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AND
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The State of South Carolina
Department of Consumer Affairs

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December 19, 1980

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Administrative Interpretation No. 1.108-8017

VARIABLE RATE LOANS ARE NOT PROHIBITED BY CONSUMER PROTECTION CODE BUT
INCREASE IN RATE ON MORTGAGE LOANS MAY BE LIMITED TO 1% BY SECTION
34-31-90 (2)

We have been asked several questions about the permissibility of variable rate consumer loans in general, and such loans secured by real estate in particular. The rate of finance charge for a variable rate loan is usually subject to change at fixed intervals in accordance with the change in a specified figure like the Consumer Price Index or the Federal Reserve discount rate. Other types of loans whose rate of finance charge may change over time include those made by a lender to an employee, with the employee's termination triggering a predetermined increase.

The Consumer Protection Code, which is South Carolina's version of the Uniform Consumer Credit Code, does not prohibit creditors from making variable rate loans as such, regardless of security. See Moore v. Canal National Bank, 409 A.2d 679 (Me. 1979); Maine Bureau of Consumer Protection Advisory Ruling No. 45 of May 16, 1980. While the Consumer Protection Code itself does not prohibit variable rate loans, it may restrict them in various ways. E.g., CPC §37-3-511 (Cum. Supp. 1979) would not permit a variable rate loan repayable in variable payment amounts for most high-rate small loans. Additionally, disclosures must comply with the federal Truth in Lending Act. CPC §§37-2-301 and 37-3-301 (1976).

Aside from limitations in the Consumer Protection Code, South Carolina Code Section 34-31-90 (Cum. Supp. 1979) limits the increase in the interest rate on a mortgage loan to 1% as follows in subsection (2):

It is hereby declared to be the public policy of this State that the lawful initial interest rate on mortgage loans, once agreed upon, may not be raised during the life of the mortgage unless agreed to by the borrower and may not be raised in excess of 1% over and above the interest rate initially agreed upon; provided, such agreed interest rate may not exceed the permitted lawful rate of interest; notwithstanding any other provisions of law to the contrary. ... Provided, further, that the provisions of this paragraph shall not apply to loans in excess of \$100,000. (Emphasis added in first clause)

A stronger statement of public policy could hardly be made. The finance charge for a consumer loan includes interest. CPC §37-1-109(1)(1976). It is the opinion of this Department that a lender making a real estate mortgage secured consumer loan governed by the Consumer Protection Code's maximum charge provisions is not prohibited by the Consumer Protection Code from making variable rate loans but may be limited by Section 34-31-90 from increasing the rate more than 1%. It is our further opinion that a consumer

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758-8587

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758-8996

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loan governed by the Consumer Protection Code's maximum rate provisions not secured by a real estate mortgage may be made at a variable rate so long as other requirements of the Consumer Protection Code are met including Truth in Lending disclosures and maximum charge limitations.

Consumer Protection Code Section 37-1-108 (Cum. Supp. 1979) provides in part in subsection (1):

This title prescribes maximum charges for all creditors except... those excluded (§37-1-202), extending consumer credit including... consumer loans (§37-3-104), and displaces existing limitations on the powers of those creditors based on maximum charges. (Emphasis added)

Further, subsection (4) of Section 37-1-108 provides in part that:

Except as provided in subsection (1)... this title does not displace...
(b) limitations on powers an organization is authorized to exercise under the laws of this State or the United States. (Emphasis added)

In construing a statute, 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 879 (1978). The Consumer Protection Code has its own rule of construction in Section 37-1-102 (1976) to liberally construe it in light of its purposes. While it is a general act intended as a unified coverage of its subject matter [CPC §37-1-104 (1976)] and is generally comprehensive as far as consumer credit is concerned, other law may supplement its provisions if not displaced by the Consumer Protection Code. CPC §37-1-103 (1976). If other law has not been displaced, the general rule of construction is that statutes covering the same subject must be given effect if it can be done by any reasonable construction. Cullum Mechanical Construction, Inc. et al. v City of Charleston, et al., 272 S.C. 553, 253 S.E.2d 106 (1979).

Although subsection (1) of Section 34-31-90 which concerns initial service or origination charges made by mortgage lenders does not apply to consumer loans governed by the Consumer Protection Code's maximum charge section [CPC §37-1-108(1) (quoted above)], in our opinion subsection (2) of Section 34-31-90 stands on its own and thus applies to mortgage loans in general, including certain consumer loans, for several reasons. First, that subsection can be interpreted as a limitation on the power of an organization to raise a rate initially agreed upon rather than a limitation on the rate or charge itself. CPC §37-1-108(1), (4).

