

TITLE 12 TRADE, COMMERCE AND BANKING
CHAPTER 2 CONSUMER PROTECTION
PART 10 EXTENSION OF CREDIT FOR SMALL LOANS

12.2.10.1 ISSUING AGENCY: Office of the New Mexico Attorney General.
[12.2.10.1 NMAC - N, 02/15/2006]

12.2.10.2 SCOPE: These rules and regulations apply to all persons, as defined in NMSA 1978, Section 57-12-2C (1967), engaging in the extension of credit in the amount of two thousand five hundred dollars (\$2,500) or less in the state of New Mexico pursuant to the New Mexico Small Loan Act of 1955 and subject to compliance with the Unfair Practices Act. These rules and regulations shall not be construed to conflict with any statutory requirements, and they are not intended to preempt any other rules and regulations that exist or subsequently are adopted to provide greater protection for consumers.
[12.2.10.2 NMAC - N, 02/15/2006]

12.2.10.3 STATUTORY AUTHORITY: The New Mexico attorney general adopts these rules and regulations pursuant to the authority to enact regulations conferred by the New Mexico Unfair Practices Act (“the act”), at NMSA 1978, Section 57-12-13 (1967).
[12.2.10.3 NMAC - N, 02/15/2006]

12.2.10.4 DURATION: Permanent.
[12.2.10.4 NMAC - N, 02/15/2006]

12.2.10.5 EFFECTIVE DATE: February 15, 2006, unless a later date is cited at the end of a section.
[12.2.10.5 NMAC - N, 02/15/2006]

12.2.10.6 OBJECTIVE: The attorney general’s office adopts these regulations to address unfair or deceptive practices and unconscionable trade practices in connection with the extension of credit for two types of small loans: payday and car title. The regulations focus on two major areas: first, small loans that are made without any reasonable underwriting guidelines or without any consideration whether the borrower is able to re-pay the small loan; and second, small loans that are extended with extremely high interest rates and require repayment in very short time periods (e.g., 14 days).

A. The attorney general finds that the extension of credit for payday and car title loans is a particularly appropriate area for the promulgation of Unfair Practices Act regulations. Before 1983 the maximum interest rate that could be charged on small loans was 36%. Since that time, interest rates on small loans have risen to an unlimited level, and on average to more than 500% APR, while interest rates on most other types of loans have declined. Since deregulation of a statutory usury ceiling, much of the small loan industry has dramatically changed the practice of making loans by extending credit to borrowers without due regard to whether each borrower has the financial ability to re-pay the loan and by requiring borrowers to pay the loans within an extremely short time period.

B. At the same time, applicable law in New Mexico caps pawn transactions, where some tangible personal property is deposited with the pawnbroker, at ten percent for the first month and four percent for each succeeding month. NMSA 1978 Section 56-12-13. This equals an annualized interest rate of 54%. Payday loans are typically secured by a post-dated check or an electronic debit authorization; car title loans are secured by the certificate of title to the vehicle and, frequently, an ignition key to the vehicle. Because payday and car title loans, like pawn transactions, are secured, charging an interest rate higher than that permitted by the legislature in pawn transactions is an unconscionable trade practice.

C. The criminal Loan Sharking Act makes it a felony to use extortionate means to collect on a loan where the interest rate exceeds 45% per year. NMSA 1978 Section 30-43-3(B)(1). The small loan Act also provides that after twelve months from the date of maturity of the loan, lenders cannot charge in excess of ten percent per year on the unpaid balance of the loan. NMSA 1978 Section 58-15-17(F).

D. The attorney general has determined that the types of “unfair practices” that the act and these regulations attempt to address are consistent with the definition of “unfairness” as defined by the federal trade commission. The attorney general also concludes that present small loan industry practices associated with payday and car title loans result in substantial injury to borrowers, are not outweighed by the purported benefits of unfettered competition in the marketplace, and impose on many borrowers unreasonable, unfair or deceptive

practices. Five public hearings were held throughout New Mexico following the announcement of the proposed rules. Written comments were accepted during the initial notice and comment rule-making period from September 15 to November 21, 2005, and again from December 15, 2005 until January 17, 2006 relative to the proposed additions. Hundreds of oral and written comments were submitted through this process.

E. These regulations provide the basis for evaluating fairly the extension of small loans under current law. They do not necessarily address every possible unfair, deceptive or unconscionable practice in the extension of credit in the form of these loans. Therefore, it is not intended that compliance with these regulations shall be an absolute protection against liability for any deceptive, unfair or unconscionable trade practice. Small loan lenders making payday and car title loans should review their practices in extending small loans in light of the purpose of these regulations and the Unfair Practices Act.

F. In sum, the purpose of these regulations is to accomplish two principal objectives. The first is to deter unfair, deceptive and unconscionable practices that harm consumers. The second is to provide clear legal standards for lenders extending small loan credit to facilitate compliance with the law and promote fair competition on a "level playing field".

