



The State of South Carolina  
**Department of Consumer Affairs**

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*Celebrating Over 40 Years of Public Service*

April 6, 2017

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**RE: Administrative Interpretation No. 3.104,106,403-1701:**

A FUTURE INCOME INVESTMENT AGREEMENT CONSTITUTES A CONSUMER LOAN UNDER THE CODE AND IS PROHIBITED THEREUNDER DUE TO BEING SECURED BY AN IRREVOCABLE ASSIGNMENT OF EARNINGS.

The Department has been asked to deliver an interpretation as to whether a Future Income Investment Agreement (“FIIA”) constitutes a “consumer loan” under the South Carolina Consumer Protection Code (“the Code”), S.C. Code Ann. § 37-1-101 *et seq.*,<sup>1</sup> whether a FIIA is subject to the South Carolina usury limits, and whether a company offering and/or providing FIIAs must be licensed pursuant to South Carolina law. The Department concludes that such transactions, also commonly referred to as Income Share Agreements and Human Capital Contracts, meet the definition of a consumer loan; thus, when a company engages in the offering or provision of such activities, they must comply with the Code, including applicable usury limits as well as licensure. The Department further concludes the repayment structure of the loan constitutes an irrevocable assignment of earnings, a practice prohibited in South Carolina.

Adopted in 1974, the Code governs the regulation of consumer credit transactions and sets forth general creditor and consumer rights and responsibilities including disclosures, maximum charges, and licensing. *See* § 37-1-101 *et seq.*, specifically §§ 37-3-301,-305,-502. Pursuant to section 37-1-301(11), a consumer credit transaction includes a consumer loan. A “consumer loan” is defined as:

- 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 twenty-five dollars [ninety thousand as adjusted] or the debt is secured by an interest in land.

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

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See § 37-3-104; § 37-1-109.

Several terms utilized in the definition of a consumer loan are also defined terms. The Code defines a “loan” as including, among other activities, “the creation of debt by the lender’s payment of or agreement to pay money to the debtor or to a third party for the account of the debtor;” and “the forbearance of debt arising from a loan.” § 37-3-106(1) & (4). While “debtor” is defined as an obligor in a credit transaction, “debt” is not a defined term. See § 37-1-301(14). The Official Comments to the 1968 Uniform Consumer Credit Code (“UCCC”), however, state that a loan is created when the “creditor creates debt by advancing money to the debtor.” Unif. Consumer Credit Code § 3.106, 7 U.L.A. 612 (1997). “Payable in installments” when applied to a consumer loan transaction is a payment required or permitted “to be made in two or more periodic payments.” § 37-1-301(19). Section 37-3-109(a) defines a loan finance charge, in pertinent part, as:

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, including any of the following types of charges which are applicable: interest or - any amount payable under a point, discount or other system of charges, however denominated...

*Emphasis added.*

The definition of a loan is further expounded upon in section 37-3-403(2). This section states “a sale of unpaid earnings made in consideration of the payment of money to or for the account of the seller of the earnings *is deemed to be a loan* to him secured by an assignment of earnings.” *Emphasis added*; § 37-3-403(2). The Code defines “earnings” as, among other items, wages, salaries, and pension and retirement payments. § 37-1-301(15).

When interpreting statutory provisions, the words of a statute must be given their plain meaning and consistently construed within the parameters of the statute’s purpose and subject. Ga. Carolina Bail Bonds, Inc. v. City of Aiken, 354 S.C. 18, 23, 579 S.E.2d 334, 336 (Ct. App. 2003). Statutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and each given effect, if it can be done by any reasonable construction. Higgins v. State, 307 S.C. 446, 415 S.E.2d 799 (1992). Further, the statutory provisions of the Code shall be liberally construed and applied to promote the Title’s underlying purposes and policies, which include to protect consumers and make uniform the law amongst various jurisdictions. See § 37-1-102(1); § 37-1-102(2)(d), (g), (e); Davis v. NationsCredit Financial Services Corporation, 326 S.C. 83, 86, 484 S.E.2d 471, 472 (1997); Camp v. Springs Mortgage Corp., 310 S.C. 514, 516, 426 S.E.2d 304, 305 (1993).



