Lewis Roca
ROTHGERBER CHRISTIE

Dale Kotchka-Alanes, Esq.
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169
(702) 949-8258
DKotchkaAlanes@lrrc.com

VIA E-MAIL

Jordan Haas
Legislative Commission
jordan.haas@lcb.state.nv.us

December 28, 2020

COMMENTS ON LCB FILE NO. R037-20

To Whom It May Concern:

Our firm represents TitleMax of Nevada, Inc. ("TitleMax"), which hereby submits its comments on the proposed regulations pertaining to Senate Bill 201 ("S.B. 201") as drafted in NV LCB File R037-20. TitleMax requests that these comments be added to the minutes of the December 28, 2020 meeting.

Despite multiple workshops and numerous industry participants raising substantive concerns regarding the scope of the proposed regulations, several overarching concerns still have not been meaningfully addressed. The regulations still far exceed the statutory authorization in S.B. 201. The Nevada Legislature approved the creation of the database to collect data that the FID and other licensees may access – nothing more. *See* NRS 604A.303. However, the proposed regulations consistently overreach and reflect a very different vision of a database that determines loan eligibility and ensures statutory compliance. Nothing in S.B. 201 gives the database or database provider the power to determine loan eligibility, and nothing in S.B. 201 delegates to the database or database provider the Financial Institution Division's ("FID's") duty to ensure statutory compliance. TitleMax sincerely hopes the Legislative Commission will vote to return the regulations to the FID to allow for meaningful industry dialogue and revisions that will bring the regulations in line with S.B. 201.

1. Unknown Service Provider and Time Frame: Licensees still have not been told who the service provider will be. Licensees cannot coordinate with the service provider and conduct the necessary information technology (IT) work to ensure their systems will be able to interface with the database until they know who the service provider is. Licensees are still lacking basic information and details about the database. Licensees also have not been informed of any proposed date regarding when the proposed regulations might go into effect. Licensees cannot sync their systems with a complex database overnight. Much work and coordination with the service provider will be required.

   It seems premature to enact regulations related to the database when the FID still has not provided basic information such as who the service provider will be and what is expected of licensees. In the Small Business Impact Statement, the FID Commissioner "noted that a common concern from the 604A community is the unknown of how the database operates. Unaware that it is a live database that interfaces with a licensee's current software and for licensees that maintain manual records; an online portal will be provided for their use. The Division and service provider will

assist any licensee with questions during an examination to alleviate any concerns."
Respectfully, by the time a licensee is subjected to an examination by the FID, it will be too late. The point is that licensees want to be in compliance with any passed regulations *before* licensees are examined and cited for purported regulatory violations. The FID has not released any details about the service provider or how licensees' current software will interface with the database, nor has the FID released any details or training regarding the "online portal" for licensees who maintain manual records. Before any regulations are enacted, TitleMax requests that the FID provide information on the service provider and a proposed time period in which licensees will be able to work with the service provider to ensure proper interfacing with their systems. Once licensees begin to work with the service provider, various issues may come to light that can be addressed in the proposed regulations.

2. Exceeding Statutory Scope: The regulations go well beyond the scope of S.B. 201.

S.B. 201 enacted NRS 604A.303, which provides:

> **NRS 604A.303 Commissioner required to implement and maintain database of certain information related to deferred deposit loans, title loans and high-interest loans; fee; confidentiality; regulations. [Effective July 1, 2020.]**
>
> 1. The Commissioner shall, by contract with a vendor or service provider or otherwise, develop, implement and maintain a database by which the Commissioner and licensees may obtain information related to deferred deposit loans, title loans and high-interest loans made by licensees to customers in this State to ensure compliance with the provisions of this chapter. The information the Commissioner and licensees **may obtain** includes, without limitation:
>
> (a) Whether a customer has a deferred deposit loan, title loan or high-interest loan outstanding with more than one licensee;
>
> (b) Whether a customer has had such a loan outstanding with one or more licensees within the 30 days immediately preceding the making of a loan;
>
> (c) Whether a customer has had a total of three or more such loans outstanding with one or more licensees within the 6 months immediately preceding the making of the loan; and
>
> (d) Any other information necessary to determine whether a licensee has complied with the provisions of this chapter.
>
> 2. After the development and implementation of the database created pursuant to subsection 1, a licensee who makes a deferred deposit loan, title loan or high-interest loan **shall enter** or update the following information in the database for each such loan made to a customer at the time a transaction takes place:
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> (a) The date on which the loan was made;
>
> (b) The type of loan made;
>
> (c) The principal amount of the loan;
>
> (d) The fees charged for the loan;
>
> (e) The annual percentage rate of the loan;
>
> (f) The total finance charge associated with the loan;
>
> (g) If the customer defaults on the loan, the date of default;
>
> (h) If the customer enters into a repayment plan pursuant to NRS 604A.5027, 604A.5055 or 604A.5083, as applicable, the date on which the customer enters into the repayment plan; and
>
> (i) The date on which the customer pays the loan in full.
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> 3. The Commissioner shall establish, and cause the vendor or service provider administering the database created pursuant to subsection 1 to charge and collect, a fee for each loan entered into the database by the licensee. The money collected pursuant to this subsection must be used to pay for the operation and administration of the database.
>
> 4. Except as otherwise provided in this subsection, any information in the database created pursuant to subsection 1 is confidential and shall not be considered a public book or record pursuant to NRS

239.010. The information may be used by the Commissioner for statistical purposes if the identity of the persons is not discernible from the information disclosed.

5. The Commissioner shall adopt regulations that:

(a) Prescribe the specifications for the information entered into the database created pursuant to subsection 1;

(b) Establish standards for the retention, access, reporting, archiving and deletion of information entered into or stored by the database;

(c) Establish the amount of the fee required pursuant to subsection 3; and

(d) Are necessary for the administration of the database.

