



The State of South Carolina  
Department of Consumer Affairs

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Administrative Interpretation No. 2.104-8008

SELLER WHO BILLS FOR PAYMENT IN FULL BUT SUBSEQUENTLY ADDS BONA  
FIDE AGREED-TO LATE CHARGE DOES NOT MAKE A CONSUMER CREDIT SALE

You have asked whether a business that sells goods and services to consumers is making consumer credit sales in the following circumstances. The business and the consumer enter into a written agreement containing the statement: "the total price indicated in this agreement is due upon completion of services to be rendered. A late charge of 1/12th of the annual maximum permissible rate of interest will be charged monthly on any balance after 90 days." The business is such that continuing purchases are not contemplated with examples being a funeral home, a seller of heating and air conditioning equipment who also installs the equipment, and a contractor who makes substantial home improvements. The price of the goods and services is the same whether paid immediately, within 90 days, or after 90 days.

Administrative Interpretation No. 2.104-7502 issued January 20, 1975 stated that in the opinion of this office where a vendor does not, in fact, regard accounts in default, but continues to extend credit and impose charges periodically for delaying payment of accounts from time to time until paid, the transactions are "consumer credit sales" within the meaning of Consumer Protection Code Section 2.104 [S. C. Code Ann. §37-2-104 (1976)]. Your question is whether the fact situation outlined above falls within our earlier interpretation. Section 2.104 defines "consumer credit sale" in subsection (1) as:

- [A] sale of goods [or] services....in which
  - (a) Credit is granted by a person who regularly engages as a seller in credit transactions of the same kind,
  - (b) The buyer is a person other than an organization,
  - (c) The goods [or] services....are purchased primarily for a personal, family or household purpose,
  - (d) Either the debt is payable in installment[s] or a credit service charge is made, and
  - (e) ...the amount financed does not exceed \$25,000 [\$32,500 as of July 1, 1980. Emergency Regulation 28-61-1.109 "Adjustment of Dollar Amounts"] (Emphasis added)

The agreement provides that the total price is due upon completion of services to be rendered. The sale is thus not "payable in installments" because there is no agreement that payments may be made periodically. CPC §1.301(12), S. C. Code Ann. §37-1-301 (1976). Because the other elements of the definition would be met if the transaction involves a credit service charge, the question becomes whether the monthly charge on the unpaid balance after 90 days is, in fact, a credit service charge.

Section 2.109 of the Consumer Protection Code [S. C. Code Ann. §37-2-109 (1976)] defines "credit service charge" as:

[T]he sum of... all charges payable directly or indirectly by the buyer and imposed directly or indirectly by the seller as an incident to the extension of credit...The term does not include...delinquency charges (§37-2-203)....

If the charge is a bona fide "late charge" (delinquency charge) as described in the written agreement, the transaction is not a consumer credit sale.

Section 2.109 is identical to the same section of the Official 1968 Text of the Uniform Consumer Credit Code. The official comment to that section says that "the definition is derived from CCPA [Consumer Credit Protection Act] Section 106(a) with changes made to relate the definition to sales." Section 106(a) of the CCPA is the section of the federal Truth in Lending Act [15 U.S.C. §1605] that explains how to determine the finance charge in consumer credit transactions for disclosure purposes. Federal Reserve Board Regulation Z Section 226.4(c) [12 C.F.R. §226.4] which implements that section of the federal law states:

A late payment, delinquency, default, reinstatement or other such charge is not a finance charge if imposed for actual unanticipated late payment, delinquency, default or other such occurrence. (Emphasis added)