A FIIA<sup>2</sup> involves the advancement of funds to a consumer for the usual purpose of paying college-related expenses including tuition, books, and room and board. However, the advancement may cover any expense. The contract delineates a repayment structure whereby the consumer is required to pay a fixed percentage of his or her future income for a specified period. The amount advanced is not taken into consideration when determining the required payments. The installments are based solely on the consumer's income, which pursuant to materials reviewed by the Department, includes, but is not limited to, gross wages, salaries, commissions, and benefits from pension plans. The total amount repaid will vary based on the flow of the consumer's income during the repayment period. It may be more if the consumer maintains full employment for the entire period covered in the agreement or, if the consumer experiences time periods of unemployment or underemployment, the amount will be less.

Taking all of the above into account and given the plain language of the Code it is clear the framework of a FIIA follows the description set forth in section 37-3-403(2). The statute is reflective of South Carolina case law whereas in Martin v. Pacific Mills, the South Carolina Supreme Court found the practice of advancing funds to workers in exchange for a portion of their unearned wages amounted to a loan, as opposed to a "bill of sale" as argued by the plaintiff. Martin v. Pacific Mills, 160 S.C. 458, 158 S.E. 831 (1931). As the Court said, "the scheme of the plaintiff was cunningly devised, but thinly veiled, to make what was plainly a loan a bill of sale—an attempted evasion of the usury law." 160 S.C. at 462, 158 S.E. at 832. *See also* Rainwater v. Boyette, 151 S.C. 474, 149 S.E. 254 (1929) (Holding that a Court will look beyond the purported form of a transaction to its substance in determining whether a transaction was employed to evade usury laws).

The Department concludes that a FIIA is a loan and further meets the definition of a consumer loan as the persons engaging in lending do so on a regular basis; the debtors are consumers using the funds for tuition, housing or other personal, family or household purposes; the consumer repays the loan in installments upon which a loan finance charge is imposed (the difference between the amount advanced and the amount paid by the debtor); and the monies given to the consumer do not exceed \$90,000. Therefore, persons engaged in activities described herein shall comply with all applicable provisions of the Code, including the provisions regarding supervised lenders if the annual percentage rate imposed exceeds twelve percent and maximum rate provisions should such interest exceed eighteen percent. *See* § 37-3-501; *See also* § 37-3-201, -305. It is important to note as well that due to the requirement to interpret the Code's provisions liberally to further the protection of consumers, transactions similar to future income investments have been determined to constitute loans pursuant to the Code. The absence of an unconditional obligation to repay an advance of funds has not dissuaded South Carolina

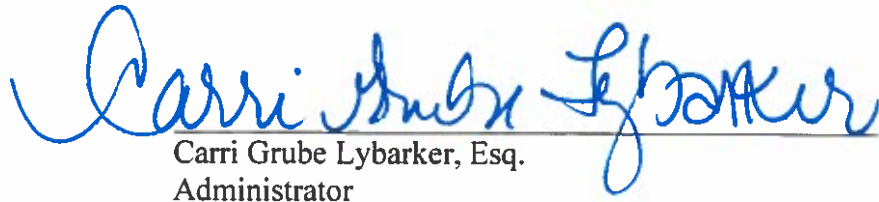
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<sup>2</sup> It appears the product is attempting to replicate income-driven repayment methods utilized by the Office of Federal Student Aid. The FIIA, however, differs greatly, from the repayment plans for federal student loans as the calculation models utilized through Federal Student Aid take into account the amount advanced, family size, discretionary income, poverty guidelines and other data points in determining the repayment amount and overall qualification for an income-driven repayment plan. *See* Income-Driven Repayment Plans: Questions and Answers, Federal Student Aid: <https://studentaid.ed.gov/sa/sites/default/files/income-driven-repayment-q-and-a.pdf> last accessed April 5, 2017.



courts or the Department in ruling a transaction is a loan. *See Administrative Interpretation 3.104,106-1403.*

The Consumer Protection Code, in addition to providing disclosures, maximum charges and licensing requirements pertaining to consumer credit transactions, also contains limitations on agreements. One such provision prohibits a lender from taking an assignment of earnings for payment or as security for a consumer loan debt<sup>3</sup>. § 37-3-403(1); *See also* § 37-2-410,-710. As stated above, pursuant to a FIIA, a consumer transfers the right to a specified percentage of the debtor's future, unpaid earnings in exchange for an amount advanced by the lender. The Department finds such practice is prohibited in South Carolina<sup>4</sup>.



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Administrator

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<sup>3</sup> Section 37-3-403(1) permits an employee to authorize deductions from earnings so long as the deduction is revocable. The Department does not address this caveat as the factual scenario presented does not include a revocable authorization.

<sup>4</sup> The Code also prohibits creditors from the attaching unpaid earnings of a debtor by garnishment. § 37-5-104; *See also* § 15-39-410,-420.