

1 HOUSE BILL 44  
2 **56TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2023**

3 INTRODUCED BY  
4 Marian Matthews  
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9  
10 AN ACT

11 RELATING TO LOANS; DEFINING "FEDERAL HOME LOAN BANK" IN THE  
12 INSURERS CONSERVATION, REHABILITATION, AND LIQUIDATION LAW;  
13 AMENDING THE INSURERS CONSERVATION, REHABILITATION, AND  
14 LIQUIDATION LAW; PROVIDING EXCEPTIONS FOR AGREEMENTS INVOLVING  
15 FEDERAL HOME LOAN BANKS IN REGARD TO THE AVOIDANCE OF  
16 TRANSFERS, PREFERENCES AND LIENS; PROVIDING RIGHTS TO FEDERAL  
17 HOME LOAN BANKS REGARDING SECURED CLAIMS ON INSURERS THAT ARE  
18 SUBJECT TO DELINQUENCY PROCEEDINGS PURSUANT TO THE LIFE AND  
19 HEALTH INSURANCE GUARANTY ASSOCIATION ACT.  
20

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

22 SECTION 1. Section 59A-41-1 NMSA 1978 (being Laws 1984,  
23 Chapter 127, Section 694) is amended to read:

24 "59A-41-1. SHORT TITLE.--~~[This article constitutes and]~~  
25 Chapter 59A, Article 41 NMSA 1978 may be cited as the "Insurers

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1 Conservation, Rehabilitation, and Liquidation Law"."

2 SECTION 2. Section 59A-41-3 NMSA 1978 (being Laws 1984,  
3 Chapter 127, Section 695) is amended to read:

4 "59A-41-3. DEFINITIONS.--As used in [~~this article~~] the  
5 Insurers Conservation, Rehabilitation, and Liquidation Law and  
6 unless context otherwise requires, the words and terms defined  
7 in Sections [~~696 through 708 of this article~~] 59A-41-4 through  
8 59A-41-16 NMSA 1978 shall have the meanings ascribed to them  
9 respectively in such sections."

10 SECTION 3. A new Section 59A-41-7.1 NMSA 1978 is enacted  
11 to read:

12 "59A-41-7.1. [NEW MATERIAL] "FEDERAL HOME LOAN BANK"  
13 DEFINED.--"Federal home loan bank" means an institution  
14 established pursuant to the Federal Home Loan Bank Act."

15 SECTION 4. Section 59A-41-42 NMSA 1978 (being Laws 1984,  
16 Chapter 127, Section 734) is amended to read:

17 "59A-41-42. FRAUDULENT TRANSFERS PRIOR TO PETITION.--

18 A. Except as provided in Subsection D of this  
19 section, every transfer made or suffered and every obligation  
20 incurred by an insurer within one [~~(1)~~] year prior to the  
21 filing of a successful petition for rehabilitation or  
22 liquidation under the Insurance Code is fraudulent as to then  
23 existing and future creditors if made or incurred without fair  
24 consideration, or with actual intent to hinder, delay or  
25 defraud [~~either~~] existing or future creditors. A transfer made

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1 or an obligation incurred by an insurer ordered to be  
2 rehabilitated or liquidated under the Insurance Code, which is  
3 fraudulent under this section, may be avoided by the receiver,  
4 except as to a person who in good faith is a purchaser, lienor  
5 or obligee for a present fair equivalent value, and except that  
6 any purchaser, lienor or obligee, who in good faith has given a  
7 consideration less than fair for such transfer, lien or  
8 obligation, may retain the property, lien or obligation as  
9 security for repayment. The court may, on due notice, order  
10 any such transfer or obligation to be preserved for the benefit  
11 of the estate, and in that event, the receiver shall succeed to  
12 and may enforce the rights of the purchaser, lienor or obligee.

