by, at least one of
17 the financial institutions that is a party to the written
18 agreement;

19 (2) the financial product or service is
20 jointly offered, endorsed or sponsored, and clearly and
21 conspicuously identifies for the consumer the financial
22 institutions that disclose and receive the disclosed nonpublic
23 personal information; and

24 (3) the written agreement provides that the
25 financial institution that receives that nonpublic personal

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1 information is required to maintain the confidentiality of that
2 information and is prohibited from disclosing or using that
3 information other than to carry out the joint offering or
4 servicing of a financial product or service that is the subject
5 of the written agreement.

6 D. A financial institution may disclose nonpublic
7 personal information to a nonaffiliated financial institution
8 pursuant to a preexisting contract with the nonaffiliated
9 financial institution, for purposes of offering a financial
10 product or service, if that contract was entered into on or
11 after the effective date of the Financial Information Privacy
12 Act. Beginning on January 1, 2006, nonpublic personal
13 information may not be disclosed pursuant to that contract
14 unless all the requirements of the Financial Information
15 Privacy Act are met.

16 Section 6. RELEASE OF NONPUBLIC PERSONAL INFORMATION
17 PERMITTED--CONDITIONS FOR RELEASE.--A financial institution may
18 release nonpublic personal information under the following
19 circumstances:

20 A. when the consumer consents or directs the
21 financial institution to release the information;

22 B. when the release is necessary to effect,
23 administer or enforce a transaction:

24 (1) in connection with servicing or processing
25 a financial product or service requested or authorized by the

1 consumer;

2 (2) in connection with maintaining or
3 servicing the consumer's account with the financial institution
4 or with another entity as part of a private label credit card
5 program or other extension of credit on behalf of that entity;
6 and

7 (3) in connection with the financial
8 institution's proposed or actual secondary market sale or
9 securing the sale, including sales of servicing rights or
10 similar transactions related to a transaction of the consumer;

11 C. when the nonpublic personal information is
12 released:

13 (1) to protect the confidentiality or security
14 of the financial institution's records pertaining to the
15 consumer, the service or product or the transaction at issue;

16 (2) to protect against or prevent actual or
17 potential fraud, identity theft, unauthorized transactions
18 claims or other liability; and

19 (3) for required institutional risk control or
20 for resolving customer disputes or inquiries;

21 D. when the nonpublic personal information is
22 released in connection with a proposed or actual sale, merger,
23 transfer or exchange of all or a portion of a business or
24 operating unit if the disclosure of nonpublic personal
25 information concerns solely consumers of the business or unit;

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1 E. when the nonpublic personal information is
2 released to comply with federal, state or local laws, rules and
3 other applicable legal requirements; to comply with a properly
4 authorized civil, criminal, administrative or regulatory
5 investigation or subpoena or summons by federal, state or local
6 authorities; or to respond to judicial process or government
7 regulatory authorities having jurisdiction over the financial
8 institution for examination, compliance or other purposes as
9 authorized by law;

10 F. when the nonpublic personal information is
11 released to an affiliate or a nonaffiliated third party in
12 order for the affiliate or nonaffiliated third party to perform
13 business or professional services on behalf of the financial
14 institution; provided that the following requirements are met:

15 (1) the services to be performed by the
16 affiliate or nonaffiliated third party could lawfully be
17 performed by the financial institution;

18 (2) there is a written contract between the
19 affiliate or nonaffiliated third party and the financial
20 institution that prohibits the affiliate or nonaffiliated third
21 party from disclosing or using the nonpublic personal
22 information other than to carry out the purpose for which the
23 financial institution disclosed the information, as set forth
24 in the written contract;

25 (3) the nonpublic personal information

1 provided to the affiliate or nonaffiliated third party is
2 limited to that which is necessary for the affiliate or
3 nonaffiliated third party to perform the services contracted
4 for on behalf of the financial institution;

5 (4) the financial institution does not receive
6 any payment from or through the affiliate or nonaffiliated
7 third party in connection with or as a result of, the release
8 of the nonpublic personal information; and

9 (5) when the nonpublic personal information is
10 released as required by Title III of the federal United and
11 Strengthening America by Providing Appropriate Tools Required
12 to Intercept and Obstruct Terrorism Act of 2001;

