



ALAN WILSON  
ATTORNEY GENERAL

January 6, 2017

Ronald R. Bodvake, Commissioner  
Consumer Finance Division  
South Carolina Board of Financial Institutions  
1205 Pendleton Street, Suite 306  
Columbia, South Carolina 29201

Dear Mr. Bodvake,

Attorney General Alan Wilson has referred your letter to the Opinions section requesting that we reconsider this Office's May 20, 2015 opinion addressed to Representative Edward R. Tallon, Sr. Op. S.C. Atty. Gen., 2015 WL 3525225 (May 20, 2015). Representative Tallon requested this Office's opinion "regarding whether a licensed deferred presentment lender ["licensee"] may legally accept debit card payments for deferred presentment transactions under the Deferred Presentment Services Act." In the conclusion of the subject opinion, we stated, "[I]t is our opinion that a debit card payment is an acceptable 'cash' payment method under the Deferred Presentment Services Act." Your reconsideration request raises considerations which we address below.

### Law/Analysis

As an initial matter, we note this Office recognizes a long-standing rule that it will not overrule a prior opinion unless it is clearly erroneous or a change occurred in applicable law. Ops. S.C. Atty. Gen., 2013 WL 6516330 (Nov. 25, 2013); 2013 WL 3762706 (July 1, 2013); 2009 WL 959641 (March 4, 2009); 2006 WL 2849807 (September 29, 2006); 2005 WL 2250210 (September 8, 2005); 1986 WL 289899 (October 3, 1986); 1984 WL 249796 (April 9, 1984). Your request letter does not indicate a change in relevant legal authority. Nor has our research uncovered a modification of law which would affect the validity of our earlier opinion. Therefore, we consider whether our earlier opinion is clearly erroneous. "An opinion is clearly erroneous when, upon review, the [O]ffice is firmly convinced that a mistake has been made." Op. S.C. Atty. Gen., 1984 WL 249796 (S.C.A.G. Apr. 9, 1984); see also Op. S.C. Atty. Gen., 2016 WL 762702 (December 20, 2016) (overruling prior opinion where this Office's interpretation of a statute's literal language led to an irrational result which "could be viewed as absurd").

We next turn to the text of South Carolina Deferred Presentment Services Act, S.C. Code Ann. § 34-39-110 et seq. (Supp. 2015), to evaluate whether our interpretation is clearly erroneous. Section 34-39-270(F), which this Office interpreted in our prior opinion, states the following:

A licensee shall notify the database provider immediately when the licensee enters into a deferred presentment transaction with a person. The licensee shall submit to the database provider such information as the board requires. When the transaction is paid in full, the licensee shall designate the transaction as closed and immediately notify the database provider. When the database provider receives notification that the transaction is paid in

full, the database provider immediately shall designate the transaction as paid in full in the database. For purposes of this subsection, an item is paid in full when the payor bank makes final payment on the customer's check pursuant to Section 36-4-215 or the customer has redeemed the check with a cash payment in full.

S.C. Code Ann. § 34-39-270(F) (emphasis added).

The reconsideration request first assigns error as follows, “[T]he legislature chose not to include debit cards as a form of acceptable payment specifically stating that the customer could redeem the check with a cash payment.” Our May 20, 2015 opinion addressed this concern at length. Rather than repeat our explanation in full, we refer you to that opinion. See Op. S.C. Atty. Gen., 2015 WL 3525225 (May 20, 2015).<sup>1</sup> Upon review of our prior opinion, we find the explanation contains sound legal reasoning and an accurate application of the rules of statutory construction. We therefore decline to overturn our opinion as clearly erroneous on this basis.