(Added to NRS by 2019, 942, effective July 1, 2020)

NRS 604A.303 (emphases added). Subsection 5 authorizes the FID to adopt regulations to prescribe *specifications* for information entered into the database, to establish retention/archive standards for information entered into the database, to establish regulations necessary for the *administration* of the database, and to establish the amount of the fee required pursuant to subsection 3. However, the FID was **not given** authority to determine what information must be entered into the database. The Legislature already enumerated what information must be entered into the database in subsection 2.

Notwithstanding this, several sections of the proposed regulations prescribe numerous items to be entered into the database far exceeding the careful balance struck by the Legislature. (*See, e.g.*, Sec. 17; Sec. 19; Sec. 20; Sec. 21.) It is confusing to have so many sections governing what must be entered into the database. More importantly, requiring entry into the database of items beyond what the Legislature has already prescribed exceeds the statutory scope of the FID's rule-making authority. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by [the Legislature]."). If the FID seeks to provide specifications around the statutorily enumerated items, TitleMax proposes that they be contained in one section.

The proposed regulations also purport to require licensees to query the database for specific information and consider this information in determining loan eligibility. (*See* Sec. 13.) However, this goes beyond the scope of S.B. 201. NRS 604A.303, as enacted, contains certain requirements. For example, the "Commissioner ***shall*** . . . develop, implement and maintain a database" and licensees "***shall*** enter or update" the information prescribed in subsection 2. NRS 604A.303(1)-(2). But nothing in S.B. 201 ***requires*** licensees to access any particular information in the database. Rather, "the Commissioner and licensees ***may obtain*** information related to deferred deposit loans, title loans and high-interest loans." NRS 604A.303(1). While "shall" "imposes a duty to act," the word "may" "confers a right, privilege or power." NRS 0.025. Thus, while licensees can access certain information if they so choose, nothing in S.B. 201 *requires* licensees to make any particular query or access any particular information. In imposing such obligations, the proposed regulations exceed, and are contrary to, the statutory requirements of S.B. 201.

Moreover, the database was touted to the Legislature as an important first step to collect information – nothing more. The Legislature did *not* forbid loans if there is an outstanding loan with another licensee or if the customer has had three or more NRS 604A loans outstanding within the past 6 months. This is merely information that *may* be obtained from the database. NRS 604A.303(1). Yet the proposed regulations purport to *require* licensees to consider such information and even state that "the database must … [i]nform the licensee whether a customer is eligible for a loan." (Sec. 13.) The Legislature did not give the database or the database service

provider power to determine eligibility for a new loan. While some states have systems and statutes in place authorizing the database itself to determine loan eligibility, the Nevada Legislature has enacted no such law. The FID itself assured the Nevada Legislature that S.B. 201 "does not provide us with any abilities that we do not currently have, nor would it provide us any additional powers . . . . The database would be a place to start and provide us another resource as we perform examinations and investigations." Nevada Assembly Committee Minutes, 5/10/2019 (testimony of Rickisha Hightower, former Interim Commissioner of the FID).

In some sections of the proposed regulations, the FID purports to impose requirements that have nothing to do with the database. (*See, e.g.*, Sec. 25 (allowing customers to request loan documents).) The FID states that the purpose of the proposed regulations is to develop and implement the database referred to in S.B. 201. But at times, the FID imposes requirements that are not related to the database at all and that change the statutory requirements of NRS 604A. The FID is not authorized to add to the statutory requirements of NRS 604A or impose regulations that are inconsistent with the statutory terms. "We reaffirm the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Util. Air Regulatory Grp. v. E.P.A.*, 573 U.S. 302, 328 (2014); *see also Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (an administrative agency "may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law.") (quotations omitted).

TitleMax will now address specific sections of the proposed regulations.

3. Section 5: Section 5 of the proposed regulations defines "due date" as "***the date, based on a payment schedule and subject to all statutory requirements, on which a customer is scheduled to: 1. Make a payment, either to pay the full amount of a loan, including principal, finance charge and fees, and extinguish the debts; or 2. If applicable, make an installment payment.***" TitleMax suggests that a clearer and more concise definition would be "the date on which the customer is contractually scheduled to make a payment." It is already a given that contractual terms must comply with all statutory requirements. At a minimum, it appears that the text "Make a payment, either to" should appear before the numeral "1" as a matter of correct grammar.

   TitleMax objects to the FID defining the "full amount of the loan" as including "principal, finance charge and fees" within the definition of "due date." A previous version of the proposed regulations contained a definition for "full amount of the loan," but this section was deleted. The FID apparently retains the deleted definition, just including it in the definition of "due date." This is problematic because the meaning of the term "loan" or "full amount of the loan" might vary depending on statutory context. Moreover, the FID does not use the term "full amount of the loan" elsewhere in the proposed regulations.

   Most concerning to TitleMax is that the FID defines "full amount of the loan" as including "principal, finance charge and fees" in a proposed regulation when TitleMax and the FID have been litigating over what "title loan" means for purposes of NRS 604A.5076(1) (providing that a title lender shall not "[m]ake a title loan that exceeds the fair market value of the vehicle securing the title loan"). A Nevada district court ruled in TitleMax's favor, declaring that NRS 604A.5076(1) means only that principal cannot exceed fair market value and that "title loan" does not include the finance charge and fees. *TitleMax of Nevada, Inc. v State, Dept. of Business and Industry Financial Institutions Div*, No. A-18-786784-C, 2019 WL 3754784, at *10 (Nev. Dist.

Ct. June 20, 2019). The FID cannot manufacture a regulation that contradicts statutory terms as interpreted by a court of law. *Fed. Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981) ("courts are the final authorities on issues of statutory construction"); *see also Ctr. for Biological Diversity v. U.S. Army Corps of Engineers*, 941 F.3d 1288, 1299 (11th Cir. 2019) ("regulations cannot contradict their animating statutes or manufacture additional agency power").

TitleMax proposes that "due date" be defined simply as "the date on which the customer is contractually scheduled to make a payment." There is no need to separately mention deadlines to extinguish the debt v. to make an installment payment.