13 B. The following provisions apply whether there are  
14 or were creditors who might have obtained any liens or persons  
15 who might have become bona fide purchasers:

16 (1) a transfer of property other than real  
17 property shall be deemed to be made or suffered when it becomes  
18 so far perfected that no subsequent lien obtainable by legal or  
19 equitable proceedings on a simple contract could become  
20 superior to the rights of the transferee;

21 (2) a transfer of real property shall be  
22 deemed to be made or suffered when it becomes so far perfected  
23 that no subsequent bona fide purchaser from the insurer could  
24 obtain rights superior to the rights of the transferee;

25 (3) a transfer ~~[which]~~ that creates an

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1 equitable lien shall not be deemed to be perfected if there are  
2 available means by which a legal lien could be created; and

3 (4) ~~[Any]~~ a transfer not perfected prior to  
4 the filing of a petition for liquidation shall be deemed to be  
5 made immediately before the filing of the successful petition.

6 ~~[(5) The provisions of this subsection apply  
7 whether or not there are or were creditors who might have  
8 obtained any liens or persons who might have become bona fide  
9 purchasers.]~~

10 C. ~~[Any]~~ Except as provided in Subsection D of this  
11 section, a transaction of the insurer with a reinsurer shall be  
12 deemed fraudulent and may be avoided by the receiver under  
13 Subsection A of this section if:

14 (1) the transaction consists of the  
15 termination, adjustment or settlement of a reinsurance contract  
16 in which the reinsurer is released from any part of its duty to  
17 pay the originally specified share of losses that had occurred  
18 prior to the time of the transaction, unless the reinsurer  
19 gives a present fair equivalent value for the release; and

20 (2) any part of the transaction took place  
21 within one year prior to the date of filing of the petition  
22 through which the receivership was commenced.

23 D. A receiver shall not avoid any transfer of, or  
24 obligation to transfer, money or property arising under or in  
25 connection with a federal home loan bank security agreement or

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1 a pledge agreement, security agreement, collateral agreement,  
2 guarantee agreement or other similar arrangement or credit  
3 enhancement relating to a security agreement, to which a  
4 federal home loan bank is a party, except if the transfer, or  
5 obligation to transfer, was made with actual intent to hinder,  
6 delay or defraud an existing or future creditor."

7 SECTION 5. Section 59A-41-43.1 NMSA 1978 (being Laws  
8 1993, Chapter 320, Section 94) is amended to read:

9 "59A-41-43.1. VOIDABLE PREFERENCES AND LIENS.--

10 A. [~~1~~] A preference is a transfer of any of the  
11 property of an insurer to or for the benefit of a creditor, for  
12 or on account of an antecedent debt, made or suffered by the  
13 insurer within one year before the filing of a successful  
14 petition for rehabilitation or liquidation under [~~Chapter 59A,~~  
15 ~~Article 41 NMSA 1978]~~ the Insurers Conservation,  
16 Rehabilitation, and Liquidation Law, the effect of which  
17 transfer may be to enable the creditor to obtain a greater  
18 percentage of this debt than another creditor of the same class  
19 would receive. If a liquidation order is entered while the  
20 insurer is already subject to a rehabilitation order, then such  
21 transfers shall be deemed preferences if made or suffered  
22 within one year before the filing of the petition for  
23 rehabilitation, or within two years before the filing of the  
24 petition for liquidation, whichever time is shorter.

25 [~~2~~] Any] B. Except as provided in Subsection N of

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1 this section, a preference may be avoided by the rehabilitator  
2 or liquidator if:

3 [~~(a)~~] (1) the insurer was insolvent at the  
4 time of the transfer;

5 [~~(b)~~] (2) the transfer was made within four  
6 months before the filing of the petition;

7 [~~(c)~~] (3) the creditor receiving [~~it~~] the  
8 preference or to be benefited thereby or [~~his~~] the creditor's  
9 agent acting with reference thereto had, at the time when the  
10 transfer was made, reasonable cause to believe that the insurer  
11 was insolvent or was about to become insolvent; or

12 [~~(d)~~] (4) the creditor receiving [~~it~~] the  
13 preference was an officer, [~~or any~~] employee, [~~or~~] attorney or  
14 other person who was [~~in fact~~] in a position of comparable  
15 influence in the insurer to an officer, whether or not [~~he~~]  
16 that person held such position, or any shareholder holding  
17 directly or indirectly more than five percent of [~~any~~] a class  
18 of [~~any~~] an equity security issued by the insurer, or any other  
19 person, firm, corporation, association or aggregation of  
20 persons with whom the insurer did not deal at arm's length.