The Consumer Protection Code, while regulating delinquency charges made in connection with consumer credit sales [CPC §2.203, S. C. Code Ann. §37-2-203 (1976)], does not define delinquency charges as distinguished from the credit service charge. However, we are directed to conform the regulation of consumer credit to the policies of the federal Consumer Credit Protection Act and otherwise to attempt to harmonize the Consumer Protection Code with the Truth in Lending Act as well as enforce it. See CPC §§1.102(2)(f), 2.301 and 6.104 (2), (3); S. C. Code Ann. §§37-1-102, 37-2-301, 37-6-104 (1976). As a result we often look to interpretations given the Truth in Lending Act and Regulation Z by the federal courts and the Federal Reserve Board. Recently the United States Supreme Court said that "unless demonstrably irrational, Federal Reserve Board staff opinions construing the [Truth in Lending] Act or Regulation [Z] should be dispositive...." Ford Motor Credit Co. v. Milhollin, \_\_\_\_\_ U.S. \_\_\_\_\_, 100 S.Ct. 790, 797 (1980).

In interpreting Section 226.4(c) of the regulation, the Federal Reserve Board has consistently focused on the agreement of the parties and the actions of the business to determine whether a charge was for actual unanticipated late payment as opposed to an extension of credit. See, e.g., Federal Reserve Board interpretations No. 838 of September 4, 1974, No. FC-0060 effective May 6, 1977, and No. 1203 of July 1, 1977; [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH) ¶¶ 31,160; 31,570; 31,642 respectively. Unofficial staff interpretation No. 1358 of January 18, 1980 is illustrative. 5 Cons. Cred. Guide (CCH) ¶31,873. In that interpretation, which involved a funeral home, the Board made the distinction between two types of transactions. In

the first type, the parties agree that the price will be paid in full within a given time and that delinquency charges will be assessed on all past due accounts. Some time after default, the accounts are referred to an attorney or a collection agency for collection. That type of transaction involves a bona fide late charge. In the second type, although the parties have initially agreed that the full amount is due by a certain date after which delinquency charges will be imposed, the parties subsequently agree that periodic payments may be made and a charge incurred for the privilege of deferring payment. No collection efforts are made although the full amount has not been paid because the business does not consider the consumer in default so long as the periodic payments are made. In such a case a consumer credit transaction has been entered into. The Seventh Circuit Court of Appeals held in Bright v. Ball Memorial Hospital Association, Inc. that certain charges made by a hospital on some of its patients' accounts constituted late payment charges rather than finance charges. 616 F.2d 328, 335 (1980). The Court cited with approval Federal Reserve Board interpretations concerning late payment charges. Whether the seller takes commercially reasonable efforts to correct the delinquency through clear notification that the consumer is delinquent and efforts to collect the delinquent account is particularly relevant according to the Court. Id. at 337.

Based on the foregoing, it is the opinion of this Department that a business who bills for payment in full in accordance with an agreement but later assesses a delinquency charge on the unpaid balance when not paid by a certain date is not making consumer credit sales for purposes of the Consumer Protection Code if the business treats the account as delinquent. Whether an account is actually treated as delinquent will be determined by all of the circumstances surrounding a particular transaction. Thus we cannot answer with certainty whether the described transaction is or is not a consumer credit sale because we know nothing about the business's actions when an account is not paid in full within 90 days.

Additionally, the language in the hypothetical agreement that the delinquency charge equals "1/12th of the annual maximum permissible rate of interest" is not to be encouraged. Such vague language makes the amount of the charge difficult to determine. If what is intended is that the monthly charge equals 1/12th of the maximum permissible rate of finance charge for that type of sale, it would appear to be a finance charge itself and thus an extension of credit would have been made especially if serious collection efforts were not undertaken soon after delinquency. Although the Court of Appeals of New Mexico did not object to similar language in the Truth in Lending case Rogers Mortuary, Inc. v. White, 594 P.2d 351 (1979), we discourage using such language in South Carolina for the reasons stated.

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Finally, you asked whether the answer to your question depends on whether, for example, 50% of the accounts were paid in full within 90 days or 90% of the accounts were paid in full within 90 days. The percentage of consumers who pay within the period before which a delinquency charge is imposed is not determinative. We would look to the agreement of the parties and the actions of the business when there is a delinquency rather than the payment behavior of the business's customers as a group to determine whether a business is making consumer credit sales.

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