4. Section 8: Section 8 provides, "***For the purposes of sections 2 to 25, inclusive, of this regulation, a loan is closed if the final status of the loan is no longer active because the loan has been paid-in-full under the loan agreement, because the loan is a title loan and the vehicle securing the loan has been repossessed, because the licensee has charged off the loan or for any other reason.***" TitleMax objects that this definition is ambiguous. There is no definition of "active" or "charged off." What it means to "charge off" a loan may be different for each licensee. For example, there are instances in which TitleMax labels a loan account as "charged off," yet TitleMax is still trying to collect on a loan. Would the loan be considered "closed" or active" in this situation? In addition, the definition is rendered broad and even more ambiguous by the catch-all phrase "or for any other reason." It is unclear when a loan would be "no longer active" for "any other reason." TitleMax suggests the definition should be clarified, particularly with regard to what "active" and "charged-off" mean. If "active" means that the licensee is still trying to collect on the loan, the definition should indicate that.

5. Section 10: Section 10 provides in part, "***The service provider shall: 1. Retain data in the database only as required to ensure that a licensee complies with the requirements of this chapter and chapter 604A of NRS.***" TitleMax objects to this section as contrary to, and beyond the scope of, S.B. 201. Nothing in S.B. 201 gives the service provider power or responsibility "to ensure that a licensee complies with the requirements of this chapter and chapter 604A of NRS." Presumably, ensuring licensee compliance with NRS Chapter 604A and NAC 604A is the duty of the FID. Nothing in S.B. 201 gives the service provider power to determine loan eligibility or ensure statutory compliance.

6. Section 11: Section 11 provides, "***1. Access to the database must be limited to members of the staff of:***
(a) A licensee who underwrite and process loans;
(b) A licensee who collect and post payments made on loans;
(c) A licensee who are senior staff members;
(d) The service provider; and
(e) The Office of the Commissioner.
2. Each user of the database must be required to:
(a) Create a password to access the database that meets the criteria of the service provider for passwords; and
(b) Safeguard the password by not sharing the password with any person or committing the password to writing."

TitleMax proposes that (a), (b), and (c) referring to licensee staff members be combined into one subsection allowing access by "Licensee staff members and those associated with a Licensee who need to access the database to provide services." As currently drafted, it is unclear who would qualify as "senior staff members." There does not appear to be a reasoned basis to allow access by all Commissioner staff members and all service provider staff members, but only certain licensee staff members. In addition, there may be corporate affiliate staff members who need to access the database to provide services. For example, TitleMax of Nevada, Inc. relies on employees of its corporate affiliates to provide Information Technology (IT) and other services. An employee of TitleMax's affiliate might need to access the database to ensure that information is properly interfacing with TitleMax's loan platform or check the database upon a question from a FID examiner. TitleMax's proposed language would ensure that the appropriate persons associated with TitleMax could access the database.

TitleMax has no objection to requiring anyone who accesses the database to do so via a password that meets the criteria of the service provider. However, TitleMax suggests that Section 2(b) be deleted. While it may be good practice to refrain from sharing a password with anyone and to refrain from writing it down, some individuals may share their passwords with administrative assistants, secretaries, or IT personnel. And some individuals may keep a list of all their passwords or be unable to remember their password without writing it down. While good security measures should be encouraged, it should not be a regulatory offense if someone shares his/her password with a fellow staff member or commits the password to writing.

7. Section 12: Section 12 provides, "***1. Before making a deferred deposit loan, title loan or high-interest loan, a licensee shall query the database. 2. To verify the identity of a customer, a query made pursuant to subsection 1 must include, at a minimum:***
(a) The full name of the customer, including, without limitation, first and last name and middle initial;
(b) The social security number or alien registration number of the customer;
(c) The number of a valid identification card which contains a photograph of the customer and was issued by a governmental entity; and
(d) The date of birth of the customer."

   TitleMax objects to this section as beyond the scope of S.B. 201. First, under S.B. 201, licensees are not required to query the database for anything. Rather, they "may obtain" certain information if they so choose. (*See supra* ¶ 2.)

   Second, nothing in S.B. 201 addresses verifying the identify of a customer – that is not what NRS 604A.303 specifies is the role of the database. The database was not statutorily provided for to detect identity fraud or to ensure a customer is who he or she says she is. Verifying the identity of a customer is beyond the scope of S.B. 201. Moreover, it seems excessive to purport to require licensees to search the database by name, social security/alien registration number, driver's license or other government ID number, *and* the customer's birth date. Name and birth date *or* the number on a government ID (including a social security card) should suffice.

   Section 12 exceeds the permissible scope of regulations to implement S.B. 201.

8. Section 13: Section 13 provides:
   "***1. In response to a query by a licensee, the database must:***

(a) Provide the licensee with the information which a licensee may obtain pursuant to paragraphs (a) to (d), inclusive, of subsection 1 of NRS 604A.303;
(b) Inform the licensee whether a customer is eligible for a loan pursuant to this chapter and chapter 604A of NRS; and
(c) If the customer is ineligible for a loan, provide the licensee with the reason for such ineligibility.
2. In determining the ability of a customer to repay a loan for the purposes of chapter 604A of NRS, a licensee shall consider the information provided pursuant to subsection 1 and any other available information.
3. A licensee may approve a loan only if the making of the loan is permissible pursuant to the provisions of this chapter and chapter 604A of NRS.
4. If the database informs a licensee that a customer is ineligible for a loan, the licensee must provide the customer with a written notice which contains:
(a) The reason for the ineligibility;
(b) The contact information of the service provider; and
(c) A statement advising the customer to submit an inquiry to the service provider if the customer has questions regarding the specific reason for the ineligibility.
5. A written notice provided by a licensee pursuant to subsection 4 does not preclude or replace any disclosure required by federal law."

