



# The State of South Carolina

## Department of Consumer Affairs

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Administrative Interpretation No. 3.201-8402

FOR PURPOSES OF THE CONSUMER PROTECTION CODE, AN INITIAL "PARTICIPATION FEE" OF TWO PERCENT OF THE INITIAL ADVANCE MAY NOT BE ASSESSED AS A PERMISSIBLE ADDITIONAL CHARGE IN CONNECTION WITH A REVOLVING CONSUMER LOAN ACCOUNT. LIKEWISE, AN ANNUAL FEE OF \$5.00 MAY NOT BE ASSESSED AS A PERMISSIBLE ADDITIONAL CHARGE ON SUCH AN ACCOUNT UNLESS THE ACCOUNT QUALIFIES AS A LENDER CREDIT CARD OR SIMILAR ARRANGEMENT.

The Department has been asked whether a licensed supervised lender may charge a one time "participation fee" of 2% of the initial advance and an annual fee of \$5.00 on a revolving loan account [S.C. Code Ann. § 37-3-108 (1976 as amended)]. If such charges may be assessed, the Department has also been asked whether they should be regarded as part of the loan finance charge or as permissible additional charges.

The difficulty of this question arises from certain inconsistencies between the Consumer Protection Code and the Federal Truth in Lending Act.

Revised Regulation Z [12 C.F.R. § 226.4(c)(4) (1981 as amended)] excludes such participation fees from the finance charge. See also Official Staff Commentary at 226.4(c)(4)-1.

Section 37-3-109 of the S.C. Code states:

- (1) "Loan finance charge" means the sum of -
  - (a) all charges payable directly or indirectly by the debtor and imposed directly or indirectly by the lender as an incident to the extension of credit, including any of the following types of charges which are applicable: interest or any amount payable under a point, discount or other system of charges, . . . .

Because the participation fee is a precondition for any extension of credit under the plan, the fee is clearly an "incident to" the credit extension. See Watts v. Copeland, 170 S.C. 449, 170 S.E. 780, 781 (1933).

There is no description of such a fee in S.C. Code Ann. § 37-3-202 (1976 as amended). Subsection (1)(c) of that section, however, under certain circumstances, allows an annual fee assessed for the privilege of using a lender credit card or similar arrangement. See S.C. Code Ann. § 37-1-301(16) (1976 as amended).

The Truth in Lending Act generally deals with disclosures of rates and charges. The South Carolina Consumer Protection Code deals with, among other things, the maximum rates and charges which may be contracted for and earned. Unquestionably, if a participation fee were charged, the Federal Truth in Lending Act would not require that the fee be disclosed as part of the finance charge. This, however, begs the question of whether the charge may be assessed as a matter of State law.

Section 37-3-201 deals with how the finance charge is earned:

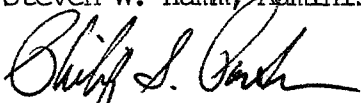
- (1) With respect to a consumer loan, including a loan pursuant to open-end credit, a lender who is not a supervised lender may contract for and receive a finance charge, calculated according to the actuarial method, not exceeding 18% per year. . . .
- (2) With respect to a consumer loan . . . a supervised lender may contract for and receive a loan finance charge, calculated according to the actuarial method, not exceeding the greater of either of the following:
  - (a) any rate filed and posted pursuant to Section 37-3-305 or
  - (b) 18% per year on the unpaid balance of principal.

Thus, because the "participation fee," is a part of the finance charge it must be earned in a manner consistent with Section 37-3-201, that is, in accordance with the actuarial method. Any method by which more of the finance charge is retained than the actuarial method allows would be regarded as an excess charge.

Under the described revolving account, the consumer's full payment of the unpaid balance of the account would result in an excess charge in the amount of the participation fee. Even if the lender attempted to devise a system whereby the consumer could be refunded the unearned finance charge, the lender's inability to predict the amounts of succeeding extensions of credit or the payment habits of the consumer would make the entire process a near mathematical impossibility.

In conclusion, it is the opinion of this Department that a one time participation fee in a revolving loan account must be regarded as part of the loan finance charge and no portion of the loan finance charge may be treated as earned except in accordance with the actuarial method. In addition, the revolving loan account would have to qualify as a lender credit card or similar arrangement in order to make the annual \$5.00 fee permissible.

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