ALAN WILSON
ATTORNEY GENERAL

January 9, 2017

The Honorable James E. Smith, Jr., Member
South Carolina House of Representatives
District 72
Post Office Box 50333
Columbia, SC 29250-0333

Dear Representative Smith:

You have asked whether South Carolina law permits the initial payment due date for a supervised loan to be shorter than the remaining substantially equal periodic intervals or longer than the periodic interval and one-half. By way of background, you state the following:

> Section 37-3-511 provides:
>
> "Supervised loans, in which the rate of loan finance charge exceeds twelve percent per annum, not made pursuant to a revolving loan account, in which the principal is one thousand dollars or less, shall be scheduled to be payable in substantially equal installments at equal periodic intervals except to the extent that the schedule of payments is adjusted to the seasonal or irregular income of the debtor, and
>
> (a) over a period of not more than thirty-seven months if the principal is more than three hundred dollars; or
>
> (b) over a period of not more than twenty-five months if the principal is three hundred dollars or less."
>
> Further, the South Carolina Department of Consumer Affairs looked at this issue in 1976 and stated in Administrative Interpretation that "the restriction on loan terms provided in Section 3.511 does not prohibit scheduling the first installment due date more than a month after the transaction date." S.C. Dep't of Consumer Affairs, Admin. Interpretation No. 3.511-7610 (1976) (enclosed). In the Administrative Interpretation, the Department was answering a question about "whether the emphasized language precludes a schedule in which the interval between the contract date and the first installment due date is not equal to the intervals between the first and subsequent due dates." See id. However, in 2013, an informal letter opinion was provided by the Department's Deputy for Regulatory Enforcement that contradicted the Department's 1976 Administrative Interpretation. Letter from Danny R. Collins, Deputy for Regulatory Enforcement (September 24, 2013) (enclosed). Although I

believe the 1976 Administrative Interpretation is correct, I am requesting that your Office review the relevant statutes and provide a formal Opinion on the question above.

Law/Analysis

A number of principles of statutory construction are relevant to your question. The cardinal rule of statutory construction is, of course, to ascertain and effectuate the legislative intent whenever possible. City of Myrtle Beach v. Juel P. Corp. et al., 337 S.C. 157, 522 S.E.2d 153 (1999), citing Joint Legislative Comm. v. Huff, et al., 320 S.C. 241, 464 S.E.2d 324 (1995); additionally, also see Glover by Cauthen v. Suitt Constr. Co., 318 S.C. 465, 458 S.E.2d 535 (1995). Our Supreme Court, in City of Myrtle Beach, supra, further stated that "[a]ll rules of the statutory construction are subservient to the one that legislative intent must prevail if it reasonably can be discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." (citing Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 440 S.E.2d 364 (1994). The determination of legislative intent is a matter of law. Charleston County Parks and Recreation Comm'n. v. Somers, 65, 459 S.E.2d 841 (1995).

Moreover, where there is ambiguity in a statute or the legislative intent cannot necessarily be ascertained, we have emphasized on numerous occasions that "construction of a statute by the agency charged with executing it is entitled to the most respectful consideration [by the courts] and should not be overruled absent cogent reasons." Op. S.C. Atty. Gen., 1997 WL 783366 (October 20, 1997), quoting Logan v. Leatherman, 290 S.C. 400, 351 S.E.2d 146, 146 (1986). The courts have noted that it is not necessary that the administrative agency's construction be the only reasonable one, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding. Ill. Commerce Comm v. Interstate Commerce Comm., 749 F.2d 825 (D.C. Cir. 1984). Typically, so long as an administrative agency's interpretation of a statutory provision is reasonable, this Office has a longstanding policy of deferring to it. Further, as we have also stated, ". . . where an administrative interpretation of a statute has been applied for a number of years without being changed by the Legislature despite amendments to the statute, a presumption is created that such interpretation is correct." Op. S.C. Atty. Gen., 1983 WL 182049 (November 3, 1983).

With these principles in mind, we turn to your question. As you note in your letter, § 37-3-511 states that the payments on specified supervised loans must be a "equal periodic intervals." There is no definition of "equal periodic intervals" contained therein. However, § 37-3-511 allows the "schedule of payments" to be "adjusted to the seasonal or irregular income of the debtor." Because a "schedule" relates to timing (as well as amount), any schedule adjustment could well mean that the typically equal periodic intervals might be different lengths of time. This option for adjustments accommodates a debtor's employment situation and explicitly allows the debtor to align the payment due dates to the debtor's pay schedule, whether the payment schedule is affected by the seasons or is irregular.

