

**STATE of NEW HAMPSHIRE
BANKING DEPARTMENT**

53 Regional Drive, Suite 200
Concord, NH 03301

In re the Matter of:
CashForce USA, Inc.

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Order

August 11, 2009

I. Authority

CashForce USA, Inc., is a New Hampshire licensed small loan lender pursuant to NH RSA 399-A (“Company”).

Pursuant to RSA 399-A:16, IV, the commissioner may issue, amend or rescind such orders as are reasonably necessary to carry out the provisions of Chapter 399-A, “Regulation of Small Loans, Title Loans and Payday Loans.” The commissioner may act when the commissioner finds that such action is necessary or appropriate to the public interest or for the protection of consumers and consistent with the purposes fairly intended by the policy and provisions of Title XXXVI. RSA 399-A:16, VI.

For a small loan lender, engaging in “dishonest or unethical practices in the conduct of making or collecting small loans” is grounds for the assessment of penalties or denial, suspension or revocation of a license. RSA 399-A:7, I, I and I (h).

The commissioner also has “exclusive authority and jurisdiction to investigate conduct that is or may be an unfair or deceptive act or practice under [the New Hampshire Consumer Protection Act] and exempt under RSA 358-A:3, I or that may violate any of the provisions of Titles XXXV and XXXVI and administrative rules adopted thereunder. The commissioner may hold hearings relative to such conduct and may order restitution for a person adversely affected by such conduct.” RSA 383:10-d. RSA 358-A:3, I exempts, among other transactions, trade or

commerce that is subject to the jurisdiction of the commissioner. Since the Company is a small loan lender it is an entity regulated by the commissioner and is exempt under RSA 358-A:3, I. Accordingly, the commissioner has jurisdiction to enforce the prohibition against unfair and deceptive trade acts or practices against Company.

II. The Product

In January 2009, Company stated to Department examiners that Company was not offering new loans. On or about May 2009, Company advertised small loan open-end lines of credit of up to \$1500 to New Hampshire consumers (“Product”). Pursuant to RSA 399-A:10, the commissioner instituted an investigation to determine the Product’s compliance with 399-A and the rules adopted thereunder. Upon information and belief, as of August 5, 2009, Company was still offering the Product. The Revolving Line of Credit (NH) Agreement for the Product (“Product Agreement”) produced by Company contemplates lines of \$250 - \$700 and contains, *inter alia*, the following terms:

Credit Limit	\$250	\$350	\$500	\$600	\$700
Monthly access fee	\$90	\$125	\$175	\$200	\$225
Stated “APR” / annual interest (“monthly interest rate” 2.5%)	30%	30%	30%	30%	30%
Minimum monthly periodic payment (access fee + required principal + interest)	\$103.75 (\$7.50 principal, \$6.25 int.)	\$144.25 (\$10.50 principal, \$8.75 int.)	\$202.50 (\$15.00 principal, \$12.50 int.)	\$233.00 (\$18.00 principal, \$15.00 int.)	\$263.50 (\$21.00 principal, \$17.50 int.)

The access fee is due and payable on the sixth day of any month there is an outstanding balance greater than \$24.99. The access fee is not refundable or prorated. Late fees and a non-sufficient funds fee are charged, if applicable. Interest is charged from the date of each advance, there is no grace period. Paying the minimum monthly payment it would take a consumer 34 months - almost 3 years - to pay off a one-time draw of \$250 at a cost of over \$3,100 (assuming no late payments or non-sufficient fund fees). For a one time draw of \$700 it

would take a consumer the same 34 months to pay it off paying the minimum monthly payment at a total cost of over \$8,400 (again, assuming no late payments or non-sufficient fund fees).

III. Discussion

A. Consumer Protection

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. In enforcing RSA 383:10-d, the commissioner first looks to the CPA itself in determining whether conduct "is or may be 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 small loan lender in part because its activities were exempt at the time of drafting. The New Hampshire Legislature, however, gave the commissioner the authority to protect consumers through enforcement of the CPA and the banking laws. See RSA 399-A:16, VI and 358:10-d. See also RSA 399-A:7, I (h).

Enforcement necessitates interpretation of what constitutes or may constitute unethical, unfair or deceptive acts or practices for trade or commerce subject to the commissioner's jurisdiction.¹ In deciding whether a specific act or practice is unfair or deceptive, the bank commissioner's duty is akin to that of the Federal Trade Commission 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."²

¹ See RSA 399-A:2, III commissioner in role as supervisor must interpret the intent of 399-A to determine the scope of the chapter.

