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AND  
CONSUMER ADVOCATE

The State of South Carolina  
Department of Consumer Affairs

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October 14, 1980

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Administrative Interpretation 1.202a-8013

SECOND MORTGAGE CONSUMER LOAN MADE BY AN INDIVIDUAL TO AN  
INDIVIDUAL IS SUBJECT TO RATE CEILING IN CONSUMER PROTECTION CODE  
DEPENDING ON NUMBER OF LOANS MADE

You have asked several questions concerning loans secured by a second mortgage on a residence made by one individual to another individual. You presented several variations of the same question: what maximum rate can be charged by the individual lender for such loans? Your questions were prompted both by recent amendments to the Consumer Protection Code and recent administrative interpretations concerning sales financed either wholly or partially by the homeowner. Act No. 433 of 1980 (R504, H3703), Administrative Interpretations No. 2.605-8005 issued May 14, 1980, No. 2.605-8002 issued March 20, 1980, and 2.605-7905 issued April 13, 1979. Because the transaction is a loan by a third party rather than a bona fide financed sale by the homeowner, the earlier interpretations do not apply.

Your first question was what maximum rate may an individual lender charge on a loan to an individual homebuyer secured by a second mortgage on the residence being bought when the buyer is using the loan in conjunction with a new first mortgage loan to finance the purchase of the residence. Consumer Protection Code Section 3.104 [S.C. Code Ann. §37-3-104 (Cum. Supp. 1979)] defines "consumer loan" in subsection (1) as:

...a loan made by a person regularly engaged in the business of making loans in which:

- (a) the debtor is a person other than an organization;
- (b) the debt is incurred primarily for a personal, family or household purpose;
- (c) either the debt is payable in installments or a loan finance charge is made; and
- (d) either the principal does not exceed [\$32,500] or the debt is secured by an interest in land. (Emphasis added)

A loan to an individual secured by a second mortgage on the home he is purchasing as his residence automatically has the elements of the definition in (a) through (d) even if the loan is repayable in one payment as long as there will be a finance charge imposed. The question becomes whether the individual making the loan is "regularly engaged in the business" of making such loans, a question which can only be answered on a case by case basis.

In Administrative Interpretation No. 3.104-7511 issued October 22, 1975 we said that a person "regularly engages" in making consumer loans when

TELEPHONES (AREA CODE 803)

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758-3017

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PUBLIC INFORMATION  
758-7546

NOTIFICATION  
758-8587

CONSUMER ADVOCACY  
758-8996

the loans are made in the regular course of business as opposed to isolated incidents. We pointed out that a determination of a lender's being regularly engaged in the business of making consumer loans does not depend on the volume or percentage of business or whether it is a major or minor endeavor. See Declaratory Ruling No. 6.201-8006 of June 26, 1980 in which we determined that Edgefield County Hospital was regularly engaged in the business of making consumer credit sales although only a small percentage of the hospital's charges were repaid on a deferred payment plan. In our opinion, if an individual holds himself out as being available for making loans to other individuals primarily for a personal, family, or household purpose rather than making only an occasional loan to a friend or relative in unique circumstances, he is regularly engaged in the business of making consumer loans. This assumes that the loans are payable in instalments or a finance charge is made and the loans are for no more than \$32,500 or secured by land.

Section 37-1-202a of the Consumer Protection Code (Cum. Supp. 1979) provides:

A consumer loan not excluded by §37-1-202 of the 1976 Code shall be subject to all provisions of the Consumer Protection Code, provided that for purposes of this section, a person other than an organization who makes not more than five consumer loans in a year shall be deemed to be a supervised financial organization. (Emphasis added)

That section was added by Section 2 of Act No. 7 of 1979 when certain first mortgage loans to build or purchase a residence were excluded from the Consumer Protection Code by Section 5. CPC §1.202(11), S.C. Code Ann. §37-1-202 (Cum. Supp. 1979). Because the loans in your question are second mortgage rather than first mortgage loans and are not otherwise excluded, Section 37-1-202a permits an individual who makes such loans and is regularly engaged in the business of making consumer loans but makes not more than five such loans in a year to charge the same maximum rates as a supervised financial organization [CPC §1.301(17); S.C. Code Ann. §37-1-301 (Cum. Supp. 1979)]. Only supervised financial organizations and persons licensed to make supervised loans are authorized to charge rates not in excess of those permitted for supervised lenders. CPC §3.502; S.C. Code Ann. §37-3-502 (Cum. Supp. 1979). Consumer Protection Code Section 3.201 [S.C. Code Ann. §37-3-201 (Cum. Supp. 1979 as amended by §2 of Act No. 433 of 1980)] permits supervised lenders to charge up to a graduated rate of 36% annual percentage rate on the first \$390, 21% on amounts over \$390 up to \$1,300 and 15% on amounts over \$1,300 or a flat rate of 18% annual percentage rate in subsection (2).

Assuming the individual is not licensed but does make more than five consumer loans in a year, he is entitled to charge not more than the maximum rate permitted for non-supervised lenders in subsection (1) of amended Section 3.201 which is a maximum 18% annual percentage rate.

If the individual lender is not regularly engaged in the business of making consumer loans (or if the loan were primarily for a business rather than a personal, family or household purpose) and the loan is for

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more than \$25,000, the parties may agree to any rate of finance charge under amended Section 3.605 of the Consumer Protection Code [S.C. Code Ann. §37-3-605 (Cum. Supp. 1979 as amended by §3 of Act No. 433 of 1980)]. Or if the loan is a non-consumer loan, regardless of the amount, the two individuals may enter into a written agreement to bring the transaction under the Consumer Protection Code under the authority of amended Section 3.601 [S.C. Code Ann. §37-3-601 (Cum. Supp. 1979 as amended by §6 of Act No. 433 of 1980)]. If the parties so agree, the loan will be subject to the Consumer Protection Code including a maximum 18% annual percentage rate. Otherwise, as you pointed out, South Carolina Code Section 34-31-30 has an 8% rate ceiling for non-consumer loans that may be applicable to a loan of \$25,000 or less. See also §34-13-120 for loans made by "lending agencies" at no more than a 7% add-on rate.

Your second question was essentially the same as the first except the second mortgage loan to the individual for the purpose of paying off the equity in the residence is in conjunction with the homebuyer's assumption of the existing first mortgage loan on the residence rather than a new loan. The answer is the same as for your first question. There is no distinction between the two second mortgage loans for purposes of the Consumer Protection Code.

Your third question involved the same facts as the first two questions except the borrower already owns the residence and therefore the loan is not to assist in purchasing the residence although it is for a personal, family or household purpose. Again, the answer would be the same as for the first two questions. There is no distinction between purchase money second mortgage loans and non-purchase money second mortgage loans for purposes of maximum rates under the Consumer Protection Code.

In summary, it is the opinion of this Department that an individual may make a second mortgage consumer purpose loan to another individual at a rate not in excess of that permitted for supervised lenders if he is regularly engaged in the business of making consumer loans but makes not more than five in one year. If the individual makes more than five consumer loans in one year, he is restricted to no more than the 18% annual percentage rate permitted for non-supervised lenders unless he obtains a supervised lender's license. Further, if the individual is not regularly engaged in making consumer loans (or if the loan is for a business purpose), he and the borrower may agree to bring the second mortgage loan under the Consumer Protection Code at a rate not exceeding 18% annual percentage rate. Finally, if the individual makes a non-consumer second mortgage loan of more than \$25,000, he and the borrower may agree to any rate of finance charge.

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