NM center on law and poverty

924 Park Ave SW, Ste C
Albuquerque, NM 87102
505.255.2840
nmpovertylaw.org

April 2, 2018

Kevin A. Graham
Senior Enforcement Counsel
Regulation and Licensing Department
PO Box 25101
Santa Fe, New Mexico 87504

RE: Proposed Rule Changes for Title 12, Chapter 18 NMAC

Dear Mr. Graham,

Please find our comments to the proposed rule changes to NMAC Title 12, Chapter 18. Attached to this letter are our recommended revisions to the proposed rule changes.

I. 12.18.3 Mandatory Brochure for Small Loan Businesses

We recommend including the following additional language in the proposed NMAC 12.18.3.8 (D): Mandatory Brochures for Small Loan Businesses.

> Subsection (D)(5) "Finance Charge" should be amended to include the definition of finance charge according to 12 CFR Part 1026.4(b)[1] and should state what costs a borrower may see included in the finance charge on small loans made pursuant to New Mexico law. According to the New Mexico Bank Installment Loan Act[2], the total finance charge "consists solely of interest and a fully earned processing fee not to exceed the lesser of two hundred dollars ($200) or ten percent of the principal." This disclosure should be made clear in the brochure, as well as on all marketing and business websites, and in-store on all schedules of charges.
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> We recommend including language in Subsection (D)(13) "Credit Report" to indicate borrowers' right to build their credit history with each small loan they take out in 2018, as required by both the New Mexico Small Loan Act and the New Mexico Bank Installment Loan Act, NMSA 58-15-10.2 and 58-7-10.
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> Additionally, we recommend including two new terms in an additional subsection (D)(14) and (D)(15): "Fees" and "Repayment." The new law strictly regulates the fees that a lender can charge a borrower entering into a loan contract, but a borrower unfamiliar with the technical

[1] N.M. STAT. ANN. 58-15-17(J) (2017).
[2] N.M. STAT. ANN. 58-7-6 (2017).

aspects of the law would not know the limits on the fees they can be charged. The FID should include a succinct summary of all fees in the mandatory brochure to help bridge this knowledge gap. We recommend including a definition of "repayment" to address another key provision in the law: the mandatory 120 day repayment period and minimum 4 installment payments requirement for all loans except tax refund anticipation loans.

Lastly, we recommend the Financial Institutions Division expand the list of entities that borrowers have the right to contact in the event they have a concern with a particular lender by including in the mandatory brochure the contact information for the New Mexico Attorney General's Office and federal Consumer Financial Protection Bureau. Adding this contact information ensures that concerns with a particular loan are directed to the appropriate government agency and gives borrowers access to important information about these government agencies that would otherwise be very difficult to find.

Please see the attachment for the language we recommend the Division adopt for the NMAC 12.18.3 "Mandatory Brochure for Small Loan Businesses."

II. 12.18.4 Mandatory Signage for All Small Loan Companies

We share the Division's concerns in amending the schedule of charges requirements to help borrowers understand the true costs of outstanding loans. Amending NMAC 12.18.4 to promote uniformity in disclosures among all licensees in New Mexico is important to ensure transparency in the costs of small loans. In order to have meaningful disclosures, a borrower should be able to walk into a small loan store and see how much a loan will actually cost. The recommendations below and expanded in greater detail in the attached document offer methods to further ensure clear and effective disclosures.

As currently written, NMAC 12.18.4.8 Subsection (E) states that the schedule of charges shall consist of two distinctive sections, and then describes five required headings. It is not clear from the subsection (E) how those headings should be divided into two distinctive sections. In the current version of NMAC 12.18.4.8, the schedule of charges required by Subsection (E) mirrors the Truth in Lending Act (TILA) disclosures, which are mandated by federal law in order to ensure uniformity in financial disclosures. The proposed subsection (E) diverges from the TILA disclosures and intended uniformity by replacing the "FINANCE CHARGE" heading with a heading entitled "FEE: a list of all additional fees that you may be charged." While we share the concern indicated by this change that the schedule of charges should clearly convey to borrowers any additional fees they may incur when entering into a loan contract, doing so should not supplement disclosure of the finance charge consistent with the TILA.