Second, the statement of South Carolina's public policy does not limit itself to mortgage loans subject to subsection (1) but instead refers to mortgage loans in general. If the General Assembly had intended to make exceptions for second mortgage loans or non-purchase money loans, it could have so stated. Instead, it made an exception based on the amount of the loan (\$100,000). What is now subsection (2) was rewritten when Act No. 1155 of 1970 was amended

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by Act No. 317 of 1973 so that the reference to "initial charge" that had been in that subsection was moved to subsection (1) concerning initial service or origination charges, completely separating the subject matter in each subsection. The addition to subsection (2) by Act No. 317 of 1973 provided that "this paragraph shall not apply to construction loans in excess of \$50,000" indicating that subsection (2) has its own exclusion and is separable from subsection (1). (Act No. 122 of 1977 further amended subsection (2) so that it does not apply to "loans in excess of \$100,000.")

Third, the language used in subsection (2) of Section 34-31-90 expresses in no uncertain terms the general public policy that the initial interest rate of a mortgage loan cannot be raised in excess of 1% over the initial rate agreed upon and can be raised then only if the borrower previously agreed to such an increase. There is presently no Supreme Court decision construing this language. Whether the language is intended to apply to all loans whose rates may change over time or only certain types of loans is not clear. We are requesting an Attorney General's opinion on the question because a construction of South Carolina law outside the Consumer Protection Code is necessary.

The continuing vitality of Section 34-31-90 is shown by recent references to it in other legislation. In the last session of the General Assembly, Act No. 379 of 1980 effective April 23, 1980 authorized the Board of Financial Institutions to promulgate regulations permitting state chartered savings and loan associations to offer variable rate first mortgage real estate loans to the extent federally chartered savings and loan associations are permitted to do so by the Federal Home Loan Bank Board. See Board of Financial Institutions Emergency Regulations 15-34 and 15-35 of August 19, 1980, State Register Vol. 4, No. 17, pp. 49-66, and November 17, 1980, SR 4-22, p.51. That law gives this authority "notwithstanding the provisions of Act 7 of 1979 and §34-31-90." The General Assembly thus appears to be carving out a limited exception to the general public policy against allowing interest rates on mortgage loans to vary at all (Act No. 7 of 1979) or increase over 1% above the initial rate (§34-31-90) to permit certain state chartered financial institutions to compete effectively with comparable federally chartered institutions. See also S.C. Op. Att'y Gen. dated July 19, 1980 regarding federal savings and loan associations' ability to make variable rate mortgage loans.

Finally, Section 6 of Act No. 7 of 1979 amended the definition of "consumer loan" in Section 37-3-104 of the Consumer Protection Code (Cum. Supp. 1979) until June 30, 1981. That definition now includes certain first mortgage loans to build or purchase a residence. Administrative Interpretation No. 3.104-7908 issued May 10, 1979. If the restriction on increasing the rate on mortgage loans in subsection (2) of Section 34-31-90 did not apply to loans made under the Consumer Protection Code, the result would be that a first mortgage loan made to enable a consumer to build or purchase a residence could be subject to increasing rates up to an 18% ceiling if made under the Consumer Protection Code while limited to a fixed interest rate if excluded from the

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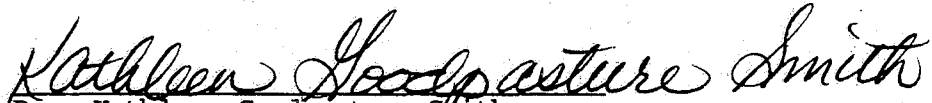
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Consumer Protection Code and made under Act No. 7 of 1979. In our opinion the General Assembly did not intend such first mortgage loans made under the Consumer Protection Code to be subject to increases of more than 1% when such a result is contrary to the declared public policy of the State.

In summary, it is our opinion that the Consumer Protection Code does not in itself prohibit variable rate consumer loans so long as the loans otherwise comply with any restrictions in the Consumer Protection Code including rate maximums. However, it is our further opinion that a real estate mortgage loan subject to the maximum charge provisions of the Consumer Protection Code is limited by subsection (2) of Section 34-31-90 to a 1% increase above the initially agreed-to rate over the life of the mortgage if that section, as interpreted by the Attorney General and ultimately the courts, applies to the loan in question.

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