13 G. when the nonpublic personal information is
14 released in connection with a written agreement between a
15 consumer and a broker-dealer registered under the federal
16 Securities Exchange Act of 1934 or an investment adviser
17 registered under the federal Investment Advisers Act of 1940 to
18 provide investment management services, portfolio advisory
19 services or financial planning, and the nonpublic personal
20 information is released for the sole purpose of providing the
21 products and services covered by that agreement; and

22 H. when the financial institution has a written
23 contractual agreement that includes:

24 (1) the rights and obligations between the
25 licensees arising out of the business relationship relating to

1 insurance or securities transactions;

2 (2) an explicit limitation on the use of
3 nonpublic personal information about a consumer to transactions
4 authorized by the contract and permitted pursuant to the
5 Financial Information Privacy Act; and

6 (3) a requirement that transactions specified
7 in the contract fall within the scope of activities permitted
8 by the licensees of the parties.

9 Section 7. GENERAL REQUIREMENTS FOR PRIVACY NOTICES. --

10 A. A form that complies with the Financial
11 Information Privacy Act shall be sent by the financial
12 institution to the consumer so that the consumer may make a
13 decision and provide direction to the financial institution
14 regarding the sharing of nonpublic personal information. A
15 financial institution shall be conclusively presumed to have
16 satisfied the notice requirements of the Financial Information
17 Privacy Act if it uses the form set forth in that act.

18 B. A financial institution shall provide a consumer
19 with annual notice of its policies for sharing consumer
20 information and shall allow forty-five days to lapse from the
21 date of providing the form in person or the postmark or other
22 postal verification of mailing before disclosing nonpublic
23 personal information pertaining to the consumer.

24 C. If a financial institution does not have a
25 continuing relationship with a consumer other than the initial

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1 transaction in which the financial product or service is
2 provided, no annual disclosure requirement exists pursuant to
3 the Financial Information Privacy Act as long as the financial
4 institution provides the consumer with the form required by
5 that act at the time of the initial transaction.

6 D. The financial institution shall use a notice
7 form that:

8 (1) uses the title "IMPORTANT PRIVACY CHOICES
9 FOR CONSUMERS" and contains paragraphs titled: "Restrict
10 Information Sharing With Companies We Own Or Control
11 (Affiliates)" and "Restrict Information Sharing With Other
12 Companies We Do Business With To Provide Financial Products And
13 Services";

14 (2) clearly and conspicuously displays titles
15 and headings in boldface and does not display text in a form
16 smaller than ten-point type;

17 (3) is a separate one-page document;

18 (4) uses short, explanatory sentences and
19 avoids multiple negatives, legal terminology and highly
20 technical terminology; and

21 (5) provides wide margins and ample line
22 spacing and uses boldface or italics to distinguish it from
23 plain text for key words.

24 E. If a financial institution does not disclose or
25 share nonpublic personal information, the financial institution

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1 may omit the references to sharing nonpublic personal
2 information in the form. The form with such omissions shall be
3 conclusively presumed to satisfy the notice requirements of the
4 Financial Information Privacy Act.

5 F. The outside of the envelope in which the form is
6 sent to the consumer shall clearly state in sixteen-point
7 boldface type "IMPORTANT PRIVACY CHOICES", except that a
8 financial institution sending the form to a consumer in the
9 same envelope as a bill, account statement or application
10 requested by the consumer does not have to include the wording
11 "IMPORTANT PRIVACY CHOICES" on that envelope. The form shall
12 be sent with a bill, other statement of account or application
13 requested by the consumer, in which case the information
14 required by Title V of the federal Gramm-Leach-Bliley Act may
15 also be included in the same envelope, as a separate notice or
16 with the information required by Title V of the Gramm-Leach-
17 Bliley Act, and including only information related to privacy
18 or with another mailing, in which case it shall be the first
19 page of the mailing.

20 G. A financial institution may provide a joint
21 notice from it and one or more of its affiliates or other
22 financial institutions, as identified in the notice, so long as
23 the notice is accurate with respect to the financial
24 institution and the affiliates and other financial
25 institutions.

1 H. A notice provided to a member of a household
2 shall be considered notice to all members of that household
3 unless the household contains another person who also has a
4 separate account with the financial institution.

