



## Financial Services & Products ADVISORY ■

**MARCH 14, 2017**

### South Carolina Consumer Finance Division Issues Guidance on Attorney/Insurance Agent Preference Requirements

On February 27, 2017, the South Carolina Board of Financial Institutions, Consumer Finance Division issued [guidance](#) on the attorney and insurance agent borrower preference requirements, which require a creditor to ascertain and comply with the borrower's preference for legal counsel and insurance agent before a loan closing. The underlying requirement, while not new, is vigilantly enforced by state regulators. For that reason, lenders should take this opportunity to ensure that their practices conform with the division's expectations.

#### **Coverage**

The attorney and insurance agent borrower preference requirements generally apply to a creditor in connection with a loan that is secured in whole or in part by a lien on real estate and which is for personal, family or household purposes (i.e., first and subordinate-lien loans) when the creditor requires the borrower to purchase insurance or pay attorneys' fees for examining title and closing the transaction. As defined by the South Carolina Consumer Protection Code, a "creditor" is "the person who grants credit in a credit transaction or, except as otherwise provided, as assignee of a creditor's right to payment, but use of the term does not in itself impose on an assignee any obligation of his assignor."

#### **Borrower Preference Requirements**

Pursuant to the South Carolina Consumer Protection Code, before loan closing a creditor is required to ascertain and comply with the borrower's preference for: (1) the legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing of the transaction; and (2) with limited exception, the insurance agent to furnish required hazard and flood property insurance for the mortgage. According to guidance issued by the division, the statute has three components that must be met: (1) providing consumers the notice of the right to select an attorney and insurance agent within three days of an application; (2) ascertaining these preferences before loan closings; and (3) assuring that borrower-chosen providers execute the loan closing.

This alert is published by Alston & Bird LLP to provide a summary of significant developments to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation. This material may also be considered attorney advertising under court rules of certain jurisdictions.

## Safe Harbor Form

There is a safe harbor if the creditor provides the borrower with the [form](#) (based on Consumer Protection Code Administrative Interpretation 10.102(a)-8302) available on the division's website and the form is fully completed and signed and dated by the borrower. A creditor may comply with this requirement by: (1) including the preference information on or with the credit application on a form substantially similar to a form prepared by the division; or (2) providing written notice to the borrower of the preference information with the notice being delivered or mailed within three business days after the application is received or prepared.

## New Guidance from the Division

The guidance issued by the division states that creditors are considered compliant with the statute when the form is complete with requested selection information and the consumer's dated signature. If during the course of a state examination the selection information is found to be missing from the form the creditor delivered to consumers, the guidance requires that the creditor "must provide documented proof to substantiate that their consumers affirmatively selected their own legal and insurance service providers." The borrower's preferences must be obtained directly from the borrower and may not be communicated to the creditor via third parties such as a realtor or a mortgage loan originator. In addition, notes in the creditor's system are insufficient evidence of the borrower's selection because they do not establish that the borrower chose the legal and insurance agents absent any influence from outside sources.

Finally, as an alternative to completing the division's form, a borrower may indicate attorney and insurance agent preference in an email to a creditor provided that the following requirements are met:

- The emailed information from the borrower displays a clear email address associated with the borrower.
- The email is received after the date the borrower received and signed the notice.
- The email clearly indicates the borrower's wish to employ the attorney/insurance agent.
- The attorney/insurance agent is specifically identified in the email.
- The attorney/insurance agent indicated in the email is actually utilized.

## What Are the Penalties for Violating the Requirements?

It is not uncommon to see findings related to this issue in state examinations. Additionally, the South Carolina Consumer Protection Code provides debtors with a private right of action against the creditor. In such an action, the debtor can recover (on a per-loan basis) the actual damages for the violation and punitive damages of \$1,500 to \$7,500, determined by the court, as well as attorneys' fees and costs. Actions for such violations cannot be brought more than three years after the violation occurred. Additionally, when a creditor requires a debtor to purchase insurance or pay any attorneys' fees for examining the title and closing a transaction and fails to adhere to the preference and disclosure requirements, the creditor can be found separately liable for actual damages and punitive damages ranging from \$100 to \$1,000. The Supreme Court of South Carolina has held that these two remedies are not exclusive and that a debtor can seek remedies under both statutory provisions.

If you would like to receive future *Financial Services & Products* advisories electronically, please forward your contact information to [financial.advisory@alston.com](mailto:financial.advisory@alston.com). Be sure to put "subscribe" in the subject line.

If you have any questions or would like additional information, please contact your Alston & Bird attorney or any member of our [Financial Services & Products Group](#).

Stephen Ornstein  
202.239.3844  
[stephen.ornstein@alston.com](mailto:stephen.ornstein@alston.com)

Morey Barnes Yost  
202.239.3674  
[morey.barnesyost@alston.com](mailto:morey.barnesyost@alston.com)

Scott D. Samlin  
212.210.9408  
[scott.samlin@alston.com](mailto:scott.samlin@alston.com)

Kathryn S. Williams  
202.239.3986  
[kathryn.williams@alston.com](mailto:kathryn.williams@alston.com)

R. Colgate Selden  
202.239.3751  
[colgate.selden@alston.com](mailto:colgate.selden@alston.com)

Rinaldo Martinez  
202.239.3205  
[rinaldo.martinez@alston.com](mailto:rinaldo.martinez@alston.com)

Nanci L. Weissgold  
202.239.3189  
[nanci.weissgold@alston.com](mailto:nanci.weissgold@alston.com)

Kendall Stensvad  
919.862.2245  
[kendall.stensvad@alston.com](mailto:kendall.stensvad@alston.com)

Zachary B. Miller  
202.239.3005  
[zach.miller@alston.com](mailto:zach.miller@alston.com)

# ALSTON & BIRD

[WWW.ALSTON.COM](http://WWW.ALSTON.COM)

© ALSTON & BIRD LLP 2017

ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777  
 BEIJING: Hanwei Plaza West Wing ■ Suite 21B2 ■ No. 7 Guanghua Road ■ Chaoyang District ■ Beijing, 100004 CN ■ +86 10 8592 7500  
 BRUSSELS: Level 20 Bastion Tower ■ Place du Champ de Mars ■ B-1050 Brussels, BE ■ +32 2 550 3700 ■ Fax: +32 2 550 3719  
 CHARLOTTE: Bank of America Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111  
 DALLAS: 2828 North Harwood Street ■ 18th Floor ■ Dallas, Texas, USA, 75201 ■ 214.922.3400 ■ Fax: 214.922.3899  
 LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213.576.1100  
 NEW YORK: 90 Park Avenue ■ 15th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444  
 RESEARCH TRIANGLE: 4721 Emperor Blvd. ■ Suite 400 ■ Durham, North Carolina, USA, 27703-85802 ■ 919.862.2200 ■ Fax: 919.862.2260  
 SILICON VALLEY: 1950 University Avenue ■ 5th Floor ■ East Palo Alto, California, USA, 94303-2282 ■ 650.838.2000 ■ Fax: 650.838.2001  
 WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.239.3300 ■ Fax: 202.239.3333