Section 13 exceeds the scope of S.B. 201 and purports to change its requirements. NRS 604A.303(1) provides that "the Commissioner and licensees may obtain" the information listed in subsections (1)(a)-(d) – not that they are required to. NRS 604A.303(1). Sections 12 and 13 work together to *require* licensees to query the database and then consider the information provided. This is inconsistent with NRS 604A.303(1).

Section 13 also exceeds the scope of S.B. 201 when it provides that "the database must … [i]nform the licensee whether a customer is eligible for a loan pursuant to this chapter and chapter 604A of NRS." S.B. 201 does not provide for the database to determine loan eligibility. This may be a future step Nevada takes, but it has not done so yet. S.B. 201 simply provides for the creation of a database that will store information. (*See supra* ¶ 2.) Moreover, it is unclear how the database would determine compliance with *all* requirements of NRS 604A and NAC 604A even if the database was supposed to determine loan eligibility. Licensees determine loan eligibility, not the database.

Section 13 further exceeds the scope of S.B. 201 when it provides, "In determining the ability of a customer to repay a loan for the purposes of chapter 604A of NRS, a licensee shall consider the information provided pursuant to subsection 1 and any other available information." S.B. 201 did not amend the ability-to-repay statute (NRS 604A.5065 for title loans) or add the information prescribed in NRS 604A.303(1)(a)-(d) as items to be considered in determining ability to repay. S.B. 201 did not provide that a loan cannot be made if a customer has another NRS 604A loan outstanding or has had three or more such loans outstanding within the past 6 months. (*See supra* ¶ 2.) Requiring licensees to consider such information and suggesting that these factors may make a customer ineligible for a loan is contrary to S.B. 201. Requiring licensees to consider "any other available information" in determining ability to repay is also inconsistent with NRS Chapter 604A. NRS 604A.5065 specifies the particular underwriting factors to be considered in determining a customer's ability to repay. The regulation turns the specific statutory

requirements into a broad and amorphous requirement to consider "any other available information," and the regulation requires consideration of factors not present in NRS 604A.5065. This is impermissible. *See Portland Audubon Soc. v. Endangered Species Comm.*, 984 F.2d 1534, 1543 n.21 (9th Cir. 1993) ("Regulations that are inconsistent with the provisions of the act they implement cannot stand."); *United States v. Bastide-Hernandez*, 360 F. Supp. 3d 1127, 1135 (E.D. Wash. 2018) ("An agency cannot, through the passage of a regulation, change a statute.").

Section 13(3) states that "A licensee may approve a loan only if the making of the loan is permissible pursuant to the provisions of this chapter and chapter 604A of NRS." Nothing in S.B. 201 altered when the making of a loan was permissible – and thus, nothing in S.B. 201's implementing regulations should do so either. It is already a given that making a loan must comply with NRS Chapter 604A, so this provision is unnecessary and beyond the scope of S.B. 201.

Moreover, S.B. 201 imposes no requirement on licensees to "provide the customer with a written notice which contains: (a) The reason for the ineligibility; (b) The contact information of the service provider; and (c) A Statement advising the customer to submit an inquiry to the service provider if the customer has questions regarding the specific reason for the ineligibility." Section 13(4) adds new requirements that are inconsistent with NRS Chapter 604A and beyond the scope of S.B. 201. In addition, it seems deceptive to advise customers to submit an inquiry to the database provider should they have questions regarding the reason for their loan ineligibility. The database provider does not determine loan eligibility. Presumably, the database provider can only access data. It cannot alter information (even if such information is inaccurate), nor can it discuss with customers potential avenues to assist customers in obtaining the loans they need, such as taking out a loan for a lower amount. Moreover, there may be situations in which a customer is ineligible for a loan not because of any statutory or regulatory requirements, but because of the licensee's own proprietary underwriting standards. It is the licensee that determines loan eligibility and may inform the customer of its determination in any way it sees fit. Section 13(4) exceeds the scope of S.B. 201.

9. Section 14: Section 14 provides, "***1. During any period in which the database is unavailable due to technical issues on the service provider's side of the system, a licensee may rely upon the written representation of a customer applying for a loan and assess the ability of the customer to repay the loan by obtaining the documentation required by this chapter and chapter 604A of NRS to verify that making the loan for which the customer applied is permissible pursuant to this chapter and chapter 604A of NRS.***
2. The written representation of a customer applying for a loan, which a licensee may rely on pursuant to subsection 1, must include, without limitation:
(a) An affirmation that the customer does not have any loan outstanding at the time the customer applies for the loan;
(b) If, at the time the customer applies for a deferred deposit loan or high-interest loan, the customer has another outstanding loan, an affirmation that:
(1) The amount of the additional deferred deposit loan or high-interest loan, as applicable, for which the customer is applying would not, when combined with the amount of the outstanding loan of the customer, exceed 25 percent of the expected monthly gross income of the customer; and

(2) The customer has the ability to repay the loan and the additional deferred deposit loan or high-interest loan for which the customer is applying; or
(c) If, at the time the customer applies for a title loan, the customer has outstanding another title loan, an affirmation that:
(1) The customer has the ability to repay the outstanding title loan and the additional title loan for which the customer is applying; and
(2) The title to the vehicle is not perfected with another lender or licensee.
3. If a licensee makes a loan to a customer during a period when the database is unavailable, whether due to a scheduled outage or other technical issues, a licensee must: (a) Enter the loan into the database not later than 24 hours after the database becomes operational;
(b) Notate on the loan file that the loan was originated during a period the database was unavailable; and
(c) Retain all records of the loan transaction as required for any loan which is made by a licensee pursuant to the provisions of this chapter and chapter 604A of NRS."