In addition, the term "irregular" is not defined within the Consumer Protection Code, but in its common and ordinary sense means "lacking continuity or regularity especially of occurrence or activity." See Merriam Webster.com (Online Dictionary). This provision offers a benefit to people with income streams which are not consistent, and it does not specify whether the irregularity relates to time or amount, or both. A person who is paid on a regular schedule but in different amounts can qualify as having irregular income and thus establish a basis for adjusting the payment intervals.

Accordingly, a person who is paid regularly and in consistent amounts should not be denied the benefit of adjusting the payment schedule to fit his or her pay schedule, particularly where § 37-3-511 does not expressly proscribe such. In addition, it appears that the option to adjust payment intervals is in keeping with the consumer-oriented perspective of the Consumer Protection Code and likely increases the debtor's ability to repay the debt. This open-ended opportunity for adjusting the payment intervals also shows that the legislature intended that debtors be able to adjust their payment intervals to accommodate their pay schedule.

Other provisions in the Consumer Protection Code similarly support flexibility for consumers in the timing of payments based on factors outside the set payment schedule, in addition to seasonal or irregular income. In S.C. Code Ann. 37-3-402, which applies to consumer loans (of which supervised loans are a type, see S.C. Code Ann. 37-3-501(1)), for example, the provisions related to balloon payments do not apply to transactions if the payment schedule already has been "adjusted to the seasonal or irregular income or scheduled payments or obligations of the consumer." See also S.C. Code Ann. 37-2-405 (same language with respect to consumer credit sales).[1] While "scheduled payments or obligations of the consumer" are not listed in 37-3-511 as options upon which to base adjustments for supervised loans, the inclusion of those options in 37-3-402 recognizes that the General Assembly intended that payments may be adjusted for those reasons as well, including for supervised loans. See S. C. Dep't of Consumer Affairs v. Rent-A-Center, Inc., 345 S.C. 251, 547 S.E.2d 881 (Ct. App. 2001) (finding that even though legislature did not specifically authorize a type of charge in one provision, the other related provisions dealing with that type of product implied that the legislature intended to allow other possible charges).

Further, "[o]ne of the primary purposes of the Consumer Protection Code is to 'protect consumer buyers, lessees, and borrowers against unfair practices by some suppliers of consumer credit, having due regard for the interests of legitimate and scrupulous creditors.'" Davis v. NationsCredit Fin. Servs. Corp., 326 S.C. 83, 86, 484 S.E.2d 471, 472 (1997) (quoting S.C. Code Ann. 37-1-102(2)(d)). Thus, providing flexibility in scheduling payments based on the "seasonal or irregular income of the debtor" should not logically be a basis for excluding other grounds for adjusting payment schedules. If the payment schedule can be adjusted for those reasons, and the

[1] This language allowing flexibility for "scheduled payments or obligations of the consumer" is not included in S.C. Code Ann. 37-23-30, which governs high cost home loans. Similar to the balloon payment provisions in 37-3-402 and 37-2-405, subsection 37-23-30(2) excepts from the balloon payment limitation situations "when the payment schedule is adjusted to the seasonal or regular income of the borrower."

statute does not specify a limitation upon the initial payment schedule, the statute should not be interpreted to impose or imply such a limitation. Any ambiguity in the definition and application of the term "equal periodic interval" should "be resolved in favor of a just, equitable and beneficial operation of the law." Bennett v. Sullivan's Island Bd. Of Adjustment., 313 S.C. 455, 458, 438 S.E.2d 273, 274 (Ct. App. 1993). Moreover, as we have often noted, "[a]ny statute must be interpreted with common sense to avoid unreasonable consequences." A statutory construction may neither limit or expand the statute's operation. Op. S.C. Atty. Gen., 2010 WL 180873 (April 22, 2010).

Furthermore, Subparts (a) and (b) of 37-3-511 limit the total period for payments on the specified supervised loan to either 37 months if the principal is more than $300 or 25 months if the principal is $300 or less. Based upon these maximum loan terms, in 1976 Administrative Interpretation 3.511-7610, the Department of Consumer Affairs opined that "[i]t is reasonable to conclude that a 'two year' loan might extend up to a month longer than two years. This would happen only if at least one interval is longer than a month." It should be noted that this Administrative Interpretation was made contemporaneously with the statute's enactment in 1976. The author of the Department's Interpretation further elaborated:

> [t]he practice under the small loan acts, from which this concept [that the initial payment period may vary] was to permit scheduling the first payment due date more than a month after the transaction date so that a "convenient" payment date could be established. The extra month permitted for scheduling repayment of "three year" and "two year" loans manifests a legislative intent to continue this practice. In order to accomplish this apparently intended result the term "periodic intervals" must be construed to mean only the recurring intervals following the first installment due date.