As a second basis for error, the reconsideration request quotes from the “South Carolina Education Lottery Act.” S.C. Code Ann. § 59-150-10 et seq. (1976 Code, as amended). In particular, Section 59-150-70(D)(2) authorizes the South Carolina Lottery Commission board to adopt regulations specifying the “sale price of lottery game tickets or shares and the manner of sale except that all sales must be for cash only. Payment by checks, credit cards, charge cards, or other form of deferred payment and payment by debit card are prohibited.” The reconsideration request posits the following:

In the construction of this section it is clear that the legislature viewed debit cards as an alternative payment method and not the same as cash. While this law specifically prohibits payment by debit card the Division feels that it parallels the Deferred Presentment Services Act by imposing an inconvenience to consumers in an effort to deter repeated or excessive use.

This Office disagrees with this conclusion. As noted in the reconsideration request, Section 59-150-70(D)(2) specifically prohibits payment by debit cards. In contrast, Section 34-39-270(F) does not mention debit cards. If the Legislature intended to exclude debit cards from the term “cash payment,” such exclusion likely would have been expressly stated as it was in Section 59-150-70(D)(2).

As a third basis for error, the reconsideration request maintains that allowing debit card payments as cash payments has resulted in avoidance of “the built in deterrent established by the legislature.” The letter states as follows:

By requiring a cash payment, the consumer had to visit the office and redeem their check, then wait one or two full days depending on the number of transactions previously entered into before being allowed to return to the office and write a new transaction. The Division feels the legislature included this to act as a form of deterrent to prevent consumers from remaining in the cycle of debt. It created some measure of inconvenience while still allowing access to short term, small dollar credit. Alternatively, if the check was deposited the consumer had to wait a minimum of 4 days from the date of deposit under NACHA rules to ensure the payee bank had received payment. This waiting period

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<sup>1</sup> See also Ronald J. Mann, Making Sense of Payments Policy in the Information Age, 93 Geo. L.J. 633, 649-650 (2005) (“[P]ayments made with a debit card are just as final as if they had been made with cash.”).

allowed time for the consumer to consider alternative sources. As a result of your interpretation, industry is now allowing the consumer to call the office and pay with a debit card and then come into the office the next day to ‘re-write’ the deferred presentment transaction.

Again, we look to the text of the Deferred Presentment Services Act to determine whether our prior opinion is inconsistent with deterrents established by the Legislature or otherwise conflicts with legislative intent. The General Assembly explicitly prohibited licensees from entering into deferred payment transactions with a customer who has an outstanding deferred payment transaction and established time periods delaying licensees from entering into subsequent deferred payment transactions with customers in Section 34-39-270(A). These prohibitions include licensees entering into a deferred presentment transaction with a person who has previously repaid such a transaction on the same business day, who has previously repaid such a transaction on the same business day or previous business day if the transaction would be the customer’s eighth or more transaction within a calendar year, or who has entered into an extended payment plan agreement with any licensee which has not been paid in full or terminated. *Id.* Our prior opinion does not contradict these prohibitions. Further, we are unable to discern a legislative intent either to require customers to make payments in person or to otherwise inconvenience customers. *Mitchell v. City of Greenville*, 411 S.C. 632, 634, 770 S.E.2d 391, 392 (2015) (“The cardinal rule of statutory interpretation is to ascertain and effectuate the legislative intent whenever possible.”). This Office has previously opined that where there is no express limitation, as in Section 34-39-270(F) for payments to be made in person, “the law will not permit such a limitation to be implied.” *Op. S.C. Atty. Gen.*, 2006 WL 2593082 (August 24, 2006). We therefore decline to overturn our opinion as clearly erroneous on this basis.

