



# The State of South Carolina Department of Consumer Affairs

2221 DEVINE STREET, STE 200  
PO BOX 5757  
COLUMBIA, SC 29250-5757

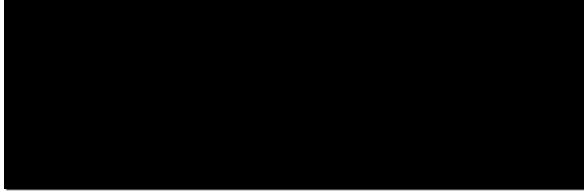
Carri Grube Lybarker  
Administrator/  
Consumer Advocate

*Celebrating Over 40 Years of Public Service*

November 8, 2016

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*Via US and Electronic Mail*



**RE: Opinion Request- Supervised Loan Location**

Dear

You have requested an opinion regarding both what constitutes a place of business for purposes of requiring a supervised lender license and whether a supervised lender can impose a fee on consumers making a payment via a specific payment method. Supervised loans are governed by the South Carolina Consumer Protection Code (“the Code”), Title 37, South Carolina Code of Laws, specifically sections 37-3-500 *et seq.*<sup>1</sup> From the information you have provided, the following questions have been posed and will be addressed herein in the form of a general answer that could change depending on specific circumstances:

- i. Does a website operated by a supervised lender established for the purpose of accepting payments from consumers with existing supervised loans constitute a place of business?
- ii. May a supervised lender impose a fee upon a consumer making a loan payment via a specified method?

As stated above, the Code applies to supervised loans, governing the regulation of persons offering and/or providing supervised loans to South Carolina consumers. Specifically, section 37-3-502 prohibits any person other than a supervised financial organization from engaging in the making of supervised loans or “taking assignments of and undertaking direct collection of payments from or enforcement of rights against debtors arising from supervised loans” without first obtaining a license to do so<sup>2</sup>. See § 37-3-502(1)-(2). The South Carolina Board of Financial Institutions (“SC-BOFI”) is charged with issuing licenses to supervised lenders under the Code. Section 37-3-503 details the licensing process and sets forth the

<sup>1</sup> Further reference to the South Carolina Code of Laws will be by Code section only.

<sup>2</sup> Restricted lenders are exempt from this requirement pursuant to § 37-3-500.

<b>ADMINISTRATOR</b> Tel.: 803-734-4233 Fax: 803-734-4060	<b>PUBLIC INFORMATION</b> Tel.: 803-734-4296 Fax: 803-734-4060	<b>CONSUMER ADVOCACY</b> Tel.: 803-734-4200 Fax: 803-734-4287	<b>ENFORCEMENT/ INVESTIGATORS</b> Tel.: 803-734-4200 Fax: 803-734-4287	<b>CONSUMER COMPLAINTS</b> Tel.: 803-734-4200 Fax: 803-734-4286	<b>ID THEFT UNIT</b> Tel.: 803-734-4200 Fax: 803-734-4229	<b>PROCUREMENT &amp; ACCOUNTING</b> Tel.: 803-734-0366 Fax: 803-734-4299
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requirement that “each place of business” be licensed and prohibits supervised lending activity at unlicensed locations. See § 37-3-503(4),(7).

You describe the website maintained by your client as being utilized “for payments only from its existing loan customers...” adding the supervised lender “does not conduct any loan applications, loan analysis, loan disbursements, or make any loan decisions” via the website. The Department issued guidance dated June 20, 2008 to SC-BOFI specifying the need for internet lenders to obtain supervised lending licenses for a website address. We take this opportunity to expound and clarify the Department’s position described in that opinion<sup>3</sup>.

As stated above, the Code requires persons making supervised loans or taking assignment of supervised loans and collecting payments or engaging in enforcement of supervised loans be licensed. The statute creates a location based licensing structure, requiring any location where supervised lending activity is taking place to obtain a license. It is implied when a person takes an application and funds a supervised loan, direct collection or enforcement of rights under such a contract will also occur. Construing “making supervised loans” in a narrow context as opposed to contemplating all activities involved in the transaction and ensuing contract fulfillment would result in an internal conflict within section 37-3-500 *et seq.* Failing to read the statute as requiring the website be licensed would serve to create two distinct groups of supervised lender licensees and different requirements of those groups. Assignees engaging in identical collection activities as your client would be required to license their website as a location due to the specific statutory reference to collecting payments. The Department refuses to interpret the Code in such a manner and has determined the collection of payments due pursuant to a supervised loan contract constitutes supervised lending activity; thus, the location where such collection occurs must be licensed as a location under the law.

