



ALAN WILSON
ATTORNEY GENERAL

February 14, 2020

The Honorable Bill Sandifer
Member
South Carolina House of Representatives
District No. 2
407 Blatt Bldg.
Columbia, SC 29201

Dear Representative Sandifer:

Attorney General Alan Wilson has referred your letter to the Opinions section. Your letter asks “whether a fee paid to a third party chosen by the consumer to facilitate a payment on a consumer credit transaction is a charge imposed or received by a creditor under South Carolina's Consumer Protection Code?” The letter explains the relationship between third-party payment processors and creditor as follows:

In addition to paying by mail or in person, payments on consumer credit accounts can be made online, over the telephone, or via a mobile device, typically by using a credit card, debit card or electronic check. These electronic payments are typically processed by third-party service providers, rather than the creditor itself. Depending on the payment method used by the consumer, the creditor or third-party provider may assess fees on payment. Consumers often turn to telephone, online, or mobile payments because they are faster and more convenient than writing and sending a check or paying in person with cash, and in some cases they may prevent a consumer from risking a late payment fee. In these cases, consumers knowingly pay a fee to use one more convenient or expedient payment option over a free option that may be less convenient or expedient in the consumer's determination.

...

Third-party payment processors and creditors are separate, distinct entities; with few exceptions, the relationship between creditors and payment processors exists solely for the purpose of facilitating consumer payments. This may take the form of encouraging the use of a specific third-party processor in order to receive a portion of a fee, but most frequently, it is merely about facilitating or assisting the consumer in using a specific processor to make a payment in a more convenient or expedient manner. Most creditors enter into agreements with third-party processors in order to establish the links necessary for the creditor to accept

payments from the processor, which makes it easier and more convenient for the consumer to make the payments using the third-party processor's service.

Law/Analysis

For the reasons that are discussed below, this Office defers to the South Carolina Department of Consumer Affairs' ("the Department") administrative interpretation regarding loan finance charges and third-party processing fees. S.C. Dep't of Consumer Affairs, Admin. Interpretation, No. 3.109, 503-1603 (2016). The interpretation concludes that fees charged by third-party payment processors will generally be considered loan finance charges according to agency principles. However, this Office recognizes that there may be circumstances when a customer incurs transaction charges that are so far removed from a lender's control that they may not be considered incident to the extension of credit. Such a determination will necessarily depend on the facts relevant to the transaction and is beyond the scope of this Office's opinions. See Op. S.C. Att'y Gen., 1985 WL 259225 (October 9, 1985) ("Because this Office does not have the authority of a court or other fact-finding body, we are not able, in a legal opinion, to adjudicate or investigate factual questions.").

It is this Office's long standing policy, like that of our state courts, to defer to an administrative agency's reasonable interpretation of the statutes and regulations that it administers. See Op. S.C. Att'y Gen., 2013 WL 3133636 (June 11, 2013). In Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control, 411 S.C. 16, 34, 766 S.E.2d 707, 718 (2014), the South Carolina Supreme Court explained, "[W]e give deference to agencies both because they have been entrusted with administering their statutes and regulations and because they have unique skill and expertise in administering those statutes and regulations." The Court stated that the determination of whether deference is afforded to an agency's interpretation of the statutes and regulations it administers involves two separate steps. Id.

First, a court must determine whether the language of a statute or regulation directly speaks to the issue. If so, the court must utilize the clear meaning of the statute or regulation. See Brown v. Bi-Lo, Inc., 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) ("We recognize the Court generally gives deference to an administrative agency's interpretation of an applicable statute or its own regulation. Nevertheless, where, as here, the plain language of the statute is contrary to the agency's interpretation, the Court will reject the agency's interpretation." (citations omitted)); Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) ("Where the terms of the statute are clear, the court must apply those terms according to their literal meaning."). If the statute or regulation "is silent or ambiguous with respect to the specific issue," the court then must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843, 104

S.Ct. 2778, 81 L.Ed.2d 694 (1984); see also Brown v. Bi-Lo, 354 S.C. at 440, 581 S.E.2d at 838.

Kiawah Dev. Partners, II, 411 S.C. at 32–33, 766 S.E.2d at 717. Because the South Carolina Code of Laws assigns the Commission on Consumer Affairs with the authority to interpret and explain the provisions of Title 37, the South Carolina Consumer Protection Code (“the Code”), as well as governing authority over the Department, this Office defers to its reasonable interpretations of the of the Code.¹

The Code establishes “loan finance charges” are 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.” S.C. Code Ann. § 37-3-109(1). While this description broadly defines loan finance charges, it does not address whether transaction fees imposed by third-party payment processors are encompassed within those charges which are either directly or indirectly imposed as an incident to the extension of credit. Therefore, because the statute is ambiguous with respect to this topic, Kiawah directs that the Department’s interpretation be afforded deference.

On November 8, 2016, the Department issued an administrative interpretation regarding third-party transactions fees. S.C. Dep’t of Consumer Affairs, Admin. Interpretation, No. 3.109,503-1603 (2016). The Department explained its interpretation as follows:

The second question posed pertains to the lender charging a fee to consumers who utilize an online system to make a payment on an outstanding supervised loan. The Code sets forth the fees creditors may charge and how such charges may be assessed and earned. Pursuant to section 37-3-109, 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" are loan finance charges and must be treated accordingly. The term does not include "charges as a result of default, additional charges (§ 37-3-202), delinquency charges (§ 37-3-203), or deferral charges (§ 37-3-204) ... " or in certain circumstances, appraisal costs. See § 37-3-109(1)(b). Section 37-3-202 sets forth those charges, which are excluded from the definition of a loan finance charge, a lender may contract for and receive "in connection with" a consumer loan in addition to a loan finance

¹ See S.C. Code Ann. § 37-6-506.