First, to the extent that the regulation suggests that "a licensee may rely upon the written representation of a customer applying for a loan" only when the database is not operational, that is contrary to the statutory authorization to rely on customers' written representations in assessing their ability to repay. NRS 604A.5065(2)(e). TitleMax reiterates that licensees are not required to search the database for any particular information (*see supra* ¶ 2) and that licensees can rely on customers' written representations regardless of whether the database is operational. To the extent the regulation provides that licensees must always obtain documentation "to assess" a customer's ability to repay – beyond and apart from "a customer's written representation" – that is contrary to NRS 604A.5065 and cannot stand. *See Portland Audubon Soc. v. Endangered Species Comm.*, 984 F.2d 1534, 1543 n.21 (9th Cir. 1993) ("Regulations that are inconsistent with the provisions of the act they implement cannot stand."); *United States v. Bastide-Hernandez*, 360 F. Supp. 3d 1127, 1135 (E.D. Wash. 2018) ("An agency cannot, through the passage of a regulation, change a statute.").

Second, there is no prohibition on making a title loan to a customer who has other outstanding loans. If the licensee wishes to accept the risk of having its interest subordinate to another lender, that is its choice and the statute does not prohibit such activity. Section 14 imposes requirements that have nothing to do with the database and that exceed the requirements of NRS Chapter 604A when it purports to mandate what customers must affirm in writing.

Third, it is unclear whether or how licensees will know whether the database is unavailable. Nothing in S.B. 201 requires licensees to query the database when making a loan, and the FID has represented that the database will interface with licensees' current software systems. Thus, it is not apparent that anything would alert licensees to the fact that the database is unavailable. It is unfair to require licensees to notate on loan files that the loan was originated during a period in which the database was unavailable if the licensee does not know the database is unavailable. If the database truly interfaces with licensees' systems, it is unclear why there is a requirement for licensees to "[e]nter the loan into the database not later than 24 hours after the database becomes operational." Presumably, this would happen automatically once the database is operational. To the extent this is something licensees must do manually, TitleMax suggests that "not later than 24 hours after the database becomes operational" be changed to "not later than the licensee's next

business day after the database becomes operational." The database could become operational during times in which the licensee is closed for business.

10. Section 15: Section 15 provides, "***1. Except as otherwise provided in this section, the service provider shall charge and collect a fee from each licensee for each loan which the licensee approves and enters into the database. The fee:***
(a) Must have been established by the competitive procurement process through which the service provider was selected by the Commissioner; and
(b) Must not exceed $3 per approved loan.
2. The service provider shall not charge or collect a fee from a licensee for a loan which is:
(a) Not approved;
(b) Voided; or
(c) Rescinded.
3. The fee may be charged only at the time of the origination of a loan and cannot be charged to extend, roll over, renew, refinance or consolidate a loan, or for any other action which would extend the due date."

TitleMax objects to the language that the "fee may be charged only at the time of the origination of a loan and cannot be charged to … refinance or consolidate a loan, or for any other action which would extend the due date." When TitleMax refinances a title loan or refinances two previous loans into one (consolidates the two), a completely new loan is made, with a new loan agreement, new Truth-in-Lending-Act Disclosures, and a new payment schedule. When a new loan is entered into the database, the service provider will not know whether it is a refinance or an initial loan, and the service provider will presumably charge TitleMax the service provider fee. As contemplated by statute and the regulations as currently drafted, TitleMax must be able to pass on any database charge it incurs to its customers. Moreover, "origination" is not defined. A refinance is a new loan that is originated as of the day the loan is made.

By listing together "extend, roll over, renew, refinance or consolidate a loan, or for any other action which would extend the due date," the FID appears to attempt to provide by regulation that refinancing and consolidation extend the due date of the original loan and are equivalent to extensions. This is improper, as a Nevada district court has affirmed that TitleMax's refinances create a new loan rather than extend an original loan. *TitleMax of Nevada, Inc. v State, Dept. of Business and Industry Financial Institutions Div*, No. A-18-786784-C, 2019 WL 3754784, at *7 (Nev. Dist. Ct. June 20, 2019). The FID cannot pass a regulation contrary to the court's statutory interpretation. *Fed. Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981) ("courts are the final authorities on issues of statutory construction"); *see also Ctr. for Biological Diversity v. U.S. Army Corps of Engineers*, 941 F.3d 1288, 1299 (11th Cir. 2019) ("regulations cannot contradict their animating statutes or manufacture additional agency power").

Furthermore, TitleMax's understanding is that when a loan is made, the service provider fee will be charged then. Instead of providing that the service provider fee cannot be charged for a voided or rescinded loan, the regulations should provide that the service provider must refund to licensees – and licensees must refund to the customer – the service provider fee charged for a loan that is later voided or rescinded.

11. Section 16: Section 16 provides, "***1. A licensee shall not charge or collect from a customer a fee:***
(a) If a loan is not approved.
(b) If a loan is voided.
(c) If a loan is rescinded.
(d) In an amount which exceeds the actual cost of the fee charged to the licensee by the service provider.
2. The fee must be itemized on the loan agreement, regardless of whether the fee is required to be included in the finance charge under the Truth in Lending Act, as amended, 15 U.S.C. §§ 1601 et. seq., and Regulation Z, 12 C.F.R. Part 226."

TitleMax reiterates that voiding and rescinding loans occur *after* a loan has been made. The regulations should provide that licensees must refund to the customer the service provider fee charged for voided or rescinded loans.

As "itemized" is not defined, TitleMax suggests it would be clearer to state that "the service provider fee must be disclosed in the loan agreement and listed separately from any other charge."

12. Section 17: Section 17 provides, "***Except as otherwise provided in section 13 of this regulation, a licensee shall enter into the database, in real time:***
1. Each loan originated by the licensee;
2. Each renewal, extension, rollover and refinance of a loan;
3. Information concerning a loan has entered a grace period;
4. Each payment on a loan;
5. The date on which an offer of a repayment plan is sent;
6. The date on which a repayment plan is entered into by the customer and the licensee;
7. Each declined loan; and
8. Any other transaction relating to a loan, as applicable and in compliance with the provisions of this chapter and chapter 604A of NRS."

