



The Commonwealth of Massachusetts

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August 17, 2004

David Melcer, Senior Counsel
Retail Services Law Department
Household Retail Services
2700 Sanders Road
Project Heights, Illinois 60070

Dear Mr. Melcer:

This letter is in response to your correspondence on behalf of Household Retail Services ("Household") dated November 5, 2003 to the Division of Banks (the "Division") in which you request the Division to reconsider Opinion No. O02112 dated January 9, 2003 relative to the issue of a document preparation fee charged to a borrower as a part of a motor vehicle retail installment sales contract. You state that Opinion No. O02112 was based upon incomplete facts as presented in the opinion request. The Division also received correspondence with related documents from the Massachusetts State Automobile Dealers Association, Inc. and GMAC Financial Services with respect to this subject matter and which raised the same or other arguments set out in your letter.

In your letter you state that a document preparation fee charged to a borrower in a motor vehicle retail installment sales contract under Massachusetts General Laws chapter 255B should not be included in calculating the finance charge on such contract. You state that the motor vehicle dealers whose contracts are purchased by Household assess a document preparation fee that is charged as part of the purchase price to all customers, cash or credit, to cover the dealer's costs in preparing all documentation that is incidental to this sale. You also state that the document preparation fee is not a fee which is charged as incident to the extension of credit. Your correspondence also included information set forth in the Attorney General's regulations, 940 CMR 5.00, titled "Motor Vehicle Regulations" with respect to particular references to document preparation fees.

As you are aware, G.L. c. 255B, §14 pertaining to finance charges provides that a retail seller may charge, receive and collect for any new or used motor vehicle, a finance charge not in excess of an annual percentage rate of twenty-one percent. It further provides that such finance charge shall be computed on the amount financed as determined under G.L. c. 140D. In addition, the last paragraph of said section 14 states "[T]he finance charge shall be inclusive of all charges incident to investigating and making the contract, and for the extension of the credit provided for in the contract and no fee, expense or other charge whatsoever shall be taken, received, reserved or contracted for except as provided in this section[finance charges] and in section 11 and section 17 and for those items expressly provided for in the retail installment contract as set forth in chapter 140D." Emphasis supplied. Section 11 of chapter 255B authorizes the holder of a retail installment contract to collect a delinquency charge on each installment

payment not paid within 15 days of its due date, and section 17 authorizes the holder to collect a deferment or extension charge from the borrower for deferring a scheduled payment or extending the term of the contract. The original enactment and historical development of chapter 255B makes clear that charges that were not finance charges or authorized charges under sections 11, 17 or set forth in then section 9, were not permissible for inclusion in a retail installment contract.¹ The Division has interpreted this language consistent with the premise that other charges not authorized in the cited sections were prohibited.²

With respect to document preparation fees as described in your correspondence which, in general industry practice, are fees charged by the dealers and cover the dealer's costs in preparing all documentation incident to the sale of the motor vehicle, it is the Division's position that these fees relate solely to the sale of the motor vehicle and are not incident to investigating and making the contract, or for the extension of credit and as such are not "finance charges". The fees are assessed in both cash and credit transactions in cases where there is no retail installment contract or no extension of credit.

As referenced in your correspondence, the Attorney General's regulation provides, "It is an unfair or deceptive act or practice for a motor vehicle dealer to advertise the price of motor vehicles unless such price includes all charges of any type which are necessary or usual prior to delivery of such vehicles to a retail purchaser, including without limitation any charges for freight, handling, vehicle preparation and documentary preparation, but excluding taxes and optional charges for the dealer's preparation of title and assistance in registering a vehicle."³

With respect to the applicable disclosure requirements, the Commonwealth's Truth in Lending Act, G.L. c. 140D and its implementing regulation 209 CMR 32.00 *et seq.* (collectively "TIL"), provide that the finance charge does not include any charge of a type payable in a comparable cash transaction.⁴ Additionally, the "cash price" means the price at which a creditor, in the ordinary course of business, offers to sell for cash the property or service that is the subject of the transaction. At the creditor's option, the term may include the price of accessories, services related to the sale, service contracts and taxes and fees for license, title, and registration. The term does not include any finance charge⁵. The applicable Official Staff Commentary set forth in Federal Regulation Z states that "Any charges imposed equally in cash and credit transactions may be included in the cash price, or they may be treated as other amounts financed under section 226.18(b)(2)." Although you and other writers sought to resolve this matter by analyses under TIL's handling of similar cash transactions, it remains the position of the Division that TIL governs the disclosure aspect of the credit transaction. As set out above, the Division has distinguished the issue by determining that the document preparation fees are incident to the sale of the motor vehicle.

In summary, document preparation fees charged by a motor vehicle dealer in both cash and non-cash transactions which relate solely to the sale of the motor vehicle are not a finance charge. These fees may be included in the "cash price" or alternatively, at the creditor's option, fees may be treated as additional sums added to the cash price pursuant to 209 CMR 32.18(2)(b). The charges for the document preparation fee must be listed in the itemization of amount financed in accordance with the requirements of 209 CMR 32.18(3). The Division will review the applicable disclosure documentation and calculations in determining compliance with G.L. c. 255B, G.L. c. 140D and 209 CMR 32.00 *et seq.* In

¹ See St. 1958 c. 674.

² See, e.g. Division Opinion 99-114(charge for default or repossession fee by retail seller not authorized under G.L. c. 255B).

³ See 940 CMR 5.02(3).

⁴ See G.L. c. 140D, §4(a) and 209 CMR 32.04(1)

⁵ See 209 CMR 32.02(1).

conducting such reviews, the Division's examination staff will remain alert to note instances of disparate treatment of individuals and patterns of disparities in the amount charged for document preparation fees based on the individual's income or residence in a low to moderate income area.

Your letter asked that the Division reconsider its opinion (O02112) on document preparation fees as part of a motor vehicle retail installment sales contract and it has done so in the distinctions made herein. However, it remains the position of the Division that, in accordance with section 14 of chapter 255B, all charges incident to investigating and making the [retail installment] contract, and for the extension of the credit provided for in the contract, shall be included in the finance charge.

The Division's position stated herein with respect to G.L. c. 255B would be the same with respect to transactions governed by G.L. c. 255D.

The conclusions reached in this letter are based solely on the facts presented and are limited to the treatment of document preparation fees as described herein and related to a contract subject to G.L. c. 255B or G.L. c. 255D. Fact patterns which vary from those presented may result in a different position statement by the Division.

Sincerely,



Joseph A. Leonard, Jr.
Deputy Commissioner of Banks
and General Counsel

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cc: Massachusetts State Automobile Dealers Association, Inc.
GMAC Financial Services