21 [~~(3)~~] C. Where the preference is voidable, the  
22 rehabilitator or liquidator may recover the property or, if it  
23 has been converted, its value from any person who has received  
24 or converted the property; except where a bona fide purchaser  
25 or lienor has given less than fair equivalent value. [~~he~~] If a

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1 bona fide purchaser or lienor has given less than fair  
2 equivalent value, the person shall have a lien upon the  
3 property to the extent of the consideration actually given by  
4 [~~him~~] the person. Where a preference by way of lien or  
5 security title is voidable, the court may on due notice order  
6 the lien or title to be preserved for the benefit of the  
7 estate, in which event the lien or title shall pass to the  
8 liquidator.

9 [B-] D. The following provisions apply whether  
10 there are or were creditors who might have obtained liens or  
11 persons who might have become bona fide purchasers:

12 (1) a transfer of property other than real  
13 property shall be deemed to be made or suffered when it becomes  
14 so far perfected that no subsequent lien obtainable by legal or  
15 equitable proceedings on a simple contract could become  
16 superior to the rights of the transferee;

17 (2) a transfer of real property shall be  
18 deemed to be made or suffered when it becomes so far perfected  
19 that no subsequent bona fide purchaser from the insurer could  
20 obtain rights superior to the rights of the transferee;

21 (3) a transfer [~~which~~] that creates an  
22 equitable lien shall not be deemed to be perfected if there are  
23 available means by which a legal lien could be created; and

24 (4) a transfer not perfected prior to the  
25 filling of a petition for liquidation shall be deemed to be

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1 made immediately before the filing of the successful petition.

2 ~~[(5) The provisions of this subsection apply~~  
3 ~~whether or not there are or were creditors who might have~~  
4 ~~obtained liens or persons who might have become bona fide~~  
5 ~~purchasers.~~

6 G.—(1) E. A lien obtainable by legal or equitable  
7 proceedings upon a simple contract is ~~[going]~~ one arising in  
8 the ordinary course of such proceedings upon the entry or  
9 docketing of a judgment or decree, or upon attachment,  
10 garnishment, execution, or like process, whether before, upon,  
11 or after judgment or decree and whether before or upon levy.  
12 It does not include liens ~~[which]~~ that under applicable law are  
13 given a special priority over other liens ~~[which]~~ that are  
14 prior in time.

15 ~~[(2)]~~ F. A lien obtainable by legal or equitable  
16 proceedings could become superior to the rights of a  
17 transferee, or a purchaser could obtain rights superior to the  
18 rights of transferee within the meaning of Subsection ~~[B]~~ D of  
19 this section, if such consequences would follow only from the  
20 lien or purchase itself, or from the lien or purchase followed  
21 by any step wholly within the control of the respective  
22 lienholder or purchaser, with or without the aid of ministerial  
23 action by public officials. Such a lien could not, however,  
24 become superior and such a purchase could not create superior  
25 rights for the purpose of Subsection ~~[B]~~ D of this section

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1 through any acts subsequent to the obtaining of such a lien or  
2 subsequent to such a purchase [~~which~~] that require the  
3 agreement or concurrence of any third party or [~~which~~] that  
4 require any further judicial action or ruling.

5 [~~D.~~] G. A transfer of property for or on account of  
6 a new and contemporaneous consideration [~~which~~] that is deemed  
7 under Subsection [~~B~~] D of this section to be made or suffered  
8 after the transfer because of delay in perfecting it does not  
9 thereby become a transfer for or on account of an antecedent  
10 debt if any acts required by the applicable law to be performed  
11 in order to perfect the transfer as against liens or bona fide  
12 purchasers' rights are performed within twenty-one days or any  
13 period expressly allowed by law, whichever is less. A transfer  
14 to secure a future loan, if such a loan is actually made, or a  
15 transfer [~~which~~] that becomes security for a future loan, shall  
16 have the same effect as a transfer for or on account of a new  
17 and contemporaneous consideration.

18 [~~E.~~] H. If [~~any~~] a lien deemed voidable under  
19 [~~Paragraph (2) of~~] Subsection [~~A~~] B of this section has been  
20 dissolved by the furnishing of a bond or other obligation, the  
21 surety on which has been indemnified directly or indirectly by  
22 the transfer of or the creation of a lien upon any property of  
23 an insurer before the filing of a petition under [~~Chapter 59A,~~  
24 ~~Article 41 NMSA 1978 which~~] the Insurers Conservation,  
25 Rehabilitation, and Liquidation Law that results in a

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1 liquidation order, the indemnifying transfer or lien shall also  
2 be deemed voidable.