As an initial matter, Section 13 does not address what a licensee shall enter into the database, so it is unclear why Section 17 commences with "Except as otherwise provided in section 13 of this regulation."

Second, as explained above in Paragraph 2 of these comments, Section 17 exceeds the scope of permissible regulations under S.B. 201. NRS 604A.303(2) already specifies exactly what information the licensee must enter into the database. For example, NRS 604A.303(2) requires licensees to enter the date of default and the date on which the customer enters into a repayment plan. NRS 604A.303(2)(g)-(h). Section 17 is duplicative when it requires entry of the "date on which a repayment plan is entered into," and it is inconsistent when it purports to add additional requirements of what information must be entered into the database (such as refinances, grace periods, and declined loans). The Legislature already specified exactly what information had to be entered into the database and did not leave this to regulation.

Third, "real time" is not defined. In responding to comments, the FID previously stated that the "database operates in real time. It interfaces with the licensee's current system; there, the

information will be entered into the database as the licensee enters it into their software." TitleMax would like to understand exactly how information will interface with TitleMax's proprietary loan management software. TitleMax uses IT personnel that are constantly updating and maintaining TitleMax's proprietary loan management software. TitleMax has concerns about the amount of access to its proprietary loan management software, which it has invested significant time and money in developing and that contains trade secret and confidential information. In addition, it is unclear if "real time" means that as long as the information in TitleMax's proprietary loan management software interfaces with the database, this is sufficient – or if the regulation is requiring that licensees enter information into their own systems "in real time." This merits clarification.

Fourth, requiring entry of "[a]ny other transaction relating to a loan, as applicable and in compliance with the provisions of this chapter and chapter 604A of NRS" is both overbroad and contradictory. "Transaction" is not defined. Would this, for example, include "payment receipts" and "collection notes" that appeared in a previous version of the regulations, but were then deleted? Licensees must be able to understand precisely what information they are required to enter into the database – each piece of information must be carefully enumerated (as the Legislature already did), not captured with an ambiguous catch-all phrase such as "any other transaction." Moreover, since NRS 604A.303(2) already lists precisely what must be entered into the database, there are no other transactions that must be entered into the database "in compliance with the provisions of this chapter and chapter 604A of NRS."

Fifth, the proposed regulation purports to require entry of each "declined loan" into the database. NRS 604A.303(3) provides, "The Commissioner shall establish, and cause the vendor or service provider administering the database created pursuant to subsection 1 to charge and collect, a fee for each loan entered into the database by the licensee." Thus, if a declined loan has to be entered into the database, there must be a fee for this. However, the proposed regulations also provide, "A licensee shall not charge or collect from a customer a fee: (a) If a loan is not approved." (Sec. 16.) If there is no fee for a declined loan, then a declined loan should not have to be entered into the database. NRS 604A.303 requires both that a fee should be charged for each loan "entered into the database" and that licensees must enter information only for loans "made to a customer." NRS 604A.303(2)-(3). If a loan is declined, no loan is made to any customer and the licensee should not be required to enter anything into the database.

Sixth, the proposed regulation requires entry into the database of "[e]ach loan originated by the licensee" and "[e]ach renewal, extension, rollover and refinance of a loan." TitleMax's refinances are new loans "originated by the licensee," so they would be entered into the database as new loans. To the extent the FID is attempting to provide via regulation that refinances are not new loans (by listing refinances with extensions and rollovers) – or that title loan refinancing is not permissible – a Nevada district court has ruled against the FID on these precise issues. *See TitleMax of Nevada, Inc. v State, Dept. of Business and Industry Financial Institutions Div*, No. A-18-786784-C, 2019 WL 3754784, at *5-10 (Nev. Dist. Ct. June 20, 2019). The FID cannot circumvent the court's statutory interpretation by passing a contrary regulation. *Fed. Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981) ("courts are the final authorities on issues of statutory construction").

13. Section 18: TitleMax believes Section 18 exceeds the scope of S.B. 201 by requiring entry into the database of information not required by S.B. 201. However, TitleMax will not address Section 18 in detail, as it pertains to deferred deposit and high-interest loans, not title loans.

14. Section 19: Section 19 provides, "***Except as otherwise provided in section 13 of this regulation, a licensee who makes a title loan shall, in real time, enter into the database the following information:***
1. Verification that the customer is the legal owner of the vehicle which secures the loan.
2. Whether the customer is a covered service member.
3. Whether the customer is a dependent of a covered service member.
4. The origination date of the loan.
5. The term of the loan.
6. The principal amount of the loan.
7. The total finance charge associated with the loan.
8. The fee charged for the loan.
9. The due date of the loan.
10. The annual percentage rate of the loan.
11. The scheduled payment amount.
12. The payment details as described in section 20 of this regulation.
13. The year, make, model and vehicle identification number of the vehicle which secures the loan.
14. The fair market value of the vehicle as valued by a third-party vendor.
15. If applicable:
(a) The name of the legal co-owner of the vehicle; and
(b) The consent of the legal co-owner of the vehicle for the vehicle to serve as security for the loan."

As an initial matter, it is unclear to TitleMax why so many different sections of the proposed regulations address what licensees allegedly must enter into the database (Sections 17, 18, 19, and 20). The regulations would be more coherent if there were one section governing everything that must be entered into the database (even if there are different subsections for high-interest, deferred deposit, and title loans).

More fundamentally, Section 19 surpasses the statutory scope of S.B. 201, which already specifies exactly what information licensees must enter into the database. NRS 604A.303(2); (*see also supra* ¶ 2.) Section 19 duplicates certain requirements of S.B. 201, such as by requiring entry of the date of the loan, the principal, the total finance charge, the fees charged for the loan, and the annual percentage rate of the loan. *See* NRS 604A.303(2)(a), (c)-(f).) [1] There is no need to require entry of this information by regulation when it is already statutorily required. Section 23 is inconsistent with S.B. 201 by purportedly requiring entry of several additional details that S.B. 201 does not authorize.

