

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION
AT RICHMOND, DECEMBER 29, 2009

CLERK'S OFFICE

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COMMONWEALTH OF VIRGINIA

DOCUMENT CONTROL

At the relation of the

CASE NO. BFI-2009-00344

STATE CORPORATION COMMISSION

Ex Parte: In the matter of adopting
rules for the conduct of other business
in payday lending offices

ORDER ADOPTING A REGULATION

On August 4, 2009, the State Corporation Commission ("Commission") entered an Order to Take Notice of a proposal by the Bureau of Financial Institutions ("Bureau") to amend 10 VAC 5-200-100, which relates to the conduct of other business in payday lending offices. The Order and proposed regulation were published in the Virginia Register of Regulations on August 31, 2009, posted on the Commission's website, and mailed to all licensed payday lenders and other interested parties. Licensed payday lenders and other interested parties were afforded the opportunity to file written comments or request a hearing on or before October 30, 2009.

Comments on the proposed regulation were filed by Title Cash of Virginia Inc.; Approved Cash Advance Centers (Virginia), LLC d/b/a Approved Cash Advance; F&L Marketing Enterprises, LLC d/b/a Cash-2-U Payday Loans; the Center for Responsible Lending; the Virginia Poverty Law Center; Housing Opportunities Made Equal of Virginia, Inc.; and Virginians Against Payday Loans. Additionally, the Community Financial Services Association of America ("CFSA") filed comments on the proposed regulation and requested a hearing.

On November 13, 2009, the Commission entered an Order Scheduling Hearing, and on December 9, 2009, the Commission convened a hearing to consider the adoption of the proposed regulation. During the hearing regarding other business conducted in payday lending offices, there was considerable discussion regarding the conditions applicable to open-end loans secured by a security interest in a motor vehicle, as views were expressed on the two additional issues that the Commission raised in its Order to Take Notice; to wit, (i) whether a licensee or third party making such loans should be required to record its security interest with the Department of Motor Vehicles, and (ii) whether a licensee or third party should be prohibited from entering into an open-end credit plan secured by a prospective borrower's motor vehicle if the motor vehicle is already subject to a purchase money security interest or other outstanding lien.

Douglas Densmore, on behalf of F&L Marketing Enterprises, LLC d/b/a Cash-2-U Payday Loans, opined that these two provisions are inconsistent with the plain language in § 6.1-330.78 of the Code of Virginia, which provides only that a loan must be secured by a security interest in a motor vehicle. Since the legislature did not include these provisions in Chapters 784 and 860 of the 2009 Acts of Assembly, Mr. Densmore concluded that such provisions do not belong in the subject regulation.

David Clarke, representing Virginians Against Payday Loans, James Speer, on behalf of the Virginia Poverty Law Center, and Theodore Adams, representing the Center for Responsible Lending, were in favor of adding conditions to the regulation that would (i) require a licensee or third party making open-end loans to record its security interest with the Department of Motor Vehicles, and (ii) prohibit a licensee or third party from entering into an open-end credit plan secured by a prospective borrower's motor vehicle if the motor vehicle is already subject to a purchase money security interest or other outstanding lien.

It has been maintained that the proposed recordation requirement would promote the public interest by putting others on notice that a licensee or third party has a security interest in a motor vehicle. Such notice serves to protect existing lienholders, prospective lenders, and purchasers of motor vehicles who would otherwise be unaware of the security interest or the open-end loan that is secured by it. It has also be asserted that the proposed requirement would (i) avoid confusion among borrowers, lenders, and potential lienholders regarding their rights with respect to motor vehicles; (ii) ensure that licensees and third parties operating in payday lending offices are making open-end loans secured by a *bona fide* security interest in a motor vehicle; and (iii) foster greater awareness on the part of borrowers who might not otherwise fully recognize the potential consequences of failing to repay such loans.

In addition, it has been contended that prohibiting a licensee or third party from entering into an open-end credit plan secured by a prospective borrower's motor vehicle if the motor vehicle is already subject to a purchase money security interest or other outstanding lien promotes the public interest because it reduces the opportunity for licensees or third parties to make loans to borrowers that they are incapable of repaying.

Staff counsel informed the Commission at the hearing that the Bureau believes that it could enforce the two auto title lending provisions in question provided that a licensee or third party making open-end loans is required by the regulation to maintain adequate supporting documentation in its loan files. Staff counsel also furnished the Commission with the results of a Bureau survey of its fellow state regulators in which the Bureau queried whether other states that allow auto title lending have either of these two provisions in their laws. Lastly, Staff counsel responded to the CFSA's written comments regarding the Bureau's proposed regulation.

