NMRLD
NEW MEXICO
REGULATION &
LICENSING DEPARTMENT

STATE OF NEW MEXICO
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REGULATORY ALERT

Licensing Requirements for Buy-Now-Pay-Later Products

This regulatory alert is an update to the original alert issued on July 23, 2021. It is intended to incorporate the changes to the New Mexico Small Loan Act of 1955 and the New Mexico Bank Installment Loan Act of 1959 taking effect as of January 1, 2023. In addition to the updated language of the original alert provided below, the definition of an "installment loan" in NMSA 1978, Section 58-15-2(F) (2023) now includes, in paragraph (2), loans that are to be repaid "in any number of payments and with any initial stated days to maturity that bears no finance charge as disclosed pursuant to 12 CFR Part 1026, known as "Regulation Z", and with respect to which no other fees or charges of any kind are imposed at any time". Loans made according to Section 58-15-2(F)(2) may, but are not required to, "report to a consumer reporting agency the terms of the loan and the borrower's performance pursuant to those terms." NMSA 1978, § 58-15-10.2(B) (2023).

The Financial Institutions Division (FID) has been asked for clarification of the requirements for Small Loan licenses under the New Mexico Small Loan Act of 1955, NMSA 1978, Sections 58- 15-1 to -42 (1955, as amended through 2023) ("SLA") and/or the New Mexico Bank Installment Loan Act of 1959, NMSA 1978, Sections 58-7-1 to -11 (1959, as amended through 2023) ("BILA") related to companies providing a buy-now-pay-later products ("BNPLP"). As an initial matter, BNPLPs are <u>not</u> "retail installment contracts" under the Retail Installment Sales Act, NMSA 1978, Sections 56-1-1 to -16 (1965, as amended through 1983) when made by a third party and not the "retail seller" whose "goods" are being purchased by a "retail buyer." § 56-1-1.

It is the position of the FID that these BNPLPs are installment loans and, if made in the amount of $10,000.00 or less, are subject to the statutory requirements of small loans made under the SLA and/or BILA, unless explicitly exempted by Section 58-

15-3 . The FID's determination is based on a careful analysis of New Mexico law and a variety of company websites for those firms offering these loans.

Some companies contend that an Annual Percentage Rate ("APR") of zero percent (0%) precludes BNPLPs from being a loan. However, the SLA sets a modified APR cap for small loans at thirty-six percent (36%). § 58-15-17(J) . Further, the SLA mandates the reporting of each loan that falls within any of four categories of APR, including "less than or equal to ten percent." § 58-15-10.1(A)(3)(a) (2022). The SLA neither specifies a minimum allowable APR, nor does it provide an exemption from the licensing requirement for lenders making loans with an APR of less than 36%.

Some companies take the position that they are not subject to the SLA because the company lacks a physical location in New Mexico. This is inaccurate. Section 58-15-5(F)(3) (2018) details the required findings the FID Director must make to issue a license. None of the required findings include a provision that a licensee have a physical location in New Mexico. *Id*. The SLA does require each small loan business (SLB) with more than one physical location in New Mexico to have an individual license for each "place of business." § 58-15-7(A) (1955). Likewise, the SLA does not distinguish between foreign or domestic companies. Any company who offers small loans in New Mexico or to New Mexico residents must be licensed. The companies and their merchant partners have purposely availed themselves of the privilege of conducting e-commerce business in New Mexico. *See Poulin Ventures, LLC v. MoneyBunny Co.*, 2020 WL 6286440, at *4-6 (D.N.M. Oct. 27, 2020). BNPLP companies and their merchant partners cause products to be sold in New Mexico, allow the end user to select an address in New Mexico for shipping products, ship the purchased product to New Mexico, and collect sales taxes on the products sold as required by the state and local jurisdiction. By conducting business transactions within New Mexico, BNPLP companies and their merchant partners are subject to New Mexico's long-arm statute found at NMSA 1978, Section 38-1-16(A)(1) (1971).

In summary, any company providing BNPLPs in amounts of $10,000.00 or less are in the business of offering small loans and, if the company wishes to engage in this business in New Mexico, the company must be licensed and act in accordance with the laws of New Mexico. Any company offering BNPLPS who chooses not to obtain a license under the SLA and continues to offer loans in amounts of $10,000.00 or less without a small loan license in New Mexico is in direct violation of the SLA. *See* § 58-15-3(A) ("A person shall not engage in the business of lending in amounts of ten thousand dollars ($10,000.00) or less for a loan without first having obtained a license from the [D]irector.").