3 ~~[F-]~~ I. The property affected by any lien deemed  
4 voidable under ~~[Subsections]~~ Subsection A, ~~[and E]~~ B or C and H  
5 of this section shall be discharged from such lien, and that  
6 property and any of the indemnifying property transferred to or  
7 for the benefit of a surety shall pass to the liquidator,  
8 except that the court may on due notice order any such lien to  
9 be preserved for the benefit of the estate and the court may  
10 direct that such conveyance be executed as may be proper or  
11 adequate to evidence the title of the liquidator.

12 ~~[G-]~~ J. The court before which the rehabilitation  
13 or liquidation proceeding is pending shall have summary  
14 jurisdiction of any proceeding by the liquidator to hear and  
15 determine the rights of any parties under this section.  
16 Reasonable notice of any hearing in the proceeding shall be  
17 given to all parties in interest, including the obligee of a  
18 releasing bond or other like obligation. Where an order is  
19 entered for the recovery of indemnifying property in kind or  
20 for the avoidance of an indemnifying lien, the court, upon  
21 application of any party in interest, shall in the same  
22 proceeding ascertain the value of the property or lien, and if  
23 the value is less than the amount for which the property is  
24 indemnity or less than the amount of the lien, the transferee  
25 or lienholder may elect to retain the property or lien upon

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1 payment of its value, as ascertained by the court, to the  
2 rehabilitator or liquidator, within such reasonable times as  
3 the court shall fix.

4 [H.] K. The liability of the surety under a  
5 releasing bond or other like obligation shall be discharged to  
6 the extent of the value of the indemnifying property recovered  
7 or the indemnifying lien nullified and avoided by the  
8 rehabilitator or liquidator, or where the property is retained  
9 under Subsection [G] J of this section to the extent of the  
10 amount paid to the rehabilitator or liquidator.

11 [F.] L. If a creditor has been preferred, and  
12 afterward in good faith gives the insurer further credit  
13 without security of any kind, for property [which] that becomes  
14 a part of the insurer's estate, the amount of the new credit  
15 remaining unpaid at the time of the petition may be set off  
16 against the preference [which] that would otherwise be  
17 recoverable from [him] the creditor.

18 [J.] M. If an insurer shall, directly or  
19 indirectly, within four months before the filing of a  
20 successful petition for rehabilitation or liquidation under  
21 [~~Chapter 59A, Article 41 NMSA 1978~~] the Insurers Conservation,  
22 Rehabilitation, and Liquidation Law, or at any time in  
23 contemplation of a delinquency proceeding, pay money or  
24 transfer property to an attorney-at-law for services rendered  
25 or to be rendered, the transactions may be examined by the

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1 court on its own motion or shall be examined by the court on  
2 petition of the rehabilitator or liquidator and shall be held  
3 valid only to the extent of a reasonable amount to be  
4 determined by the court, and the excess may be recovered by the  
5 rehabilitator or liquidator for the benefits of the estate;  
6 provided that where the attorney is in a position of influence  
7 in the insurer or an affiliate thereof payment of any money or  
8 the transfer of any property to the attorney-at-law for  
9 services rendered or to be rendered shall be governed by the  
10 provisions of [~~Subparagraph (d) of~~] Paragraph [~~(2)~~] (4) of  
11 Subsection [~~A~~] B of this section.

12 N. A liquidator or rehabilitator shall not avoid a  
13 preference arising under or in connection with a federal home  
14 loan bank security agreement or a pledge agreement, security  
15 agreement, collateral agreement, guarantee agreement or other  
16 similar arrangement or credit enhancement relating to a  
17 security agreement to which a federal home loan bank is a  
18 party."

