HENRY MCMASTER
ATTORNEY GENERAL

January 11, 2010

The Honorable Converse A. Chellis, III, CPA
Treasurer, State of South Carolina
Post Office Box 11778
Columbia, South Carolina 29211

Dear Mr. Chellis:

We understand that as Chairman of the Board of Financial Institutions (the "Board"), you wish to request an opinion of this Office interpreting section 34-39-175 of the South Carolina Code. In your recent letter to this Office, you asked whether pursuant to this provision, "should outstanding deferred presentment loans be captured in the initial implementation of the common database or would such action be an improper retroactive application of the new statute?"

Law/Analysis

As you mentioned in your letter, the Legislature recently passed act 78 of 2009 (the "Act"), pertaining to deferred presentment transactions. 2009 S.C. Act No. 78. Pursuant section 34-39-270 of the South Carolina Code contained in the Act:

> (A) A licensee may not enter into a deferred presentment transaction with a person:
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> (1) who has an outstanding deferred presentment transaction;
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> (2) who has repaid a previous deferred presentment transaction with any licensee on the same business day;
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> (3) who has repaid a previous deferred presentment transaction with any licensee on the same business day or the previous business day if the transaction being requested would be the customer's eighth or more transaction within a calendar year; or

> (4) who has entered into an extended payment plan agreement with any licensee as provided in Section 34-39-280 which has not been paid in full or terminated.
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> (B) No eighth or subsequent deferred presentment transaction within a calendar year may be entered into on the same or subsequent business day of the repayment of the previous deferred presentment transaction.

. . . .

To implement this provision, the Legislature requires the Board of Financial Institutions to establish a database. Section 34-39-175 of the South Carolina Code explains this requirement.

> (A) In order to prevent a person from having a deferred presentment transaction that exceeds the limit in Section 34-39-180(B) and Section 34-39-270(A), the Consumer Finance Division of the Board of Financial Institutions shall implement a common database with real-time access through an internet connection for deferred presentment providers, as provided in this subsection. The board shall enter into a contract with a single source private vendor to develop and operate the database. By no later than February 1, 2010, the database must be accessible to the board and the deferred presentment providers to meet the requirements of this chapter and verify if a deferred presentment transaction is outstanding for a particular person. Deferred presentment providers shall submit the person's data to the database provider before entering into a deferred presentment transaction and once a deferred presentment transaction has been paid in full, in a format the board requires by regulation, including the drawer's name, social security number, or employment authorization alien number, address, driver's license number, amount of the transaction, date of transaction, the date that the transaction is closed, and additional information required by the board. The database provider may impose the database verification fee authorized by Section 34-39-270(H) for data required to be submitted by a licensee. The board may adopt procedures to administer and enforce the provisions of this section and to ensure that the database is used by licensees in accordance with this section.
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> (B) The information provided in the database is limited for the use in determining if a customer is eligible or ineligible to enter into a

> new deferred presentment transaction and to describe the reason for the determination of eligibility or ineligibility.

You question whether or not the Board can require deferred presentment providers to provide information to populate the database prior to its implementation. Section 34-39-175 does not specifically state such a requirement. Thus, in order to make this determination, we must consider the rules of statutory interpretation. As our Supreme Court recently stated in SCANA Corp. v. South Carolina Department of Revenue, 384 S.C. 388, 392, 683 S.E.2d 468, 470 (2009):

> The cardinal rule of statutory construction is to ascertain and effectuate the intent of the Legislature. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." Broadhurst v. City of Myrtle Beach Election Comm'n, 342 S.C. 373, 380, 537 S.E.2d 543, 546 (2000). The Court should give words their plain and ordinary meaning, without resort to subtle or forced construction to limit or expand the statute's operation. Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 469, 636 S.E.2d 598, 607 (2006).

Moreover,

> [c]ourts should consider not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law. Whitner v. State, 328 S.C. 1, 492 S.E.2d 777 (1997); see also Stephen, 324 S.C. at 340, 478 S.E.2d at 77 (statutory provisions should be given reasonable and practical construction consistent with purpose and policy of entire act). In interpreting a statute, the language of the statute must be construed in a sense which harmonizes with its subject matter and accords with its general purpose. Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 420 S.E.2d 843 (1992); Hudson, 336 S.C. at 246, 519 S.E.2d at 582. 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).

