

October 11, 2023

C O N F I D E N T I A L M E M O R A N D U M

TO: Kurtis Morrison
Deputy Attorney General, Intergovernmental Affairs

THRU: Nathan Blake
Deputy Attorney General, Consumer Protection
Telephone Extension: 6239

Martha Fulford, Assistant Deputy Attorney General
Telephone Extension: 6109

Nikolai Frant, First Assistant Attorney General
Telephone Extension: 6111

FROM: Hanah Harris, Reviewing Assistant Attorney General
Telephone Extension: 6237

RE: Request for Rule Opinion – Administrator of the Uniform Consumer Credit Code

SOS Tracking No: 2023-00392
Rule Opinion Due Date:10/31/2023

Our client, the Administrator of the Uniform Consumer Credit Code (UCCC), has requested an Attorney General Rule Opinion for the below rule. This memorandum explains the basis for this Office's opinion as to "constitutionality and legality" under § 24-4-103(8)(b), C.R.S.

Tracking No: 2023-00392; 4 CCR 902-1

Description of Rules or Amendments

The Administrator adopted this rule to protect and inform consumers of income share agreements (ISAs). An ISA is a financial product in which the consumer receives an advance of funds in exchange for an agreement to pay a fixed percentage of their income for a predetermined amount of time. A key feature of an ISA is that the qualifying payments will fluctuate with changes to the consumer's

income. Furthermore, the ISA will be extinguished after a predetermined amount of time, without regard to how much the consumer has paid.

This rule makes clear that ISAs are loans. As such, ISAs are consumer loans subject to the UCCC when they meet all of the other criteria set forth in C.R.S. § 5-1-301(15)(a). These regulations include the requirement to comply with statutory interest rate maximums and to provide rebates to avoid prepayment penalties. For the same reasons, ISA lenders must comply with all licensing requirements established in the UCCC and in the Student Loan Equity Act (SLEA), where applicable.

In addition, the rule requires that ISAs be presented to consumers with a disclosure that clearly states the terms of the loan. This disclosure effectively communicates the unique features of ISAs, specifically that the qualified payment amount will fluctuate with the consumer's income, and the impact that those features will have on the consumer. This initial disclosure is supplemented with an annual disclosure and a disclosure required whenever the qualifying payment amount changes.

Significant Public Comments and Resultant Rule Changes, if Any, and Possible Legal Challenges, if Any

Between 2021 and 2022, the Administrator held three public stakeholder meetings, published two versions of the draft rule, and welcomed oral and written comments from interested parties. The Administrator considered these comments when editing the proposed rule at each stage of the stakeholder process.

In August 2023, the Administrator held a public rulemaking hearing attended by interested parties including industry representatives, consumer advocates, and members of the public. The Administrator received both oral and written comments as part of the rulemaking process. The Administrator subsequently made edits to the final rule and to this document in response to those oral and written public comments.

The Administrator does not anticipate that the rule will be challenged. No commentator stated that the rule should not exist, that it is unlawful, or that it would be challenged in court. The Administrator's rule is aligned with recent enforcement actions by the CFPB indicating that ISAs are loans subject to the federal Truth in Lending Act. This rule flows directly from that determination. Furthermore, the rule has been edited extensively in response to public comment from both consumer and industry advocates.

The Administrator herself is a member of the Attorney General's Office and reports directly to the Attorney General. The rule was drafted and subsequently edited by a team of attorneys and a consumer credit examiner, who are also employees of the office. All of these individuals were acting as counsel to the Administrator for the duration of this rulemaking.

The Administrator incorporated information received through public comment into each iteration of the draft rule. Comments from consumer and industry advocates were considered and resulted in edits to the rule. Significant edits included changes to the required disclosure and to the definition of key terms used in the rule. The changes related to specific comments are described in the attached Statement of Basis and Purpose.

Specific Statutory or Constitutional Authority for Rules or Amendments

The Administrator's legal authority for rules under the UCCC includes

- rulemaking authority, C.R.S. §§ 5-6-104(1)(e) and (2);
- information required for disclosure and compliance with the Truth in Lending Act, C.R.S. § 5-3-101;
- statutory caps for maximum finance charges, C.R.S. § 5-2-201;
- statutory right to prepay, C.R.S. § 5-2-210;
- statutory rebate upon prepayment, C.R.S. § 5-2-211;
- licensure requirements, C.R.S. § 5-2-301 and § 5-20-106(2);
- prohibitions against false, misleading, or deceptive statement or representation, C.R.S. § 5-3-11;
- prohibition against assignment of earnings, C.R.S. § 5-3-206;
- requirement of notification by credit sellers, C.R.S. § 5-6-201; and
- record-keeping requirements, C.R.S. § 5-2-304.

Incorporation by Reference of Codes, Rules, or Standards Promulgated by Third-Party Organizations

The Administrator's rule 18 does not incorporate any "code, standard, guideline, or rule."

Additional Information Regarding Legality and Constitutionality, Including, if Applicable, Justification for Emergency Rulemaking

None. See above. This is not an emergency rulemaking.

Conclusion

I have analyzed rule 18 and, based on my analysis, I conclude that

- (1) rule 18 is within the power delegated to the Administrator of the UCCC,
- (2) rule 18 is constitutional, and
- (3) rule 18 is otherwise authorized by law.