NOW THE COMMISSION, having considered the proposed regulation, the written comments filed, the record herein, and applicable law, concludes that the proposed regulation should be modified to (i) require a licensee or third party making open-end loans to record its security interest with the Department of Motor Vehicles, and (ii) prohibit a licensee or third party from entering into an open-end credit plan secured by a prospective borrower's motor vehicle if the motor vehicle is already subject to a purchase money security interest or other outstanding lien. The Commission further concludes that the regulation should be modified to require licensees or third parties to maintain adequate supporting documentation of compliance with these two provisions in their loan files. The Commission believes that these additional conditions are consistent with existing law and will promote the public interest.

Accordingly, IT IS ORDERED THAT:

(1) The proposed regulation, 10 VAC 5-200-100, as modified herein and attached hereto, is adopted effective February 1, 2010.

(2) This Order and the attached regulation shall be posted on the Commission's website at <http://www.scc.virginia.gov/case>.

(3) The Commission's Division of Information Resources shall send a copy of this Order, including a copy of the attached regulation, to the Virginia Registrar of Regulations for publication in the Virginia Register of Regulations.

(4) This case is dismissed from the Commission's docket of active cases.

AN ATTESTED COPY hereof shall be sent by the Clerk of the Commission to: Roy A. Hutcheson, Jr., Vice President, Title Cash of Virginia Inc., 513 Sparkman Drive, NW, Suite C, Huntsville, Alabama 35801; Patricia Dauterman, Director of Employee Development & Compliance, Approved Cash Advance Centers (Virginia), LLC d/b/a Approved Cash Advance,

P.O. Box 2038, Cleveland, Tennessee 37320-2038; Carla Stone Witzel, Gordon, Feinblatt, Rothman, Hoffberger & Hollander, LLC, 233 East Redwood Street, Baltimore, Maryland 21202-3332; Jennifer Johnson, Senior Legislative Council, Center for Responsible Lending, P.O. Box 3638, Durham, North Carolina 27702-3638; James W. Speer, Executive Director, Virginia Poverty Law Center, 700 East Franklin Street, Suite 14T1, Richmond, Virginia 23219; Helen O'Beirne, Housing Opportunities Made Equal of Virginia, Inc., 700 East Franklin Street, Suite 3A, Richmond, Virginia 23219; David W. Clarke, LeClairRyan, 951 East Byrd Street, Eighth Floor, Richmond, Virginia 23219; Tommy Moore, Executive Vice President, Community Financial Services Association of America, 515 King Street, Suite 300, Alexandria, Virginia 22314-3137; Douglas W. Densmore, Gentry, Locke, Rakes, & Moore, LLP, P.O. Box 40013, Roanoke, Virginia 24022-0013; Theodore F. Adams, III, McGuireWoods LLP, One James Center, 901 East Cary Street, Richmond, Virginia 23219-4030; and to the Commissioner of Financial Institutions, who shall mail a copy of this Order and the attached regulation to all licensed payday lenders and other interested parties designated by the Bureau of Financial Institutions.

A True Copy
Teste:


Clerk of the
State Corporation Commission

OTHER BUSINESS IN PAYDAY LENDING OFFICES

10VAC5-200-100. Other business in payday lending offices.

A. This section governs the conduct of any business other than payday lending where a licensed payday lending business is conducted. As used in this section, the term "other business operator" refers to a licensed payday lender or third party, including an affiliate of the licensed payday lender, who conducts or wants to conduct other business from one or more payday lending offices.

1. Pursuant to § 6.1-463 of the Code of Virginia, a licensee shall not conduct the business of making payday loans at any office, suite, room, or place of business where any other business is solicited or conducted except a registered check cashing business or such other business as the commission determines should be permitted, and subject to such conditions as the commission deems necessary and in the public interest.

2. Notwithstanding any provision of this section or order entered by the commission prior to February 1, 2010, the following other businesses shall not be conducted from any office, suite, room, or place of business where a licensed payday lending business is conducted:

- a. Selling insurance or enrolling borrowers under group insurance policies.
- b. Making loans under an open-end credit or similar plan as described in § 6.1-330.78 of the Code of Virginia, unless the loans are secured by a security interest in a motor vehicle, as this term is defined in § 46.2-100 of the Code of Virginia.

3. Pursuant to § 6.1-439 of the Code of Virginia, no person registered or required to be registered as a check casher under Chapter 17 (§ 6.1-432 et seq.) of Title 6.1 of the Code of Virginia shall make loans from any location, including an office, suite, room, or place of business where a licensed payday lending business is conducted, unless the person is licensed under, and the loans are made in accordance with, the Act.

