

8 February 2022

[REDACTED]
Acorn Finance 2012 Limited
[REDACTED]
[REDACTED]
[REDACTED]

By email only to: [REDACTED]

Dear Mr [REDACTED]

Outcome of Commerce Commission's investigation into Acorn Finance 2012 Limited and its compliance with the Credit Contracts and Consumer Finance Act 2003 - Warning

1. The Commerce Commission (**Commission**) has been investigating Acorn Finance 2012 Limited (**Acorn**) in relation to its compliance with the high-cost lending rules and the initial disclosure obligations under the Credit Contracts and Consumer Finance Act 2003 (**CCCF Act**). We have now completed our investigation and are writing to inform you of the outcome.
2. The Commission has found Acorn's conduct is likely to have breached several provisions of the CCCF Act, including:
 - 2.1 section 45H (rate of charge cap);
 - 2.2 sections 45F and 45G (prohibition on lending to repeat borrowers); and
 - 2.3 section 17 (initial disclosure).
3. We note Acorn has confirmed that it stopped offering high-cost loans on 18 February 2021, and the above conduct is no longer at issue.
4. The Commission has determined that in the circumstances of this case it is appropriate to issue Acorn with a warning letter.
5. A warning is not a final finding of non-compliance, only the courts can decide whether a breach of the law has occurred. However, the Commission has determined that at this time we will not be bringing legal action against Acorn.¹

¹ Please see the Commission's published *Enforcement Response Guidelines* at para [41].

The law

6. The following provisions of the CCCF Act are relevant to the Commission's investigation into Acorn.

Rate of charge cap – section 45H

7. Section 45H(1) of the CCCF Act states that the maximum rate of charge (**ROC**) that is recoverable under a high-cost consumer credit contract (**HCCC**) is 0.8% per day, calculated in accordance with the regulations as a proportion of the amount of credit provided.
8. Section 45H(2) states that a HCCC must not provide for an amount to be recoverable that will result in that maximum rate being exceeded, or that is capable of resulting in that maximum rate being exceeded.
9. No person may be a creditor under a HCCC that contravenes section 45H, or accept a payment, or debit a fee or charge to the debtor's account, in a way that results in the maximum rate being exceeded (section 45H(3)).
10. Section 45H came into effect on 1 June 2020.

Repeat borrowing – sections 45F and 45G

11. Sections 45F and 45G prohibit creditors from entering into certain HCCCs with debtors in circumstances described under the sections. These provisions prohibit lending to a borrower that:
- 11.1 has an unpaid balance on any HCCC with another lender (section 45F(1)(a)); or
 - 11.2 had an unpaid balance on any HCCC with another lender within the preceding 15 days (section 45F(1)(b)); or
 - 11.3 has entered into two or more HCCCs in the preceding 90 days (section 45G(1)).
12. A lender has a defence to breaching sections 45F and 45G if the lender can prove that before entering into the contract:
- 12.1 it complied with section 9C in respect of the requirement to make reasonable inquiries; and
 - 12.2 it had reasonable grounds to believe that during the relevant period the borrower did not have an unpaid balance on any HCCC (in relation to section 45F);² or
 - 12.3 it had reasonable grounds to believe that the borrower had not entered into 2 or more HCCCs during the relevant period (in relation to section 45G).³
13. Sections 45F and 45G came into effect on 1 June 2020.

² Please see section 45F(2).

³ Please see section 45G(2).

Initial disclosure

14. Under section 17, every creditor under a consumer credit contract must ensure disclosure of as much of the key information set out in Schedule 1 as is applicable to the contract is made to every borrower under the contract before the contract is entered into.
15. From 1 May 2020, the CCCF Act introduced additional disclosure obligations for lenders offering HCCCs. These are found in Schedule 1 of the CCCF Act at (na), (nb) and (uaa).
16. From 1 June 2020, HCCC lenders have also been required to include in their initial disclosure a statement of the rate of charge ((nc), Schedule 1).

The investigation

17. In October 2020, pursuant to its monitoring functions, the Commission issued Acorn with a statutory notice requiring it to provide a sample of borrower files so that the Commission could assess Acorn's compliance with the new provisions of the CCCF Act relating to high-cost lending. On 5 November 2020 Acorn provided 26 borrower files to the Commission.
18. On 29 March 2021, you attended a voluntary interview with the Commission. You also subsequently responded to several requests for further information.
19. We thank you for your cooperation with the investigation.

Rate of charge

20. Our review of the 26 borrower files provided by Acorn found 12 out of the 26 contracts stated a daily rate of charge (ROC) that exceeded 0.8%. This was identified as a likely breach of section 45H of the CCCF Act.
21. You subsequently advised at interview, and in further correspondence to the Commission,⁴ that Acorn had undertaken its own review of its borrower files and had identified a total of 44 instances where the HCCCs it had entered into with borrowers stated a daily rate of charge that exceeded 0.8% in likely breach of section 45H.