State v. Morgan, 352 S.C. 359, 366, 574 S.E.2d 203, 206 (Ct. App. 2002).

In your letter, you argue "the Generally Assembly clearly intended for current outstanding loans to be entered into the database." We agree with your assessment of the Legislature's intent. Section 34-39-175, cited in its entirety above, states that "[b]y no later than February 1, 2010, the database must be accessible to the board and the deferred presentment providers to meet the requirements of this chapter and verify if a deferred presentment transaction is outstanding for a particular person." (emphasis added). In addition section 34-39-270, requiring verification, states "[t]he database must be established and operated so as to prevent a licensee from entering into a transaction that violates the provisions of this section." As you indicate in your letter, if the database is not populated when it goes into effect, deferred presentment providers will have no way to verify whether or not a particular person has an outstanding loan. Thus, the verification requirement pursuant to section 34-39-270 will be frustrated. We do not believe that this was the intention of the Legislature given, as you say, its aim to cut down on the number of deferred presentment transactions one person may be involved in at a given time.

In addition, you also mentioned in your letter that the timing of the Act's enactment also indicates the Legislature intended for the database to be populated prior to it becoming effective. Section 11 of the Act states that most provisions of the Act become effective upon approval of the Act by the Governor, which effectively occurred on June 16 when the House and Senate overrode the Governor's veto. However, section 11 states some provisions, including the verification requirement, are to become effective upon the implementation of the database. You argue the fact that the Legislature specified that the database must first be established prior to the verification law indicates the Legislature intended for the database to be populated prior to requiring verification. This assessment seems logical. Otherwise, the Legislature would have made both the database provision and the verification requirement effective at the same time. However, we also note that section 34-39-175 allows the Board to set up the infrastructure of the database prior to its implementation and allows the Board to contract with a third party to set up and manage the database. These are tasks that we believe the Board would need to complete prior to the verification requirement taking effect regardless of whether the database is populated or not. Therefore, the requirement that the database be established prior to the effective date of the verification requirement may or may not indicate that the Legislature intended for the database to be populated at its implementation.

Regardless of the several provisions cited above that seem to indicate that the Legislature intended for the database to be populated at its implementation, we found one provision in the Act that appears contrary to that interpretation. Section 34-39-270 of the South Carolina Code contains a provision requiring deferred presentment providers to notify persons seeking to enter into a deferred presentment transaction that their information will be entered into a database. This provision states, in pertinent part: "The licensee also shall notify the person that information related to a new transaction must be entered into the database." S.C. Code Ann. § 34-39-270(G).

By this provision, we assume the Legislature finds it important for those seeking to enter into deferred presentment transactions to be notified that their information will become part of a database.

The provision allows persons entering into such transactions to make an informed decision as to whether or not to enter into the transaction knowing that their information will be available to the Board and other deferred presentment providers. According to the Act, this provision does not become effective until the implementation of the database. Therefore, if the database is populated prior to it becoming effective, a person whose information is loaded into the initial database may not receive notification from the deferred presentment provider as the deferred presentment provider would not be required to make this notification to the applicant. Because most of the provisions of the Act became effective in June of 2009 and the database has yet to be implemented, we hope that deferred presentment providers have been proactive in providing this notice to their applicants. However, in reading this provision, the deferred presentment providers do not appear to be legally obligated to provide such notice until the database becomes effective. Accordingly, if we were to read the Act as requiring the database to be populated with data concerning current transactions prior to its effective date, this reading would hinder the Legislature's intent to provide notice to those whose information will be contained in the database.

Because section 34-39-175 is not clear from its plain language that the database must be populated with data prior to its implementation, we look to the Act as a whole. While we agree with your assessment that several of the provisions including the language used in section 34-39-175 indicate that the Legislature intended for the database to be populated at its implementation, we are reluctant to interpret section 34-39-175 as requiring the database be populated at its implementation due to the Legislature's clear intent in section 34-39-270(G) to provide those entering into deferred presentment transactions with notice prior to their information being entered into the database. However, we believe the best method of resolving this issue is to seek clarification either from the courts through a declaratory judgment action or by a legislative amendment to the statute by the Legislature.

