

DEPARTMENT OF ADMINISTRATION
DIVISION OF BANKING & FINANCIAL INSTITUTIONS



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MEMORANDUM

TO: Servicers of Montana Consumer Loans

FROM: Kelly M. O'Sullivan, Staff Attorney
Montana Division of Banking and Financial Institutions

RE: Servicing of Montana Consumer Loans

DATE: February 23, 2016

Issue

The Division of Banking and Financial Institutions (Division) has recently received inquiries regarding the applicability of the Montana Consumer Loan Act (Act) to an entity that services a Montana Consumer Loan.

Opinion

It is the opinion of the Division that the provisions of the Act continue to apply to an entity that acts as a servicer by receiving or accepting payments due pursuant to a Montana Consumer Loan and either keeping those payments or directing them to another entity(s). It is the opinion of the Division that a servicer of Montana Consumer Loans must be licensed under the Act, for the reasons set forth below.

Analysis

The Montana Consumer Loan Act is found at Title 32, Chapter 5. The Montana Consumer Loan Act was revised on January 1, 2011 by the passage of Initiative No. 164 (I-164). I-164 was enacted by a 71% vote of the people of Montana. It capped interest rates and fees that may be charged for Montana Consumer Loans to those specifically provided in the Act and none other.

I-164 contained these findings:

The people of Montana find that some lenders are charging Montanans over 400% interest annually, that excessive interest rates can lead Montana families into a debt trap of repeat borrowing, that the United States congress has enacted laws capping interest rates on loans to military families at 36% annually, and that responsible small loans are available at interest rates of 36% annually or less.

It is clear that the intent of I-164 was to prevent Montana borrowers from falling into a debt trap and the Act was revised to strictly control the interest and fees that may be charged to Montana consumers under the Act and to prevent any attempt to evade its application by any device, subterfuge, or pretense. Mont. Code Ann. § 32-5-103(3).

I-164 capped interest rates at 36% per year. It allows a deferral fee of the greater of \$15 or 5% of the amount currently due, not to exceed \$50. One fee may be charged per deferral. It allows a past due fee of the greater of \$15 or 5% of the amount past due, not to exceed \$50. The fee charged for any past-due amount may be charged only once. Other fees may not be charged for any default of the contract by the borrower. Mont. Code Ann. § 32-5-301.

The law of statutory construction in Montana is clear. In construing a statute, a court must reject a construction that leaves any part of the statutory language without effect. The court must give effect to all relevant provisions of the statute. Mont. Code Ann. § 1-2-101; Montco v. Simonich, 285 Mont. 280, 1997 Mont. LEXIS 232 (Mont. October 31, 1997). The court's role is to ascertain and declare what is in terms and or in substance contained in the statute and not to insert what is omitted or omit what is inserted. State v. Cooksey, 2102 Mont. 226, 366 Mont. 346, 286 P.3d 1174 (2012).

First it is clear that a licensee may not transfer a loan to another entity and thereby convey more rights to interest or fees than the lender had. "All contracts for loans and all other contracts entered into by the licensee pursuant to the provisions of this chapter that are sold and transferred to an acquiring organization continue to be governed by the provisions of this chapter." Mont. Code Ann. § 32-9-103(2).

Second it is also clear that the drafters of I-164 intended that anyone who collects a Montana consumer loan must be a licensee under the Act. Mont. Code Ann. § 32-5-103(1) states, "Except as provided in subsection (5), a person may not engage in the business of making consumer loans in any amount and contract for, charge, or receive directly or indirectly on or in connection with any loan any compensation, whether for interest, fees, other

consideration, or expense, except as provided in and authorized by this chapter.” (Emphasis added.)

Mont. Code Ann. § 32-5-103(4) states, “Any loan made or collected in violation of subsection (1) by a person other than a licensee or a person exempt under subsection (5) is void, and the person does not have the right to collect, receive, or retain any principal, interest, fees, or other charges.” (Emphasis added.)

Mont. Code Ann. § 32-5-103(5) exempts certain entities from the Act, including regulated lenders, as defined in 31-1-111, to whom the exemption in 31-1-112 applies. However, Mont. Code Ann. § 31-112 excludes consumer loan licensees from the definition of a regulated lender who is exempt from all limits on the rate of interest that it can charge.

It is consistent with the findings and purpose of I-164 that any servicer of a Montana consumer loan be bound by the licensing provisions of the Act in order to enforce the interest and fee prohibitions of the Act.