This analysis is reasonable and we defer to it, as we believe would the courts. Apparently, such an approach is apparently consistent with custom and practice. For example, Section 37-3-511 allows a $300 loan to be repaid in 25 months. If the installment amounts must be "substantially equal," and the payments must be due in "equal periodic intervals," the repayment schedule could be at least two formats. The 25 months could be divided exactly equally into 25 monthly or 50 bi-weekly payments, but to accomplish this strict equality, the first payment would be due on the day the borrower signs the loan documents. The reasonable (and most plausible) alternative recognized by the legislature is that the borrower may wait to a later date to make the first payment, and the remaining time allocated to substantially equal payment amounts at equal periodic intervals.

The statute does not limit the 25- or 37-month loan terms to monthly or bi-weekly payment schedules. Within those maximums, then, the lender and customer are free to define a payment schedule along lines which best suits their transaction.

As explained above, although "equal periodic interval" is not defined. Section 37-3-511 itself allows the initial payment date to be set for an interval different from the remaining

periodic intervals for a variety of reasons that generally are intended to align the payments with the borrower's pay schedule. While other provisions of the Consumer Protection Code define "interval," those definitions are limited to specific contexts and are not broadly applicable to all supervised loans. They thus do not provide guidance to interpret and apply 37-3-511.

Two provisions define "interval" in the contexts of deferrals of payments for precomputed loans (37-3-204(l)(d)) and precomputed consumer credit sales (37-2-204(l)(d)):

> The "interval" between specified dates means the interval between them including one or the other but not both of them; if the interval between the date of a transaction and the due date of the first scheduled installment does not exceed one month by more than 15 days when the computational period is one month, or does not exceed 11 days when the computational period is one week, the interval may be considered by the creditor as one computational period.

Several deficiencies prevent these sections from providing guidance to interpret 37-3-511, especially in a way that would contradict the reasonable interpretation of 37-3-511, described above, and thus limit the ability to set the initial payment interval for a time period different from the subsequent periodic intervals.

First, both of these sections state on their face that they apply to "precomputed loans": "In this section and in the provisions on rebate upon prepayment [] the following defined terms apply with respect to a precomputed consumer loan." S.C. Code Ann. 37-3-204(1); see also S.C. Code Ann. 37-2-204(1) (similar language for "precomputed consumer credit sale"). In addition, "transaction" in those sections "means a precomputed consumer loan unless the context otherwise requires." S.C. Code Ann. 37-3-204(1)(h); see also S.C. Code Ann. 37-2-204(1)(h).

As defined in the CPC, "[a] loan, refinancing, or consolidation is 'precomputed' if the debt is expressed as a sum comprising the principal and the amount of the loan finance charge computed in advance." S.C. Code Ann. 37-3-107(2); see also 37-2-105(7) (similarly defining precomputed in the context of consumer credit sales). For a precomputed loan, the payment schedule is based upon an upfront total of the entire amount due allocated across the term of the loan.

Second, the definition of interval in 37-3-204(l)(a) and 37-2-204(l)(a) does not limit the length of the interval, but defines it generally to establish from which place to start counting and which place to end in computing the effect of a deferred payment. The second clause of the sentence provides a framework for connecting the interval to a "computational period," but in doing so by using specific amounts of time, it does not limit the first scheduled installment to a particular time period: "the interval may be considered by the creditor as one computational period." The creditor may, but is not required to, consider the first installment due date as one computational period based on the calculation provided in the definition of interval.

The definition and optional calculation for intervals under these sections are appropriate because the related definition of "computational period" recognizes that the installments may not be at substantially equal timeframes:

> "Computational period" means (i) the interval between scheduled due dates of installments under the transaction if the intervals are substantially equal or, (ii) if the intervals are not substantially equal, one month if the smallest interval between the scheduled due dates of installments under the transaction is one month or more, and, otherwise, one week.

S.C. Code Ann. 37-3-204(l)(a); S.C. Code Ann. 37-2-204(l)(a). The issue of defining computational periods and intervals is of particular significance for precomputed loans. Because the total amount due was the basis for the payment schedule, any payment deferrals require a mechanical computation of the effect of the deferral on the remaining payments. In comparison, for an actuarially computed loan,[2] the effect of a deferral is self-adjusting because the total amount due is based on the outstanding principal balance on the due date and the operation of the agreed-upon interest rate and other charges. A precomputed loan does not operate the same way. While a supervised loan may be a precomputed loan, a supervised loan also could be computed actuarially. For that type of loan, the definition of interval for precomputed loans is especially inapplicable.

