STATE of NEW HAMPSHIRE
BANKING DEPARTMENT
53 Regional Drive, Suite 200
Concord, NH 03301

In re the Matter of:	)	DECISION
Advance America, Cash Advance	)	
Centers of New Hampshire, Inc.	)	
	)	
Request for No-Action Determination/	)	January 6, 2009
Declaratory Ruling	)	

Advance America, Cash Advance Centers of New Hampshire, Inc., a licensed small loan lender pursuant to NH RSA Chapter 399-A ("Company"), has requested that the New Hampshire Banking Department ("Department") issue a no action letter or declaratory ruling that the credit line product described in the Company's request letter dated December 9, 2008 and the supplemental materials attached thereto ("Credit Line Product") complies with New Hampshire law and that the Company may offer the Credit Line Product on and after January 1, 2009. Specifically, the Company argues that the Credit Line Product is a small loan rather than a payday loan, and thus, the 36% APR cap on payday loans does not apply.

Having considered the Company's December 9, 2008 request and the supplemental materials attached thereto, I find that the Credit Line Product does not comply with New Hampshire law and that it may not be offered in New Hampshire or to New Hampshire consumers after the date of this Letter. I so find because an APR of 365% or more on a small loan constitutes an unfair trade practice pursuant to RSA 383:10-d and is therefore unlawful. Further, the Credit Line Product contract is vague in regards to key terms and conditions and is thus deceptive. The determination of unfairness and deception renders the Company's argument regarding the type of loan – small loan vs. payday – moot.

Discussion

New Hampshire's Consumer Protection Act, RSA chapter 358-A ("CPA") is a comprehensive statute designed to regulate business practices for consumer protection and its terms should be broadly defined. While entities regulated by the Bank Commissioner are exempt from the CPA under 358-A:3,I, the Commissioner has "exclusive authority and jurisdiction to investigate conduct that is or may be an unfair or deceptive act or practice under [the CPA] and exempt under RSA 358-A:3,I . . .." (RSA 383:10-d). Since the Company as a small loan lender is an entity regulated by the Bank Commissioner, its conduct or potential conduct is within the Commissioner's jurisdiction to enforce the prohibition against unfair and deceptive trade practices.

By its terms, in enforcing RSA 383:10-d, the Commissioner must first look to the CPA itself in determining whether conduct is an unfair or deceptive act or practice.

The CPA states that:

> It shall be unlawful for any person to use any unfair method of competition or any unfair or deceptive act or practice in the conduct of any trade or commerce within this state. Such unfair method of competition or unfair or deceptive act or practice shall include, but is not limited to, the following . . . . (RSA 358-A:2).

The CPA proscribes unfair or deceptive trade practices in general, and then provides a non-exhaustive list of specific acts deemed to be unfair or deceptive. The list of specific acts does not include acts that specifically address the conduct of a financial services company such as Advance America. When the Act was drafted and in subsequent amendments, trade or commerce subject to the jurisdiction of the Commissioner was exempt from the Act. (RSA 358-A:3). Unfair or deceptive acts or practices potentially attendant to financial commerce were consequently not contemplated when the enumerated categories were established. The Legislature, however, gave the Commissioner the authority to interpret what constitutes an unfair or deceptive act or

practice for trade or commerce subject to the Commissioner's jurisdiction. (See RSA 358:10-d).

In deciding whether a specific act or practice is unfair or deceptive, the New Hampshire Supreme Court looks to the federal courts' and agencies' interpretation of the Federal Trade Commission ("FTC") Act for guidance. (See RSA 358-A:13). The Commissioner's duty in this regard is akin to that of the FTC as articulated by Judge Learned Hand, "to discover and make explicit those unexpressed standards of fair dealing which the conscience of the community may progressively develop."[1] Thus, in making my determination, the FTC test will be employed.

The first prong of the FTC test asks whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise – whether, in other words, it is within at least the penumbra of some common-law, statutory or other established concept of unfairness. My answer is that an APR of up to 365% or more on a small loan is within that penumbra of unfairness.

