COLORADO DEPARTMENT OF LAW
Administrator Uniform Consumer Credit Code
Statement of Basis, Specific Statutory Authority, and Purpose

I. Basis and Specific Statutory Authority.

The Colorado Uniform Consumer Credit Code ("UCCC") authorizes the Administrator to "adopt, amend, and repeal procedural rules to carry out the provisions of this code" with approval of the council of advisors on consumer credit subcommittee.[1] The Administrator is also empowered to "adopt rules not inconsistent with the federal 'Truth in Lending Act' and federal 'Consumer Leasing Act' to assure a meaningful disclosure of credit terms so that a prospective borrower will be able to compare more readily the various credit terms available to him or her and to avoid the uninformed use of credit."[2]

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.

II. Purpose and Findings.

1. General.

Colorado adopted the UCCC to "further consumer understanding of the terms of credit transactions and to foster competition among suppliers of consumer credit," to protect consumer borrowers against unfair practices, and "to provide rate ceilings to assure an adequate supply of credit to consumers," among other purposes.[3] The UCCC is "liberally construed" to promote these purposes.[4] The Administrator proposes this rule to protect borrowers of Income Share Agreements ("ISA").

2. Scope.

Rule 18 governs all ISAs covered by the territorial scope of the UCCC.[5] ISAs are defined to include all consumer credit transactions in which amount of the consumer's installment payments and the total repayment obligation is based upon the consumer's future qualified income. The agreement must also include a period of time after which the consumer's obligations under the ISA are complete, no matter how much the consumer paid to the creditor.

---

[1] C.R.S. § 5-6-104(1)(e).
[2] C.R.S. § 5-6-104(2).
[3] C.R.S. § 5-1-102(2).
[4] C.R.S. § 5-1-102(1).
[5] C.R.S. § 5-1-201.

One comment, provided by the ISA Alliance, proposed that creditors of ISA loans would have the flexibility to decide whether their products would be governed by this Rule 18. The Administrator did not adopt this proposal because she determined it to be a hinderance to regulatory clarity and compliance. An ISA may include credit transactions not identified by the creditor as income share agreements.

3. Definitions – Rule 18(a).

Rule 18 defines certain terms commonly used in ISA loan products currently on the market, based on publicly available loan agreements and agreements provided to the Administrator as attachments to public comments. The Administrator incorporated many of the definitions that were suggested by commenters.

The Administrator altered the definition of "Income Share Agreement" to clarify that Rule 18 does not regulate conventional loans with a principal balance where the installment payments are nevertheless calculated based on the consumer's income. This question was raised in a comment drafted jointly by Better Future Forward, the Colorado Workforce Development Council, ISA Alliance, Jobs for the Future, and Social Finance. In response, the Administrator clarified that loans are ISAs only where the installment payment amount *and* the total obligation are based on the consumer's future qualified income.

The Administrator changed the definition of the term "Payment Cap" in the proposed rule based on comments received on drafts presented to stakeholders. The definition includes examples of the payment cap disclosure in order to improve the clarity of the rule. Similarly, the Administrator replaced the word "compensation" with "income" and later amended to "qualified income" in response to public comment and to improve the clarity of the rule. The Administrator also eliminated the word "repaid" and replaced this with more specific terms.

The Administrator relocated the definition of "Earned Finance Charge" from a lower subsection to the definitions section based on a public comment. In response to another public comment, the definition provides that the creditor shall calculate the earned finance charge based on the *greater* of the annual percentage rates disclosed in accordance with either 12 C.F.R. § 1026.18(e) or, if disclosed, 12 C.F.R. § 1026.18(f)(1)(ii).

4. Truth in Lending Act and Regulation Z – Rule 18(b).

The federal Truth in Lending Act ("TILA") and its implementing regulation ("Regulation Z") generally apply wherever an entity regularly offers or extends credit to consumers for personal, family, or household purposes.[6] Regulation Z defines credit:

> "Credit means the right to defer payment of debt or to incur debt and defer its payment.[7]"

The Consumer Financial Protection Bureau ("CFPB") signed a consent order concerning the ISA lender Better Future Forward ("BFF") filed on September 7, 2021. [8] The CFPB determined that both TILA and Regulation Z apply to BFF's ISAs.[9] The CFPB found that the ISAs offered by BFF were loans.[10] The CFPB further determined that the ISAs are "credit under Regulation Z because they provide the right to defer

---

[6] 12 C.F.R. § 1026.1(c)(1).
[7] 12 C.F.R. § 1026.2(a)(14).
[8] Consent Order, No. 2021-CFPB-0005 (filed 9/7/2021) https://files.consumerfinance.gov/f/documents/cfpb_better-future-forward-inc_consent-order_2021-09.pdf.
[9] *Id.*
[10] *Id.* at ¶ 23.

