



# The State of South Carolina

## Department of Consumer Affairs

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November 5, 1982

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Administrative Interpretation No. 2.201-8202

### VARIABLE RATE CONSUMER CREDIT SALES OF RESIDENTIAL MANUFACTURED HOMES ARE NOT PROHIBITED BY THE CONSUMER PROTECTION CODE.

You have asked whether the Consumer Protection Code [S.C. Code Ann. §§ 37-1-101 *et seq.* (1976 as amended)], permits variable rate credit sales of residential manufactured homes. You are concerned that although the Code does not expressly prohibit variable rate credit sales, neither does the Code expressly permit such sales and the failure to expressly provide for such sales might be regarded as prohibition by implication. The Department does not believe such sales to be prohibited for a number of reasons.

First, the Consumer Protection Code, as amended by Act No. 385 of 1982 recognizes the permissibility of variable rates implicitly in Sections 37-2-405 and 37-3-402, which restrict balloon payments. In the case of consumer credit sales, subsection (2)(c) of Section 37-2-405 states that the balloon payment restriction does not apply to:

[A] secured credit transaction in which the primary security is a lien on real estate to the extent a formula for determining the rate of the credit service charge and any change in the amount of payment upon re-negotiation or refinancing is specified in the agreement between the parties or is an alternative mortgage instrument (emphasis added).

You pointed out that the term "alternative mortgage instrument" is not defined in the Code even though the term "alternative mortgage loan" is defined at Section 37-1-301(5) to include variable rate mortgages. The same term "alternative mortgage instrument," however, is used in § 37-3-402(2)(c) to exempt certain such loans from the consumer loan balloon payment restrictions. Clearly, an "alternative mortgage loan" is a type of "alternative mortgage instrument." Section 37-2-405 clearly indicates the same sort of credit sale transaction would be an "alternative mortgage instrument." All parts of a statutory enactment must be read to have force and effect unless there is some inconsistency. *State ex rel McLeod v. Nessler*, 273 S.C. 371, 256 S.E.2d 419 (1979); *Bradford v. Byrnes*, 221 S.C. 255, 70 S.E.2d 228 (1952). "Alternative mortgage instrument" is a technical term [*Poole v. Saxon Mills*, 192 S.C. 339, 6 S.E.2d 761 (1940)] not generally used outside the field of real estate finance. To determine the meaning of the term it is proper to look to other portions of the statute. Where the same or substantially the same words or phrases appear in different parts of a statute they will be given generally accepted and consistent meanings unless the contrary legislative intent is clearly expressed. *McKenna v. Bd. of Trustees of the University of Illinois*,

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90 Ill. App.3d 992, 414 N.E.2d 123 (1980). Thus, it is a reasonable conclusion that "alternative mortgage instrument" was meant by the legislature to include instruments with features similar to "alternative mortgage loans," such as variable rates.

This is consistent with the meaning of "alternative mortgage instrument" as used in the regulations of federal savings and loan associations by the Federal Home Loan Bank Board, which includes variable rate loans. See 12 C.F.R. §545.6-4 (1981).

Even ignoring the implicit recognition of variable rate authority in Section 37-2-405, there is no other provision of the Consumer Protection Code which lends credence to the notion that variable rate credit sales are prohibited, either expressly or by implication.

While South Carolina recognizes the rule of construction "Expressio unius est exclusio alterius," this rule is not inflexible and should be applied to accomplish legislative intent and not to defeat it. Home Building & Loan Association v. City of Spartanburg, 185 S.C. 313, 194 S.E. 139 (1938); See also Gattis v. Chaves, 413 F.Supp. 33 (D.S.C. 1976). In fact, the fundamental tenet of statutory construction in South Carolina is that the intention of the legislature is the primary guideline to be used. Adams v. Clarendon County School District No. 2, 270 S.C. 266, 241 S.E.2d 897 (1978).