19 SECTION 6. Section 59A-41-53 NMSA 1978 (being Laws 1984,  
20 Chapter 127, Section 745, as amended) is amended to read:

21 "59A-41-53. SUMMARY PROCEEDINGS--ENFORCEMENT--PENALTY.--

22 A. The superintendent may apply for and the  
23 district court for Santa Fe county or the county in which the  
24 insurer has its principal office may grant such restraining  
25 orders, temporary and permanent injunctions and other orders as

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1 may be deemed necessary to enforce the superintendent's order;  
2 except that a federal home loan bank shall not be stayed,  
3 enjoined or prohibited from exercising or enforcing a right or  
4 cause of action regarding collateral pledged under a security  
5 agreement or a pledge agreement, security agreement, collateral  
6 agreement, guarantee agreement or other similar arrangement or  
7 credit enhancement relating to such federal home loan bank  
8 security agreement.

9 B. Violation of any order of the superintendent  
10 issued under Section 59A-41-51 NMSA 1978 by any person as to  
11 whom the order is in effect shall subject such person to a  
12 penalty of not more than ten thousand dollars (\$10,000), to be  
13 collected in a civil action brought by the attorney general in  
14 the name of the state of New Mexico. The attorney general  
15 shall deposit all funds so collected with the state treasurer  
16 for credit as provided for insurance department receipts in  
17 general under Section 59A-6-5 NMSA 1978."

18 SECTION 7. A new section of the Insurers Conservation,  
19 Rehabilitation, and Liquidation Law is enacted to read:

20 "[NEW MATERIAL] FEDERAL HOME LOAN BANKS--RIGHTS REGARDING  
21 COLLATERAL--PROCEDURES.--

22 A. This section governs any secured claim that a  
23 federal home loan bank has on an insurer that is subject to a  
24 delinquency proceeding under the Insurance Code. To the extent  
25 that the provisions of this section conflict with other

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1 applicable provisions of law, the provisions of this section  
2 shall apply.

3 B. A receiver shall not void a redemption or  
4 repurchase of stock or equity securities made by a federal home  
5 loan bank within four months of the commencement of a  
6 delinquency proceeding or if such stock or equity securities  
7 received prior approval from the receiver; provided that a  
8 transfer is voidable if the transfer was made with the actual  
9 intent to hinder, delay or defraud an insurer member, the  
10 receiver for the insurer member, existing creditors or future  
11 creditors.

12 C. If a federal home loan bank exercises its rights  
13 regarding collateral pledged by an insurer member who is  
14 subject to a delinquency proceeding, the federal home loan bank  
15 shall repurchase any capital stock that is in excess of the  
16 amount of federal home loan bank stock that the insurer member  
17 is required to hold as a minimum investment, but only to the  
18 extent the federal home loan bank in good faith determines that  
19 the repurchase is permissible under applicable law, regulations  
20 and the federal home loan bank's capital plan and consistent  
21 with the federal home loan bank's current capital stock  
22 practices that are applicable to its entire membership.

23 D. Following the appointment of a receiver for an  
24 insurer member, the federal home loan bank, within ten business  
25 days after a request made by the receiver, shall provide a

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1 process and establish time lines for the:

2 (1) release of collateral that exceeds the  
3 value of collateral available for lending, as determined in the  
4 advance agreement with the federal home loan bank, that is  
5 required to support secured obligations remaining after any  
6 repayment of advances;

7 (2) release of the insurer member's collateral  
8 remaining in the federal home loan bank's possession following  
9 repayment in full of outstanding secured obligations of the  
10 insurer member;

11 (3) payment of fees owed by the insurer member  
12 and the operation of deposits and other accounts of the insurer  
13 member with the federal home loan bank; and

14 (4) possible redemption or repurchase of  
15 federal home loan bank stock or excess stock of any class that  
16 an insurer member is required to own.

17 E. Upon a request from the receiver, the federal  
18 home loan bank shall provide any available options that an  
19 insurer member may exercise to renew or restructure an advance  
20 to defer associated prepayment fees, subject to the following:

21 (1) market conditions;

22 (2) the terms of the advances outstanding to  
23 the insurer member;

24 (3) the applicable policies of the federal  
25 home loan bank; and

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1 (4) compliance with the Federal Home Loan Bank  
2 Act and regulations promulgated thereunder.

3 F. A federal home loan bank shall not be stayed or  
4 prohibited from exercising its rights regarding collateral  
5 pledged by an insurer member of that federal home loan bank if  
6 ten days have passed since the commencement of a delinquency  
7 proceeding involving that insurer member."

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