



The State of South Carolina
Department of Consumer Affairs

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May 4, 1981

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Administrative Interpretation No. 3.201-8103

NON-SUPERVISED LENDER MAY MAKE LOANS AT A RATE OF FINANCE CHARGE UP TO AND INCLUDING 18% ANNUAL PERCENTAGE RATE NOTWITHSTANDING §37-3-501(1).

You have raised several questions concerning a requirement imposed by the Federal National Mortgage Association (FNMA) that your mortgage loan company become a supervised lender in order to participate in a new refinance loan program.

First, you correctly concluded that a loan to refinance a first mortgage purchase money home loan, although secured by a first mortgage which meets one of the requirements for exclusion, is a consumer loan subject to the Consumer Protection Code because it is not also "to enable the debtor to build or purchase a residence." CPC §37-1-202(11) (Cum. Supp. 1980 as amended by §1B of Act No. 6 of 1981, R16, H2164). Section 37-3-104 (Cum. Supp. 1980) of the Consumer Protection Code currently defines "consumer loan" as follows in subsection (1):

... a loan made by a person regularly engaged in the business of making loans in which:

- (a) the debtor is a person other than an organization;
- (b) the debt is incurred primarily for a personal, family or household purpose;
- (c) either the debt is payable in installments or a loan finance charge is made; and
- (d) either the principal does not exceed [\$32,500.00] or the debt is secured by an interest in land. (Bracketed amount adjusted pursuant to §37-1-109).

(Subsection (2) of §37-3-104 excluding a loan primarily secured by a first lien which is a purchase money security interest in land and the reference to it in subsection (1) have been suspended until June 30, 1985. §6 of Act No. 7 of 1979 as amended by §2 of Act No. 6 of 1981, R16, H2164.)

It is the opinion of this Department that loans to refinance an existing first mortgage loan to build or purchase a residence with the addition of funds for other purposes such as those to be made under this program are consumer loans when they have the elements of the definition above. Such loans are therefore governed by the Consumer Protection Code including maximum charges because they are not specifically excluded. CPC §37-1-202 as amended, A.I. No. 3.508-7911 of June 5, 1979.

TELEPHONES (AREA CODE 803)

ADMINISTRATION
758-3017

CONSUMER COMPLAINTS
758-2040
WATTS 1-800-922-1594

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758-8587

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Next, it is your understanding of the Consumer Protection Code that although your mortgage company is not now a supervised lender it may charge as high as 18% annual percentage rate on its consumer loans under the authority of Consumer Protection Code Section 37-3-201(1) as amended by Act No. 433 of 1980 until July 1, 1982. Unlike non-supervised lenders who have one maximum flat rate, supervised lenders have alternative maximum rates: either the graduated rate scale in subsection (2)(a) (36%, 21%, 15%) or the flat rate maximum of 18% annual percentage rate in subsection (2)(b) of Section 37-3-201 (Cum. Supp. 1980). Whether your company became a supervised lender or not, you said that your company would not charge over 18% annual percentage rate.

Your question concerned Section 37-3-501(1) which defines a "supervised loan" as "a consumer loan in which the rate of the loan finance charge exceeds 12% per year as determined according to the provisions on loan finance charge for consumer loans (§37-3-201)." That definition is confusing when compared to Section 37-3-201(1)'s 18% maximum, and you questioned whether it affects the authority of a non-supervised lender to charge as much as 18%, especially considering that Section 37-3-502 (Cum. Supp. 1980) provides:

Unless a person is a supervised financial organization or has first obtained a license from the [Board of Financial Institutions] authorizing him to make supervised loans, he shall not engage in the business of:

- (1) making supervised loans... .

We agree with you that the failure to amend the definition of supervised loan in Section 37-3-501 in conjunction with the amendment to Section 37-3-201(1) was apparently an oversight by the legislature. It is the opinion of this Department that a non-supervised lender may currently charge up to and including 18% annual percentage rate on its consumer loans notwithstanding the definition of supervised loan in Section 37-3-501(1). In our opinion that definition may be read as if "18%" were substituted for "12%" until July 1, 1982 because of the otherwise irreconcilable conflict between the two provisions. The General Assembly expressed a clear intent to permit non-supervised lenders to charge up to and including 18% annual percentage rate when it amended Section 37-3-201(1) to say in part, "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." That amendment, contained in Section 2 of Act No. 433 of 1980, changed the previous language which was originally contained in Act No. 686 of 1976 limiting non-supervised lenders to a maximum 12% annual percentage rate. The definition of supervised loan was also part of Act No. 686 of 1976 which at the time enacted coincided with the 12% limitation then in Section 37-3-201(1). It would not be logical to conclude that the General Assembly intended non-supervised lenders to be authorized to make loans

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at no more than 12% annual percentage rate when it more recently specifically said they may contract for and receive as much as 18% annual percentage rate on their consumer loans.

Your ultimate question concerned why FNMA would require your mortgage company to become a supervised lender when the company may already charge up to a maximum 18% annual percentage rate and is generally subject to the Consumer Protection Code including restrictions on other charges, limitations on agreements and practices, disclosure and advertising requirements, and annual notification filing and fee payments. Although we do not presume to know the reasons for FNMA's requirement several considerations come to mind. For instance, the amendment to Section 37-3-201(1) increasing the maximum permissible rate from 12% to 18% is temporary and will be repealed July 1, 1982 unless it is made permanent or otherwise extended by the General Assembly. Additionally, an applicant for a supervised lender's license must demonstrate to the Board of Financial Institutions that its financial responsibility, character and fitness are such as to warrant belief that the business will be operated honestly and fairly within the purposes of the Consumer Protection Code. CPC §37-3-503 (Cum. Supp. 1980). Further, licensees are required to maintain records, file annual reports, and be examined periodically by the Board of Financial Institutions. CPC §§37-3-505, 37-3-506 (Cum. Supp. 1980). Such supervision may be considered desirable for lenders participating in a particular program. For example, regular examinations may bring to light possible violations of the Consumer Protection Code which may be corrected by the creditor, bringing it into compliance with the law and reducing potential liability. CPC §37-5-202(6) (Cum. Supp. 1980).

In summary, in our opinion a non-supervised lender may charge up to and including 18% annual percentage rate under the authority of Section 37-3-201(1) (Cum. Supp. 1980) until July 1, 1982 and the definition of supervised loan in Section 37-3-501(1) (Cum. Supp. 1980) may be read as if "12%" were "18%" until July 1, 1982.

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