While South Carolina has no formal legislative history, the General Assembly did provide some insight into its intention with S.C. Code Ann. § 37-1-102 (1976 as amended) which states in pertinent part:

- (1) This title shall be liberally construed and applied to promote its underlying purposes and policies.
- (2) The underlying purposes and policies of this title are:
  - (a) to simplify, clarify and modernize the law governing retail installment sales, consumer credit and usury;
  - (b) to provide rate ceilings to assure an adequate supply of credit to consumers;
  - (c) to further consumer understanding of the terms of credit transactions and to foster competition among suppliers of consumer credit so that consumers may obtain credit at reasonable costs;
  - \* \* \* \* \*
  - (f) to conform the regulation of consumer credit transactions to the policies of the Federal Consumer Credit Protection Act . . . .

Variable rates are simply a means by which a creditor shifts to the consumer all or part of the risk that at some future time during the course of the transaction the costs of money may be higher. Clearly, variable rate financing potentially poses new risks not previously assumed by debtors. To the extent a consumer is willing to assume such risks, that consumer may take advantage of a lower initial rate and may in some circumstances benefit from a further reduced rate if the index or formula for determining the rate declines. If the failure to expressly permit variable rate credit sales were read as an implied prohibition of such sales, this prohibition would conflict with the provisions of Section 37-1-102(2)(c) by increasing the costs of consumer credit and inhibiting competition in a number of ways. First, credit sellers in South Carolina compete with credit sellers in other jurisdictions where variable rates are allowed. Perhaps more importantly, however, credit sellers compete with financial institutions for the financing of particular items. To the extent that a credit seller is prohibited from using variable rates and lenders are allowed variable rates either by express federal authority [12 C.F.R. § 29 and § 545 (1981)] or by this Department's interpretation [Administrative Interpretation No. 1.108-8017], that credit seller is placed at a competitive disadvantage.

Finally, the notion that variable rate credit sales are prohibited because of the Code's failure to address variable rate credit sales specifically conflicts with the reading of the Consumer Protection Code and its antecedent legislation read as a whole. The Consumer Protection Code is structured so that consumer credit sales and consumer loans are treated in essentially the same manner except in those situations where differing requirements are specifically addressed. By analogy, Section 37-3-201 does not specifically authorize variable rates on consumer loans. The General Assembly has on several occasions seen fit to specifically restrict the use of variable rate loans, both consumer and non-consumer loans. See S.C. Code Ann. § 34-31-90(2) (1981); Section 2 of Act 7 of 1979, as amended, and Section 56 of Act 385 of 1982. Although repealed by Section 57 of Act 385 of 1982, Section 2 of Act 7 of 1979, as amended, provided a vehicle for individual consumer lenders who make a limited number of consumer loans in a year to enjoy the status of supervised financial organizations, subject to the requirement of Section 3 of that Act that if the loan was for \$100,000 or less, the agreement had to provide for a fixed rate of interest. Such a restriction would have been unnecessary if variable rate loans were truly prohibited merely by failure to specifically authorize them.

In Administrative Interpretation No. 1.108-8017 we stated that variable rates on loans were not prohibited by the Consumer Protection Code but that rate variation might be restricted by Section 34-31-90(2), a section which has likewise been repealed by Section 57 of Act 385 of 1982. In Declaratory Ruling No. 2.605-8102 we stated that bona fide non-consumer credit sales made at unrestricted rates under Section 37-2-605 could be made with a variable feature. We are of the opinion that the same reasoning should apply to consumer credit sales of residential manufactured homes. As expressed in Declaratory Ruling No. 2.605-8102, we encourage sellers contemplating variable rate

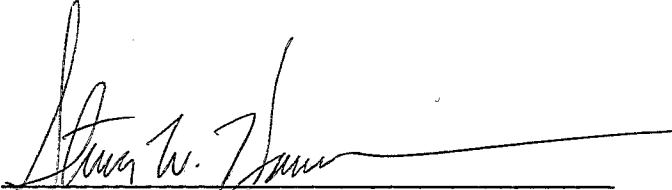
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transactions to provide reasonable terms in connection with such transactions including the use of indices outside the seller's control.

In summary, it is the opinion of this Department that variable rate consumer credit sales of residential manufactured homes may be made in compliance with the Consumer Protection Code, provided the seller complies fully with all provisions of the Consumer Protection Code.



Steven W. Hamm  
Administrator

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