[12.2.10.6 NMAC - N, 02/15/2006]

12.2.10.7 DEFINITIONS: Unless defined herein, all words should be given their customary and ordinary meanings.

A. "APR" means annual percentage rate as defined in the federal Truth in Lending Act.

B. "Balloon payment" means a provision in a loan agreement that requires the borrower to pay, at a specified time or upon demand, a final installment with a larger amount that includes the remaining loan principal.

C. "Car title loan" means, other than a purchase money loan, a short maturity loan secured by an unencumbered or encumbered state issued certificate of title or certificate of ownership to a motor vehicle or other similar personal property.

D. "Loan to value ratio" means the ratio between the value of the collateral for a loan and the principal amount of the loan.

E. "Payday loan", also referred to as a payday advance loan; deferred presentment loan; or deferred deposit loan, means a short maturity loan on the security of:

(1) a check;

(2) any form of assignment of interest in the account of a person at a depository institution; or

(3) any form of assignment of income payable to a person.

F. "Person" or "party" means natural persons or corporations, trusts, partnerships, associations, cooperative associations, clubs, companies, firms, joint ventures, syndicates or any other entity.

G. "Short-maturity loan" means a small loan with a repayment period of twelve months or less.

H. "Small loan" means, for the purposes of these regulations, a payday loan or a car title loan in the principal amount of two thousand five hundred dollars (\$2,500) or less.

I. "Small loan lender" means any person who makes a payday or car title loan in New Mexico regardless of whether that person is licensed under the small loan Act, NMSA 1978, 58-15-1 (1955) et seq. and any person acting as an employee or agent of a small loan lender.

J. "Underwriting guidelines" means the factors used by a small loan lender, such as income of the borrower, credit history, and outstanding debts, to determine the ability of the borrower to repay a loan.

K. "Unreasonable risk of loss of the collateral" means that the terms of the small loan are such that the borrower is more likely than not under the circumstances to be unable to repay the loan so that the loan will be paid by the proceeds of the sale of the collateral or by an execution on the borrower's property or garnishment of the borrower's wages after civil judgment is entered against the borrower.

[12.2.10.7 NMAC - N, 02/15/2006]

12.2.10.8 UNFAIR OR DECEPTIVE TRADE PRACTICES:

A. It is an unfair or deceptive trade practice for a small loan lender to offer or make a small loan that is not based upon reasonable underwriting guidelines, such as the borrower's income, or when the lender knows or should know with the exercise of reasonable diligence that the loan is beyond the borrower's reasonable ability to repay according to the terms of the loan. For the purposes of this rule, there shall be a rebuttable presumption that the borrower has a reasonable ability to repay the loan if the loan amount does not exceed 25% of the borrower's net monthly income.

B. It is an unfair or deceptive trade practice for a small loan lender to rely solely on the loan-to-value ratio in extending a loan to a borrower.

C. It is an unfair or deceptive trade practice for a small loan lender to misrepresent that a borrower meets the lender's underwriting guidelines for a particular loan or to misrepresent that particular guidelines are being used when the borrower does not meet the lender's underwriting guidelines or when such guidelines do not exist.

D. It is an unfair or deceptive trade practice for a small loan lender to make a small loan without providing the consumer a reasonable period of time to repay the loan. For the purposes of this rule, there shall be a rebuttable presumption that this standard is met if the loan does not require that it be repaid in full for at least four months, provided there is no prepayment penalty if the loan is paid off sooner.

E. It is an unfair or deceptive trade practice for a small loan lender to make a small loan with the knowledge that the borrower is likely to be unable to repay the loan, or to make the loan with the reasonable expectation of seizing the borrower's collateral.

F. It is an unfair or deceptive trade practice for a small loan lender to falsify, or encourage any prospective borrower to falsify, the borrower's credit application for a payday or car title loan.

G. It is an unfair or deceptive trade practice for a small loan lender to fail to clearly and conspicuously disclose orally and in writing a payday or car title loan's fees, charges, and payments.

H. It is an unfair or deceptive trade practice for a small loan lender to engage in an act or practice in connection with the offering of a small loan, where the borrower exclusively or primarily uses the proceeds of the small loan to re-pay another small loan.

I. It is an unfair or deceptive trade practice to require the purchase of credit insurance or an auto club membership as a condition to the making of any small loan by a small loan lender.

J. It is an unfair or deceptive trade practice for a small loan application form of the licensee to be preprinted to offer or provide financing for the purchase of credit insurance or auto club memberships. Any agreement to purchase credit insurance or auto club membership shall be separate from any small loan agreement, and must provide a disclosure which is either signed or initialed by the consumer acknowledging that he/she understands that the purchase of the credit insurance or auto club membership was in no way a condition or requirement for obtaining any loan from the small loan lender.