payment of debt or to incur debt and defer its payment."[11] The CFPB found that BFF violated Regulation Z.[12]

5. UCCC – Rule 18(b).

The UCCC defines credit as "the right granted by a creditor to a consumer to defer payment of debt or to incur debt and defer its payment."[13] The Colorado Supreme Court held that a debt is an "obligation to repay."[14] A conditional obligation to repay is sufficient to create a debt, even when the consumer may not be required to repay any amount under certain conditions.[15]

ISAs are consumer credit transactions, as defined in C.R.S. § 5-1-301(12), where the amount of the consumer's installment and total repayment obligation for the transaction is calculated based upon the amount of the consumer's future qualified income. This obligation to repay creates a debt, notwithstanding the conditional or variable nature of a consumer's repayment obligation. The UCCC defines a consumer credit transaction to include both a consumer loan and a consumer credit sale.[16] An ISA is a debt and may be a consumer loan where it meets the other requirements set forth in C.R.S. § 5-1-301(15)(a). Similarly, an ISA may be a consumer credit sale where it meets the other requirements set forth in C.R.S. § 5-1-301(11)(a).

6. Supplemental Colorado Disclosures – Rule 18(c).

In Rule 18(c)(1), the Administrator requires creditors to disclose costs and loan terms under six (6) alternative factual scenarios. These disclosures illustrate the way that the costs of the ISA will vary based on future changes to the consumer's qualified income.

The disclosures in Scenario 1 are calculated as if the consumer will earn less than the minimum income threshold for the duration of the ISA. Since the minimum income threshold is defined as the income below that a consumer's monthly installment payment is reduced to $0, this scenario illustrates a circumstance where the consumer satisfies their obligation under the ISA while paying nothing to the creditor.

Scenario 5 provides for disclosures calculated as if the consumer will earn the qualified income amount resulting in the consumer paying the Annual Percentage Rate ("APR") disclosed pursuant to 12 C.F.R. § 1026.18(e).

Disclosures in Scenarios 2-4 are calculated as if the consumer will earn less than the qualified income used in Scenario 5. These disclosures illustrate how the amount of the consumer's monthly installment payments and total amount paid will decrease if the consumer earns a lower qualified income.

Disclosures in Scenarios 6-8 are calculated as if the consumer will earn more than the qualified income in Scenario 5. These disclosures illustrate how the amount of the consumer's monthly installment payments and total amount paid will increase if the consumer earns a higher qualified income.

Scenario 9 provides for disclosures to be calculated as if the consumer will earn the maximum income threshold. This disclosure illustrates how the amount of the consumer's monthly installment

[11] *Id.* at ¶ 28.
[12] *Id.* at ¶ 31.
[13] C.R.S. § 5-1-301(16).
[14] *Oasis Legal Financial Group, L.L.C. v. Coffman*, 361 P.3d 400, 407-08 (Colo. 2015).
[15] *Id.* at 408 (holding that a litigation finance agreement is a debt although all or a portion of the amount financed may not be repaid under certain circumstances).
[16] C.R.S. § 5-1-301(12).

payments and total of payments will be limited. Scenario 9 disclosures are required only when the terms of the ISA include a maximum income threshold.

Several commenters recommended the inclusion or exclusion of different scenarios. The Administrator largely incorporated those recommendations into the proposed rule. The Administrator added a scenario reflecting when a consumer may complete their obligations under the ISA without making any payments. The Administrator also added a scenario to reflect the circumstance in which the consumer earns more than the maximum income threshold.

In response to comments, the Administrator eliminated the disclosure of an APR for each scenario. After receiving comments on the matter, the Administrator decided that the APR disclosures required by TILA sufficiently inform consumers.

Rule 18(c)(2) requires the disclosure of terms that are common among ISA contracts, where applicable. During stakeholder comment, one commenter suggested edits and additions to the disclosure of common ISA loan terms. Those recommendations have been incorporated into the Administrator's proposed rule.

7. Finance charges and other UCCC requirements – Rule 18(d)

All creditors making consumer credit transactions, including income share agreements, shall comply with the finance charge maximums set out in C.R.S. § 5-2-201 and other requirements of the UCCC.