Instead, we recommend that a separate section be included in the schedule of charges stating all fees permitted under New Mexico lending law that the licensee could potentially charge the borrower.

a. Uniformity of Disclosures

These proposed regulations address disclosures made to borrowers slightly differently depending on the form of the disclosure – be it a brochure, a schedule of charges, a website, etc. Our comments on these regulations emphasize the need for uniformity in all venues where borrowers have access to information. We recommend, as addressed below, that the disclosures made to borrowers in stores mirror the disclosures made to borrowers on lending and marketing websites. Similarly, we

recommend, in our comments on the proposed NMAC 12.18.4, that the schedule of charges mirror what borrowers find on their loan documents.

We encourage the FID to require licensees to disclose to borrowers, in clear, straightforward terms, the true costs of their loan and the benefit of their bargain. The more opportunity to confuse a borrower – be it through the addition of arbitrary fees, the delivery of contract terms in a language in which the borrower cannot communicate, or signage obscuring actual costs of a loan – the greater the opportunity for exploitation. The market operates more effectively when all members of the public can understand the terms of the contracts into which they are entering.

III. 12.18.5 and 12.18.6 Annual Data Report for Payday Loan Lenders and Annual Data Report for Title Loan Companies

In the 2004 regulations, the FID authorized annual data reporting for both payday loan and title loan products, beyond the minimum requirements mandated by the Small Loan Act. These data reporting requirements, promulgated in NMAC 12.18.5 and 12.18.6, respectively, are repealed by the FID's proposed regulations. While payday loan reporting is no longer applicable under the new law, there has been no explanation offered for why title loan reporting is repealed.

In 2004, the FID saw it necessary in regulation to require lenders to report data on loans above and beyond the statutory minimum. We caution the FID to avoid reducing the reporting requirements for lenders simply because the law has changed. To the contrary, we emphasize the importance of thorough reporting requirements, particularly around the fees lenders are charging; all loans refinanced, renewed, or extended in 2018 and beyond; and refund anticipation loan transactions. These are all data impacted by the changes enacted in New Mexico lending law in 2017. Without a clear and accurate picture of loan transactions in this state, it will significantly decrease financial transparency in New Mexico and make it difficult to effectively regulate licensed lenders.

We therefore urge the FID not to delete NMAC 12.18.6, but to amend it to require annual data reporting for specific loans products sold, including but not limited to refund anticipation and holiday loans, and renewed or refinanced loans, as well as require annual data reporting for fees charged to borrowers segregated by type.

IV. 12.18.7 Hearing Procedures for Small Loan Companies

While the majority of the current NMAC 12.18.7 "Terms and Conditions For Payday Loan Agreements" pertains to the terms of payday loan agreements, the procedures for hearings by the Division pursuant to the New Mexico Small Loan Act of 1955 remain relevant in the wake of the changes to the Small Loan Act that went into effect in 2018.

Regulations pertaining to debit authorizations remain relevant even though short term loans with repayment periods less than 120 days are no longer permissible under either the Small Loan Act or the New Mexico Bank Installment Loan Act of 1959. We recommend inserting language from the current NMAC 12.18.7.8 and 12.18.7.12 that provides important protections for borrowers who choose to provide a wage assignment or draft or debit authorization into the final version of NMAC 12.18.7. As long as wage assignments and draft or debit authorizations are still permissible under this new law, those

regulations specific to them (NMAC 12.18.7.8 and 12.18.7.12) should remain in effect and should not be repealed.