² 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).

1. Finance Charge and Annual Percentage Rate

The January 6, 2009 decision “In Re Advance America, Cash Advance Centers of New Hampshire, Inc.” (“Advance America”), found 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.”

“APR” is an acronym for annual percentage rate. The goal of an annual percentage rate is to relate the amount and timing of value received by the consumer to the amount and timing of payments made. The annual percentage rate is the finance charge expressed as a nominal yearly rate. The finance charge is a measure of the cost of consumer credit represented in dollars and cents. Finance charges include charges or fees payable directly or indirectly by the consumer and imposed directly or indirectly by the lender either as incident to or as a condition of an extension of consumer credit. A finance charge usually does not include any charge of a type payable in a comparable cash transaction, e.g. taxes, title, and license or registration fees. The finance charge always includes any interest charges and often other charges as well such as participation fees, loan origination fees, and monthly service charges. What charges are included depends on the definition of “finance charge” being utilized and can differ.

The chapter addressing small loans, RSA 399-A, however, does not define “finance charge.” Fortuitously, New Hampshire law is not void of applicable guidance in this matter.³ RSA 358-C, “Unfair, Deceptive or Unreasonable Collection Practices,” defines finance charge as “a charge such as interest, fees, service charges, discounts and other charges associated with the extension of credit.” RSA 358-C:1, IX.⁴ For the purpose of determining unethical, unfair or deceptive acts or practices, the finance charge (and therefore, the corresponding APR)

³ Accordingly, there is no need to turn to federal law. Further, federal law does not provide a suitable definition. For example, Regulation Z (15 U.S.C. 1601 *et seq.*) defines “finance charge” and “APR” for disclosure purposes only. As such, its definitions are not appropriate for use in determining whether an act, practice or product is unethical, unfair or deceptive under New Hampshire law. The federal Military Lending Act (10 U.S.C. 987 see also 32 CFR Part 232), is only applicable to closed-end loans and as such is also not suitable.

⁴ While it is a disclosure statute, Chapter 399-B, “Disclosure of Finance Charges” for Pawnbrokers and Moneylenders, similarly defines “finance charges” to include “charges such as interest, fees, service charges, discount, and other charges associated with the extension of credit.” RSA 399-B:1, II.

must accurately reflect the total cost to the consumer of utilizing the credit product by whatever name, e.g. interest, access fees, participation fees, application fees, etc. The definition contained in RSA 358-C does so and is thus appropriate to this determination.

B. Analysis

In Advance America, the product contemplated had a minimum of a 365% annual interest rate. There were no monthly participation or access fees, accordingly, the APR was the interest rate. The Product has 30% interest. The Product Agreement represents the interest rate as “APR = 30%” which equates APR with interest, no other fees or charges are included in the APR. While this representation of APR is not necessarily inaccurate for disclosure purposes under Regulation Z provisions for open-end credit, it is not an accurate representation of the true cost to the consumer and that is the focus of this analysis. For that, the definition of finance charge as defined above must be applied. Applying that definition, the finance charge of the Product is: interest rate + access fee. The result is as follows:

Credit Limit	\$250	\$350	\$500	\$600	\$700
Annual Interest	30%	30%	30%	30%	30%
per Month	\$6.25	\$8.75	\$12.50	\$15.00	\$17.50
per Year	\$75	\$105	\$150	\$180	\$210
Access Fee per month	\$90	\$125	\$175	\$200	\$225
per year	\$1080	\$1500	\$2100	\$2400	\$2700
Access fee % of Credit Limit – Annual	432%	429%	420%	400%	386%
Finance Charge annual (interest + access fees)	\$1155	\$1605	\$2250	\$2580	\$2910
APR	462%	458.57%	450%	430%	415.71%

As discussed above, a one-time draw of \$250 can cost a consumer over \$3,100. The majority of that cost is in access fees, \$2,790. For a one-time draw of \$700, the access fees in the example above total \$7,425. Clearly, access fees significantly impact the total cost of the Product for the consumer. It is unreasonable, therefore, to not include fees in a calculation of the finance charge, and thus the APR, for purposes of analyzing a credit product in terms of unethical, unfair or deceptive trade practices or acts.

