

NEW MEXICO FINANCIAL INSTITUTIONS DIVISION

NOTICE OF FINANCIAL INSTITUTIONS DIVISION PROPOSED RULE

The Financial Institutions Division is proposing a rule regarding terms and conditions of payday loan agreements. Copies of the proposed rule are available on the Financial Institutions Division website, <http://www.rld.state.nm.us/fid/index.htm>, or by calling 505-476-4885. Any person wishing to comment on the proposed rule may do so via e-mail to PDR.RLD@state.nm.us or in writing to William J. Verant, Director, Financial Institutions Division 2550 Cerrillos Road 3rd Floor, Santa Fe, New Mexico 87505. All comments must be received in the Financial Institutions Division office no later than 5 p.m. (MDT) June 30, 2006.

Comments suggesting changes to the proposed rule shall state and justify the particular reasons for the suggested changes and should include all specific language necessary or appropriate to effectuate the changes being suggested.

TITLE 12 TRADE, COMMERCE AND BANKING
CHAPTER 18 LOAN COMPANIES
PART 7 TERMS AND CONDITIONS OF PAYDAY LOAN AGREEMENTS

12.18.7.1 ISSUING AGENCY: Financial Institutions Division of the Regulation and Licensing Department.
[12.18.7.1 NMAC - N, 07/31/06]

12.18.7.2 SCOPE: Small Loan licensees conducting payday loan business in the state of New Mexico.
[12.18.7.2 NMAC - N, 07/31/06]

12.18.7.3 STATUTORY AUTHORITY: Section 58-15-11 NMSA 1978.
[12.18.7.3 NMAC - N, 07/31/06]

12.18.7.4 DURATION: Permanent.
[12.18.7.4 NMAC - N, 07/31/06]

12.18.7.5 EFFECTIVE DATE: July 31, 2006 unless a different date is cited at the end of a section.
[12.18.7.5 NMAC - N, 07/31/06]

12.18.7.6 OBJECTIVE: The objective of this part is to establish regulations governing the conduct of small loan licensees who enter into payday lending agreements.
[12.18.7.6 NMAC - N, 07/31/06]

12.18.7.7 DEFINITIONS:

- A. "Consumer" means a person who enters into a payday loan agreement and receives the loan proceeds in New Mexico.
- B. "Debit authorization" means an authorization signed by a consumer to electronically transfer or withdraw funds from an account for the specific purpose of repaying a payday loan.
- C. "Director" means the director of the financial institutions division of the regulation and licensing department.
- D. "Division" means the financial institutions division of the regulation and licensing department.
- E. "Installment loan" means a loan that is to be repaid in a minimum of four successive substantially equal payment amounts to pay off a loan in its entirety with a period of no less than one hundred twenty days to maturity.
- F. "Payday loan" means a loan in which the licensee agrees in writing to defer presentment of a consumer's check or debit authorization until the consumer's next payday or another date agreed to by the licensee and the consumer and:
 - (1) includes any advance of money or arrangement or extension of credit whereby the licensee, for a fee, finance charge or other consideration:
 - (a) accepts a dated instrument from a consumer or an authorization signed by a consumer to transfer or withdraw funds from an account for the specific purpose of repaying a payday loan;

(b) agrees to hold a dated instrument for a period of time prior to negotiating or depositing the instrument; or

(c) pays to the consumer, credits to the consumer's account or pays another person on behalf of the consumer the amount of an instrument actually paid or to be paid pursuant to the New Mexico Small Loan Act of 1955; but

(2) does not include:

(a) an overdraft product or service offered by a banking corporation, savings and loan association or credit union; and

(b) installment loans.

G. "Payday loan product" means a payday loan, a renewed payday loan or a payment plan as described in 12.18.7.12 NMAC.

H. "Person" includes an individual, copartner, association, trust, corporation and any other legal entity.

I. "Renewed payday loan" means a loan in which a consumer pays in cash the administrative fee payable under a payday loan agreement and refinances all or part of the unpaid principal balance of the existing payday loan with a loan from the same licensee. A "renewed payday loan" includes a loan in which a consumer pays off all or part of an existing payday loan with the proceeds of a payday loan from the same licensee.

[12.18.7.7 NMAC - N, 07/31/06]

12.18.7.8 REQUIREMENTS FOR PAYDAY LOANS:

A. No licensee shall make a payday loan to a consumer if the total amount of the loan, including principal and administrative fees, will, when combined with the principal amount of all of the consumer's other outstanding payday loans, exceed twenty-five percent of the consumer's gross monthly income. Each licensee who provides payday products shall ensure full compliance with this section no later than November 1, 2006.