The proposed NMAC 12.18.7 "Hearing Procedures" should be renamed "Terms and Conditions of Small Loan Agreements" and should include the definitions and regulations around debit authorizations contained in the current regulations and still relevant under the new law. Additionally, it is crucial that this first round of regulations address two key issues: defining what a loan modification is and defining what it means to rollover, renew, and refinance a loan under the Small Loan Act and Bank Installment Loan Act. The FID is granted the express authority to issue regulations that specifically address the issue of renewal and refinance in the Small Loan Act and should take this opportunity to do so in this round of regulations.[3]

a. Holiday Loans

In both disclosures to borrowers and in guidelines to lenders, the FID should define "Holiday Loan." A product popularly offered by lenders in the northwestern region of New Mexico, the FID's position has been to include a holiday loans in the definition of "Other Loans," rather than in the definition of "Refund Anticipation Loan." Therefore, holiday loans should be subject to the same 120 day repayment period and minimum of 4 repayments as all other non-RAL loan products under the new law. To eliminate the confusion between a holiday loan and an actual refund anticipation loan, it is necessary to clarify the distinction between the two products and the definition of "holiday loan" in regulation.

b. Defining What It Means to Make a Loan

We recommend that NMAC 12.18.7 specifically address what it means to make a new loan. If an existing loan is renewed, refinanced, or rolled over into a new loan with the same lender under pre-2018 terms, that loan is in potential violation of the Small Loan Act or Bank Installment Loan Act. Both the new lending law and the proposed regulations are silent on this particular issue, and it is important that the FID provide in regulation an explanation as to how the agency will respond to loans renewed or otherwise modified after this law went into effect.

We are concerned that without immediate clarification in regulation, outstanding loans made prior to 2018 will continue to be rolled over without regard for, among other things, the interest rate and repayment period mandated by the new law. Unlimited renewals and the extension of multiple renewals without principal reduction are inconsistent with sound lending practices and consumer protections. In New Mexico, licensees frequently market and encourage borrowers to "renew," "refinance," or "rollover" their existing loans. The repeated renewal of loans dramatically increases the loan's costs while making it significantly difficult for a borrower to compare loan costs and understand the long term financial consequences of the extension.[4] Both the federal Consumer Financial Protection Bureau (CFPB) and the Office of the Comptroller of the Currency (OCC) have expressed concern with the common practice of repeatedly rolling over small, short term loans.[5] There is thus an urgent need to define in regulation what constitutes a "loan modification" and what constitutes a "new loan" in order to close this potentially glaring loophole.

[3] N.M. STAT. ANN. 58-15-11(2017).

[4] 12 CFR Part 1041.

[5] *Id.*; Office of the Comptroller of the Currency, OCC Advisory Letter on Payday Lending AL 2000-10 (Nov. 27, 2000) https://www.occ.treas.gov/news-issuances/advisory-letters/2000/advisory-letter-2000-10.pdf.

Consistent with the interpretation of the federal CFPB, if a loan is rolled over, the terms of the loan agreement are modified, any fees are added, or the finance charge is in any way altered, those changes constitute a new loan.[6] We suggest that the FID define the following terms in regulation: "renewal," "loan modification," "rollover," "loan extension," and "refinance", and request that the FID make clear in these regulations that all of these result in a new loan subject to the new law.

Please see attachment regarding our recommendations for this Part.

V. 12.18.8 Licensing of Non-Resident Lenders

We recommend only minor revisions to this section to ensure that NMAC 12.18.8 is inclusive of all regulated loan transactions made by non-resident lenders. Please see attachment for our recommendations.

VI. 12.18.9 Refund Anticipation Loans

We commend the Division for including tax refund anticipation loans (RALs) in the first round of regulation, as there is an urgent need for further clarity around this newly regulated product. In particular, we commend the Division for including restrictions on the collateral permissible for securing a refund anticipation loan.

With regard to NMAC 12.18.9.7(A), we recommend the Division include the following requirements for the mandatory disclosures for borrowers of refund anticipation loans in order to promote uniformity in disclosures across licensees and to ensure that these disclosures fulfill their intended purpose: ensuring that borrowers understand the terms of the agreements into which they are entering.

First, in NMAC 12.18.9.7(A)(1), we recommend inserting the definition of refund anticipation loan included in Section 15-15-2 of the New Mexico Small Loan Act, so that the disclosures are clear with regard to what the refund anticipation loan product entails.