5 Section 8. FORMATTING AND CONTENT REQUIREMENTS FOR
6 DISCLOSURE CONSENT FORMS. --

7 A. A financial institution shall use a form to
8 obtain consent to disclose nonpublic personal information to a
9 nonaffiliated third party that:

10 (1) is a separate document, not attached to
11 any other document;

12 (2) is to be dated and signed by the consumer;

13 (3) clearly and conspicuously discloses that
14 by signing, the consumer is consenting to the disclosure to
15 nonaffiliated third parties of nonpublic personal information
16 pertaining to the consumer;

17 (4) clearly and conspicuously discloses:

18 (a) that the consent will remain in
19 effect until revoked or modified by the consumer;

20 (b) that the consumer may revoke the
21 consent at any time; and

22 (c) the procedure for the consumer to
23 revoke consent; and

24 (5) clearly and conspicuously informs the
25 consumer that:

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1 (a) the financial institution will
2 maintain the document or a true and correct copy;

3 (b) the consumer is entitled to a copy
4 of the document upon request; and

5 (c) the consumer may want to make a copy
6 of the document for the consumer's records.

7 B. A response directing the financial institution
8 not to disclose nonpublic personal information to a
9 nonaffiliated financial institution shall be deemed a direction
10 to the financial institution to not disclose nonpublic personal
11 information to an affinity partner, unless the form containing
12 the notice provides the consumer with a separate choice for
13 disclosure to an affinity partner.

14 C. When a consumer directs that nonpublic personal
15 information not be disclosed, that direction is in effect until
16 otherwise stated by the consumer.

17 Section 9. EXCEPTIONS TO PROHIBITIONS ON DISCLOSURE. --

18 A. "Nonpublic personal information" does not
19 include publicly available information that the financial
20 institution has a reasonable basis to believe is lawfully made
21 available to the general public from federal, state or local
22 government records, widely distributed media or disclosures to
23 the general public that are required by federal, state or local
24 law.

25 B. For purposes of the Financial Information

1 Privacy Act, a person is not a consumer solely because of:

2 (1) participating or benefiting from an
3 employee benefit plan that a financial institution administers
4 or sponsors or for which the financial institution acts as a
5 trustee, insurer or fiduciary;

6 (2) coverage under a group or blanket
7 insurance policy or group annuity contract issued by the
8 financial institution;

9 (3) status as a beneficiary in a workers'
10 compensation plan;

11 (4) status as a beneficiary of a trust for
12 which the financial institution is a trustee; or

13 (5) being a person who has designated the
14 financial institution as trustee for a trust; provided that the
15 financial institution provides all required notices and rights
16 required by the Financial Information Privacy Act to the plan
17 sponsor, group or blanket insurance policyholder or group
18 annuity contract holder.

19 C. "Financial institution" does not include:

20 (1) an institution that is primarily engaged
21 in providing hardware, software or interactive services;
22 provided that it does not act as a debt collector or engage in
23 activities for which the institution is required to acquire a
24 charter, license or registration from a state or federal
25 governmental banking, insurance or securities agency;

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1 (2) an entity chartered and operating under
2 the federal Farm Credit Act of 1971; provided that the entity
3 does not sell or transfer nonpublic personal information to an
4 affiliate or a nonaffiliated third party;

5 (3) an institution chartered by congress
6 specifically to engage in a proposed or actual securitization,
7 or a secondary market sale, including sales of servicing rights
8 or similar transactions related to a transaction of the
9 consumer, as long as those institutions do not sell or transfer
10 nonpublic personal information to a nonaffiliated third party;

11 (4) a provider of professional services or any
12 wholly owned affiliate thereof that is prohibited by rules of
13 professional ethics and applicable law from voluntarily
14 disclosing confidential client information without the consent
15 of the client; or

16 (5) a person licensed as a dealer for the
17 installment sale or lease of motor vehicles pursuant to the
18 requirements of the Motor Vehicle Code who assigns
19 substantially all of those contracts to financial institutions
20 within thirty days.

21 D. Nothing in the Financial Information Privacy Act
22 shall be construed to change existing law relating to access by
23 law enforcement agencies to information held by financial
24 institutions.

25 E. Nothing in the Financial Information Privacy Act

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1 shall be construed to prohibit a financial institution from
2 denying a consumer a financial product or service if the
3 financial institution could not provide the financial product
4 or service to a consumer without the consent required prior to
5 disclosure of the consumer's nonpublic personal information,
6 but the consumer has failed to provide consent.

