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HOUSE BILL 870

45TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2001

INTRODUCED BY

Miguel P. Garcia

AN ACT

**RELATING TO FINANCIAL TRANSACTIONS; ENACTING THE PAYDAY LOAN
ACT; REGULATING THE TERMS OF PAYDAY LOANS; PROVIDING FOR
LICENSING OF PERSONS PROVIDING PAYDAY LOANS.**

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

**Section 1. SHORT TITLE. -- This act may be cited as the
"Payday Loan Act".**

**Section 2. PURPOSE OF ACT. -- The purpose of the Payday
Loan Act is to protect consumers who enter into short-term,
high rate loans from abuses that occur in the credit
marketplace. The Payday Loan Act shall be liberally construed
as a consumer protection statute to effectuate its purpose.**

Section 3. DEFINITIONS. -- As used in the Payday Loan Act:

**A. "check" means a negotiable instrument, as
defined in Article 3 of the Uniform Commercial Code, which is**

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1 drawn on a bank;

2 B. "consumer" means a person who, singly or
3 jointly with another person, enters into a payday loan;

4 C. "director" means the director of the financial
5 institutions division of the regulation and licensing
6 department;

7 D. "facilitator" means a person who facilitates,
8 enables or acts as a conduit for another person who is or may
9 be exempt from licensing and who makes deferred deposit loans;

10 E. "licensee" means a person licensed by the
11 regulation and licensing department pursuant to the provisions
12 of the Payday Loan Act to engage in payday loans; and

13 F. "payday loan" means any arrangement in which a
14 person, for a fee, service charge or other consideration,
15 accepts a check and agrees to hold it for a period of days
16 prior to deposit or presentment and includes a check drawn in
17 anticipation of receipt of a compensation or employment
18 payment.

19 Section 4. APPLICABILITY. --

20 A. The Payday Loan Act applies to payday loans and
21 to a person who, for a fee, service charge or other
22 consideration, accepts a check and agrees to hold it for a
23 period of days prior to deposit or presentment.

24 B. The Payday Loan Act applies to any person who
25 facilitates, enables or acts as a conduit for another person,

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1 who is or may be exempt from licensing and who makes payday
2 loans.

3 C. The provisions of the Payday Loan Act apply to
4 any person who seeks to evade its applicability by any device,
5 subterfuge or pretense whatsoever.

6 Section 5. EXEMPTIONS. --

7 A. Retail sellers that cash checks and who charge
8 no more than two dollars (\$2.00) per check for the service are
9 exempt from the provisions of the Payday Loan Act.

10 B. State or federally regulated financial
11 institutions are exempt from the provisions of the Payday Loan
12 Act to the extent that they are exempt by virtue of other
13 state or federal laws regarding limitations on interest or
14 rates. All other provisions of the Payday Loan Act apply
15 except Section 6 of that act.

16 Section 6. LICENSING. --

17 A. A person who is not exempt from the Payday Loan
18 Act shall not make or offer to make a payday loan unless he
19 has been issued a license by the director. The director shall
20 not issue or renew any such license until a prospective
21 licensee meets all the requirements for licensing and licensee
22 conduct required under the New Mexico Small Loan Act of 1955.

23 B. The director may promulgate rules to carry out
24 the provisions of the Payday Loan Act.

25 Section 7. INFORMATION REQUIRED AND ANNUAL REPORTS. --

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1 A. A licensee shall keep and use books, accounts
2 and records that enable the director to determine if the
3 licensee is complying with the provisions of the Payday Loan
4 Act. The licensee shall maintain other records as required by
5 the director. The director is authorized to examine a
6 licensee's records at any reasonable time. All records shall
7 be kept for four years following the last entry on a loan.
8 Records shall be maintained according to generally accepted
9 accounting procedures so that an examiner may review the
10 record keeping and reconcile each payday loan with
11 documentation maintained in the payday loan records.

