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ADMINISTRATOR  
AND  
CONSUMER ADVOCATE

## The State of South Carolina

### Department of Consumer Affairs

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March 20, 1980

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Administrative Interpretation No. 2.605-8002

HOMEOWNER AND BUYER MAY CONTRACT FOR ANY CREDIT SERVICE  
CHARGE IN CONNECTION WITH CREDIT SALE OF RESIDENCE SECURED BY  
SECOND MORTGAGE ON THAT RESIDENCE.

You have asked for an administrative interpretation concerning the classification of and maximum rate of finance charge that may be charged in connection with the sale of a residence in the following circumstances. The seller, who is the current homeowner and is not regularly engaged in the business of selling homes on credit, enters into a contract to sell the residence to a buyer for a mutually agreeable price on a deferred payment plan. The outstanding first mortgage loan agreement between the lender and homeowner remains intact and the seller takes a second mortgage on the residence as security for his transaction with the buyer. The first mortgage loan agreement between the lender and homeowner, who is now the seller of the residence, does not have a due-on-sale clause permitting acceleration of the unpaid balance or other action upon sale or transfer, or otherwise restrict sale or transfer of the residence. You described this transaction between the homeowner-seller and buyer as a "wraparound mortgage" agreement in which the buyer agrees to pay the seller an amount equal to the full amount remaining on the first mortgage loan plus the seller's equity in the residence.

Such an agreement requires the buyer to make his payments directly to the seller who in turn is required to continue making his first mortgage payments to the first mortgage lender. This transaction differs from an assumption of the first mortgage loan in that the buyer is not obligated to the lender on the first mortgage loan but instead is obligated only to the seller. The deed passes to the buyer at the time of the sale but the sale is subject to the existing first mortgage.

You asked whether a transaction such as that described is a credit sale of a residence in which the buyer and seller may agree to any credit service charge under the authority of Consumer Protection Code Section 2.605 [S.C. Code Ann. §37-2-605 (1976)]. You noted that Administrative Interpretation No. 2.605-7905, issued April 13, 1979, stated that a homeowner may sell the equity in his own residence on a deferred payment plan, secure the debt by a second mortgage on the residence, and contract for any credit service charge with respect to the debt. The major difference between the transaction prompting the request for the earlier administrative interpretation and the current one is that in the former the homeowner is financing only the sale of his equity in the residence with the balance being financed separately (such as by an assumption of the first mortgage loan) while in the latter the homeowner is financing the entire purchase price of the residence himself.

TELEPHONES [AREA CODE 803]

ADMINISTRATION  
758-3017

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

PUBLIC INFORMATION  
758-7546

NOTIFICATION  
758-8587

CONSUMER ADVOCACY  
758-5864

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It is the opinion of this Department that the homeowner-seller in the transaction outlined above is making a sale other than a consumer credit sale and the parties may therefore contract for any credit service charge under the authority of Consumer Protection Code Section 2.605 which says:

With respect to a sale other than a consumer credit sale, the parties may contract for the payment by the buyer of any credit service charge.

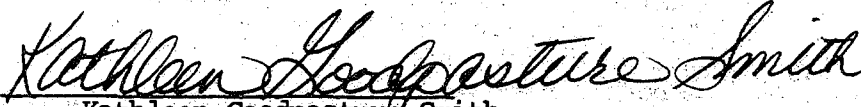
Such a transaction, if a bona fide sale, does not meet the definition of "consumer credit sale" in Consumer Protection Code Section 2.104 [S.C. Code Ann. §37-2-104 (1976)] because the credit is granted by a person who does not regularly engage as a seller in credit transactions of the same kind [§2.104(1)(a)] although the other elements of the definition may be met. Thus it is a "sale other than a consumer credit sale." The threshold question, however, in every such transaction is whether it is in fact a bona fide sale rather than an attempt to evade the usury laws. Brown v. Crandall, 218 S.C. 124, 61 S.E.2d 761 (1950). See Declaratory Ruling No. 2.605-8001 Litchfield-By-The-Sea, Inc., January 17, 1980, page 3.

We are concerned that since Administrative Interpretation No. 2.605-7905 was issued, some persons apparently have assumed that a financed sale of the equity in a homeowner's residence could be accomplished by using standard loan documents. When a credit sale is being made, the documents which evidence the transaction should be clear concerning the nature of the transaction so that the reliance on Consumer Protection Code Section 2.605 as authority for the amount and rate of credit service charge being made is apparent. Use of documents referring to the transaction as a "loan" instead of a "credit sale" can only confuse the issue of the nature of the transaction and thus the applicable provisions of law relating to permissible charges. In all credit sales of a residence or equity in a residence, we encourage full, clear disclosure to the buyer of the nature of the transaction as well as the terms of the agreement to make clear the parties' understanding when the agreement was entered into. Additionally, in transactions similar to the one you described as a "wraparound mortgage," we encourage providing adequate protection to the buyer in the event of default of the seller on the first mortgage loan.

In summary, in the opinion of this Department, a homeowner-seller and a buyer may enter into a credit sale transaction to finance the purchase of a residence, secure it by a second mortgage on the residence, and contract for any credit service charge under the authority of the Consumer Protection Code Section 2.605.

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BY:

  
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