

## **Opinion No. 85-01**

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**OPINION OF:** Paul Bardacke, Attorney General

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### **BACKGROUND**

Various state financial institutions which make loans have raised questions concerning allowable fees which they may charge for the preparation of documents, points, service charges or late charges. These questions arise because there is confusion about the effect of the repeal of usury restrictions which had been contained in the many acts under which financial institutions make loans. Institutions now question whether any such fees may be charged without specific statutory authorization in the act under which a transaction is being conducted.

The different New Mexico financial institutions which seek to assess fees for the preparation of documents, points, service charges or late charges may be making loans under one or more of at least five separate special acts, not including the new general usury act. The acts vary substantially and it is necessary to consider each separately.

### **QUESTIONS**

May a financial institution making a loan assess fees without specific statutory authorization to charge such fees in the act under which the loan is made?

### **CONCLUSIONS**

Authorization in each individual act is not necessary; in those acts lacking specific authorization, fees may be assessed provided the requirements of the present usury statutes are met. In those acts which enumerate specific charges which may be made under the Act, lenders are limited to those charges.

### **OPINION**

#### **DISCUSSION**

**I. New Mexico Bank Installment Loan Act of 1959, Section 58-7-1 to 58-7-9 NMSA 1978.**

The New Mexico Bank Installment Loan Act applies to any state or national bank, small loan licensee or sales finance company which makes a loan that is repayable in installments or is made under a credit card plan. Prior to July 1, 1981, this Act limited the rate of interest which could be charged on installment loans. **See** Section 58-7-4 NMSA 1978, repealed July 1, 1981. With the repeal of this interest ceiling and the failure to enact substitute language within the installment loan Act, there are no limits on interest rates for installment loans provided the rate charged is agreed to in writing and that the lender fully complies with disclosure requirements. **See** Sections 56-8-11.1 and 56-8-11.2 NMSA 1978.

As to charges other than interest, since its inception the Installment Loan Act has provided that no additional amounts shall be charged in connection with any installment loan unless authorized. Section 58-7-6 NMSA 1978 contains a list of allowable charges which includes, among other, delinquency charges, filing and recording fees, charges related to abstract of title, and a one-time charge for preparation of truth-in-lending documents.

This section was untouched by the bill which repealed the interest rate limitations. In 1983, however, amendments which changed the applicability of restrictions on additional charges were made elsewhere in the Act. Section 58-7-9 NMSA 1978 (1984 Supp.) of the Act now provides:

B. With the exception of precomputed loan transactions, a lender is not bound by the provisions of the New Mexico Bank Installment Loan Act of 1959 in making loans where the loan is made in accordance with the provisions of Sections 56-8-9 through 56-8-14 NMSA 1978.

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G. All loans other than precomputed loan transactions made under the New Mexico Bank Installment Loan Act of 1959 shall be clearly identified on the loan documents as being made under that Act.

Although the term "precomputed" is not defined in the Act, it is understood by financial lenders to include only transactions in which the finance charge is computed in advance and added to the note. **See** Section 58-7-3.1.

Thus, the restrictions of the Installment Loan Act apply to precomputed loans or those loans which are identified on the loan documents as being made under that Act

## **II. Credit Union Act, Section 58-11-1 to 58-11-33 NMSA 1978.**

Under the Credit Union Act, credit unions are given the power to make loans to their members. **See** Section 58-11-5(a)(2). Prior to July 1, 1981, interest rates and service charges were limited by statute. **See** Section 58-11-17, repealed July, 1981. The one-time service charge, used to defray the actual costs of documents preparation, truth-in-

lending disclosure statements and equal credit opportunity disclosure statements could not exceed five dollars on loans up to five hundred dollars or one percent of the actual loan amount up to twenty-five dollars on loans in excess of \$500.

With the repeal of Section 58-11-17 in 1981, and the subsequent failure to revive this provision, any reference to interest rates or service charges was removed from the body of the Credit Union Act. However, coincidental with this repeal, was the repeal of Section 56-8-11 which had set out a general interest restriction applicable to all lenders not otherwise governed by special acts. The replacement language is Section 56-8-11.1 which provides that the maximum rates of interest or charges shall be those agreed to, provided that such agreement be in writing and, unless otherwise excepted, be fully disclosed as provided by Section 56-8-11.2 NMSA 1978. It is the opinion of this office that these provisions authorize the charging of interest of other fees by credit unions.

One recognized guide in statutory construction "is the consideration of the history and prior condition of a particular law." **Munroe v. Wall**, 66 N.M. 15 (1959). It appears that the Legislature recognizes that **all** prior statutory provisions relating to usury were being repealed and that the enactment of Section 56-8-11.1 was intended to fill the gap left by the far-reaching repealing bill. The failure to insert a provision similar to Section 56-8-11.1 within the Credit Union Act cannot be construed to mean that the Legislature intended to leave credit unions totally without statutory authority to charge interest or service charges. Statutes must not be construed to achieve and absurd result such as this or to defeat the intended objective of the legislature. **State v. Herrera**, 86 N.M. 224 (1974). Further, that the allowable charges under the Credit Union Act are to be those permitted by Section 56-8-11.1 is supported by the concept that statutes relating to the same subject should be construed together if possible. **In re Martinez' Will**, 47 N.M. 6 (1942).

As to credit unions, it thus appears that service charges, late fees or similar charges may be assessed provided the disclosure provisions of Section 56-8-11.2 NMSA 1978 are followed.