[1] While NRS 604A.303 requires licensee to enter the "fees charged for the loan," NRS 604A.303(2)(d), the proposed regulation refers to the "fee charged for the loan" in the singular. It is ambiguous what fee this is referring to. The statutory language and the regulatory language should be consistent – which is why it is problematic and unnecessary for the regulations to repeat certain items already present in the statute (and then add additional, unauthorized items).

15. Section 20: Section 20 provides, "***1. Except as otherwise provided in section 13 of this regulation, for each payment made on a loan, the licensee shall, in real time, enter into the database the following information, without limitation:***
(a) The scheduled payment amount.
(b) The due date of the payment.
(c) The actual payment amount.
(d) The date on which the payment was made.
(e) The allocation of the total payment, including, without limitation, the dollar amount applied to the principal and the dollar amount applied to interest and fees.
(f) The amount and date of payment received from a customer when the loan is paid in full.
2. If a customer fails to make a payment as scheduled, the licensee shall enter into the database the following information:
(a) The new interest rate, if applicable.
(b) Whether a repayment plan was offered.
(c) Whether the customer entered into a repayment plan.
(d) The duration of the grace period, if any.
3. If a customer enters into a loan agreement which requires installment payments, the licensee must enter into the database the information required pursuant to subsection 1 for each installment payment."

Section 20 purports to require licensees to enter into the database detailed information as to each and every payment. This is inconsistent with S.B. 201, which already prescribes what information a licensee must enter into the database. NRS 604A.303(2); (*see also supra* ¶ 2.) S.B. 201 requires:

(a) The date on which the loan was made;
(b) The type of loan made;
(c) The principal amount of the loan;
(d) The fees charged for the loan;
(e) The annual percentage rate of the loan;
(f) The total finance charge associated with the loan;
(g) If the customer defaults on the loan, the date of default;
(h) If the customer enters into a repayment plan pursuant to NRS 604A.5027, NRS 604A.5055 or NRS 604A.5083, as applicable, the date on which the customer enters into the repayment plan; and
(i) The date on which the customer pays the loan in full.

NRS 604A.303(2). That is all S.B. 201 requires. Section 20 goes far beyond S.B. 201 and requires details the Legislature rejected. For example, Section 20 requires entry of the amount and date of each payment. Sometime customers make several small payments, and the Legislature wisely did not include such minutiae in S.B. 201. Only the main terms of the loan agreement, the date of default, the date of any repayment plan, and the date on which the customer pays the loan in full are required. NRS 604A.303(2).

Moreover, there are now many sections governing what must purportedly be entered into the databased. Entry of whether a customer entered a repayment plan is now required by NRS 604A.303(2)(h), Section 17, Section 20, and Section 21. There is no need for such redundancy –

it only makes it more cumbersome to ensure compliance with all statutory and regulatory provisions.

16. Section 21: Section 21 provides, "***Each licensee shall enter into the database and maintain the status of each loan originated by that licensee, including, without limitation:***
1. If the loan is in collection, whether being collected by the licensee or by a third party:
(a) The date on which the loan entered into collection.
(b) The payment history of the loan.
2. If the loan is in default:
(a) The date on which the loan entered into default.
(b) The payment history of the loan.
(c) And if the interest rate changed, the new rate and the date on which the rate changed.
3. If the loan is in a grace period:
(a) The date on which the loan entered into the grace period.
(b) The payment history of the loan.
4. If the loan is in a repayment plan:
(a) The date on which the loan entered the repayment plan.
(b) The payment history of the loan.
5. If the loan is closed:
(a) The date on which the loan closed.
(b) The reason the loan was closed.
6. If a vehicle which secured a loan was ordered to be repossessed:
(a) The date on which the vehicle was ordered to be repossessed.
(b) The date on which the repossession of the vehicle occurred."

It is again unclear to TitleMax why so many different sections purportedly govern what must be entered into the database. Parts of Section 21 are duplicative of Section 20 (such as requiring payment history) and NRS 604A.303(2) (such as specifying the date a repayment plan was entered into). However, Section 21 is inconsistent with S.B. 201 in that it requires much more information to be entered into the database than what NRS 604A.303(2) requires. (*See supra* ¶ 2.)

NRS 604A.303(2) provides the only information a licensee must "enter or update," and the updates are manageable as they require only entering or updating the primary terms of the loan, the date of default, the date a repayment plan is entered, and the date on which the customer pays the loan in full. NRS 604A.303(2). Section 21, in contrast, is extremely burdensome and exceeds the scope of S.B. 201. For example, a loan is theoretically always "in collection" status until it is paid in full, yet the proposed regulation purports to require entry of the "date on which the loan entered into collection." This does not make sense to TitleMax as the loan is always in first-party collection until it is paid in full or referred to a third-party collector. The regulation is inconsistent with its animating statute.

Moreover, if the database truly interfaces with licensees' loan systems (as the FID previously suggested), it is unclear why the status of the loan would have to be entered into the database at all – presumably, the status of any loan would be ascertainable because the database would interface with the lender's loan platform. TitleMax suggests that Section 21 be deleted in its entirety.

17. Section 22: Section 22 provides, "***A licensee shall retain for not less than 3 years all data and documentation collected and reviewed for any loan, loan transaction or query made in the database. For the purposes of this section, 'documentation' includes, without limitation:***
1. All copies of the documents considered in determining the ability of a customer to repay a loan, including the gross income of the customer, identity and credit history; and
2. For title loans, any third-party vendor documentation which shows the fair market value of the vehicle which secured the title loan and a copy of the title to the vehicle."