The second question posed pertains to the lender charging a fee to consumers who utilize an online system to make a payment on an outstanding supervised loan. The Code sets forth the fees creditors may charge and how such charges may be assessed and earned. Pursuant to section 37-3-109, the “sum of 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*” are loan finance charges and must be treated accordingly. The term does not include “charges as a result of default, additional charges (§ 37-3-202), delinquency charges (§ 37-3-203), or deferral charges (§ 37-3-204)...” or in certain circumstances, appraisal costs. See § 37-3-109(1)(b). Section 37-3-202 sets forth those charges, which are excluded from the definition of a loan finance charge, a lender may contract for and receive “in connection with” a consumer loan in addition to a loan finance charge. It is the Department’s interpretation that a fee charged to a consumer utilizing a payment method to make required payments on a consumer credit transaction is incident to the credit transaction and constitutes a finance charge. Should your client argue the loan payment transaction fee is not a finance charge, the fee is not found in the listing delineated in section 37-3-202, thus is not a permissible additional charge and cannot be assessed.

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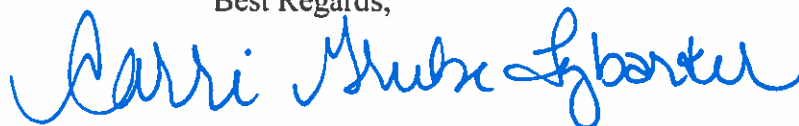
<sup>3</sup> In addition to stating a website address constitutes a location, the informal opinion provides the framework to enable online supervised lenders to comply with the Code’s requirements.

The Department interprets the imposition of a loan payment transaction fee by a third party in the same manner. It is a generally held rule of agency law that an agent may possess no more authority than the principal. *Colleton County Taxpayers Ass'n v. Sch. Dist.*, 371 S.C. 224, 638 S.E.2d 685 (2006). Stated differently, an agent has no implied power to do indirectly that which the principal is not authorized to do directly. *Gambill v. Fuqua*, 148 Ala. 448, 42 So. 735 (1906). As the lender is not statutorily permitted to charge a payment processing fee to its borrowers, neither can the third-party agent of the lender charge such a fee to borrowers. Should the third party be considered an independent contractor as opposed to an agent, similar reasoning prohibiting the third party from charging the consumer a payment processing fee applies as the duty to obey the law is non-delegable. *United States v. Youritan Construction Co.*, 370 F. Supp. 643, 649 (N.D. Cal. 1973), aff'd in part, remanded in part by, 509 F.2d 623 (9th Cir. 1975). The lender will be considered liable for the impermissible actions in this circumstance. *See Simmons v. Tuomey Regional Medical Center*, 341 S.C. 32, 533 S.E.2d 312 (2000).

While you raise the point that consumers benefit by receiving the option to make payments via the web portal, the creditor benefits as well. The Department is not prohibiting the offering of such a service, just prohibiting the imposition of a related fee for use of the payment method. South Carolina is a deregulated state meaning under limited restrictions, creditors subject to the Code can generally charge whatever interest rate they choose. The cost of accepting and processing payments, whether through paper checks or electronic or automatic means, is a cost of doing business. These costs may be considered by the lender when determining the appropriate rates to charge South Carolina consumers; however, if the creditor chooses not to absorb such costs and alternatively imposes a fee onto consumers it constitutes a finance charge. Such an interpretation is consistent with Official Staff Commentary of Regulation Z. *See* 12 CFR Part 226, Supplement I to Part 226.

In summary, a website through which supervised lending activity, including collecting payments, occurs constitutes a place of business/ location for the purposes of the supervised loan statutes and requires licensure. A lender may accept payments via a web portal or other payment method if the lender does not directly or indirectly impose a fee for such a service. I hope I fully answered your questions. Please do not hesitate to contact me directly at 803-734-4233 should you need any further information.

Best Regards,



Carri Grube Lybarker, Esq.

Cc: Ron Bodvake, Commissioner, SC-BOFI