Repeat borrowing

22. Our review of the 26 borrower files provided by Acorn identified five instances where Acorn had entered into a HCCC with a borrower in circumstances that are prohibited under sections 45F and 45G of the CCCF Act. Specifically, the investigation identified:
 - 22.1 three borrowers who had unpaid balances on a HCCC with another lender when Acorn lent to them (in likely breach of section 45F(1)(a));
 - 22.2 one borrower who had an unpaid balance on a HCCC with another lender within the 15 days preceding Acorn lending to them (in likely breach of section 45F(1)(b)).⁵

⁴ In your email dated 5 July 2021.

⁵ We note this borrower is also one of the borrowers who had received a loan from Acorn in likely breach of section 45F(1)(a).

22.3 two borrowers who had entered into two or more HCCC in the last 90 days preceding Acorn lending to them (in likely breach of section 45G(1)).

Initial disclosure

23. Our review of the 26 borrower files provided by Acorn identified that in May 2020, Acorn failed to make the following disclosures to borrowers when required:
- 23.1 that the loan was a HCCC (na); and
- 23.2 the effect of the section 45E cap on the total interest and fees payable under the contract, which must have included the maximum costs of borrowing, how the costs were calculated, and the total amount that was recoverable (nb).
24. We initially identified 9 contracts where Acorn had failed to make the above disclosures. However, following further discussion with Acorn, it confirmed that between 1 and 27 May 2020, 129 borrowers did not receive all the initial disclosure information required by section 17 of the CCCF Act.⁶
25. Acorn's failure between 1 and 27 May 2020 to disclose as much of the key information set out in Schedule 1 as was applicable to the contracts is a likely breach of section 17 of the CCCF Act.

Acorn's response

Rate of Charge

26. You explained during interview that between 1 June 2020 and 9 July 2020 you had numerous conversations with your software provider, ██████████ regarding the ROC its software was calculating for the contracts Acorn was issuing to borrowers during this period.
27. You explained that you believed ██████████ software was miscalculating the ROC in the contracts being issued. You advised that during this period you had carried out your own ROC calculations where a daily ROC over 0.8% had been stated on the contract, and that you believed that the daily ROC was in fact under 0.8% and not as stated.
28. You explained that you subsequently determined that both ██████████ and your own ROC calculations were incorrect during this period and conceded that some contracts did provide for a daily ROC over the 0.8% cap. However, you stated that you worked with ██████████ to correct the calculations and that on 10 July 2020, ██████████ system was updated to reflect a new calculation method. You stated that from this date onwards the daily ROC was correctly calculated, and the right ROC was stated on borrower contracts. You believe Acorn was compliant with the daily ROC cap from this date.
29. Following your interview, you provided the Commission with a ██████████ exception report which identified that between 1 June 2020 and 9 July 2020 there were 44

⁶ In your email dated 21 October 2021.

borrowers whose contracts provided for a daily ROC over the 0.8% cap.⁷ You confirmed that these borrowers had been charged at the rate stated in their contracts.⁸

30. We note that Acorn has refunded each of the 44 borrowers impacted by ROC issues the flat amount of \$10. The Commission is satisfied that for the vast majority of the 44 borrowers, this amount will compensate them beyond the difference between the stated ROC and the 0.8% cap.

Repeat borrowing

31. You explained at interview that it was Acorn's policy to ask each applicant to confirm verbally whether they had borrowing with any other lenders, and to contact these other lenders to confirm whether these loans were HCCCs. You stated that Acorn would rely on the information applicants and other lenders provided, and only lent to borrowers when both they and the other lender stated the loans were not HCCC. However, you accept that, Acorn entered into HCCCs with borrowers in circumstances that are prohibited under section 45F and 45G of the CCCF Act.⁹
32. The Commission identified 5 examples of such. You explained that due to the way Acorn recorded the information provided by applicants, it would be difficult for Acorn to identify any further instances of repeat borrowing in likely breach of sections 45F and 45G.¹⁰ We note that Acorn has refunded each of the 5 impacted borrowers identified by the Commission their total costs of borrowing (interest and fees).

Initial disclosure

33. You explained that Acorn was expecting the high-cost rules to come into force on 1 June 2020.¹¹ However, when several of the provisions, including some of the additional initial disclosure requirements for high-cost loans, were introduced early in May 2020, Acorn's system was not able to be updated in time to reflect the changes. However, you explained that the system was updated on 27 May 2020, and borrowers who entered into loans following this date received correct initial disclosure.¹²
34. You identified 129 borrowers who did not receive the initial disclosure information required by section 17 of the CCCF Act between 1 and 27 May 2020.
35. We note that Acorn has refunded all interest charges to borrowers impacted by disclosure issues.