12 B. A licensee shall file an annual report with the
13 director on or before the last day of March for the twelve-
14 month period in the preceding calendar year on forms
15 prescribed by the director. The reports shall be verified by
16 the oath or affirmation of the owner, manager or president of
17 the licensee. The reports shall disclose in detail and under
18 appropriate headings:

19 (1) the resources, assets and liabilities of
20 the licensee at the beginning and the end of the period;

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

24 (3) the total number of payday loans made in
25 the reported year;

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1 (4) the total number of payday loans
2 outstanding as of end of the reported year;

3 (5) the minimum, maximum and average dollar
4 amount of checks whose deposits were deferred in the reported
5 year;

6 (6) the average annual percentage rate as
7 defined in the federal Truth in Lending Act for all loans
8 made, and the average number of days a deposit of a check was
9 deferred during the reported year;

10 (7) the total of returned checks, the total
11 of returned checks recovered and the total of checks charged
12 off during the reported year;

13 (8) verification that the licensee has not
14 used the criminal process or caused the criminal process to be
15 used in the collection of any payday loans during the reported
16 year; and

17 (9) the total number of payday loans renewed
18 and the number of times a payday loan was renewed by each
19 consumer.

20 C. If a licensee conducts another business or is
21 affiliated with other licensees under the Payday Loan Act, or
22 if any other situation exists under which allocations of
23 expense are necessary, the licensee shall make such
24 allocations according to appropriate and reasonable accounting
25 principles as approved by the director. Information about any

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1 other business conducted on the same premises as that of
2 payday loans shall be provided as required by the director.

3 D. A licensee shall file a copy of the contract
4 described in Subsection B of Section 9 of the Payday Loan Act
5 and the fee schedule described in Subsection C of Section 9 of
6 that act with the director prior to the date of commencement
7 of business at each location, at the time any changes are made
8 to the documents or schedule and annually thereafter upon
9 renewal of the license. These documents shall be available to
10 interested parties and to the general public.

11 Section 8. LIMITATIONS ON PAYDAY LOANS. --

12 A. Each payday loan shall have a minimum term of
13 no less than two weeks for each fifty dollars (\$50.00) owed on
14 the loan.

15 B. A consumer shall be permitted to make partial
16 payments in amounts of no less than five dollars (\$5.00) on
17 the loan at any time, without charge.

18 C. A payday loan shall not exceed three hundred
19 dollars (\$300).

20 D. After each payment made, in full or in part, on
21 any payday loan, the licensee shall give to the person making
22 the payment a signed, dated receipt showing the amount paid
23 and the balance due on the loan.

24 E. The minimum amount of a payday loan is fifty
25 dollars (\$50.00).

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1 F. The check written by the consumer in a payday
2 loan must be payable to the order of the licensee.

3 G. Upon receipt of the check from the consumer for
4 a payday loan, the licensee must immediately stamp the back of
5 the check with an endorsement that states: "This check is
6 being negotiated as part of a loan pursuant to the Payday Loan
7 Act, and any holder of this check takes it subject to all
8 claims and defenses of the maker."

9 H. The licensee must provide the consumer, or each
10 consumer if there is more than one, with a copy of the loan
11 documents described in Section 9 of the Payday Loan Act, prior
12 to the consummation of the loan.

13 I. The holder or assignee of any check written by
14 a consumer in connection with a payday loan takes the
15 instrument subject to all claims and defenses of the consumer.
16 A payday loan agreement may be renewed or extended for no more
17 than two consecutive terms, each such term not to exceed the
18 original term, by mutual consent of the licensee and the
19 consumer, except that after the second renewal or extension
20 all payments thereafter shall be first applied to reduce the
21 principal balance.

22 Section 9. REQUIRED DISCLOSURES TO CONSUMERS. --

23 A. Before making a payday loan, the licensee
24 shall deliver to the consumer a pamphlet approved by the
25 director that explains, in simple English and Spanish, all of

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1 the consumer's rights and responsibilities in a payday loan
2 transaction, and includes a toll free number to the director's
3 office to handle concerns or complaints by consumers, and
4 informs consumers that the director's office can provide
5 information about whether a lender is licensed, whether
6 complaints have been filed with the director and the
7 resolution of the complaints.

