

STATE OF NORTH CAROLINA
WAKE COUNTY

IN A MATTER
BEFORE THE COMMISSIONER OF BANKS
DOCKET NO. 2005:008:CF

IN RE:)
)
ADVANCE AMERICA, CASH ADVANCE)
CENTERS OF NORTH CAROLINA, INC.)
_____)

ANSWER

This Answer generally sets forth, in summary fashion, the position of Advance America, Cash Advance Centers of North Carolina, Inc. ("Advance America-NC") to the Notice of Hearing as narrowed by the Commissioner's orders dated April 21, 2005 and May 11, 2005. Advance America-NC denies generally that it is subject to or has violated the North Carolina Consumer Finance Act ("CFA"), N.C. GEN STAT. § 53-166 *et seq.*

From its inception, Advance America-NC has placed the highest priority on maintaining open and straightforward communication with regulators at the state and federal levels, has intended to act lawfully, has interfaced with regulators on a regular basis to provide pertinent and comprehensive information about its business practices, and has demonstrated a good faith intent to comply with the law. Lawful business conduct always has been Advance America-NC's practice with respect to its activities in North Carolina; acting in compliance with all applicable state and federal laws and regulations is a hallmark of Advance America-NC's code of conduct. From the opening of its first location in North Carolina in 1997, Advance America-NC has provided important financial services in the State of North Carolina, responding

to demonstrated consumer needs in a manner that is cost-competitive with overdraft privileges or bounced check protection.

The business relationship currently under review began on or about March 1, 2003, when Advance America-NC entered into a Marketing and Servicing Agreement with Republic Bank & Trust ("RB&T"), a Kentucky state-chartered, federally-insured bank. Pursuant to this agreement, Advance America-NC serves as RB&T's authorized third-party agent in North Carolina to process, market and service deferred deposit transactions (the "transactions") made by RB&T to customers in North Carolina. Advance America-NC fully disclosed material aspects of that relationship, which commenced during the period following the sunset of the payday lending law, N.C. GEN. STAT. § 53-281, in which third-party agents of out-of-state banks operating lawfully under the agency business model, albeit in unregulated fashion due to what a senior OCOB representative has characterized as a "regulatory gap" that was then and is now present in the State's law.

Advance America-NC based its legitimate belief that it was and is operating legally and appropriately in North Carolina on (1) the expressed views of North Carolina regulators that Advance America-NC was operating either in conformity with North Carolina law or beyond the reach of North Carolina law, on which views it could reasonably rely, and (2) aspects of its relationship with RB&T that put it firmly under the preemptive purview of § 27 of the Federal Deposit Insurance Act ("FDIA"), 12 U.S.C. § 1831d (2001), under which state-chartered, FDIC-insured banks are authorized by federal law to charge fees or interest on any loan, note or evidence of debt at the rate permitted by the laws of the bank's home state.

Advance America-NC anticipates that the evidence submitted into the record and adduced at the hearing in this matter will illustrate these aspects and fully support the assertion that federal law preempts State regulation of this relationship.

To the extent that the Commissioner should conclude that the CFA is not preempted, despite the nature of Advance America-NC's relationship with RB&T and the reach of federal law in this area, we respectfully submit that the CFA, by its own terms, does not apply to Advance America-NC. The CFA applies to persons who “engage in the business of lending in amounts of ten thousand dollars (\$10,000) or less” and who “contract for, exact, or receive, directly or indirectly, or in connection with any such loan,” interest or fees that exceed that permitted by North Carolina’s general usury and interest laws. N.C. GEN. STAT. § 53-166(a). For purposes of determining applicability of the CFA, the statute provides that “lending” includes “endorsing or otherwise securing loans or contracts for the repayment of loans.” *Id.* While there are no reported North Carolina cases construing this language, the phrase “endorsing or otherwise securing” was intended to apply to persons who provide either an endorsement or some other form of security to a third party lender on behalf of a borrower. In other words, the term “otherwise securing” means “otherwise providing security.” The language “endorsing or otherwise securing” was designed to cover third parties who sign loan contracts as endorsers or who otherwise provide security for small loans and was not designed to refer to persons who market or solicit loans for others, as does Advance America-NC. Therefore, Advance America-NC does not fall under the coverage of the CFA.

In addition, entities that act as agents for out-of-state lenders are not themselves required to be licensed. *See* N.C. GEN. STAT. § 53-190(b). Under this statute, the licensure of the out-of-state lender that finalizes loan contracts outside of North Carolina is sufficient. *See id.* In this case, RB&T, which could otherwise be required to be licensed under the CFA as a small loan lender, enjoys an express exclusion to the CFA (N.C. GEN. STAT § 53-191), as well as federal preemption.

Moreover, the State is estopped from proceeding further against Advance America-NC due to the position it affirmatively took regarding the unregulated nature of the agency business model during the course of this relationship, and the reliance reasonably placed on that position by Advance America-NC. In the years preceding and during Advance America-NC's relationship with RB&T, the State of North Carolina has signaled that the agency business model, under which Advance America-NC and RB&T operate in North Carolina, is proper and not in violation of any State law, and beyond the application of State law. North Carolina regulators acknowledge that Advance America-NC has concealed nothing about the conduct of its business pursuant to the agency business model and was permitted to conduct such business without government interference before the institution of this proceeding.

Further, Advance America-NC has had overwhelming reason, beyond the statements and silence of state regulators, to assume that it has proceeded legally and appropriately as a federally-regulated business. This is because other regulators have treated it that way. RB&T's regulators, including the FDIC and the Kentucky Office of Financial Institutions, have examined its deferred deposit transaction product, which includes examinations

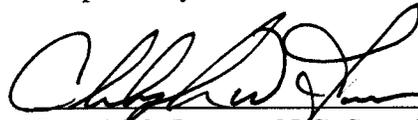
of both RB&T and Advance America-NC, on a regular basis. These examinations have identified no significant deficiencies, and regulators have approved the business conduct of Advance America-NC as RB&T's third party agent.

In addition, the evidence will show that the FDIC recognizes that banks can and do operate lawfully, safely and soundly through third parties in the payday lending business, and that the FDIC regards the banks as the regulated lender under such arrangements. The FDIC also recognizes that such use of such third party agents facilitates competition in the financial services industry and keeps down costs for consumers.

For these reasons, the evidence will show that there has been no violation of the CFA, Article 15 of Chapter 53 of the North Carolina General Statutes, N.C. GEN. STAT. §§ 53-164 *et seq.*, or the North Carolina statute entitled "Check Cashing Businesses," Article 22 of Chapter 53 of the North Carolina General Statutes, N.C. GEN. STAT. §§ 53-275 *et seq.*, and that Advance America-NC is operating lawfully, and safely and soundly as an institution-affiliated party in this State, meeting the market demand for important financial products.

Dated: July 1, 2005

Respectfully submitted,



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CERTIFICATE OF SERVICE

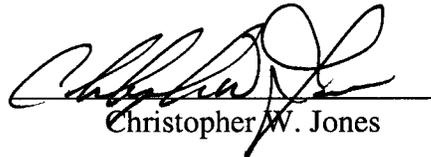
I hereby certify that I have this day served a copy of the foregoing **ANSWER** on all parties to this action by sending a copy by electronic mail and by United States mail, postage prepaid, addressed as follows:

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This the 1st day of July, 2005.


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