The Commission's view

36. In this case, having fully considered the relevant information received, the Commission's view is that it is likely Acorn's conduct breached sections 45H (rate of charge), 45F and 45G (repeat borrowing), and 17 (disclosure) of the CCCF Act.

⁷ The 9 borrowers who we had identified as having ROC issues during our review of Acorn's borrower files were included in this 44.

⁸ In your email dated 10 May 2021.

⁹ In your email dated 21 October 2021.

¹⁰ In a phonecall on 19 October 2021.

¹¹ In a phonecall on 19 October 2021.

¹² In your email dated 21 October 2021.

37. As outlined above, we have reached this view because:
- 37.1 44 borrowers were charged a rate of charge over 0.8% per day;
 - 37.2 5 borrowers entered into HCCC's with Acorn in circumstances prohibited by the repeat borrowing provisions of the high-cost rules; and
 - 37.3 129 borrowers did not receive initial disclosure as required by Schedule 1 of the CCCFA.

Warning

38. After weighing up the factors set out in our Enforcement Response Guidelines, the Commission has decided it is appropriate and sufficient to conclude our investigation into Acorn by issuing this warning letter rather than by issuing legal proceedings.
39. The Commission has taken the following factors into account:
- 39.1 Acorn's quick responses to requests for information and overall co-operation with the investigation;
 - 39.2 The harm was restricted to a small number of borrowers and was not widespread;
 - 39.3 The potential breaches occurred over a short period of time;
 - 39.4 The rate of charge and disclosure issues were quickly identified and fixed by Acorn without intervention from the Commission;
 - 39.5 Acorn's steps to remediate impacted borrowers; and
 - 39.6 That Acorn stopped offering HCCC on 18 February 2021 and the conduct is no longer an issue.
40. This warning represents our opinion that the conduct which Acorn has engaged in is likely to have breached the CCCF Act and that legal action remains available to the Commission in future if the conduct continues or is repeated.
41. We may draw this warning letter to the attention of the courts in any subsequent proceedings brought by the Commission against Acorn.
42. This warning letter is public information and will be published on the Commission's case register on our website. We will be making public comment about our investigation into Acorn and the conclusions we have reached, including issuing a media release.

Penalties for breaching the CFF Act

43. As indicated above, only the courts can decide if there has been a breach of the CCCF Act. The potential penalties for each of the likely breaches is set out below.

Rate of charge

44. Where a lender fails to comply with section 45H it may:
- 44.1 Be ordered to refund, as soon as practicable, any payment made by a borrower that results in the maximum rate being exceeded in accordance with section 48.
 - 44.2 Be subject to orders made under section 94 including allowing for the affordable repayment of any unpaid debt (including the amount and timing of payments).

- 44.3 Be ordered to pay statutory damages to borrowers in accordance with sections 88 to 92. The amount of statutory damages payable is equal to the amount of interest, credit fees, and default fees that have become payable on the loan, (section 89(1)(aad)), though the amount payable can be extinguished or reduced where it is just and equitable to do so.
- 44.4 Be ordered to pay pecuniary penalties in accordance with section 107A (up to a maximum of \$200,000 in the case of an individual and \$600,000 in the case of a company).

Repeat borrowing

45. Where a lender fails to comply with section 45F or 45G it may:
- 45.1 Be required to pay statutory damages to affected borrowers in accordance with sections 88 to 92.
- 45.2 Be ordered to pay pecuniary penalties in accordance with section 107A (up to a maximum of \$200,000 in the case of an individual and \$600,000 in the case of a company).

Initial disclosure

46. Where a lender fails to comply with section 17, it may:
- 46.1 Be required to refund the costs of borrowing paid by borrowers during the period in which the lender failed to comply with section 17 in accordance with sections 48 and 99(1A).
- 46.2 Be required to pay statutory damages to borrowers in accordance with sections 88 to 92.
- 46.3 Be issued with an infringement notice and required to pay an infringement fee or charged with an infringement offence and fined in accordance with sections 102A to 105F (up to \$10,000 in the case of an individual and \$30,000 in the case of a company).
47. You should be aware that our decision to issue this warning letter does not prevent any other person or entity from taking private action through the courts.

Further information

48. We recommend that Acorn seeks legal advice and encourage it to regularly review its compliance procedures and policies.
49. We have published a series of fact sheets and other resources to help businesses comply with the CCCF Act and the other legislation we enforce. These are available on our website at www.comcom.govt.nz. We encourage you to visit our website to better understand Acorn's obligations and the Commission's role in enforcing the CCCF Act.
50. You can also view the CCCF Act and other legislation at www.legislation.co.nz.

51. Please contact me on [REDACTED] or by email [REDACTED] if you have any questions about this letter.

