



IRVIN D. PARKER
ADMINISTRATOR
AND
CONSUMER ADVOCATE

The State of South Carolina

Department of Consumer Affairs

2221 DEVINE STREET
P. O. BOX 5757
COLUMBIA, S. C. 29250

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Administrative Interpretation No. 2.605-8005

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

We have been asked what, if any, maximum rate of interest applies to the sale of a residence by a homeowner when the sale is secured by a first mortgage on the residence. Although the Consumer Protection Code does not specify maximum rates of interest, Section 2.109 [S.C. Ann. §37-2-109(1976)] defines "credit service charge" as:

...the sum of...all charges payable directly or indirectly by the buyer and imposed directly or indirectly by the seller as an incident to the extension of credit, including any of the following types of charges which are applicable: time price differential, service, carrying or other charge, however denominated...

The definition clearly includes what may be called "interest" or "finance charge" as well as other terms used to describe the cost of credit in a sale transaction.

This question is one in a series concerning financing of residences by homeowners themselves. On April 13, 1979 we issued Administrative Interpretation No. 2.605-7905 headed "HOMEOWNER AND BUYER MAY CONTRACT FOR ANY CREDIT SERVICE CHARGE IN CONNECTION WITH CREDIT SALE OF EQUITY IN RESIDENCE SECURED BY SECOND MORTGAGE ON THAT RESIDENCE." The question prompting that interpretation involved a homeowner's assistance in financing the sale of his residence by financing the equity while a third party financed the balance such as by the buyer's assumption of the existing first mortgage loan.

On March 20, 1980 we issued Administrative Interpretation No. 2.605-8002 headed "HOMEOWNER AND BUYER MAY CONTRACT FOR ANY CREDIT SERVICE CHARGE IN CONNECTION WITH CREDIT SALE OF RESIDENCE SECURED BY SECOND MORTGAGE ON THAT RESIDENCE." The question prompting that interpretation involved a homeowner's financing the sale of his residence subject to the existing first mortgage loan on the residence.

The previous two interpretations involved a homeowner's financed sale of a residence or equity in a residence secured by a second mortgage on the residence. The major difference between those two transactions and the one you described is that the residence in the transaction in question which is financed entirely by the homeowner is secured by a first mortgage on the residence. As in the other two cases, the sale is not a consumer credit sale as defined in Section 2.104 of the Consumer Protection Code [S.C. Code Ann. §37-2-104(1976 as amended)] because the homeowner-seller is

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Administrative Interpretation No. 2.605-8005

May 14, 1980

Page 2

not "regularly engaged as a seller in credit transactions of the same kind." CPC §2.104(1)(a). Additionally, a purchase money first mortgage transaction such as this is an exception to the definition of consumer credit sale. Subsection (2) of Section 2.104 provides:

Unless the sale is made subject to this title by agreement (§37-2-601), "consumer credit sale" does not include...

(b) a sale of an interest in land if the debt is primarily secured by a first lien which is a purchase money security interest in land. (Emphasis added)

Because a homeowner's financed sale of a residence secured by a first mortgage on the residence is not a consumer credit sale, Consumer Protection Code Section 2.605 [S.C. Code Ann. §37-2-605(1976)] governs the maximum credit service charge (which includes interest) that may be charged:

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.

It is the opinion of this Department that a homeowner-seller and buyer may agree that the homeowner-seller finance the sale of the residence, secure the transaction by a first mortgage on the residence, and contract for any credit service charge which is mutually agreeable. As we pointed out in Administrative Interpretation No. 2.605-8002, we are concerned because some sales of residences have apparently been accomplished by using standard loan documents. To avoid confusion about the nature of a transaction and thus law applicable to it, we urge that documents used in connection with financed homeowner sales of residences be clearly drawn as appropriate for credit sale transactions.

Irvin D. Parker
Administrator

By Kathleen Goodpasture Smith
Kathleen Goodpasture Smith
Counsel to the Administrator

KGS:laad