8 B. Licensees shall provide consumers with a
9 written agreement on a form specified or approved by the
10 director that can be kept by the consumer, and must include
11 the following information in English and in the language in
12 which the loan was negotiated:

13 (1) the name, address, telephone number of
14 the licensee making the payday loan and the name and title of
15 the individual employee who signs the agreement on behalf of
16 the licensee;

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

19 (3) disclosures required by the federal Truth
20 in Lending Act, regardless of whether the Truth in Lending Act
21 applies to the particular payday loan;

22 (4) disclosures required under any other
23 state law;

24 (5) a clear description of the consumer's
25 payment obligations under the loan; and

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1 (6) in a manner that is more conspicuous than
2 the other information provided in the loan document and is in
3 at least fourteen point bold type face, a statement that:
4 "You cannot be prosecuted in criminal court to collect this
5 loan". Such notice shall be located immediately preceding the
6 signature of the consumer.

7 C. A licensee shall post plainly worded notices,
8 approved by the director, in English, Spanish and any other
9 languages in which a significant amount of payday loan
10 business is conducted, in a conspicuous place at each location
11 of a business providing payday loans that informs consumers:

12 (1) that the licensee cannot use the criminal
13 process against a consumer to collect any payday loans; and

14 (2) of the schedule of all interest and fees
15 to be charged on payday loans with an example of the amounts
16 that would be charged on separate three-hundred-dollar (\$300)
17 loans payable in fourteen days and thirty days, giving the
18 corresponding annual percentage rates.

19 D. Financial institutions making payday loans
20 that, because of the application of other state or federal
21 law, are exempt from the fee limitations of the Payday Loan
22 Act, and that charge fees, interest and charges greater than
23 those authorized by the Payday Loan Act, must post, in a
24 conspicuous place in each branch in which payday loans are
25 entered into, the notice below. A single instance of charging

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1 a consumer more than the fees, interest or other charges
2 permitted in the Payday Loan Act requires the financial
3 institution to post this notice:

4 "WARNING: The fees and interest charged on payday loans made
5 at this institution are higher than those charged at other
6 financial institutions."

7 Section 10. PERMITTED CHARGES. --

8 A. No licensee may charge or receive, directly or
9 indirectly, any interest, fees or charges except:

10 (1) a licensee may charge an administrative
11 fee of no more than five dollars (\$5.00) for each payday loan
12 entered into with a consumer;

13 (2) in addition to the administrative fee,
14 the licensee may charge interest on the amount of cash
15 delivered to the consumer in a payday loan. The rate charged
16 on the outstanding balance after maturity shall not be greater
17 than the rate charged during the loan term. Charges on loans
18 shall be computed and paid only as a percentage of the unpaid
19 principal balance. As used in this paragraph, "principal
20 balance" means the balance due and owed exclusive of any
21 interest, service charges or other loan-related charges; and

22 (3) if there are insufficient funds to pay a
23 check on the date of presentment, a licensee may charge a fee,
24 not to exceed the lesser of fifteen dollars (\$15.00) or the
25 fee imposed upon the licensee by the financial institution to

1 which the check was presented. Only one fee may be collected
2 with respect to a particular check even if it has been
3 redeposited and returned more than once. A fee charged
4 pursuant to this subsection is a licensee's exclusive charge
5 for late payment.

6 B. When a loan is repaid before its due date,
7 unearned interest charges must be rebated to the consumer
8 based on a method at least as favorable to the consumer as the
9 actuarial method.

10 Section 11. PROHIBITED ACTS. -- A licensee making payday
11 loans shall not:

12 A. engage in the business of payday lending unless
13 the director has first issued a valid license;

14 B. threaten to use or use the criminal process in
15 this or any other state to collect on the loan;

16 C. alter the date or any other information on the
17 check;

18 D. use any device or agreement that would have the
19 effect of charging or collecting more fees, charges or
20 interest than allowed by the Payday Loan Act, including
21 entering into a different type of transaction with the
22 consumer that has that effect;

23 E. engage in unfair, deceptive or fraudulent
24 practices in the making or collecting of a payday loan;

25 F. enter into a payday loan with a consumer that

1 is unconscionable. In determining whether a payday loan
2 transaction is unconscionable, consideration shall be given to
3 whether the amount of the loan exceeds twenty-five percent of
4 the consumer's net income for the term of the loan;

5 G. charge to cash a check representing the
6 proceeds of the payday loan;

7 H. use or attempt to use the check provided by the
8 consumer in a payday loan as security for purposes of any
9 state or federal law;