B. Without affecting the rights of a consumer to prepay a payday loan or renewed payday loan at any time without additional cost or penalty:

(1) no payday loan or renewed payday loan shall have a stated term of less than fourteen days nor more than thirty-five days; and

(2) there shall be a scheduled pay date for the consumer within the term of the payday loan or renewed payday loan.

C. Any payday loan or renewed payday loan shall include a provision granting the consumer the right to rescind the transaction by returning in cash, or through certified funds, one hundred percent of the amount advanced by a licensee for a payday loan or renewed payday loan no later than 5:00 p.m. on the first day of business conducted by the licensee following the execution of the agreement. If a consumer exercises the right of rescission pursuant to this subsection, no fee for the rescinded transaction shall be charged to the consumer, and the licensee shall not charge or impose on the consumer a fee for exercising the right of rescission pursuant to this subsection. If this section is applicable, any fee collected by a licensee shall be returned in full to the consumer.

D. Any payday loan made within seven days of the maturity date of a prior payday loan or renewed payday loan, by the same licensee, shall automatically be treated as either:

(1) a renewal if the loan has not previously been renewed or has only been renewed once; or

(2) a payment plan if the loan has been renewed twice.

E. A consumer shall be permitted to make payments in any amount on a payday loan product at any time before maturity without additional fees. A payment received by a licensee shall first be applied to administrative fees owed with any remaining amount to be applied to principal.

F. After each payment is made, in full or in part, on a payday loan product, the licensee shall give to the person making the payment a signed, dated receipt showing the amount paid, the amount credited toward administrative fees and principal, and the balance due on the loan.

G. A check written by a consumer for a payday loan product shall be payable to the order of the licensee.

H. The licensee shall provide the consumer, or each consumer if there is more than one, with copies of the payday loan product agreement in Spanish or English prior to the consummation of the loan. Consumers shall have the option to decide which language version of the agreement they wish to receive.

I. A payday loan product agreement shall not be renewed, refinanced or extended without the written consent of the consumer.

J. Licensees making payday loans shall provide the consumer with an information brochure in English or Spanish. Consumers shall have the option to decide which language version of the brochure they wish to receive.

K. A licensee shall collect on payday loans in default in a professional, fair and lawful manner. A licensee who complies with the requirements and prohibitions set forth in 15 USC 1692c - 1692f of the federal Fair Debt Collections Practices Act shall be deemed to have operated in a professional, fair and lawful manner.
[12.18.7.8 NMAC - N, 07/31/06]

12.18.7.9 PAYDAY LOAN PRODUCTS - PERMITTED CHARGES:

A. A licensee shall not charge or receive from a consumer, directly or indirectly, fees or charges except as provided in this section.

B. Upon the execution of a new payday loan, the licensee may impose an administrative fee of fifteen dollars and fifty cents (\$15.50) per one hundred dollars (\$100) of principal, which fee is fully earned and nonrefundable at the time a payday loan agreement is executed unless a payday loan is rescinded pursuant to Subsection C of 12.18.7.8 NMAC and which is payable in full at the end of the term of the payday loan.

C. Upon the execution of an agreement to renew a payday loan, the licensee may impose an administrative fee of fifteen dollars and fifty cents (\$15.50) per one hundred dollars of principal, which fee is fully earned and payable at the end of the term of the renewed payday loan and nonrefundable at the time a renewal agreement for a payday loan is executed unless a renewed payday loan is rescinded pursuant to Subsection C of 12.18.7.8 NMAC.

D. A licensee shall not charge a consumer interest on the outstanding principal or fees owed on a payday loan product.

E. If there are insufficient funds to pay a check or other type of debit on the date of presentment by the licensee, a licensee may charge a borrower a fee not to exceed fifteen dollars (\$15.00). Only one fee may be collected by a licensee on a check or debit. Late fees or delinquency charges shall not be allowed. A check or debit request shall not be presented to a financial institution by the lender for payment more than one time unless the consumer agrees to one additional presentation or deposit.
[12.18.7.9 NMAC - N, 07/31/06]

12.18.7.10 PAYDAY LOAN PRODUCTS - PROHIBITED ACTS: A licensee shall not:

A. threaten or intimidate a consumer or threaten to use or request the use of criminal process in this or another state to collect on a payday loan product;

B. use a device or agreement that would have the effect of charging or collecting more fees, charges or interest than allowed by law or regulation by entering into a different type of transaction with the consumer that has that effect;