As the final basis for error, the reconsideration request notes examples of debit card payments which were returned unpaid or as fraudulent charges resulting in customers with multiple transactions open at the same time in the database. As discussed above, licensees are prohibited from entering into a deferred presentment transaction with a customer who has a such an outstanding transaction by the express terms of Section 34-39-270(A)(1). In order for licensees to be able to determine whether a customer has an outstanding deferred presentment transaction, the legislature required licensees to immediately notify the database provider when a customer has paid a transaction in full. S.C. Code Ann. § 34-39-270(F).<sup>2</sup> However, an item is not paid in full until “the payor bank makes final payment on the customer’s check” or “the customer has redeemed the check with a cash payment in full.” *Id.*

While our prior opinion found that a debit card payment is an acceptable cash payment method, it did not state when a debit card payment redeems a check in full. Based on the examples of debit card payments which were returned unpaid, it appears that some licensees have prematurely notified the

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<sup>2</sup> See 2009 Act No. 78, § 2, codified at S.C. Code Ann. § 34-39-270, titled in part:

AN ACT TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976... BY ADDING SECTION 34-39-270 SO AS TO PROHIBIT A DEFERRED PRESENTMENT PROVIDER FROM ENTERING INTO A DEFERRED PRESENTMENT TRANSACTION WITH A PERSON WHO HAS AN OUTSTANDING DEFERRED PRESENTMENT TRANSACTION OR WHO HAS ENTERED INTO AN EXTENDED PAYMENT PLAN AGREEMENT AND TO REQUIRE A DEFERRED PRESENTMENT PROVIDER TO VERIFY WHETHER AN INDIVIDUAL IS ELIGIBLE TO ENTER INTO A DEFERRED PRESENTMENT TRANSACTION...

database provider that transactions are paid in full. In NACS v. Bd. of Governors of Fed. Reserve Sys., 746 F.3d 474 (D.C. Cir. 2014), the D.C. Circuit Court of Appeals described the process underlying transactions on debit card networks. To summarize, debit cards transactions employ different methods of authentication, PIN or signature transactions, to establish that an authorized cardholder initiated the transaction. Id. at 477-478. Under either method, the transaction is processed in three stages: authorization, clearance, and settlement. Id. at 478. At the authorization stage, the cardholder's bank merely determines whether the cardholder has sufficient funds in his account to complete the transaction and whether the transaction appears fraudulent. Id. Of particular importance to the present reconsideration request, even if the cardholder's bank "approves the transaction, that transaction still must be cleared and settled before any money changes hands." Id. Until a licensee's account is credited with funds, the debit card transaction has not concluded. Id. The examples of payments which were returned unpaid should not impact a licensee's ability to determine a customer's eligibility to enter into a deferred presentment transaction under Section 34-39-270 unless a licensee has notified the database provider that the customer's account is paid in full prior to actually receiving funds. To the extent our prior opinion could be construed to require licensees to notify the database provider an item is paid in full by a debit card transaction before settlement, we take this opportunity to supplement our conclusion. It is this Office's opinion that a court would likely find a licensee's duty under Section 34-39-270(F) to notify the database provider that a transaction is paid in full does not accrue until the licensee's account is credited at the settlement phase of a debit card payment transaction process.

### **Conclusion**

Upon review of our May 20, 2015 opinion, we find it contains sound legal reasoning and an accurate interpretation of the law. This Office therefore declines to overrule our prior opinion that a "cash payment in full" under S.C. Code Ann. 34-39-270(f) includes payments made by debit card. However, we take this opportunity to clarify that a payment made with a debit card should not be considered a cash payment in full until a licensee receives funds at the settlement phase of the transaction. We hope the guidance provided above will assist you and the South Carolina Board of Financial Institutions in administering the deferred presentment transaction database. This Office is, however, only issuing a legal opinion based on the current law at this time and the information as provided to us. Until a court or the General Assembly specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in the matter. Additionally, you may petition the court for a declaratory judgment, as only a court of law can interpret statutes and make such determinations. See S.C. Code § 15-53-20 (1976 Code, as amended). If it is later determined otherwise, or if you have any additional questions or issues, please let us know.

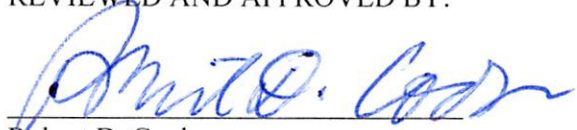
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Sincerely,



Matthew Houck  
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
Solicitor General