Based on the legislative activities since 37-3-511 was enacted in 1976, the General Assembly has been able to rely upon the Department's 1976 opinion that did not limit the length of the initial payment deadline. The current language of S.C. Code Ann. 37-3-511 referring to the "substantially equal installments at equal periodic intervals" was passed by the General Assembly in 1976 and it became effective on June 30, 1976.

As stated above, on November 3, 1976, the Department of Consumer Affairs explained that "the restriction on loan terms provided in Section 3.511 does not prohibit scheduling the first instalment due date more than a month after the transaction date and charging a finance charge equal to $1/30^{th}$ of an applicable monthly rate for each day in excess of a month in the interval." S.C. Dep't of Consumer Affairs, Admin. Interpretation No. 3.511-7610 (1976). The question presented to the Department generally was "whether the emphasized language precludes a schedule in which the interval between the contract date and the first installment due date is not equal to the intervals between the first and subsequent due dates." See Admin. Interpretation No. 3.511-7610.

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[2] "'Actuarial method' means the method, defined by rules adopted by the Administrator, of allocating payments made on a debt between principal or amount financed and loan finance charge or credit service charge pursuant to which a payment is applied first to the accumulated loan finance charge or credit service charge and the balance is applied to the unpaid principal or unpaid amount financed." S.C. Code Ann. 37-1-301(1).

The opinion also stated that "'equal periodic intervals' means equal time periods between the first and subsequent installment due dates." The question was not limited to considering whether the contract-to-first-installment interval was less than the intervals between the first and subsequent due dates. As of the 1976 Administrative Interpretation, the legislature would have understood that the equal periodic interval requirements applied to the interval beginning with the first installment due date, whenever that may be.

Following the Department's 1976 Administrative Interpretation, in 2009 and 2010 the General Assembly amended Chapter 3, Part 5, to change the definitions of supervised lender and supervised loan and to change licensing requirements. See S.C. Act 287 (2010); S.C. Act 67 (2009). Importantly, the Legislature did not change 37-3-511, knowing that the Department had interpreted the statute in its 1976 opinion as allowing the equal periodic interval to begin with the first installment due date. Based upon our 1983 Opinion, referenced above, this failure to amend the statute in light of the longstanding Administrative Interpretation, would be deemed virtually dispositive.

The Legislature's action to amend the statute, while leaving 37-3-511 in place, is evidence of the legislature's presumed familiarity with the 1976 administrative interpretation and intention that the statute continue to be interpreted in that way. "It is presumed that the Legislature is familiar with prior legislation, and that if it intends to repeal existing laws it would . . . expressly do so; hence, if by any fair or liberal construction two acts may be made to harmonize, no court is justified in deciding that the later repealed the first." Justice v. Pantry, 330 S.C. 37, 43-44, 496 S.E.2d 871, 874 (Ct. App. 1998) (quoting State v. Hood, 181 S.C. 488, 491,188 S.E. 134, 136 (1936)).

On September 24, 2013, the Department of Consumer Affairs issued a private letter opinion in response to an inquiry regarding 3-511. That letter concluded more specifically than the 1976 opinion that the period between the contract date and first payment "cannot be more than one and one-half of the periodic interval, and there is no provision for it to be shorter." The Department relied on S.C. Code Ann. 37-3-204(l)(d) for guidance in interpreting what an interval should be, which, as discussed above, does not apply to all supervised loans but explicitly and implicitly applies only to precomputed loans.

"The Administrator of the Department of Consumer Affairs is entitled and authorized to interpret the Consumer Protection Code on behalf of the Commission on Consumer Affairs." See S.C. Code Ann. 37-6-506. This authority is not exclusive. In addition, "[t]he construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." Dunton v. S.C. Bd. Of Exam'rs in Optometry, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987). An administrative construction, however, "affords no basis for the perpetuation of a patently erroneous application of the statute." Monroe v. Livingston, 251 S.C. 214, 217, 161 S.E.2d 243, 244 (1968).

Further, the September 2013 private letter opinion does not supersede the guidance from Administrative Interpretation 3.511-7610, which has been published as a formal administrative opinion. See S.C. Dep't of Consumer Affairs, Administrative Opinions, available at http://www.consumer.sc.gov/Pages/AdministrativeInterpretations.aspx. The September 2013 private letter is not listed among the Department's official administrative interpretations. See id.