First, this regulation purports to require retention of any and all data and documentation reviewed for any loan, loan transaction, or query made in the database (even though "loan transaction" is not defined and is unclear). The proposed regulation exceeds the scope of S.B. 201, as it purports to impose a broad document retention standard unrelated to information in the database. Moreover, such a document retention regulation is unnecessary, as NAC 604A.200 already provides, "Except as otherwise provided in NRS 604A.700, a licensee shall maintain for at least 3 years the original or a copy of each account, book, paper, written or electronic record or other document that concerns each loan or other transaction involving a customer in this State." Proposed Section 21 is duplicative and unnecessary (and to the extent it is not duplicative, it would be inconsistent with NAC 604A.200). The FID deleted former proposed sections that dealt with document retention as well. The FID should delete proposed Section 21, as NAC 604A.200 is already a comprehensive regulation governing document retention.

Second, TitleMax objects to any purported requirement to retain "[a]ll copies of the documents considered in determining the ability to of a customer to repay a loan, including the gross income of the customer, identity and credit history." That has nothing to do with the database and is again beyond the scope of S.B. 201. To the extent the FID is attempting to amend NRS 604A.5065 via regulation, that is improper. While NRS 604A.5065(2) lists the "current or reasonably expected income of the customer" and the "credit history of the customer" as potential underwriting factors to be considered "to the extent available," documents reporting the customer's income and credit history are not always available or provided to TitleMax. TitleMax cannot retain documents it does not have. Moreover, "credit history" is not defined. "Credit history" could refer to TitleMax's own assessment of a customer's credit history with TitleMax, or it could refer to a third-party report. But nothing in NRS Chapter 604A requires TitleMax to order and pay for a credit history report from a third-party company such as Equifax, Experian, or TransUnion. To the extent proposed Section 22 purports to require lenders to always retain documentation of a customer's income and credit history, that is inconsistent with NRS 604A.5065(2) and should be amended. *See Portland Audubon Soc. v. Endangered Species Comm.*, 984 F.2d 1534, 1543 n.21 (9th Cir. 1993) ("Regulations that are inconsistent with the provisions of the act they implement cannot stand."); *Duke v. United States*, 255 F.2d 721, 724 (9th Cir. 1958) ("If there is any conflict between the statute and the regulation, the former prevails."); *United States v. Bastide-Hernandez*, 360 F. Supp. 3d 1127, 1135 (E.D. Wash. 2018) ("An agency cannot, through the passage of a regulation, change a statute.").

Section 22 exceeds the scope of S.B. 201, is inconsistent with 604A.5065(2), and is unnecessary in light of NAC 604A.200.

18. Section 23: Section 23 provides, "***1. Except as otherwise provided in section 10 of this regulation, a licensee shall not delete any information relating to a customer that is entered into the database.***
2. If a loan or loan transaction is voided or rescinded, a licensee must notate on the loan file and in the database that the loan or loan transaction is voided or rescinded, as applicable, and the reason that the loan or loan transaction is voided or rescinded. Except as otherwise provided in section 10 of this regulation, the licensee shall not delete the voided or rescinded loan or loan transaction from the database."

    Section 10 addresses the service provider archiving and deleting information, whereas Section 23 addresses the licensee deleting information. Section 10 does not appear to be an exception to Section 23, and it is unclear why Section 23 commences, "Except as otherwise provided in section 10." It is also unclear to TitleMax whether licensees will even have the ability to delete information in the database. If not, there is no reason for this regulation.

19. Section 24: Section 24 provides, "***1. The Office of the Commissioner must have access to the database and will use the database as a tool of enforcement to ensure the compliance of each licensee with the provisions of this chapter and chapter 604A of NRS.***
2. The Office of the Commissioner may periodically run reports for purposes other than examinations, investigations or internal reporting, including, without limitation, to publish online a report regarding the scope of the industry. The data in such a report must not disclose identifying customer information or information which identifies a licensee, including, without limitation, the name, address or number of the license of a licensee. The report may contain:
(a) The number of loans made for each loan product;
(b) The number of defaulted loans;
(c) The number of loans paid, including the number of loans paid by their respective due dates and loans paid after their respective due dates;
(d) The total amount borrowed and collected; and
(e) Any other permissible data that the Commissioner or his or her designee deems necessary."

    It is unclear what the regulation means when it states that the FID "will use the database as a tool of enforcement." The FID itself assured the Nevada Legislature that S.B. 201 "does not provide us with any abilities that we do not currently have, nor would it provide us any additional powers." Nevada Assembly Committee Minutes, 5/10/2019 (testimony of Rickisha Hightower, former Interim Commissioner of the FID). To the extent the FID proposes regulatory requirements that are inconsistent with S.B. 201 and then wants to use the database to enforce those requirements that are inconsistent with NRS Chapter 604A, that is an improper use of the FID's rule-making power.

    Moreover, in providing that reports from the database may contain "[a]ny other permissible data that the Commissioner or his or her designee deems necessary," the regulation is broad, ambiguous, and vests the FID with unbridled discretion. Why list what reports from the database may contain if they may contain anything at all?

    TitleMax suggests that Section 24 is impermissibly broad and vague.

20. Section 25: Section 25 provides, "***A customer may request from a licensee, without charge, fee or cost, a copy of his or her loan history, file, record and any other documentation relating to any loan for which the customer applied or the repayment of any loan made to the customer.***"

This section has nothing to do with the database and is beyond the scope of S.B. 201. TitleMax already has procedures in place whereby customers can request a copy of their loan agreement and any documents they have signed. However, the proposed regulation is overbroad, as it encompasses *any* documentation relating to any loan. This could potentially include confidential and propriety information as well as collection notes and attorney-client privileged information. Nothing in S.B. 201 addresses customers having a right to request information from licensees, and this section exceeds the statutory authorization for the FID to implement regulations "necessary for the administration of the database." NRS 604A.303(5)(d). Thus, this section should be removed as beyond the scope of S.B. 201 and potentially in conflict with Nevada's privilege statutes (*see* NRS Chapter 49).

Thank you for the opportunity to provide comments and suggestions regarding the proposed regulations. Please feel free to contact me should you have any questions or require any clarifications.

Sincerely,

/s/ Dale Kotchka-Alanes
Dale Kotchka-Alanes
Lewis Roca Rothgerber Christie LLP