The NH Legislature clearly is concerned about high interest rates being charged to "individuals who are otherwise unable to obtain credit." (HB 267 301:1). In enacting House Bill 267 (2008), the Legislature stated that APR interest rates of up to 350% and more were "unfair and improper" and proceeded to cap title and payday loans at 36%. (HB 267 301:1-3). The APR contemplated by the Company's proposed Credit Line Product is at a minimum 365% and may be as high as 456%. Certainly equity instructs us that if an APR of up to 350% is "unfair" then charging in excess of 350% APR is unfair as well.

Some may argue that if the Legislature wanted to cap all small loan interest rates at 36% they could have done so. This misses the point. The CPA was enacted to prohibit

[1] FTC v. Standard Educ. Soc'y, 86 f.2D 6921,696 (2d Cir 1936) rev'd in part on other grounds, 302U.S. 112 (1937).

unfair trade practices that, while not specifically proscribed by the law, nevertheless were within that penumbra spoken of by Justice Hand. Conduct that is otherwise legal may still be an unfair or deceptive trade practice. Proving that the Credit Line Product is not a payday (or title) loan does not mean that the loan is fair. The Legislature heard ample evidence of the unfairness of the interest rates charged by payday and title lenders. The unfairness was not that the loans were called payday or title loans. The unfairness was because of the interest rates charged.

Further, it does not serve the public interest to protect only consumers of "payday" or "title" loans from 350% or more APR which the Legislature has found to be unfair. Thus, I find that the interest rates of the Credit Line Product fall within the FTC test's penumbra.

The second inquiry of the FTC test focuses on whether the practice is immoral, unethical, oppressive, or unscrupulous. Again looking to the Legislature, it has found that charging more than 350% APR is "unreasonable and predatory." (HB 267, 301:1). Studies have shown that those entangled in these sorts of high interest loans are more likely to declare bankruptcy and can increase a consumer's financial distress, rather than decrease it. (See SB 472 321:1,II). In addition, Commission to Study Access to Consumer Credit for People in New Hampshire heard ample testimony concerning the negative impact these loans have on the people who take the loan. This included a report that a statistically higher number of borrowers file bankruptcy within a few years of being approved for a payday loan as opposed to those who were not approved. Lastly, small loan licensees themselves have testified that consumers who utilize their products do so because they have no where else to go. To charge up to 350% APR or more to consumers with no other options is contrary to the idea of consumer protection. For these above reasons, I find that the Credit Line Product is oppressive and unscrupulous.

The third and final inquiry in the FTC test is whether the act causes substantial injury to consumers. The FTC has stated that a substantial consumer injury generally consists of monetary, economic or other tangible harm. Charging consumers high interest causes monetary harm to the consumer. 36% APR has been determined by the NH legislature to be "reasonable." (HB 267 301:1).

Under the Credit Line Product, a consumer who borrows $500 for a year paying just the interest at 365% will pay $2,325 in interest payments. A consumer who borrows $500 for a year paying just the interest at 456% will pay $2,780 in interest payments. A loan that envisions paying interest over 5.5 times the principal of the loan is oppressive. Consequently, charging a minimum of 365% APR is unreasonable and causes substantial harm to the consumer.

All three inquiries of the FTC test have been answered in the affirmative. Accordingly, the Credit Line Product is unfair under 358-A and is therefore unlawful.

Conclusion

I hereby find that any small loan product providing for 365% or more APR is unfair pursuant to RSA 383:10-d and may not be offered in New Hampshire or to consumers in New Hampshire. This ruling does not hold that an APR of under 365% for a small loan is valid or fair. All institutions regulated by the Bank Commissioner and exempt from the CPA are bound by this order. Further, any acts in contravention of this decision may be subject to a hearing to order restitution and any other remedies available.

January 6, 2009

/s/

Peter C. Hildreth
Bank Commissioner
New Hampshire Banking Department