

Questions & Answers re: SEA 395

Published: June 15, 2020 (Revised August 14, 2020)

This document contains Questions and related Answers to upcoming changes in state statutes administered and/or supervised by the Indiana Department of Financial Institutions (“DFI” or “Department”) as a result of the enactment of SEA 395. The following are intended to be instructive to assist regulated businesses, regulatory staff, attorneys, and the general public about recent legislative developments in preparation for the July 1 effective date. While we have addressed a number of anticipated questions, the information below is not all-encompassing and we recommend a careful review of the new law in its entirety, Senate Enrolled Act 395 (“SEA 395”) signed into law as Public Law 85 ([link here](#)).

**** THE INFORMATION BELOW BECOMES EFFECTIVE ONCE
THE STATUTORY CHANGES GO INTO EFFECT ON JULY 1, 2020****

Q1: Can nonrefundable prepaid finance charges be contracted for and assessed on retail installment contracts subject to Chapter 2 of the IUCCC?

A: Yes. Beginning July 1, 2020, consumer credit sellers may contract for a nonrefundable prepaid finance charge on retail installment agreements. The new tiered structure permits a Creditor to impose the following prepaid finance charges on an amount financed (under chapter 2) of a given closed-end consumer credit transaction (in all cases, the amount referenced is exclusive of prepaid finance charges):

- \$75 maximum for a credit sale amount of \$2,000 or less;
- \$150 maximum for a credit sale amount above \$2,000 and up to \$4,000;
- \$200 maximum for a credit sale amount above \$4,000.

For non-depository Creditors, the new law also creates a “hard cap” for the nonrefundable fee, in that it prohibits any additional amount of prepaid finance charges, even if refundable, above the new maximum amounts permitted within the tier.

Q2: Can the new nonrefundable prepaid finance charge permitted on retail installment agreements represent a number of other charges or fees or must it represent a flat charge? Is a document fee considered a nonrefundable prepaid finance charge?

A: Any individual charge or fee that otherwise constitutes a prepaid finance charge may be included in the total nonrefundable prepaid finance charge. Should a credit seller fail to disclose a given amount as a prepaid finance charge as required by state law and/or Truth in Lending, the Department will consider such charge to be a part of the total permitted nonrefundable prepaid finance charge.

Should the total amount of all prepaid finance charges exceed the maximum permitted by the new tiers, such a fee will be considered an overcharge subject to refund. Generally, if a fee or charge is incidental to the extension of credit, and is otherwise not excluded from the finance charge as a permissible additional charge, it will be considered a part of the total nonrefundable prepaid finance charge permitted under the tier. Typically a document fee will not be considered a prepaid finance charge, as it is not typically incidental to the extension of credit. Should you have additional questions on this topic, please contact the Department for guidance and assistance with how to categorize any specific fees or charges.

Q3: Does the prepaid finance charge need to have a specific name on credit agreements or does it need to be contracted for as nonrefundable?

A: It is not necessary to give the fee a specific title so long as it is disclosed as a prepaid finance charge. If the intention is for the charge to be treated as nonrefundable, then it is a best practice for the contract to reflect that the charge is nonrefundable. If the agreement is silent, the Department will interpret the fee as being part of the nonrefundable prepaid finance charge subject to the maximum amounts permitted in the tiers.

Q4: Both the UCCC consumer loan and consumer credit sale provisions contain express authority to impose a nonrefundable prepaid finance charge. However, effective July 1, 2020, precomputed consumer loans and consumer credit sales are prohibited. Given those two facts, should the UCCC be read to prohibit imposing any other prepaid finance charges in connection with a consumer credit sale or a consumer loan, even if those prepaid finance charges would be refunded upon prepayment?

A: Yes, the legislative changes include a hard cap on prepaid finance charges, ie, only nonrefundable prepaid finance charges confined to the maximum amounts permitted within the tiers for non-depository creditors/lenders will be permitted.

Q5: As a depository institution, are our consumer loan and credit products subject to the new tiers?

