

REGULATORY GUIDANCE

Clarification regarding the calculation of high-cost loan points and fees pursuant to the Home Loan Protection Act

The Financial Institutions Division (hereafter "Division") has recently received inquiries regarding whether fees not paid by the borrower – such as amounts paid by the seller, creditor, realtor, or other non-borrower parties – must be included in the total points and fees calculation for a home loan. This guidance clarifies the application of the Home Loan Protection Act, NMSA 1978, Section 58-21A-1(A) *et seq.* (as amended through 2021) (hereafter "HLPAct"), specifically as it relates to the determination of high-cost loan points and fees.

In determining whether a fee must be included in the points-and-fees calculation, the Division considers whether the fee constitutes a cost of credit borne directly or indirectly by the borrower. Although the HLPAct does not expressly address every circumstance involving seller-paid or third-party-paid charges, the Division interprets the statute consistent with its consumer-protection purpose and with analogous federal high-cost mortgage principles under the Truth in Lending Act and Regulation Z.

Under those principles, charges that are imposed as a condition of extending credit and are paid directly or indirectly by the borrower are included in the points-and-fees calculation. Conversely, amounts paid by a seller or other third party that are not charged to, financed by, reimbursed by, or otherwise borne by the borrower are generally not considered borrower-paid points and fees for purposes of determining whether a loan is a high-cost home loan.

Division Interpretation: For purposes of determining whether a loan is a high-cost home loan under the HLPAct, fees and charges that are paid directly or indirectly by the borrower must be included in the applicable points-and-fees calculation to the extent required by the HLPAct. Fees paid by a seller, creditor, realtor, or other third-party generally may be excluded when the borrower does not directly or indirectly bear the cost of such fees. The Division will evaluate the substance of the transaction rather than the form of the payment and will consider whether the borrower ultimately bears the economic burden of the charge.