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**From:** Administrator, Colorado Uniform Consumer Credit Code

**To:** Interested Parties, Licensees, Notification Filers

**RE: Administrator's Interpretive Opinion Letter: Amendment of Surcharge Statute (C.R.S. section 5-2-212), Effective July 1, 2022)**

In the 2021 legislative session, the Colorado legislature passed an amendment to C.R.S. section 5-2-212 (the "Surcharge Statute"). The amendment takes effect July 1, 2022.

Under the amendment, the legislature eliminated the surcharge prohibition and permitted surcharges that either are (1) capped at 2% (C.R.S. section 5-2-212(1)(c)(I)) or (2) an amount not to exceed the "merchant discount fee" that the seller or lessor incurs in processing the sales or lease transaction.<sup>1</sup> (C.R.S. section 5-2-212(1)(c)(II)). The seller or lessor must disclose the surcharge as a separate line item on the receipt, and may only impose a single surcharge per sales or lease transaction. C.R.S. section 5-2- 212(d), (e). The surcharge shall not be imposed on payments by cash, check, debit card, or a redemption of a gift card. C.R.S. section 5-2-212(f)(I)-(IV).

If the seller or lessor imposes the 2% cap, it must disclose to the consumer by either (1) using signage in a manner that is visible to consumers, or (2) for sales or lease transactions made online, in a display before an online customer's completion of the sales or lease transaction in a manner that is visible to the online customer that:

**To cover the cost of processing a credit or charge card transaction, and pursuant to section 5-2-212, Colorado Revised Statutes, a seller or lessor may impose a processing surcharge in an amount not to exceed 2% of the total payment made for goods or services purchased or leased by use of a credit or charge card. A seller or lessor shall not impose a processing surcharge on payments made by use of cash, a check, or a debit card or redemption of a gift card.**

<sup>1</sup> C.R.S. section 5-2-212(1)(g)(II) defines the merchant discount fee as "the actual fee, expressed as a percentage or fixed amount of the total transaction amount, that a seller or lessor pays its processor or service provider to process the transaction."

C.R.S. section 5-2-212(1)(c)(I). If the seller or lessor imposes a surcharge not to exceed the merchant discount fee, it must disclose using signage or in a display for online sales that:

**To cover the cost of processing a credit or charge card transaction, and pursuant to section 5-2-212, Colorado Revised Statutes, a seller or lessor may impose a processing surcharge in an amount not to exceed the merchant discount fee that the seller or lessor incurs in processing the sales or lease transaction. A seller or lessor shall not impose a processing surcharge on payments made by use of cash, a check, or a debit card or redemption of a gift card.**

A seller or lessor who violates C.R.S. section 5-2-212 is subject to liability as a creditor under the Uniform Consumer Credit Code, C.R.S. section 5-1-101, et seq. ("UCCC"), and therefore is subject to actions brought by the Administrator. C.R.S. section 5-2-212(3).

### **The Surcharge Statute Applies to All Consumer Sales and Lease Transactions**

To aid with compliance, the Administrator provides interpretive guidance on two discrete issues: (1) whether the provisions of C.R.S. section 5-2-212 apply to consumer leases; and (2) whether the provisions of C.R.S. section 5-2-212 apply to business transactions that do not involve a consumer purpose.

#### *A. Consumer Leases*

The UCCC is generally limited to transactions primarily for personal, family, or household purposes as its provisions contain the terms "consumer credit sales", "consumer leases", and "consumers loans", which are all defined and limited to transactions involving these purposes. C.R.S. sections 5-1-301(11)(a)(III), (14)(a)(I), (15)(a)(II). In addition, the definition of "consumer lease" in the UCCC applies to "a lease of goods and includes any insurance incidental to the lease and any other services merely incidental to upkeep or repair of the goods" and that "a lessor regularly engaged in the business of leasing makes to a person, other than an organization, who takes under the lease primarily for a personal, family, or household purpose; ... [i]n which the amount payable under the lease does not exceed seventy-five thousand dollars; and [t]hat is for a term exceeding four months." C.R.S. section 5-1-301(14).

However, C.R.S. section 5-2-102 (which was not amended by the recent legislation) makes clear that "[t]he provisions concerning credit card surcharges contained in section 5-2-212 apply to all sales and leases." (emphasis added). This scope is stated in contrast to the other provisions in Article 2. *Id.* ("For purposes of this article, 'consumer credit transaction' applies to consumer loans, including supervised loans, consumer credit sales, and refinancing and consolidations of these transactions but does not include consumer leases except for the charges and procedures in sections 5-2-202 and 5-2-203. **The provisions concerning credit card surcharges contained in section 5-2-212 apply to all sales and leases.**") (emphasis added). Moreover, it makes clear through this contrast that C.R.S. section 5-2-212 specifically applies to all consumer leases, including residential leases. *Id.* Consumer residential leases are not covered by other provisions of Article 2, but the credit card surcharge protection applies to "all sales and leases." In addition, C.R.S. section 5-2-212 applies to "any" sales or lease transactions. C.R.S. section 5-2-212(1)(a).

When interpreting a statute, the court begins with its plain language. *Frazier v. People*, 90 P.3d 807, 810 (Colo. 2004). If the statute is unambiguous and does not conflict with other statutory provisions, the court looks no further. *Id.* The scope of C.R.S. section 5-2-212 is unambiguous. It applies to “any sales and lease transaction....”. This broad scope is supported by C.R.S. section 5-2-102. C.R.S. section 5-2-102 makes plain that C.R.S. section 5-2-212 applies to “all sales and leases,” including consumer residential leases. In addition, the legislature clarified in its 2021 amendments that “[f]or purposes of liability for a violation of this section, a buyer or lessee is a consumer ....” C.R.S. section 5-2-212 (3)(b). This makes clear that, for violations of C.R.S. section 5-2-212, all buyers and lessees receive the UCCC’s protections for consumers. This is consistent with the purposes of the UCCC, which generally protects consumers. See generally C.R.S. section 5-1-102.

Thus, C.R.S. section 5-2-212 is an independent protection placed within the UCCC that expansively applies to “all sales and leases.” It protects all buyers and lessees, and affords them the UCCC’s consumer protections for violations of C.R.S. section 5-2-212. It covers any type of consumer sale or lease, including consumer residential leases, as they are “sales or leases.” II.

### *B. Business Transactions*

The Administrator is aware that a strictly textual interpretation of C.R.S. section 5-2-212 could support an even broader scope, applying its protections to both consumer transactions and to non-consumer business transactions. She issued an opinion letter along these lines back in 1985. See Opinion Letter, Credit Card Surcharge Ban, dated June 13, 1985 (“[B]usiness purpose transactions via credit cards and charge cards are covered by the surcharge ban.”). That letter specifically provided that it was not an official interpretation of the UCCC. While the Letter’s reading of the statute is a plausible one, the Administrator believes it is reasonable to interpret the UCCC’s amended surcharge provisions as inapplicable to business-to-business transactions that have no consumer purpose, such as those with a business credit card. Regulating business-to-business transactions without a consumer purpose does not directly advance the UCCC’s purposes. See generally C.R.S. section 5-1-102. The Administrator does believe that the surcharges provisions in C.R.S. section 5-2-212 applies to any sales or leases with a consumer purpose.