In our attached revisions to NMAC 12.18.9.8(6), we emphasize the necessity of clarifying the timeline for which licensees engaged in issuing RALs should estimate APR. While the proposed regulations prohibit the recalculation of the APR upon repayment of the loan, both the proposed regulations and New Mexico lending law are silent as to the timeline by which APR for this product *should* be calculated. The 2018 Internal Revenue Service (IRS) official position on the timeline taxpayers can expect to receive their return is: "The IRS issues most refunds in less than 21 days."[7]

We recommend the addition of the following language to NMAC 12.18.9.10: "All licensees must make disclosures and estimate APR for tax refund anticipation loans according to the best information reasonably available to the licensee at the time the loan is made. All disclosures and estimates must be calculated according to the soonest possible date that the best information reasonably available indicates a tax return may be received. The best information reasonably available shall be the official statement offered by the Internal Revenue Service. All borrowers must be notified of the date by which the

[6] 12 CFR Part 1041.
[7] Internal Revenue Service, Refunds (March 22, 2018) https://www.irs.gov/refunds.

estimates and disclosures are calculated." This requirement is consistent with the Truth in Lending Act's requirements for the use of estimates in disclosures.[8]

Furthermore, we're concerned with the potential issue wherein a licensee issues a loan with a finance charge calculated based on the estimate that a refund will be received within 21 days, but the refund is, in fact, received by the licensee in a shorter period of time. In this scenario, which is very likely to occur given the IRS's conservative refund estimates, the finance charge originally deducted from the estimated refund would now exceed the 175% APR cap. To prevent this clear violation of New Mexico lending law from occurring, the FID should include an additional section in the RAL regulation, NMAC 12.18.9.10, to require that licensees notify borrowers of the date the IRS issues the refund. Additionally, if the licensee receives a refund prior to the time estimated in the initial loan contract, then the licensee should issue a refund to the borrower for the difference between the estimated finance charge on the loan contract and the finance charge calculated for the number of days the loan was actually extended, at the same interest rate originally stated on the contract.

We suggest inserting the following language in mandatory disclosures to borrowers in 12.18.9.7(A)(2): "The APR is calculated pursuant to the estimated time that the best information reasonably available from the Internal Revenue Service indicates individuals may receive their tax refunds."

In our revisions to NMAC 12.18.9.7(A)(4), we emphasize the importance of requiring that the following language be included verbatim, in bold letters and 12-point font, in disclosures made to borrowers of refund anticipation loans: "**You can usually receive your tax refund in 8 to 21 days without getting a loan or paying extra fees. You are not required to take out a refund anticipation loan or refund anticipation check to receive your tax return.**" In states that have regulated refund anticipation loans, such disclosures are deemed necessary to help borrowers understand the distinction between their tax refunds from the Internal Revenue Service, and a refund anticipation loan from a licensed lender.

We recommend inserting an additional section NMAC 12.18.9.7(A)(6) with the following language: "the licensee shall give a copy of the form to the borrower and retain a copy in the licensees file. In addition to providing the written form to the borrower, the licensee shall read the notice orally to the borrower in the borrower's preferred language. The form shall be written in the language in which the notice was given orally to the borrowers." This language echoes the Division's current regulations for payday loan disclosures in NMAC 12.18.7.13. This provision ensures both that this information is conveyed in the language and manner that is most understandable to borrowers, and as well ensures that these disclosures are both meaningful and effective.

Lastly, as set forth above, we recommend including the information regarding all the government entities that a borrower has the right to contact in the event a concern arises with a particular lender that we have recommended be included in both the mandatory brochure, schedule of charges, and, below, on both business and marketing websites.

[8] 12 CFR Part 1026.17(c) ("Regulation Z").

VII. Language Access

The FID should require that all written disclosures be made available in the language in which the verbal loan transaction is conducted. When a loan transaction is conducted in a language other than English, but all of the written disclosures – on contracts, signage, schedules of charges, brochures, marketing websites, and business websites – are made in English, the borrower does not have access to the same information as a native English speaker at any point in the loan transaction process.