8. Prohibition against assignment of earnings – Rule 18(e)

The UCCC prohibits earnings assignments for all debts arising from consumer credit transactions, including ISAs.[17] While an ISA creditor may use the amount of a consumer's future income to calculate the consumer's repayment obligation, the creditor may not obtain a consumer's future earnings pursuant to a wage assignment. The creditor further cannot take a security interest in a consumer's unpaid earnings to secure repayment of the ISA. This provision does not prohibit a revocable payroll deduction plan or preauthorized payment plan, in which the consumer authorizes a series of wage deductions as a method of making payments. The UCCC also prohibits creditors from attaching unpaid earnings of the consumer by garnishment or like proceedings prior to entry of judgment in an action against the consumer for debt arising from a consumer credit transaction.[18]

Rule 18(e) requires a disclosure concerning compliance with these prohibitions.

9. Prepayment and rebate – Rule 18(f).

The UCCC provides that consumers have the right to prepay the unpaid balance of a consumer credit transaction without penalty.[19] A creditor is permitted to retain only the amount financed and the earned finance charge in the event of a prepayment.[20] In some circumstances, a rebate of the unearned finance charge is necessary to avoid a prepayment penalty.

Rule 18(f) requires the creditor to rebate back to the consumer any finance charge collected in excess of the earned finance charge and functions in compliance with C.R.S. § 5-2-211 of the UCCC. "Earned finance charge" is a defined term in Rule 18.

---

[17] C.R.S. § 5-3-206.
[18] C.R.S. § 5-5-105.
[19] C.R.S. § 5-2-210.
[20] C.R.S. § 5-2-211(1).

If the creditor elects to disclose a variable rate APR with a maximum APR pursuant to 12 C.F.R.1026.18(f)(1)(ii), the creditor may calculate the earned finance charge using that maximum APR. If the creditor does not elect to disclose a maximum APR as part of a variable rate disclosure, the creditor must calculate the earned finance charge using the APR disclosed pursuant to 12 C.F.R. § 1026.18(e). Consistent with 18(e), in all cases, the earned finance charge is limited by the finance charge maximums in C.R.S. § 5-2-201.

10. Prohibition against deceptive statement or representation – Rule 18(g).

The UCCC contains prohibitions against false, misleading, or deceptive statements or representations regarding consumer credit transactions.[21] Rule 18(g) identifies two types of statements that are false, deceptive, or misleading as applied to ISAs: (1) any representation that an income share agreement is not a loan, is not credit, or is not a consumer credit transaction if the transaction meets the definition in C.R.S. § 5-1-301(12); and (2) any representation that the consumer must or should report the income share agreement as a sale of income to any tax authority. This list is non-exhaustive and does not preclude a finding that other statements are false, deceptive, or misleading.

11. Notice of change in qualifying payment – Rule 18(h).

Rule 18(h) provides that whenever the qualifying payment amount for an ISA is altered, either to increase or decrease the amount of the payment, the creditor must send a notice to the consumer thirty days prior to the change. The notice must include important information such as the amount of the new qualifying payment amount in relation to the current qualifying payment and the date on which the new amount will take effect.

12. Annual statement of account – Rule 18(i).

In addition to the notice required under Rule 18(h), Rule 18(i) provides that the creditor must send an annual statement of account with more detailed information about the status of the ISA loan. This annual statement must include sufficient information for the consumer to determine how many months or qualifying payments remain until their obligation under the ISA loan is complete. The statement also provides the consumer with the amount required to prepay the balance of the ISA loan. The statement also includes an explanation of how the creditor calculated the various figures.

13. License application – Rule 18(j).

Rule 18(j) provides that lenders are required to obtain a license from the Administrator under C.R.S. § 5-2-301. The Administrator shall receive and act on any applications for licensure submitted in accordance with C.R.S. § 5-2-302. In addition to the information required in that Section, Rule 18(j) sets out information specific to ISA loans that must be included in the application. This information is sufficient for the Administrator to evaluate whether the creditors' proposed business practices are in compliance with this Rule 18.

[21] C.R.S. § 5-3-110(1).

14. Record keeping – Rule 18(k).

Rule 18(k) requires creditors to maintain records necessary for the Administrator to evaluate the creditors' compliance with disclosures required under the rule.

15. Student Loan Equity Act.

The Administrator received several public comments concerning the application of the Student Loan Equity Act ("SLEA") to ISAs. The Administrator anticipates providing guidance on the SLEA to accompany a final rule under the UCCC.

III. Public Rulemaking Process.

During the course of the rulemaking process, the Administrator held four (4) public stakeholder meetings, published three versions of the draft rule, and welcomed oral and written comments from interested parties.

In addition to the edits and additions to the rule which are specifically referenced above, comments from the public also helped identify and explain the many permutations of ISAs currently available on the market. This enabled the Administrator to better understand and regulate this relatively new financial product.