B. Upon the filing of a written application, provision of any information relating to the application as the Commissioner of Financial Institutions may require, and payment of the fee required by law, other business may be conducted in a location where a licensed payday lending business is conducted if the commission finds that (i) the proposed other business is financial in nature; (ii) the proposed other business is in the public interest; (iii) the other business operator has the general fitness to warrant belief that the business will be operated in accordance with law; and (iv) the applicant has been operating its payday lending business in accordance with the Act and this chapter. The commission shall in its discretion determine whether a proposed other business is "financial in nature," and shall not be obliged to consider the meaning of this term under federal law. A business is financial in nature if it primarily deals with the offering of debt, money or credit, or services directly related thereto.

C. Nonfinancial other business may be conducted pursuant to any order of the commission entered on or before June 15, 2004. However, this subsection shall not be construed to authorize any person to begin engaging in such other business at payday lending locations where such other business was not conducted as of June 15, 2004.

D. Written evidence of commission approval of each other business conducted by an other business operator should be maintained at each location where such other business is conducted.

E. Except as otherwise provided in subsection N of this section, all approved other businesses in payday lending offices shall be conducted in accordance with the following conditions:

1. The licensee shall not make a payday loan to a borrower to enable the borrower to purchase or pay any amount owed in connection with the (i) goods or services sold, or (ii) loans offered, facilitated, or made, by the other business operator at the licensee's payday lending offices.

2. The other business operator shall comply with all federal and state laws and regulations applicable to its other business, including any applicable licensing requirements.

3. The other business operator shall not use or cause to be published any advertisement or other information that contains any false, misleading, or deceptive statement or representation concerning its other business, including the rates, terms, or conditions of the products, services, or loans that it offers. The other business operator shall not make or cause to be made any misrepresentation as to (i) its being licensed to conduct the other business, or (ii) the extent to which it is subject to supervision or regulation.

4. The licensee shall not make a payday loan or vary the terms of a payday loan on the condition or requirement that a person also (i) purchase a good or service from, or (ii) obtain a loan from or through, the other business operator. The other business operator shall not (a) sell its goods or services, (b) offer, facilitate, or make loans, or (c) vary the terms of its goods, services, or loans, on the condition or requirement that a person also obtain a payday loan from the licensee.

5. The other business operator shall maintain books and records for its other business separate and apart from the licensee's payday lending business and in a different location within the licensee's payday lending offices. The Bureau shall be given access to all such books and records and be furnished with any information and records that it may require in order to determine compliance with all applicable conditions, laws, and regulations.

F. If a licensee (i) received commission authority for an other business operator to conduct open-end credit business from the licensee's payday lending offices, or (ii) receives commission authority for an other business operator to conduct open-end auto title lending business from the licensee's payday lending offices, the following additional conditions shall be applicable:

1. Any loan made by the other business operator pursuant to an open-end credit agreement shall be secured by a security interest in a motor vehicle, as defined in § 46.2-100.

2. The licensee shall not make a payday loan to a person if (i) the person has an outstanding open-end loan from the other business operator, or (ii) on the same day the person repaid or satisfied in full an open-end loan from the other business operator.

3. The other business operator shall not make an open-end loan to a person pursuant to an open-end credit agreement if (i) the person has an outstanding payday loan from the licensee, or (ii) on the same day the person repaid or satisfied in full a payday loan from the licensee.

4. The other business operator and the licensee shall not make an open-end loan and a payday loan contemporaneously or in response to a single request for a loan or credit.
 5. The licensee and other business operator shall provide each applicant for a payday loan or open-end credit plan with a separate disclosure, signed by the applicant, that clearly identifies all of the loan products available in the licensee's payday lending offices along with the corresponding Annual Percentage Rate, interest rate, and other costs associated with each loan product.
 6. Upon entering into an open-end credit plan secured by a borrower's motor vehicle, the other business operator shall record its security interest with the Department of Motor Vehicles and maintain adequate supporting documentation thereof in its loan file.
 7. The other business operator shall not enter into an open-end credit plan secured by a prospective borrower's motor vehicle if the motor vehicle is already subject to a purchase money security interest or other outstanding lien. The other business operator shall maintain adequate supporting documentation in its loan file that a borrower's motor vehicle was not subject to a purchase money security interest or other outstanding lien at the time the borrower entered into the open-end credit plan.
- G. If a licensee received or receives commission authority for an other business operator to conduct business as an authorized delegate or agent of a money order seller or money transmitter from the licensee's payday lending offices, the other business operator shall be and remain a party to a written agreement to act as an authorized delegate or agent of a person licensed or exempt from licensing as a money order seller or money transmitter under Chapter 12 (§ 6.1-370 et seq.) of Title 6.1 of the Code of

Virginia. The other business operator shall not engage in money order sales or money transmission services on its own behalf or on behalf of any person other than a licensed or exempt money order seller or money transmitter with whom it has a written agreement.