10 I. accept payment of the payday loan through the
11 proceeds of another payday loan provided by the same licensee
12 or any facilitator except such allowed renewals as set forth
13 in Subsection L of this section;

14 J. make more than one payday loan to a consumer at
15 a time;

16 K. make a payday loan that, when combined with
17 another outstanding payday loan owed to another licensee,
18 exceeds a total of three hundred dollars (\$300) when combining
19 the face amount of the checks written in connection with each
20 loan. The licensee shall make inquiry of the consumer or
21 utilize available information whether such loans are
22 outstanding. In no event shall a licensee make a loan to a
23 consumer who has two or more such loans outstanding,
24 regardless of the total value of the loans;

25 L. renew, repay, refinance or consolidate a payday

1 loan with the proceeds of another payday loan made by the same
2 consumer for more than two renewals; provided that after the
3 second and final renewal all payments thereafter shall be
4 first applied to reduce the principal balance. Upon
5 termination of a payday loan through the payment of the
6 consumer's check by the drawee bank, the return of a check to
7 a consumer who redeems it for consideration, or any other
8 method of termination, the licensee shall not enter into
9 another payday loan with the same consumer for at least thirty
10 days thereafter, except that a licensee may extend the term of
11 the loan beyond the due date without charge;

12 M. accept any collateral for a payday loan;

13 N. charge any interest, fees or charges other than
14 those specifically authorized by the Payday Loan Act,
15 including:

16 (1) charges for insurance; or

17 (2) attorney fees or other collection costs;

18 O. threaten to take any action against a consumer
19 that is prohibited by the Payday Loan Act or make any
20 misleading or deceptive statements regarding the payday loan
21 or any consequence thereof;

22 P. make a misrepresentation of a material fact in
23 obtaining or attempting to obtain a license;

24 Q. include any of the following provisions in a
25 payday loan:

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- 1 (1) a hold harmless clause;
- 2 (2) a confession of judgment clause;
- 3 (3) a waiver of the right to a jury trial, if
- 4 applicable, in any action brought by or against a consumer;
- 5 (4) a mandatory arbitration clause;
- 6 (5) any assignment of or order for payment of
- 7 wages or other compensation for services;
- 8 (6) a provision in which the consumer agrees
- 9 not to assert any claim or defense arising out of the
- 10 contract; or
- 11 (7) a waiver of any provision of the Payday
- 12 Loan Act;

13 R. sell any insurance of any kind whether or not

14 sold in connection with the making or collecting of a payday

15 loan; or

16 S. engage in any other violation of the Payday

17 Loan Act.

18 Section 12. ENFORCEMENT AND REMEDIES. --

19 A. The remedies provided in this section are

20 cumulative and apply to licensees and to persons to whom the

21 Payday Loan Act applies and who are not licensed.

22 B. Any facilitator is subject to enforcement under

23 Section 6 of the Payday Loan Act and this section if the

24 person making the deferred deposit loans fails to comply with

25 the requirements of that act.

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1 C. The violation of any provision of the Payday
2 Loan Act, or any rule adopted pursuant to that act, except as
3 the result of accidental or bona fide error of computation,
4 renders the loan void, and the person shall have no right to
5 collect, receive or retain any principal, interest or other
6 charges whatsoever with respect to the loan.

7 D. Any person found to have violated the Payday
8 Loan Act shall be liable to the consumer for actual,
9 consequential and punitive damages, plus statutory damages of
10 one thousand dollars (\$1,000) for each violation, plus costs
11 and attorney fees.

12 E. A consumer or the attorney general may sue for
13 injunctive and other appropriate equitable relief to stop any
14 person from violating any provision of the Payday Loan Act.

15 F. The consumer may bring a class action suit to
16 enforce the Payday Loan Act.

17 G. The remedies provided in this section are not
18 intended to be the exclusive remedies available to a consumer,
19 and the consumer is not required to exhaust any administrative
20 remedies provided under the Payday Loan Act or any other
21 applicable law before resorting to the remedies provided in
22 this section.

23 Section 13. SEVERABILITY.--If any part or application of
24 the Payday Loan Act is held invalid, the remainder or its
25 application to other situations or persons shall not be

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1 affected.

2 Section 14. EFFECTIVE DATE. -- The effective date of the
3 provisions of this act is July 1, 2001.

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