7 F. Nothing in the Financial Information Privacy Act
8 is intended to prohibit a financial institution from offering
9 incentives or discounts to elicit a specific response to the
10 notice.

11 Section 10. DISCLOSURE-RELATED LIABILITY LIMITATIONS. -- A
12 financial institution shall not be required to offer or provide
13 financial products or services offered through affiliated
14 entities or jointly with nonaffiliated financial institutions
15 when the consumer has directed that nonpublic personal
16 information not be disclosed pursuant to the Financial
17 Information Privacy Act and the financial institution could not
18 offer or provide the financial products or services to the
19 consumer without disclosure of the consumer's nonpublic
20 personal information that the consumer has directed not be
21 disclosed pursuant to that act.

22 Section 11. ENFORCEMENT. -- The following entities are
23 authorized to assess civil penalties in an action brought
24 pursuant to the Financial Information Privacy Act:

25 A. the attorney general; or

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1 B. a functional regulator with jurisdiction over
2 regulation of the financial institution as follows:

3 (1) in the case of banks, savings
4 associations, credit unions, commercial lending companies and
5 bank holding companies, the financial institutions division of
6 the regulation and licensing department or the appropriate
7 federal authority;

8 (2) in the case of any person engaged in the
9 business of insurance, by the insurance division of the public
10 regulation commission; and

11 (3) in the case of any investment broker or
12 dealer, investment company, investment advisor, residential
13 mortgage lender or finance lender, by the financial
14 institutions division of the regulation and licensing
15 department or the appropriate federal authority.

16 Section 12. PENALTIES. -- Penalties for violations of the
17 Financial Information Privacy Act that apply irrespective of
18 the amount of damages suffered by the consumer as a result of
19 that violation include:

20 A. for a negligent disclosure, sharing or use of
21 nonpublic personal information, the penalty shall not exceed
22 two thousand five hundred dollars (\$2,500) per person for
23 violations of disclosures or five hundred thousand dollars
24 (\$500,000) for violations applied to release of information on
25 more than one person;

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1 B. for a knowing and willful violation, disclosure,
2 sharing or use of nonpublic personal information, a civil
3 penalty not to exceed two thousand five hundred dollars
4 (\$2,500);

5 C. to determine the penalty to be assessed pursuant
6 to a violation of the Financial Information Privacy Act, the
7 court shall take into account the following factors:

8 (1) the total assets and net worth of the
9 violating entity;

10 (2) the nature and seriousness of the
11 violation;

12 (3) the persistence of the violation,
13 including any attempts to correct the situation leading to the
14 violation;

15 (4) the length of time over which the
16 violation occurred;

17 (5) the number of times the entity has
18 violated the Financial Information Privacy Act;

19 (6) the harm caused to consumers by the
20 violation;

21 (7) the level of proceeds derived from the
22 violation; and

23 (8) the impact of possible penalties on the
24 overall fiscal solvency of the violating entity; and

25 D. in the event a violation of the Financial

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1 Information Privacy Act results in the identity theft of a
2 consumer, the civil penalties set forth in this section shall
3 be doubled and restitution shall be assessed for any financial
4 loss sustained by the person injured, including out-of-pocket
5 costs, attorney fees and expenses incurred in clearing the
6 consumer's credit history or credit rating, as well as costs
7 incurred in connection with a civil or administrative
8 proceeding to satisfy a debt, lien, judgment or other
9 obligation arising as a result of the identity theft.

10 Section 13. SEVERABILITY. --If any part or application of
11 the Financial Information Privacy Act is held invalid, the
12 remainder or its application to other situations or persons
13 shall not be affected.

14 Section 14. APPLICABILITY. --Nothing in this act shall be
15 construed as altering or annulling the authority of any
16 department or agency of the state to regulate any financial
17 institution subject to its jurisdiction. However, this act
18 shall preempt and be exclusive of all local agency ordinances
19 and regulations relating to the use and sharing of nonpublic
20 personal information by financial institutions. This section
21 shall apply both prospectively and retroactively.

22 Section 15. EFFECTIVE DATE. --The effective date of the
23 provisions of this act is July 1, 2005.