According to the regulations, the Administrator is required to keep copies of administrative interpretations available for public inspection. S.C. Reg. 28-26. The statute governing administrative interpretations, however, specifies that "the administrator shall: . . . (d) make available for public inspection all final orders, decisions and opinions." S.C. Code Ann. 37-6-407(d). A decision of the administrator is not effective against a person and cannot be invoked by the administrator for any purpose unless it has been made available for public inspection. Id. at -407(2). The Administrative Interpretations on the web site have been made publicly available as required by the statute. The September 2013 private letter has not, because it is not passively available; a person must affirmatively request it somehow from the Department. Because the September 2013 private letter has not been made available for public inspection as required by the statute, it is not "valid or effective against any person or party, nor may it be invoked by the administrator for any purpose" except as to a person who has actual knowledge of the letter, as specified by the statute.

Finally, the status of the 1976 Administrative Interpretation is not dependent on the historic "small loan acts" that are referred to in that Interpretation: "The practice under the small loan acts, from which this concept is derived, was to permit scheduling the first payment due date more than a month after the transaction date so that a 'convenient' payment date could be established." As explained above, the plain language of section 37-3-511 recognizes the flexibility intended by the legislature in allowing adjustments to the payment schedules to accommodate the borrower's circumstances, and in creating a maximum loan term that incorporates a later initial payment date. The legislature was aware of the practices from the small loan statutes when it enacted 37-3-511, and if it wanted that section to operate differently, it would have so provided.

Conclusion

In conclusion, for the reasons set forth above, it is our opinion that, with respect to a supervised loan, the initial payment due date may be shorter than the remaining substantially equal periodic intervals or longer than the periodic interval and one-half. We reach this conclusion for several reasons. First, § 37-3-511 does not limit the initial payment due date to a certain time period. We will not imply such a requirement when such has not been expressly required by the General Assembly. As we have previously stated, where there is no express limitation, "the law will not permit such a limitation to be implied." Op. S.C. Atty. Gen., 2006 WL 2593082 (August 24, 2006). Secondly, the statute provides flexibility for the debtor and lender to determine the initial payment due date in accord with the borrower's pay schedule. As one authority has noted, "to allow some flexibility in the payment schedule is clearly of potential

benefit to consumers, particularly with regard to the first interval." See Maine Dept. of Business Regulation, Bureau of Consumer Protection, Advisory Ruling 49-A, 1980 WL 596562 (November 7, 1980). We believe it is prudent to conclude that the General Assembly intended to allow this flexibility in enacting § 37-3-511.

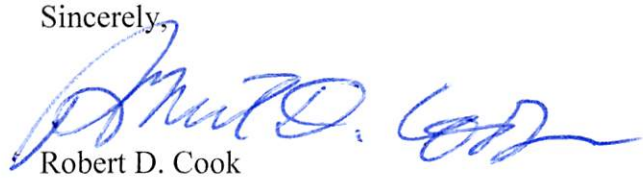
Other definitions of "interval" contained in the Consumer Protection Code are inapplicable. Thus, we deem the Department's private letter opinion based upon one of those definitions as not controlling.

Third, it is the policy of this Office to defer to a longstanding administrative interpretation if such determination is reasonable. The 1976 Administrative Interpretation of the Department was rendered contemporaneously with the enactment of § 37-3-511, and referenced the fact that it is customary for the lender and borrower to agree to a different period of time between the consummation of the loan and the due date of the initial payment in order to accommodate the borrower's pay schedule. In our view, such an interpretation by the Department is reasonable, allowing the necessary "flexibility" to accommodate the borrower, referenced above.

Fourth, and finally, this 1976 Interpretation has endured over the years in the eyes of the General Assembly, even in the face of other amendments to § 37-3-511. This Office has noted that such deference by the Legislature is particularly entitled to great weight. It is apparent that, over the years, the Legislature has indicated its agreement with the contemporaneous Interpretation rendered in 1976 and its recognized flexibility in the statute by not altering § 37-3-511.

We further note that this advisory opinion is based only on the question presented, the current law, and the information which you have provided to us, and constitutes our effort to construe the law as we believe a court would. This opinion is not an attempt by this Office to establish or comment upon public policy, nor to comment on any pending litigation or criminal proceeding. We note also that you may choose to petition a court for a declaratory judgment, as only a court of law can interpret statutes and make such determinations. See S.C. Code Ann. 15-53-20.

Sincerely,



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