### **III. New Mexico Small Loan Act of 1955, Section 58-15-1 to 58-15-15, 58-15-17 to 58-15-31 NMSA 1978.**

The Small Act regulates persons who engage in the business of lending amounts of two thousand five hundred dollars (\$2,500.) or less. Prior to July 1, 1981, this Act set out in detail the maximum allowable interest charges on small loans. **See** Section 58-15-14, repealed July 1, 1981. This section also prohibited the receipt of any charges in advance and further provided that any charges not expressly authorized within the Small Loan Act were prohibited. Such express authorization for other charges is found in Section 58-15-20 which authorizes the collection of filing or recording fees, attorney fees, and court costs but prohibits the charging of notary fees. With the repeal of Section 58-15-14, the question is whether there are still limitations on the types of other allowable charges.

Although the Small Loan Act no longer states that charges not expressly authorized are prohibited, the list of allowable charges set out in Section 58-15-20 remains intact. Under accepted rules of statutory construction, there is a presumption that if the Legislature enumerated a list of allowable fees or charges, they had no others in mind. **See American Auto. Ass'n., Inc. v. Bureau of Revenue**, 88 N.M. 148, rev. on other grounds 88 N.M. 462 (1975). Therefore, apart from interest charges on loans, only those fees described in Section 58-15-20 may be charged for loans made under the Small Loan Act. Charges cannot be received in advance or compounded. **See** Section 58-15-14.1 NMSA 1978.

As to interest charges, with the repeal of Section 58-15-14, the maximum rate of interest may now be that rate agreed to in writing by the parties as allowed in Section 56-8-11.1 NMSA 1978 and disclosed as provided in Section 56-8-11.2 NMSA 1978. The single limitation is that interest cannot be received in advance and cannot be compounded. **See** Section 58-15-14.1 NMSA 1978.

#### **IV. Motor Vehicle Sales Finance Act, Section 58-19-1 to 58-19-14 NMSA 1978.**

The Motor Vehicle Sales Finance Act regulates persons engaged in the business of motor vehicle sales finance. Prior to July 1, 1981, this Act contained detailed provisions on allowable finance charges which could be assessed on motor vehicle loans. Section 58-19-8, repealed July 1, 1981, contained a schedule of allowable finance charges based on the age of the vehicle being purchased and also authorized a minimum finance charge of twenty-five dollars on any transaction.

This section was repealed in its entirety at the same time Section 56-8-11.1 NMSA 1978 was enacted. No substitute finance charge provisions have been adopted for the Motor Vehicle Sales Finance Act. Persons licensed as sales finance companies are thus without any specific statutory authority, under the Motor Vehicle Sales Finance Act, to collect **any** finance charges. Because, as with credit unions, this could not have been what the legislature intended, one must find in Section 56-8-11.1 NMSA 1978, the authority to collect finance charges.

#### **V. Residential Home Loan Act, Section 56-8-22 to 56-8-30 NMSA 1978**

The Residential Home Loan Act, passed in 1980, authorized a system under which the Director of the Financial Institutions Division could determine the current maximum interest rate permitted for home loans. Any interest limitations imposed by the Act were in lieu of the general interest limitations then set forth in Section 56-8-11 NMSA 1978. **See** Laws 1980, ch 64, § 7. It is important to note here that "rate of interest" upon which such limitations were imposed is defined in the Act to include "both the interest on the principal amount of the loan and discount points, premiums, commitment fees and other interest charges made pursuant to home loan..." Section 56-8-24(G) NMSA 1978.

In 1981 Sections 56-8-25 to 56-8-28 NMSA 1978 of the Act, which had set out the procedures to be used for determining the maximum rate of interest, were all repealed

coincidental with the enactment of Section 56-8-11.1 NMSA 1978. There are no longer any interest rate limitations in the Act. For this matter, under the definition of "rate of interest," there are no prohibitions or limitations on any types of fees with the exception of the prohibition on prepayment penalties. **See** Section 56-8-29 that persons charging an interest rate greater than that allowed in the Act are subject to civil penalty, this section is now completely meaningless. Thus only Sections 56-8-11.1 and 56-8-11.2 govern limits the rate of interest, including discount points, premiums and commitment fees which may be charged.

#### **VI. The Usury Act, Section 56-8-11.1 to 56-8-11.4 NMSA 1978**

Prior to 1981, lenders whose transactions were not tailored to one of the above acts were restricted by the general usury interest rate. **See** Section 56-8-11 NMSA 1978, repealed July 1, 1981. That ceiling was removed with the passage of the new Usury Act, Section 56-8-11.1 to 56-8-11.3 NMSA 1978 which became effective July 1, 1981. (The act as originally adopted included a reviver of all previous usury provisions and a repealer of the Usury Act, effective July 1, 1983; this section, Section 56-8-11.4, was itself repealed on July 1, 1983.)

With this new Act lenders whose transactions are not being made under a separate, special act may assess whatever interest rate is agreed to by the parties. Section 56-8-11.1 NMSA 1978. The limitations under which the lender must act are that the interest rate agreed to be in writing, **See** Section 56-8-11.1, and that the rather detailed disclosure requirements be met. **See** Section 56-8-11.2 NMSA 1978. For a more detailed discussion of the writing and disclosure requirements, **See** 12 N.M.L. Rev. 173 (1982).

#### **CONCLUSION**

The attached chart sets out the statutes under which different types of loan transactions may be conducted. The chart includes disclosure requirements although an in-depth discussion of what requirements apply to each type of transaction is beyond the scope of this opinion.

#### **ATTORNEY GENERAL**

Paul Bardacke, Attorney General

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