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May 19, 1981

Administrative Interpretation No. 3.601-8104

PARTIES TO A LOAN MAY AGREE IN A SIGNED WRITING THAT THE LOAN IS SUBJECT TO THE CONSUMER PROTECTION CODE WHEN ITS PURPOSE IS UNCERTAIN.

You have raised a question concerning language in Consumer Protection Code Section 37-3-601 which you believe, if interpreted literally, may limit its usefulness. That section as amended by Section 6 of Act No. 433 of 1980 until July 1, 1982 says:

[Except in the case of a loan primarily secured by a first lien which is a purchase money security interest in land,] the parties to a loan other than a consumer loan may agree in [] writing signed by the parties that the loan is subject to the provisions of this title applying to consumer loans. If the parties so agree, the loan is a consumer loan for [all] purposes of this title. (Emphasis added; brackets indicate non-uniform language.)

You are concerned that the language "loan other than a consumer loan" may unnecessarily limit the applicability of this section to transactions that are clearly not for a consumer purpose. While a business purpose loan is clearly a "loan other than a consumer loan," your question is whether a loan that is difficult to classify may be made subject to the Consumer Protection Code under Section 37-3-601 when it ultimately might be determined to be a consumer loan after all.

Although the majority of transactions are clearly either primarily for a personal, family or household purpose or not, a number of transactions defy easy classification. CPC §37-3-104 (Cum. Supp. 1980). A determination whether a particular transaction meets the definition of consumer loan must be made on a case by case basis and we look to the federal courts and Federal Reserve Board interpretations of what constitutes "primarily a personal, family or household purpose" for guidance. E.g. Puckett v. Georgia Homes, Inc., 369 F. Supp. 614 (D.S.C. 1974); see CPC §§37-1-102(2)(f) and 37-6-104(3) (1976) for duty to harmonize with the Federal Consumer Credit Protection Act. The Federal Reserve Board has not always found it easy to classify a transaction according to its purpose and may defer to the courts. See, e.g. FRB letters No. 374 of July 17, 1970, No. 675 of March 1, 1973 [1968-1974 Transfer Binder] Cons. Cred. Guide (CCH) ¶¶30,552 and 30,953; No. 792 of May 10, 1974, No. 918 of August 19, 1975 [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH) §§31,114 and 31, 252 construing Regulation Z [12 C.F.R. §226.2(p)].

Except for the language appearing in brackets above, Section 37-3-601 is

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the same as Section 3.601 of the Official 1968 Text of the Uniform Consumer Credit Code (UCCC). The Official Comment to that section refers the reader to the comment to UCCC Section 2.601, the parallel provision for sales. That Official Comment says:

The consumer purpose test is the basic standard for determining the coverage of this Act, but a purpose test can cause difficulties for a creditor in ascertaining the buyer's [or borrower's] purpose. Since the right to charge a given rate may depend on whether the purpose of the [transaction] is personal or business... the creditor takes a risk whenever he makes a charge for credit. This section permits creditors, by inserting an appropriate clause in a... contract, to be certain that the transaction is a consumer credit [transaction] for the purposes of this Act. If the creditor is willing to subject himself to all the restrictions of the Act, there is no reason why he should not be able to make the same charges to any buyer [or borrower] as those he can make to one who buys [or borrows] for a consumer purpose. (Emphasis added.)

As we said in Administrative Interpretation No. 3.601-7918 of December 27, 1979, "we see no reason or legislative intention to prevent the parties to a loan from bringing a transaction under the Consumer Protection Code, whether to clear up any uncertainty as to what law applies... or to provide a balance between what may be a higher maximum rate than otherwise might apply and more protection for the borrower...." AI No. 3.601-7918 at page 3.

We do not read Section 37-3-601 narrowly to prevent parties who have genuine doubt about the classification of the transaction from agreeing that the Consumer Protection Code applies to it. It is the opinion of this Department that the language "loan other than a consumer loan" is broad enough to cover not only those transactions that are clearly outside the definition of consumer loan but also a loan whose purpose raises questions about its classification. The language in the Consumer Protection Code section is basically uniform with the addition of an exception. As the Official Comment says, because it is sometimes difficult to ascertain a transaction's purpose, this section provides certainty when the parties agree in a signed writing that the transaction be subject to the Act whether or not it actually meets the definition of a consumer credit transaction. When there is doubt, it is prudent to comply with the Consumer Protection Code rather than risk the consequences of non-compliance should it be found to be a consumer credit transaction after all.

You enclosed an alternate form of agreement for review and asked that we sanction its use in transactions which fall within the gray area between clearly a consumer loan and clearly not a consumer loan. This form is a variation of a form you enclosed which you said is currently used for loans that are clearly not consumer loans. The form identifies the

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borrower, the loan amount, and the lender and contains a place for the date and signatures of the parties. It also contains the following two provisions:

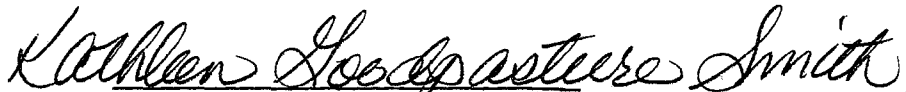
1. The parties to the above loan hereby acknowledge that some question exists as to whether the above captioned loan is a "consumer loan" and that they further acknowledge that the loan is not a loan primarily secured by a first lien which constitutes a purchase money security interest in land. Furthermore, the parties wish to hereby stipulate that this loan is being transacted for a personal, family, or household purpose.

2. Pursuant to Section 37-3-601 of the Code of Laws of South Carolina, 1976, as amended, the parties agree that the above loan is subject to the provisions of the South Carolina Consumer Protection Code and this loan shall be considered a consumer loan for all purposes.

In our opinion such a form is appropriate when the parties wish to take advantage of Section 37-3-601 to provide certainty as to which law applies to a particular transaction because it is not clear whether the loan meets the definition of consumer loan or not.

In summary, in our opinion parties to a loan for which the purpose is not entirely clear may bring the loan under the Consumer Protection Code when both parties sign a written agreement that the loan is subject to the Consumer Protection Code. A signed written agreement similar to the alternate form you enclosed would be suitable under these circumstances.

Roy C. Harms
Deputy Administrator



By Kathleen Goodpasture Smith
Counsel to the Administrator

KGS/srs