K. It is an unfair or deceptive trade practice for a small loan lender to submit a check received for payment of a small loan for deposit more than one time, or to create electronic checks for deposit and deposit such electronic checks or electronically debit the borrower's checking account after a check or electronic debit has been dishonored or returned for insufficient funds.

L. It is an unfair or deceptive trade practice for a small loan lender to charge application, document preparation, credit check or any fees other than a reasonable returned check or declined debit authorization charge.

M. It is an unfair or deceptive trade practice for a small loan lender to require payment of interest charges for the full term of the small loan if the small loan is paid off early.

N. It is an unfair or deceptive trade practice for a small loan licensee to require small loan terms that provide for payments against interest only. Payments on small loans shall include both interest and principal during the term of the small loan.

O. It is an unfair or deceptive trade practice to allocate payments during the term of the small loan so that a balloon payment is due at the last scheduled payment of the loan, i.e., payments against the principal balance of the loan shall be equally divided during the term of the loan.

[12.2.10.8 NMAC - N, 02/15/2006]

12.2.10.9 UNCONSCIONABLE TRADE PRACTICES:

A. It is an unconscionable trade practice for a small loan lender to engage in an act or practice in connection with the offering of a small loan which shocks the conscience or is exceedingly unfair, harsh or callous, such as when, given the circumstances, the terms of the loan place the borrower with a substantial and unreasonable risk of loss of the collateral while the lender assumes little or no risk of loss.

B. It is an unconscionable trade practice for a small loan lender to engage in an act or practice in connection with the offering of a small loan where the lender intentionally makes a loan for the purpose of seizing the borrower's collateral.

C. It is an unconscionable trade practice for a small loan lender to engage in an act or practice in connection with the offering of a small loan that takes unreasonable advantage of the small loan lender's superior knowledge and expertise or when there is no legitimate business justification for such a small loan and the lender knows that the borrower is especially vulnerable or is facing an emergency need for the small loan.

D. It is an unconscionable trade practice for a small loan lender to engage in an act or practice in connection with the offering of a small loan that takes unfair advantage of the borrower's relative education,

language skills, advancing age, clear inability to handle monies, or other factors that place the borrower at an unreasonable disadvantage.

E. It is an unconscionable trade practice for a small loan lender to engage in an act or practice in connection with the offering of a small loan that charges interest or other credit costs that are significantly excessive in comparison to other available loans, regardless of whether the interest and cost charges of the loan are otherwise lawful under state or federal credit statutes.

F. It is an unconscionable trade practice for a small loan lender to offer or make a payday or car title loan and:

(1) charge more than seven dollars fifty cents (\$7.50) or ten percent of the amount loaned, whichever is greater, for the first thirty-day period of the loan; this charge shall not be made on the refinancing of an existing loan or credit transaction; a loan or extension of credit shall be considered to be refinancing of an existing loan if any part of the proceeds of the subsequent loan is applied toward the payment of a prior loan with the same small loan lender;

(2) for the remaining period of the payday or car title loan, including any refinancing, to charge directly, indirectly or by any subterfuge, a small loan charge in connection with any payday or car title loan transaction at a rate in excess of four percent per month on the unpaid principal balance of the loan or extension of credit; this shall be limited to a period of 12 months from the date of maturity of the loan; in total, this cap on interest equates to an average rate of 54% per annum: ten percent for the first month, followed by four percent for the subsequent eleven months; and

(3) to charge a rate in excess of ten percent per annum after twelve months from the date of maturity of the loan;

(4) the foregoing payday and car title loan charges are limiting maximums and nothing in this rule shall be construed to prohibit a small loan lender from contracting for or receiving a lesser rate.

G. It is an unconscionable trade practice for a small loan lender to require borrowers to waive the right to participate in a class action or jury trial, to seek punitive damages, to require waiver or release of pre-existing claims or causes of action arising from prior transactions, or avail themselves of any other form of legal redress.

H. It is an unconscionable trade practice for a small loan lender to fail to provide written translation of documents in the language in which solicitation(s) have been made or in which the transaction took place, or to fail to provide written verification that a full and complete oral translation of the contract was provided to the borrower for any transaction that took place in an oral (non-written) language.

[12.2.10.9 NMAC - N, 02/15/2006]

12.2.10.10 SEVERABILITY: If any portion of these rules and regulations is held invalid, the remainder of the rules and regulations and applications thereof shall remain unaffected.

[12.2.10.10 NMAC - N, 02/15/2006]

12.2.10.11 ENFORCEMENT: The New Mexico attorney general or any person as defined under the New Mexico Unfair Practices Act who may enforce that act may also enforce these rules and regulations in any appropriate proceeding.

[12.2.10.11 NMAC - N, 02/15/2006]

HISTORY of 12.2.10 NMAC: [RESERVED]