American Financial Services Association Testimony
re: proposed amendments to Title 12, Chapter 18 – Loan Companies

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January 13, 2023

Financial Institutions Division
New Mexico Regulation and Licensing Department

The American Financial Services Association (AFSA) appreciates the opportunity to submit written testimony on the proposed amendments to Title 12, Chapter 18. We represent financial institutions who want to stay in New Mexico and continue to offer safe and affordable loans across the state. We respectfully ask the Department to clarify the calculation method required by the new law.

To be clear, we recognize the rate cap is the law in New Mexico, and we're not asking the Department to change the law. But you have the power to make clarifications to ensure credit remains as available as possible under the law. Without technical clarification, the law becomes an even bigger barrier to credit access.

New Mexico is one of just four states to adopt a rate cap that comprehensively includes non-Truth in Lending Act (TILA) type considerations in the calculation. In fact, the definition of APR in New Mexico is so unique that it creates a New Mexico-only definition of APR that differs from all other federal and state laws.

HB 132 / Ch. 23's definition broadly includes "charges for any ancillary product or service sold or *any fee charged in connection or concurrent with* the extension of credit" (emphasis added).[1]

We need to know three things:

1) does this definition include fees that are unrelated to the extension of credit but concurrent with the credit transaction?;
2) does this definition include post-origination fees that cannot be predicted in advance, because they are only incurred depending on the actions of the borrower?; and
3) does "concurrent with" the extension of credit include products or services sold subsequent to the closing of the loan transaction?

If the language "*any fee charged in connection of concurrent with*" is interpreted to include fees that do not occur until after the contract is formed, but are arguably "connected" to the extension of credit, we cannot accurately calculate the rate and absurd scenarios could result.

[1] NM 57-7-7(D)(1) and 58-15-17(J)(1).

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These examples illustrate our need for department clarification on how to calculate the rate under the new law.

Example 1: A late fee for non-payment. That is a "fee charged in connection" with the extension of credit. If there is no loan, there is no late fee. Potential late fees are already disclosed to consumers in a loan agreement, but how can this be calculated into a New Mexico-only APR since only the actions of the consumer will dictate whether a late fee is ever incurred.

Example 2: A non-sufficient funds (NSF) bank charge for a bounced check. That is a "fee charged in connection" with the extension of credit. If there is no loan, there is no NSF fee. But like example 2 above, if fees "connected to," but unknown if they will ever occur at the time of the extension of credit, New Mexico licensed financial institutions are potentially expected to do an impossible task: calculate a fee that has not been charged at the time of the loan into a rate. There is no way to do this.

Example 3: A borrower who is worried about job loss and missing credit payments returns to her lender three months after obtaining a loan to ask about credit unemployment insurance. Must the lender take into account the APR on the loan when deciding if its affiliated insurance company may offer the requested product? Does the answer change depending on how much time has passed since the loan was made? Does the answer change if the insurance premium is paid in cash up front vs. billed over time on the same monthly statement as the loan?

Example 4: A lender's affiliated insurance company begins offering a new home and auto protection plan in 2024. Loan customers who are repaying loans made after January 1, 2023 express interest in buying the home and auto product. Must the lender take into account the APR on the loan when deciding if its affiliate may offer the requested product? Does the answer change depending on how much time has passed since the loan was made? Does the answer change if the membership fee is paid in cash up front vs. billed over time on the same monthly statement as the loan?

Example 5: A parking fee at the financial institution paid by the consumer when they get the loan. That is a "fee charged" and "concurrent" with the extension of credit. In New Mexico only, should this be included in the rate calculation?

Example 6: Jane takes out an $8,000 loan and never pays a penny back, so the creditor sues her. The creditor wins and is awarded attorney's fees. Those fees are "in connection" with the extension of credit. No loan, no lawsuit, no attorney's fees. We need clarification that these fees, which are only charged depending on Jane's subsequent behavior, are not expected to be part of a calculation at the time of the loan.

Example 7: David takes out a $6,000 one-year loan at ZERO PERCENT TILA APR. He never pays it back. He incurs $200 in monthly late fees, and the creditor sues and is eventually awarded court fees and attorney's fees of $2,000. If it's not clarified that "in

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connection with" the extension of credit means fees that are predicted to incur, his ZERO PERCENT APR LOAN could violate the New Mexico rate cap, because $2,200 is more than 36%. But the creditor could not have known at the time of the loan that David would not pay back the loan.

How can a creditor disclose something in a rate calculation that has not occurred and likely will never occur? Without clarification from the Department, New Mexico creditors are asked to do the impossible. We do not believe it was the intention of the legislature to a create a trap where rates cannot be calculated by a regulated lender.

The solution we humbly ask for is relatively simple, and well withing the Department's established authority.[2] Please 1) clarify that "concurrent" in the new law relates to credit-related fees; 2) clarify that "in connection with" the extension of credit means fees that are part of the loan at the time the loan is made, and not fees that depend on subsequent borrower behavior; and 3) clarify that ancillary products sold *after* a loan is made are not dependent on the New Mexico APR cap, and specify any timing or other conditions the department would require to conclusively demonstrate that an ancillary product was not sold "in connection or concurrent with" the loan.

Thank you for your consideration of this request for regulatory clarification.

[2] NM 58-15-11.

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