C. require or permit a consumer to enter into a new payday loan to pay an existing payday loan in whole or in part, when that existing loan can be renewed or is eligible for a payment plan pursuant to 12.18.7.12 NMAC;

D. charge a fee to cash a check representing the proceeds of a payday loan product;

E. assign or attempt to assign a consumer's personal check to a third party unless for collection purposes;

F. use or attempt to use the check written by the consumer for a payday loan product as security for purposes of a state or federal law;

G. require a consumer to provide multiple checks or multiple debit authorizations in amounts less than the total amount of the payday loan or renewal loan (e.g., five \$20.00 checks instead of one \$100 check for a \$100 loan);

H. accept collateral for a payday loan product other than the consumer's check or debit authorization or require a consumer to provide a guaranty from another person for a payday loan product;

I. include any of the following provisions in a payday loan product agreement:

(1) a hold harmless clause;

(2) a confession of judgment clause or power of attorney;

(3) an assignment of or order for payment of wages or other compensation for services;

(4) a waiver of claims for punitive damages;

(5) a provision in which the consumer agrees not to assert a claim or defense arising out of the contract;

(6) a waiver of a provision of the New Mexico Small Loan Act of 1955 or the rules promulgated pursuant to the New Mexico Small Loan Act of 1955;

(7) a waiver of the right to renew a payday loan or enter into a payment plan; or

(8) a waiver of any rights secured by New Mexico law including but not limited to the New Mexico Uniform Arbitration Act;

J. make a payday loan product contingent on the purchase of insurance or other goods or services;

K. take a check, instrument or form in which blanks are left to be filled in after execution of the check, instrument or form;

L. offer, arrange, act as an agent for or assist a third party in any way in the making of a payday loan product unless the third party complies with all applicable federal and state laws and regulations;

M. knowingly enter into a payday loan product with a consumer who lacks the capacity to consent;

N. use an agency agreement or partnership agreement as a scheme or contrivance to circumvent these rules or provisions of the New Mexico Small Loan Act of 1955; for the purposes of this subsection:

(1) "agency agreement" means any agreement between in-state entities and a banking corporation, savings and loan association or credit union operating under the laws of the United States or of any state whereby the in-state agent holds a predominant economic interest in the revenues generated by a payday loan or renewed payday loan made to New Mexico residents; and

(2) "partnership agreement" means any agreement between in-state entities and a banking corporation, savings and loan association or credit union operating under the laws of the United States or of any state whereby the in-state partner holds a predominant economic interest in the revenues generated by a payday loan or renewed payday loan made to New Mexico residents;

O. finance or refinance all or any portion of any fees permitted in 12.7.18.9 NMAC.

[12.18.7.10 NMAC - N, 07/31/06]

12.18.7.11 RENEWED PAYDAY LOANS: During the term of the loan, on or before the due date (maturity) of the loan, and up to 14 days after the due date of the loan, if the loan has not been repaid in full, the licensee must offer the consumer the opportunity to renew the consumer's payday loan. The consumer, at his or her sole discretion, has the right to renew the payday loan up to two times. The term of the renewed payday loan shall include a scheduled pay date for the consumer.

[12.18.7.11 NMAC - N, 07/31/06]

12.18.7.12 PAYDAY LOANS PAYMENT PLANS:

A. During the term of the loan, on or before the due date (maturity) of the loan, and up to 28 days after the due date of the second renewed payday loan, if the loan has not been repaid in full, the licensee must offer the consumer the opportunity to enter into a payment plan. The consumer may elect, and a licensee shall permit, entry into a payment plan for the unpaid principal balance of the renewed payday loan.

B. To be eligible to enter into a payment plan, a consumer must first pay the administrative fee for the renewed payday loan as set forth in Section 12.18.7.9. No fees, charges or interest may be charged on the loan in a payment plan.

C. A payment plan must provide for:

(1) a minimum of 130 (one hundred and thirty) days for the repayment of the unpaid principal balance of a renewed payday loan; and

(2) relatively equal installment payments based upon the consumer's schedule of pay periods.

[12.18.7.12 NMAC - N, 07/31/06]

12.18.7.13 PAYDAY LOANS - WAITING PERIOD:

A. A licensee shall not make a payday loan to a consumer qualifying pursuant to the provisions of Subsection B of this section until at least seven calendar days have passed since the consumer completed all payment obligations pursuant to a payday loan product.

B. The provisions of Subsection A of this section shall apply to a consumer who within the prior twelve months:

(1) has had payment obligations under one or more payday loan products for sixty or more consecutive days; or

(2) has had payment obligations under one or more payday loan products for ninety or more days in the aggregate.