A: Depository institutions (only) are exempt from the “hard cap”, and will retain the ability to charge an additional prepaid finance charge above the maximum nonrefundable amount permitted within the tiers; however, such amount remains subject to refund upon a consumer’s prepayment and a depository institution that chooses to charge a prepaid finance charge must test the calculation at consummation against max rate and the loansharking cap, and also upon a consumer’s prepayment to determine whether or not a refund is due.

A reminder that this exemption only applies to a depository when they are the original creditor or lender; retail installment agreements for which a depository purchases and takes assignment are subject to the tier where a non-depository is listed as the original creditor.

Q6: I am a compliance officer for a depository institution; how should I prepare for implementation of the new parameters imposed by SEA 395?

A: In anticipation of the new upcoming law changes, the Department recommends that a depository institution undertake the following:

- Review policies and procedures and make a business determination regarding what products, if any, will continue to carry a refundable portion of the prepaid finance charge;
- Test accounts at consummation to ensure that the total finance charge (including both refundable and nonrefundable prepaid finance charges) contracted for does not exceed the maximum permitted by Ind. Code. §24-4.5-3-508 and the criminal loansharking statute (Ind. Code. § 35-45-7);
- Ensure there is a system in place to test accounts upon a consumer's prepayment to determine if any refund is due;
- For other questions and concerns, consider reaching out proactively to the Department. We are glad to assist in ensuring your documents, disclosures, and calculations are in compliance.

Q7: Can both the original creditor and purchaser/assignor collect a prepaid finance charge? Can both the creditor and purchaser each collect from the consumer the maximum prepaid finance charge permitted on a single transaction?

A: No; the total nonrefundable prepaid finance charge imposed in one transaction is capped at the maximum amount permitted by the tiers. However, the original creditor and the subsequent purchaser of a retail installment agreement may agree between themselves as to what portion each of them will retain of the nonrefundable prepaid finance charge imposed upon a retail installment agreement.

Q8: Do the new tiered caps apply to first lien transactions secured by land?

A: No. First lien mortgage loans extended by Licensed Mortgage Lenders or Depositories are not subject to the nonrefundable prepaid finance charge limitations.

Q9: Do the new tiered caps apply to subordinate lien transactions secured by land?

A: Credit sales and supervised loans (ie, a consumer loan with an effective annual yield **greater than 25%** exclusive of the nonrefundable prepaid finance charge) that are secured by a subordinate lien mortgage are subject to the new tiered nonrefundable prepaid finance charge "hard caps."

However, Lenders engaged in subordinate lien consumer loans (ie, loans with an effective annual yield of **25% or less**, exclusive of the nonrefundable prepaid finance charge) may continue to contract for and receive a nonrefundable prepaid finance charge of not more than 2% of the loan

amount or 2% of the line of credit (if the account is revolving). Subordinate lien consumer loans are not subject to a “hard cap”, and lenders retain the ability to charge a prepaid finance charge above the maximum nonrefundable percentage amount permitted by law. A Lender that chooses to charge a refundable prepaid finance charge above the nonrefundable percentage amount permitted must test the calculation at consummation against max rate. Such amount remains subject to refund upon a consumer’s prepayment and Lender must also test such a transaction upon a consumer’s prepayment to determine whether or not a refund is due.

Q10: Can finance charges be imposed upon the nonrefundable portion of the prepaid finance charge? (Revised 8/14/20)

A: The UCCC does not prohibit the compounding of interest or calculating interest/finance charges on finance charges, including the nonrefundable prepaid finance charge, so long as the yield on the rate imposed on the principal or amount financed plus finance charges (including any nonrefundable prepaid finance charge) does not exceed the maximum rate allowed on the principal or amount financed as defined under the UCCC.