In addition to interpreting the language in section 34-39-175 to determine the Legislature's intent with regard to the contents of the database upon its implementation, we understand that the Board and deferred presentment providers are concerned that if this provision is interpreted to require information on current loans to be contained in the database upon implementation, this interpretation would equate to retroactive application of section 34-39-175. "The retrospective operation of a statute is not favored by the courts, and statutes are presumed to be prospective in effect." State v. Dickey, 380 S.C. 384, 404, 669 S.E.2d 917, 928 (Ct. App. 2008). However, we do not believe including current data in the database constitutes retroactive application of the law.

In a 1983 opinion, we considered whether a statute requiring a twelve-month period elapse between the filing of a rate schedule with the South Carolina Public Service Commission and any new filing constituted retroactive application of the statute. Op. S.C. Atty. Gen., July 1, 1983. We stated:

> [C]omputing the twelve-month period from a date occurring before the effective date of Act 138 does not constitute a retroactive application of the law.
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> > [A] statute does not operate retroactively merely because it relates to antecedent events, or because part of the requisites of its action is drawn from time antecedent to its passing, but is retroactive only when it is applied to rights accrued prior to its enactment. 82 C.J.S., Statutes, § 412 (1953).

Id. Furthermore, we cited to a Pennsylvania case holding that a statute "was not being applied retroactively merely because a part of the requisites for its action was drawn from a time antecedent to its enactment." Id. (citing City of Philadelphia v. Phillips, 179 Pa. Super. 87, 116 A.2d 243 (1955)). Moreover, as the United States Supreme Court stated in Landgraf v. USI Film Products, 511 U.S. 244, 269-70(1994):

> A statute does not operate "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment, see Republic Nat. Bank of Miami v. United States, 506 U.S. 80, 100, 113 S.Ct. 554, 565-566, 121 L.Ed.2d 474 (1992) (THOMAS, J., concurring in part and concurring in judgment), or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.

As mentioned previously, the provision of the Act establishing the database became effective when the House and Senate overrode the Governor's veto on June 16, 2009. We understand that you are not seeking to require deferred presentment providers to provide vast amounts of historical information. Rather, the Board is seeking to populate the database based on current outstanding deferred presentment transactions as of a date prior to the implementation of the database. Thus, while this information may include transactions entered into prior to June 16, the provisions of the Act will not act to upset any of these transactions or place new legal consequences on these transactions. These prior transactions will remain unaffected and the new law will only impact new transactions that are entered into after the implementation of the database. As such, if a court were to interpret section 34-39-175 as requiring the database to be populated prior to its implementation, we do not believe such an interpretation would constitute a retroactive application of this provision.

Conclusion

Section 34-39-175, establishing a database to house information on persons with outstanding deferred presentment transactions, does not specify whether or not outstanding deferred presentment transactions should be captured in the initial implementation of the database. Employing the rules of statutory interpretation, we find evidence in several provisions, including section 34-39-175, indicating that the Legislature may have intended for the database to be populated at its implementation. Namely, we agree with your assessment that the purpose of the Act as a whole will be frustrated if the database does not contain any information by which deferred presentment providers can verify whether an individual has an outstanding transaction, as required in section 34-39-270(C). Moreover, if a court were to rule that the database is to be populated at its implementation, we do not believe this reading of the statute would constitute retroactive application of its provisions.

However, absent guidance from a court, we cannot ignore the fact that in section 34-39-270(G), the Legislature also expresses its intent to protect those entering into deferred presentment transactions by requiring deferred presentment providers to notify these individuals that their information will become part of the database. Accordingly, we are constrained from interpreting section 34-39-175 to require the database to include current deferred presentment transactions when the person taking out the loan may not have received notice that their information will be included in the database. Thus, we advise that unless the Board obtains clarification from the courts or the Legislature, the database should become populated as new transactions are entered into after its implementation date.

Very truly yours,

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Attorney General

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