June 29, 2012

The Honorable Gary K. King
Attorney General of New Mexico
P.O. Drawer 1508
Santa Fe, NM 87504-1508

Re: Revised Rule on Negotiating a Sale in a Language other than English 12.2.9.1 NMAC *et seq*

Dear Mr. Attorney General,

On behalf of the American Financial Services Association (AFSA),[1] and the Consumer Installment Lenders Association of New Mexico (CILANM),[2] we thank you for the opportunity to comment on the proposed amendments to the New Mexico Attorney General Rule on Negotiating a Sale in a Language other than English, published in the New Mexico Register on May 31, 2012 in Volume X, Number 10. AFSA and CILANM members have significant concerns about these amendments and the underlying regulation. These concerns relate to their combined potential unintended consequences for consumer access to essential financial services in the state of New Mexico that would stem from both the onerous compliance burden on financial services companies, and from the uncertainty the rules would create in the secondary market for financial services securities.

Languages

As currently formulated, the proposed regulation requires a translation for any transaction conducted "in any language other than English." This is unnecessarily broad, and creates an undue burden on those covered by the regulation. At present, there are over 300 unique languages spoken in the United States, but only a handful of those are statistically significant. In New Mexico, for example, it appears that most citizens are, in fact, English speakers, with Spanish being the next most common language. Navajo lags both English and Spanish significantly, but still represents a substantial share of all citizens.

It does not appear that other languages, such as French or Russian, are predominant. Nor does it appear that retailers or service providers are actively marketing to French or Russian speakers on a wide scale basis. Yet as currently written, if a French speaker were to approach a retailer in his or her native language and that retailer had a service representative who knew just enough French to consummate a transaction, the retailer would need to obtain a full written translation in French. In other words, as currently crafted, retailers and service providers would need to obtain and keep up to date, translated

[1] The American Financial Services Association is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members are important sources of credit to the American consumer, providing approximately 20 percent of all consumer credit. AFSA member companies offer personal installment loans, vehicle financing, mortgages and payment cards. The Association encourages and maintains ethical business practices and supports financial education for consumers of all ages.

[2] Consumer Installment Loan Association of New Mexico (CILANM) members have provided New Mexico consumers with closed-end installment loans under the New Mexico Bank Act of 1959 since 1996. CILANM represents 150 branches in over 30 communities across New Mexico, and CILANM member companies contribute over $88 million to the New Mexico economy annually.

agreements in each of the 300+ languages spoken in the U.S., on the off chance that a single transaction took place in one of those languages.

We believe there is much easier way to accomplish your goals, without this overbroad approach. Confronted by similar issues, the state of California passed a statute (Cal. Civ. Code 1632) which requires similar translations. However, to avoid an undue burden on business, the state of California wisely looked at census data to determine which languages were the most commonly spoken in the state (in California's case, these were Spanish, Chinese, Korean, Vietnamese and Tagalog). Section 1632 therefore requires that translations be provided, but ***only if*** the transaction is negotiated in one of these five languages. The statute thus provides clear guidance on what is required, and does not unfairly penalize a retailer for a one-off transaction that took place in a less common language. We believe that this approach can balance the goals of the New Mexico Attorney General, without imposing undue burdens, risks or unintended consequences on New Mexico retailers and service providers. We therefore recommend that the New Mexico Attorney General follow California's lead, study census data, identify specific languages that are of concern, and craft the regulation accordingly.

Related to this, the term "language principally used," as well as "present" and "discuss," (12.2.9.9) must explicitly exclude any and all mass media advertising. There is no way that a financial services provider or retailer could ever know in which language individual consumers saw advertisements. For example, a bilingual or multilingual consumer may respond to an advertisement in Spanish by contacting a retailer or service provider, speaking in English with an English speaking representative, and thus consummate a transaction entirely in English. In such a circumstance, the retailer or service provider would not be in a position to know that the consumer's original contact was prompted by an advertisement in a non-English language. Without an explicit exemption for advertising, businesses would have to contract in multiple languages if they advertised in multiple languages, an unworkable prospect for most businesses, particularly small businesses that are unlikely to have the resources to comply. In reality, it will cause businesses to abandon traditional courtesies in the provision of multi-lingual resources for the convenience of consumers, and advertise or conduct transactions only in English. This, in turn, could cause other adverse consequences: because the correlation between language and other demographics, such as income or race have not been clearly studied, if service providers opt to cease offering multi-lingual services, the result could be an unintentional decrease in the availability of credit and other services to minorities or low to moderate income consumers. We know this is not your intent, and it is self-evidently bad for consumers.