Thus, the new law and the proposed regulations fail to address a practice that is all too common in small loan contracts: the failure to make oral and written disclosures in the borrower's primary language. This practice violates basic common law contract principles, as there is no "meeting of the minds" when a borrower does not understand the terms of the loan they are entering into because the disclosures and contract are written in a language they do not understand. Multiple state courts have held that there is no "meeting of the minds" when a contract is signed in a language that borrowers do not understand.[9]

Furthermore, the New Mexico Unfair Practices Act defines an "unfair or deceptive trade practice" as "an act specifically declared unlawful pursuant to the Unfair Practices Act, a false or misleading oral or written statement, visual description or other representation of any kind knowingly made in connection with the sale, lease, rental or loan of goods or services or in the extension of credit or in the collection of debts . . . which may, tends to or does deceive or mislead any person."[10] When the terms of a contract for a small loan are presented only partially in the borrower's preferred language, or when there is a difference between the terms of the agreement as they are presented to the borrower and as they are written, that loan transaction runs the dangerous risk of containing false or misleading statements which may deceive the borrower.

It is absolutely necessary that the FID address the issue of language access in these regulations, to prevent the proliferation of potentially unfair practices by licensed lenders. At the very least, all loan documents must be available in Spanish, as well as English, and a licensee must be prohibited from entering into a contract with someone in a language in which they are not proficient.

VIII. Opt-Out Provision for Credit Reporting

We recommend that the FID include an opt-out provision for credit score reporting. While we applaud the legislature for adopting a statute that gives New Mexico borrowers the right build their credit with every payment they make on a small loan, the mandatory reporting requirement does not give borrowers who may have concerns with credit reporting an opportunity to opt out of this provision in the event that they do not wish to have their personal information reported to the major credit reporting agencies.[11]

Including an opt-out provision in the required disclosures for both RALs and for all other small loan products is a valuable consumer protection consistent with the overarching policy of this new law.

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[9] See Hialeah Automotive, LLC v. Basulto, 141 So.3d 1145, (Fla. 2014) (an arbitration agreement did not exist when the contract for the purchase of an automobile was entirely in English and the purchasers could not communicate in English, even though the defendant's employees were able to speak Spanish).

[10] N.M. STAT. ANN. §57-12-2 (2017).

[11] N.M. STAT. ANN. 58-7-10 (2017); N.M. STAT. ANN. 58-15-10.2 (2017).

IX. 12.18.10 Electronic Media Requirements

We emphasize the necessity of including the "Electronic Media Requirements," in regulation, as these de facto rules by which the Division has been regulating the online business and marketing of small loans constitute "rules, regulations, or standards" that "affect persons not members of the agency, including affecting persons served by the agency" as defined by Section 14-4-2(F) of the New Mexico Rules Act.

As indicated above, we recommend inserting the same information regarding government entities that a borrower has the right to contact in the event a concern arises with a particular lender that we have recommended in three other sections of these regulations. Including this information on business and marketing sites ensures uniformity in disclosures across all forms of venues in which small loans are made and marketed in New Mexico.

X. Operational Controls and Risk Management Procedures

As stated above with regards to the definition of a rule under the State Rules Act 12-4-2(F), a "rule" is defined as "rules, regulations, or standards" that "affect persons not members of the agency, including affecting persons served by the agency." The Division has shared with us and posted on their website the "Operational Controls and Risk Management Procedures," a document described as follows: "*All licensees under the New Mexico Small Loan Act of 1955 must demonstrate appropriate financial responsibility, character and general fitness as to command the confidence of the public and warrant belief that the business will be operated lawfully, honestly, fairly and efficiently. The Operational Controls and Risk Management Recommendations listed herein are designed to assist applicants and licensees in their continuing efforts to meet these goals."*

These Operational Controls and Risk Management Procedures establish standards to which licensees must conform in order to demonstrate the "appropriate financial responsibility, character, and general fitness" required by Section 58-15-5(F) of the Small Loan Act. As such, this document sets forth the requirements for licensure for all entities seeking to issue small loans in New Mexico. Therefore, it should legally be promulgated in regulation, rather than a de facto rule posted on the Division's website.

Thank you for your consideration of these comments. If you have questions, please contact the New Mexico Center on Law and Poverty by phone at (505) 255-2840 or email at Lindsay@nmpovertylaw.org.

Sincerely,

/s/

New Mexico Center on Law and Poverty	Navajo Nation Human Rights Commission	Native American Voters Alliance
Working Families	Miquela Anaya	Jack Hiatt