



COMMONWEALTH OF MASSACHUSETTS

Office of Consumer Affairs and Business Regulation

DIVISION OF BANKS

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February 10, 2022

Kenneth Rojc, Esq.
Nisen & Elliott, LLC
200 West Adams Street
Suite 2500
Chicago, IL 60606

Dear Mr. Rojc:

The Division of Banks (Division) is in receipt of your correspondence dated August 19, 2020 and received on August 26, 2020, in which you request an advisory opinion regarding Massachusetts General Laws chapter 255B, governing motor vehicle retail installment contracts. In particular, you have inquired whether, in Massachusetts, a fee may be charged for a consumer's cancellation of a guaranteed asset protection waiver ("GAP Waiver(s)") that is financed as part of a motor vehicle retail installment contract. The request was also the subject of email correspondence and telephone calls between you and Division staff. I regret the extended delay in providing this response to you.

According to your correspondence, your client is a national bank that does business in Massachusetts and purchases retail installment sales contracts ("RISCs") from motor vehicle dealers located in Massachusetts. As part of financing the RISCs, your client also finances GAP Waivers, which, as you note, are a specific form of debt cancellation contract. As explained in your request, a GAP Waiver is a contractual agreement in which a creditor agrees, for a separate charge, to cancel or waive all or part of amounts due on a borrower's finance agreement in the event of a total physical damage loss or unrecovered theft of the motor vehicle. As noted, this agreement is typically a separate addendum to the finance agreement. The charge for a GAP Waiver in the RISC is retained by the motor vehicle dealer who is responsible for paying the provider/administrator ("Provider") whatever price those parties have negotiated for the coverage, payment of claims, and processing of refunds arising from GAP Waivers. The lending institution, such as your client, who then purchases the RISC from the motor vehicle dealer may be considered to be the holder of a RISC revised by that GAP Waiver. Providers have included language in their GAP Waivers that addresses cancellation and any corresponding refund, including the calculation methodology and circumstances under which a cancellation fee may be charged and deducted from the refund amount. The cancellation fee amount would typically be disclosed on the face of the GAP Waiver contract. According to your correspondence, the cancellation fee is not disclosed on the RISC because (i) it is not financed as part of the RISC and (ii) it is a conditional charge, one that would only be assessed upon cancellation of the GAP Waiver. Your request also notes that certain regulators and courts have concluded that the lending institution, as the assignee of the RISC, would be the responsible party for providing the refund to the customer at the time of cancellation. With regard to the refund process, the lending institution would contact the Provider to determine the refund amount due. The lending institution would then refund this amount to the customer and seek reimbursement from the motor vehicle dealer who initially sold the GAP Waiver to the customer. The Provider retains the cancellation fee. As described in

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your correspondence, therefore, the lending institution, such as your client, as the party handling the customer interactions, would be essentially passing the Provider's cancellation fee onto the consumer in the form of a reduced refund amount. You have also clarified that the cancellation charge would be imposed for all types of GAP cancellations, including cancellations resulting from refinancing and prepayments.

Your correspondence requests that the Division confirm whether GAP Waiver cancellation fees ranging from \$25 to \$60 may be charged to consumers in Massachusetts.¹

The pertinent chapter of the Massachusetts General Laws does not specifically address debt cancellation coverage, or any charges for cancellation of such products. Section 14 of chapter 255B states that "finance charge shall be inclusive of all charges incident to investigating and making the contract, and for the extension of the credit provided for in the contract and no fee, expense or other charge whatsoever shall be taken, received, reserved or contracted for except as provided in this section and in section eleven and section seventeen...." Section 11 authorizes the holder of a retail installment contract to collect a delinquency charge on each installment payment not paid within 15 days of its due date, and section 17 authorizes the holder to collect a deferment or extension charge from the borrower for deferring a scheduled payment or extending the term of the contract. As you are aware, the Division has opined that debt cancellation coverage may be included in the motor vehicle retail instalment contract. *See* Division Opinion 03-133. It has been the Division's longstanding position regarding permissible fees that no fees or charges may be taken, received or contracted for except the fees described in G. L. c. 255B, § 14.² Therefore it is the position of the Division that a Massachusetts consumer may not be charged a cancellation fee for cancellation of a GAP Waiver.

Your client may wish to pursue legislation amending G. L. c. 255B to expressly permit charges for the cancellation of GAP.

The conclusions reached in this letter are based solely on the facts presented. Fact patterns which vary from those stated above may result in a different position statement by the Division.

Sincerely,

/s/ Barbara Keefe
Deputy Commissioner of Banks
and General Counsel

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¹ Your request expressly notes that you are not inquiring as to whether such cancellation fees are includable as a finance charge in the context of a RISC. Likewise, your correspondence states that you are not inquiring how to disclose any such permissible cancellation fees in the context of a GAP Waiver contract.

² *See e.g.* Division Opinions 99-114 and 03-133.