H. If a licensee received or receives commission authority for an other business operator to conduct the business of (i) tax preparation and electronic tax filing services, or (ii) facilitating third party tax preparation and electronic tax filing services, from the licensee's payday lending offices, the following additional conditions shall be applicable:

1. The licensee shall not make, arrange, or broker a payday loan that is secured by an interest in a borrower's tax refund, or in whole or in part by (i) any other assignment of income payable to a borrower, or (ii) any assignment of an interest in a borrower's account at a depository institution. This condition shall not be construed to prohibit the licensee from making a payday loan that is secured solely by a check payable to the licensee drawn on a borrower's account at a depository institution.

2. The other business operator shall not engage in the business of (i) accepting funds for transmission to the Internal Revenue Service or other government instrumentalities, or (ii) receiving tax refunds for delivery to individuals, unless licensed or exempt from licensing under Chapter 12 of Title 6.1 of the Code of Virginia.

I. If a licensee received or receives commission authority for an other business operator to conduct the business of facilitating or arranging tax refund anticipation loans or tax refund payments from the licensee's payday lending offices, the following additional conditions shall be applicable:

1. The other business operator shall not facilitate or arrange a tax refund anticipation loan or tax refund payment to enable a person to pay any amount owed to the licensee as a result of a payday loan transaction.
2. The other business operator and the licensee shall not facilitate or arrange a tax refund anticipation loan or tax refund payment and make a payday loan contemporaneously or in response to a single request for a loan or credit.
3. The licensee shall not make, arrange, or broker a payday loan that is secured by an interest in a borrower's tax refund, or in whole or in part by (i) any other assignment of income payable to a borrower, or (ii) any assignment of an interest in a borrower's account at a depository institution. This condition shall not be construed to prohibit the licensee from making a payday loan that is secured solely by a check payable to the licensee drawn on a borrower's account at a depository institution.
4. The other business operator shall not engage in the business of receiving tax refunds or tax refund payments for delivery to individuals unless licensed or exempt from licensing under Chapter 12 of Title 6.1 of the Code of Virginia.
5. The licensee and other business operator shall provide each applicant for a payday loan or tax refund anticipation loan with a separate disclosure, signed by the applicant, that clearly identifies all of the loan products available in the licensee's payday lending offices along with the corresponding Annual Percentage Rate, interest rate, and other costs associated with each loan product.

J. If a licensee received or receives commission authority for an other business operator to conduct a consumer finance business from the licensee's payday lending offices, the following additional conditions shall be applicable:

1. The licensee shall not make a payday loan to a person if (i) the person has an outstanding consumer finance loan from the other business operator, or (ii) on the same day the person repaid or satisfied in full a consumer finance loan from the other business operator.

2. The other business operator shall not make a consumer finance loan to a person if (i) the person has an outstanding payday loan from the licensee, or (ii) on the same day the person repaid or satisfied in full a payday loan from the licensee.

3. The licensee and other business operator shall not make a payday loan and a consumer finance loan contemporaneously or in response to a single request for a loan or credit.

4. The licensee and other business operator shall provide each applicant for a payday loan or consumer finance loan with a separate disclosure, signed by the applicant, that clearly identifies all of the loan products available in the licensee's payday lending offices along with the corresponding Annual Percentage Rate, interest rate, and other costs associated with each loan product.

K. If a licensee received or receives commission authority for an other business operator to conduct the business of operating an automated teller machine from the licensee's payday lending offices, the other business operator shall not charge a fee or receive other compensation in connection with the use of its automated teller machine

by a person when the person is withdrawing funds in order to make a payment on a payday loan from the licensee.

L. The commission may impose any additional conditions upon the conduct of other business in payday lending offices that it deems necessary and in the public interest.

M. Except as otherwise provided in subsection N of this section, the conditions set forth or referred to in subsections E through L of this section shall supersede the conditions set forth in the commission's approval orders entered prior to February 1, 2010.

N. If prior to February 1, 2010 a licensee received commission authority for an other business operator to conduct a business not identified in subsections F through K of this section, the conditions that were imposed by the commission at the time of the approval shall remain in full force and effect.

O. Failure by a licensee or other business operator to comply with any provision of this section or any condition imposed by the commission, or failure by a licensee to comply with the Act, this chapter, or any other law or regulation applicable to the conduct of the licensee's business, may result in the revocation of the authority to conduct other business, fines, license suspension, license revocation, or other appropriate enforcement action.