Note that the definition of principal under IC 24-4.5-3-107(3) and the definition of amount financed under IC 24-4.5-2-111 are generally equivalent to the definition of the amount financed under TILA. Therefore, “principal” and “amount financed” under the UCCC do not include the nonrefundable prepaid finance charge. As a result, *when at max rate*, a creditor cannot impose finance charges on the nonrefundable prepaid finance charge. This would cause the yield on the principal or amount financed (which excludes the nonrefundable prepaid finance charge) to be in excess of the maximum permitted. Please also consider review of the Department’s loansharking advisory, which provides in greater detail guarding against violations of Indiana’s criminal usury law – [Advisory Letter 2017-02](#).

Q11: New language added to the credit service charge (IC 24-4.5-2-201) and loan finance charge (IC 24-4.5-3-201) statutes that permits a nonrefundable prepaid finance charge be included indicates that such charge may be paid separately at consummation or withheld from the proceeds. Why was this language included?

A: This particular language regarding “paid separately in cash or by check before or at consummation; or withheld from the proceeds” was added to make clear that if a consumer pays some or all of the nonrefundable prepaid finance charge in cash or check at the time of consummation of the agreement, that a consumer’s payment cannot be treated “outside” of the transaction.

Q12: Do the tiered credit sale/loan amounts include the nonrefundable prepaid finance charge?

A. No. When determining the maximum nonrefundable prepaid finance charge permitted, a Creditor should use the credit sale/loan amount *exclusive* of the applicable nonrefundable prepaid finance charge referenced in the tiers.

For example, a consumer enters into a retail installment agreement to purchase a vehicle with an all-in price of \$3,900. In addition to the all-in price of \$3,900, the consumer wishes to finance the prepaid finance charges. The credit seller may charge a maximum nonrefundable prepaid finance charge of \$150 since the prepaid finance charge is not included in the credit sale amount for purposes of the tiers (\$3,900 would be the credit sale amount for purposes of the tiers).

Q13: Are the new nonrefundable prepaid finance charge tiers in IC 24-4.5-2-201(11)(credit sales) and IC 24-4.5-3-201(9)(loans) considered equivalent to the minimum credit service charge (chapter 2) or loan finance charge (chapter 3) that has otherwise historically been permitted by the UCCC? (NEW, 8/14/20)

A. No. The new law changes enacted as a result of SEA 395 did not affect the minimum credit service charge or minimum loan finance charge that are otherwise permitted to be contracted for in the UCCC. The minimum credit service charge under chapter 2 (IC 24-4.5-2-201(8)) and minimum loan finance charge (IC 24-4.5-3-201(7)) for which a creditor/lender may contract *remains at \$51* (as adjusted/indexed) pursuant to [750 IAC 1](#). However, the minimum credit service charge/minimum loan finance charge may only be imposed if the seller/lender does not otherwise contract for or receive a nonrefundable prepaid finance charge.

Q14: The template agreement utilized by my company/car dealership and/or being serviced by my bank/credit union/finance company provides that finance charges will accrue on the unpaid balance, less the amount of the prepaid finance charge. Can interest accrue on the amount of the prepaid finance charge? Can I deduct the full amount of the prepaid finance charge from the first payment? (NEW, 8/14/20)

A. If the agreement dictates that no finance charges will accrue on the prepaid finance charge, a creditor is expected to honor the terms of the agreement. In some instances, the agreement may provide that the finance charge will accrue on the unpaid balance, less the prepaid finance charge. In such an instance, the creditor is expected to deduct the amount of the prepaid finance charge from the unpaid balance due prior to assessing or calculating the finance charge due (ie, unpaid balance less (-) prepaid finance charge = applicable unpaid balance subject to finance charges).

A creditor's agreement may indicate that the prepaid finance charge or any charge be deducted in the manner dictated by the creditor. An agreement may permit the creditor to deduct the prepaid

finance charge from the first payment or spread the prepaid finance charge throughout installments over the life of the loan. Additionally, interest may accrue on the prepaid finance charge if permitted by the terms of the agreement and is otherwise in compliance with Q10 above.

If an agreement is silent regarding the manner in which the prepaid finance charge will be paid, collected, or otherwise amortized, a creditor is encouraged to contact the Department to discuss its specific scenario and proposed method to collect the prepaid finance charges or amortize the transaction.