The Contract Should Govern the Agreement

If the entire contract that governs an agreement between two parties is understood, either by being written in the non-English language or by certified translation, we submit that the purpose of the statute – to protect consumers from bad actors – will be fulfilled. While we understand and are sympathetic to a desire to make sure that the contract itself is understood by both parties, requiring outside conversations that are not part of the written agreement to be memorialized in writing is an unnecessary burden and likely to pose additional problems for retail installment contracts that contain integration clauses.

This has broad implications for the secondary market. Securitization of financial service products for resale on the secondary market relies on the certainty of standardized contracts and procedures. By requiring outside agreements to be included in contracts, the new rules would upset the fundamentals of the indirect financing model that has efficiently and effectively operated for decades. By introducing an unfamiliar and non-standard (as relates to other states) measure, these rules would limit the ability of the secondary market to function as a commoditized market for financial services transactions. This would put the state of New Mexico at a competitive disadvantage, with secondary market purchasers being

unwilling to assume the perceived risks associated with the new rules. This in turn would have the effect of reducing the availability of financial services products in the state.

Additionally, we do not believe the rule should be crafted so as to completely relieve consumers of their own responsibility to know their own limitations and take actions to protect themselves. This is not to suggest that consumer protection is not a worthy goal – far from it. However, when a consumer is aware that he or she is facing a language barrier, he or she should bear some level of responsibility to know that limitation, and take some personal actions for his or her own protection. For example, if a creditor has advertised a loan product in Spanish, and throughout the advertising and sales process, has clearly and conspicuously disclosed (in Spanish as well, of course) that the final loan documents are available only in English, the consumer is placed on notice of that fact. The consumer at this point has two alternatives: choose to do business elsewhere, or obtain a translator of his/her choosing, and at his/her own expense. We respectfully suggest that you consider a rule which provides that, as an alternative to providing translations, that providers of goods and service may merely warn consumers, through clear and conspicuous disclosures such as these, that no such translations are available.

An added compliance challenge stems from the presence of a large Native American population in New Mexico, with an oral history and tradition. To require the memorialization in written form of conversations that occur outside of an ultimate written agreement, when the language used is an oral language, is akin to trying to pound a square peg into a round hole.

Location of Transactions, Commercial Transactions and Periodic Payments

The definition of "transaction in New Mexico" with respect to residency, location of property, and where communications occur (including phone and online channels) is also troublesome. We ask for clarity of meaning and assurance that the rule does not apply to finance, loan and lease transactions in which the collateral or leased property is not located in New Mexico or to commercial transactions, which lack the standardization of consumer transactions. Neither should the rule apply to any individual payment, periodic payment or money transfer transaction or to communications with consumers arising from the routine servicing of a loan where in new/separate written agreements <u>do not</u> result.

Non-Executed Written Agreements

As currently written, the regulation would apply to conversations that lead "to the execution of a written agreement." We wish to call your attention to the fact that some of our members offer products or services that do not "lead to the execution of a written agreement," as that phrase would be conventionally understood. For example, credit card relationships are, of course, governed by a "written agreement," but it is not an agreement the consumer ever "executes." His or her use of the card is governed by the agreement without a separate signed writing. Deposit account products (such as savings/checking accounts) present similar challenges: the consumer's use of the account is governed by written terms and conditions, but that agreement is never "executed" in the traditional sense of the term. We ask you to clarify that unless a consumer is affirmatively asked to sign a document in English, the proposed regulation does not apply.

"Material Terms" and "Business Transactions"

Likewise, the rule defines "material terms and conditions" as "those terms and condition to which a reasonable person would attach importance in making his or her choice of action regarding a transaction, that the business or its agent, employee or representative knows or has reason to know that the consumer regards, or is likely to regard, as important in determining his or her choice of action in the transaction." (12.2.9.7(C)). This puts the business in the position of having to work out what a consumer knows, has

reason to know, or regards as important, which is unworkable. We ask you to amend this language to remove this requirement or else provide a safe harbor upon which a financial institution could rely. Alternatively, if you do not see fit to provide a safe harbor, we would request that the regulation at least provide a listing of illustrative examples of items which are, and are not, "material terms."

An additional clarity is requested for the term "Business Transaction" in 12.2.9.7, which is undefined, and we submit should be replaced in 12.2.9.8 with the word "trade" or "commerce."

Effective Date

In addition to these concerns we would like to clarify the effective date of the rule, which we believe should be at least twelve months after the publication of the final rule and, in the interests of fairness, not apply retroactively. This will give those subject to the Rule's requirements sufficient enough time for the implementation of any necessary changes to policies and procedures.

We appreciate your anticipated willingness to clarify these rules to provide for concrete ways in which responsible financial services providers can reasonably comply and we respectfully request that you give our suggestions due consideration. If you have questions, we would be delighted to discuss further.

Respectfully,

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