[12.18.7.13 NMAC - N, 07/31/06]

12.18.7.14 PAYDAY LOANS - VERIFICATION:

A. Before entering into a payday loan agreement with a consumer, a licensee must use a commercially reasonable method of verification to verify that the proposed loan agreement is permissible under the provisions of this rule and the New Mexico Small Loan Act of 1955.

B. No later than October 15, 2006, the director shall certify that one or more consumer reporting service databases are commercially reasonable methods of verification. The list of providers that the director has certified as providing commercially reasonable methods of verification shall be posted on the division's website and shall be mailed to each licensee by first class mail at the address of record as shown on the division's licensing files.

C. Each licensee who provides payday loan products shall ensure full compliance with Subsection A of this section no later than November 1, 2006.

D. A consumer seeking a payday loan may make a direct inquiry to the consumer reporting service to request a more detailed explanation of the basis for a consumer reporting service's determination that the consumer is ineligible for a new payday loan, and the consumer reporting service shall provide a reasonable response to the consumer.

E. In certifying a commercially reasonable method of verification, the director shall ensure the certified database:

(1) provides real-time access through an internet connection or, if real-time access through an internet connection becomes unavailable due to a consumer reporting service's technical problems incurred by the consumer reporting service, through alternative verification mechanisms, including verification by telephone;

(2) is accessible to the division, the office of the attorney general and to licensees in order to ensure compliance with this rule and the New Mexico Small Loan Act of 1955 and in order to provide any other information the director deems necessary;

(3) requires licensees to input whatever information is required by this rule;

(4) maintains a real-time copy of the required reporting information that will be available to the division upon request;

(5) provides licensees with no more than a statement that a consumer is eligible or ineligible for a new payday loan and a description of the reason for the determination; and

(6) provides adequate safeguards to ensure that consumer information contained in the database is kept strictly confidential.

F. A licensee shall update the certified database by inputting all information required under Paragraph (3) of Subsection E of this section at the time that:

(1) a payday loan is made;

(2) a payday loan is renewed;

(3) a consumer elects to enter into a repayment plan;

(4) a consumer's payday loan is paid in full; or

(5) a licensee determines a payday loan is in default.

G. A licensee may rely on the information contained in the certified database as accurate and is not subject to any penalty or liability as a result of relying on inaccurate information contained in the database.

H. In determining whether a credit reporting service should be certified as a commercially reasonable method of verification, the director will consider whether such credit reporting service is adequately capitalized, demonstrates the resources and ability to perform the services required pursuant to this section, and has appropriate surety to ensure performance of its obligations pursuant to this section and to reasonably protect claimants in the event that actions or inactions on the part of the credit reporting service results in damages to licensees or consumers.

[12.18.7.14 NMAC - N, 07/31/06]

12.18.7.15 REQUIRED DISCLOSURES WHEN MAKING PAYDAY LOANS OR RENEWED

PAYDAY LOANS: A licensee making payday loans or payday loan renewals shall provide a notice immediately above the borrower's signature on each payday loan agreement or renewed payday loan agreement in at least twelve-point bold type using the following language.

(1) "A payday loan is not intended to meet long-term financial needs.

(2) You should use a payday loan only to meet short-term cash needs.

(3) You will be required to pay additional administrative fees if you renew the payday loan rather than pay the debt in full when due.

(4) A payday loan is a high-cost loan. You should consider what other lower-cost loans are available to you.

(5) You have the right to renew your payday loan two times. If you renew a payday loan two times and cannot fully repay that loan when due, you have a right to enter into a payment plan requiring payment within a minimum of one hundred thirty days, in relatively equal installments, based upon your scheduled pay periods. If you enter into a payment plan, you will not have to pay an additional administrative fee or interest on the outstanding principal balance.

(6) You have up to 14 days after the due date of a payday loan or renewed payday loan to renew your loan, if you cannot repay the loan on the due date. You have up to 28 days after the due date of the second renewal of your payday loan to enter into a payment plan, if you cannot repay the second renewal loan on the due date.

(7) There are limits to the number of payday loans, renewals and payment plans you can have during certain periods of time. If within the prior twelve months you have had payment obligations under a payday loan or a renewal of a payday loan for sixty or more consecutive days or ninety or more days in the aggregate, you may not enter into a new payday loan until after seven calendar days have passed since you completed all payment obligations under the payday loan, payday loan renewal or payment plan.”

[12.18.7.15 NMAC - N, 07/31/06]

HISTORY OF 12.18.7 NMAC: [RESERVED]