(1) The Commission shall be the policymaking and governing authority of the Department of Consumer Affairs and shall appoint the administrator and be responsible for enforcement of this title.

(2) The Commission, through the administrator, shall see that the provisions of this title are faithfully administered and enforced and to that end it may adopt, amend and repeal rules and regulations, not inconsistent with law, to interpret and explain provisions of this title, carry out the purposes and policies of this title, to prevent circumvention or evasion thereof or to facilitate compliance therewith.

charge. It is the Department's interpretation that a fee charged to a consumer utilizing a payment method to make required payments on a consumer credit transaction is incident to the credit transaction and constitutes a finance charge. Should your client argue the loan payment transaction fee is not a finance charge, the fee is not found in the listing delineated in section 37-3-202, thus is not a permissible additional charge and cannot be assessed.

The Department interprets the imposition of a loan payment transaction fee by a third party in the same manner. It is a generally held rule of agency law that an agent may possess no more authority than the principal. Colleton County Taxpayers Ass'n v. Sch. Dist., 371 S.C. 224, 638 S.E.2d 685 (2006). Stated differently, an agent has no implied power to do indirectly that which the principal is not authorized to do directly. Gambill v. Fuqua, 148 Ala. 448, 42 So. 735 (1906). As the lender is not statutorily permitted to charge a payment processing fee to its borrowers, neither can the third-party agent of the lender charge such a fee to borrowers. Should the third party be considered an independent contractor as opposed to an agent, similar reasoning prohibiting the third party from charging the consumer a payment processing fee applies as the duty to obey the law is non-delegable. United States v. Youritan Construction Co., 370 F. Supp. 643, 649 (N.D. Cal. 1973), *aff'd in part, remanded in part by*, 509 F.2d 623 (9th Cir. 1975). The lender will be considered liable for the impermissible actions in this circumstance. See Simmons v. Tuomey Regional Medical Center, 341 S.C. 32, 533 S.E.2d 312 (2000).

While you raise the point that consumers benefit by receiving the option to make payments via the web portal, the creditor benefits as well. The Department is not prohibiting the offering of such a service, just prohibiting the imposition of a related fee for use of the payment method. South Carolina is a deregulated state meaning under limited restrictions, creditors subject to the Code can generally charge whatever interest rate they choose. The cost of accepting and processing payments, whether through paper checks or electronic or automatic means, is a cost of doing business. These costs may be considered by the lender when determining the appropriate rates to charge South Carolina consumers; however, if the creditor chooses not to absorb such costs and alternatively imposes a fee onto consumers it constitutes a finance charge.

Id. at 2-3.

It is this Office's opinion that a court would likely grant the Department's interpretation deference because it appears consistent with the plain language of Section 37-3-109 and we cannot say it is arbitrary or capricious. Kiawah Dev. Partners, II, 411 S.C. at 34-35, 766 S.E.2d at 718 ("We defer to an agency interpretation unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'"). Therefore, generally, the fees charged by third-party payment processors which facilitate an extension of credit are loan finance charges according to 37-3-109.

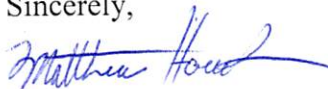
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However, an attachment to the request letter included the Department's December 12, 2017 Third Party Fee Guidance Draft. It lists several non-exhaustive factors which the Department considers when determining compliance with the Code, such as the appearance that the consumer does not have a choice in utilizing a payment processor, the relationship between the creditor and processor, and whether a consumer can set up the payments on their own without assistance from the creditor. Thus, there may be circumstances when a customer incurs transaction charges that would not be incident to the extension of credit, but such a determination would be fact dependent and is beyond the scope of this Office's opinions. See Op. S.C. Att'y Gen., 1985 WL 259225 (October 9, 1985).

Conclusion

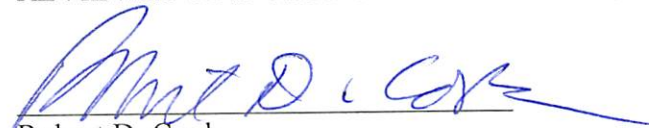
As is discussed more fully above, this Office defers to the South Carolina Department of Consumer Affairs' ("the Department") administrative interpretation regarding loan finance charges and third-party processing fees. S.C. Dep't of Consumer Affairs, Admin. Interpretation, No. 3.109,503-1603 (2016). The interpretation concludes that fees charged by third-party payment processors will generally be considered loan finance charges according to agency principles. However, this Office recognizes that there may be circumstances when a customer incurs transaction charges that are so far removed from a lender's control that they may not be considered incident to the extension of credit. Such a determination will necessarily depend on the facts relevant to the transaction and is beyond the scope of this Office's opinions. See Op. S.C. Att'y Gen., 1985 WL 259225 (October 9, 1985) ("Because this Office does not have the authority of a court or other fact-finding body, we are not able, in a legal opinion, to adjudicate or investigate factual questions.").

Sincerely,



Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General