STATE OF INDIANA

DEPARTMENT OF FINANCIAL INSTITUTIONS

30 South Meridian Street, Suite 300
Indianapolis, Indiana 46204-2759
Telephone: (317) 232-3955
Facsimile: (317) 232-7655
Web Site: http://www.in.gov/dfi

CONSUMER CREDIT DIVISION
ADVISORY LETTER 2017 - 02
August 1, 2017

TO: Indiana state-chartered banks, Indiana state-chartered credit unions, and lenders who make consumer loans under chapter 3 of the IUCCC (collectively "Lenders")

FROM: Ryan E Black, Deputy Director, Consumer Credit Division

RE: Nonrefundable Prepaid Finance Charge under the Indiana Uniform Consumer Credit Code ("IUCCC") and compliance with Indiana's criminal loansharking statute

This Advisory Letter is being issued by the Consumer Credit Division of the Indiana Department of Financial Institutions ("the Department"). Certain legislative changes and conversations have risen the concern that Lenders subject to Indiana's Uniform Consumer Credit Code ("IUCCC") providing consumer loans[1] may unknowingly exceed the prohibitions contained in Indiana's criminal usury law, commonly known as the loansharking statute.

Background

With respect to a consumer loan that is not a small loan (commonly known as a payday loan) or a first lien mortgage, the IUCCC currently authorizes a Lender to assess a maximum nonrefundable prepaid finance charge ("PFC") (formerly referred to as a "loan origination fee" or "LOF"[2]) of not more than $50.[3] The maximum amount for this charge increased by statutory changes effective July 1, 2013. At the same time, the fee became permissible on loans where the finance charge exceeded 21% exclusive of the PFC, therefore permitting the fee on a loan with a 36% rate of finance charge exclusive of the PFC. The same statute[4] generally permits a blended maximum loan finance charge not to exceed 36% or a flat 25%, whichever is greater[5].

Separately, Indiana's loansharking statute[6] found in the criminal code makes it a felony to charge an interest rate greater than 72% [two times the rate specified in Ind. Code §24-4.5-3-508(2)(a)(i)]. Although the IUCCC authorizes a PFC in addition to the maximum finance charge permitted under the IUCCC, a PFC may only be imposed if the resulting annual percentage rate ("APR") at consummation does not exceed 72%. Thus, the loansharking statute imposes an effective APR "cap" where exceeding the cap is considered criminal, applying the traditional legal application of usury.

---

[1] Ind. Code §24-4.5-3 *et seq.*
[2] See the Indiana DFI's 2017 General Assembly legislation of interest
[3] On non-real estate secured transactions under Ind. Code §24-4.5-3-508(8)
[4] *Id.* at (2).
[5] *See generally* Ind. Code §24-4.5-3-201(1) and 508(2).
[6] Ind. Code §35-45-7

Prior to July 1, 2013, when the maximum PFC (previously LOF) was statutorily lower and was not permitted on loans in excess of 21%, Lenders were less likely to consummate a transaction with an APR in excess of 72%. However, as the legislature increased the maximum nonrefundable prepaid finance charge and broadened the types of loans that may include the fee, it has become easier for the resulting APR calculation to exceed 72%.

The Department's interpretation is supported by the holding previously issued by the Indiana Supreme Court in *Livingston v. Fast Cash*[7] in 2001, and the Indiana Attorney General's ("IAG") Official Opinion 2000-1 ("Opinion").[8] As recognized in the Opinion's analysis, Lenders may contract for and receive one or more loan origination fee(s) so long as the resulting APR does not exceed the interest established in the loansharking statute.

The IAG's opinion also recognizes that the statute prohibits both receiving such an excessive fee, as well as contracting for the excessive fee; therefore, any agreement with a consumer where the APR exceeds 72% could be considered void pursuant to the loansharking chapter.[9] When a contract is void, it cannot be enforced under state law; a void contract has no legal effect from the time it was consummated, and neither party is bound by any of its terms.

As recognized in both *Livingston* and in the IAG opinion, the General Assembly has chosen to exempt certain industries from application of the loansharking statute. Otherwise compliant finance charges for small loans (payday loans) (Ind. Code §24-4.5-7-411[10]) and pawn loans (Ind. Code §28-7-5-28.5[11]) are currently exempt from the loansharking statute.

It should also be noted that the IUCCC generally is not applicable to rental purchase agreement transactions (Ind. Code §24-7) or civil proceeding advance payment transactions (Ind. Code §24-12).

Recommended Action

The Department recommends that Lenders carefully review their loan programs to ensure total finance charge calculations would not exceed the maximum permitted under the IUCCC, not to exceed 72% as capped by the loansharking statute.

If a Lender discovers that an agreement with a consumer has an APR in excess of 72%, we recommend that the Lender consider contacting legal counsel for advice. The Department would consider only the principal amount of the original loan plus finance charges up to 72% to be recoverable by the Lender.[12] Regardless of any action taken by the Lender, liability may still exist for the Lender.

---

[7] Minimum loan finance charges for supervised, or "payday," loans were limited by maximum 36% APR allowed for loans up to $300 as provided by the IUCCC, and by the 72% APR limit in statute prohibiting "loansharking." Thus lenders could contract for and receive a loan finance charge of up to $33 for loans up to $300, as long as fee would not result in an APR that exceed interest limits, even if short term payday loans were never contemplated by IUCCC. Livingston v. Fast Cash USA, Inc., 2001, 753 N.E.2d 572.

[8] Lenders that assess a loan finance charge in accordance with the IUCCC are still subject to Indiana's loansharking statute, and finance charges that exceed the statutory limits set forth in the IUCCC are subject to refund. If finance charges are more than 72%, they violate the loansharking statute and are void. 2000 Op.Atty.Gen. No. 2000-1.

[9] See Ind. Code §35-45-7-4.

[10] The legislature exempted payday lenders from this requirement in 2002, after the *Livingston* decision.

[11] The legislature had previously exempted pawnbrokers from this requirement prior to the *Livingston* decision.

[12] See Ind. Code §24-4.5-6-104(2).

Summary

Lenders that assess a PFC under chapter 3 of the IUCCC may unknowingly approach or exceed an APR of 72%. Further, Lenders are advised that if APR calculations are more than 72%, the criminal loansharking statute does apply. The loansharking statute provides that a violation of such is a felony and that a contract for a loan made in violation of the chapter is void.

This Advisory Letter is applicable to all Lenders subject to Chapter 3 of the IUCCC, and is in effect unless later amended or withdrawn. This letter is intended to provide a clarification of existing Department policy and interpretation, and is not a substitute for advice from a Lender's legal counsel.

If you have questions regarding this publication, please contact the Department.

Consumer Credit Division
317-232-3955
dfilicensing@dfi.in.gov