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Advisory Opinion

Debt Cancellation and Suspension Agreements Offered by Colorado-Chartered Banks, Colorado-Chartered Industrial Banks, and Colorado-Chartered Credit Unions

This office has received requests from a few state-chartered credit unions asking for permission to include the cost of debt cancellation and suspension contracts and agreements as a permitted additional charge pursuant to section 5-2-202, C.R.S. This advisory opinion allows this practice until if and when a rule is adopted pursuant to section 5-2-202(1)(d), C.R.S. or this advisory opinion is withdrawn or revised.

As a preliminary matter, the Colorado Uniform Consumer Credit Code (UCCC) applies to "consumer credit transactions" as defined by section 5-1-301(12), C.R.S. and includes consumer credit sales, consumer leases, and consumer loans. These terms are further defined in sections 5-1-301(11), (14), & (15), C.R.S.[1] This advisory opinion is limited to establishing when Colorado-chartered depository institutions may impose a charge for debt cancellation and suspension agreements and exclude the charge from the finance charge and corresponding annual percentage rate (APR).

Debt cancellation and suspension agreements are generally similar to various types of credit insurance. If a credit transaction includes a debt cancellation or suspension agreement and certain events occur, such as the consumer's death, disability, or loss of employment, the consumer is relieved from making some or all of the remaining payments due under the credit contract. Although debt cancellation and suspension agreements are similar to traditional credit insurance in some ways, it is my understanding that the Colorado Division of Insurance has concluded that these products do not meet the statutory definitions of insurance and not subject to that division's regulatory authority.[2]

[1] Nothing in this opinion applies to or limits debt cancellation and suspension agreements on commercial, business, or agricultural transactions or other transactions that are not "consumer credit transactions" under the UCCC.

[2] If the Division of Insurance concludes that debt cancellation and suspension agreements are insurance policies, it will also have regulatory authority over these products.

Under the UCCC, the Administrator may consider charges to be permitted additional charges, allow them to be added to the credit balance, and excluded from the APR if she adopts a rule pursuant to section 5-2-202(1)(d), C.R.S. In adopting a rule authorizing a permitted additional charge, the Administrator must first find that the product is beneficial and valuable to consumers and its cost is reasonable in relation to its benefits. Any rule adopted by the Administrator must be approved by a committee consisting of the Attorney General or his designee and four members of the Council of Advisors on Consumer Credit. Sections 5-6-104(1)(e) & 5-6-302(2), C.R.S. If the Administrator has not adopted a rule authorizing a permitted additional charge, the product may usually be sold in consumer credit transactions but its cost must be included in the finance charge when calculating the APR for purposes of the maximum rate ceilings set by section 5-2-201, C.R.S.[3]

The Administrator has adopted UCCC Rule 8 on guaranteed automobile protection, one type of debt cancellation product. 4 C.C.R. 902-1 at 4-7. However, Rule 8 is inapplicable to other types of debt cancellation and suspension agreements. It is possible that the Administrator may conduct future rulemaking to consider the adoption of a rule permitting the financing of debt cancellation and suspension agreements as permitted additional charges for all creditors under the UCCC, revising Rule 8, or revising all existing rules on permitted additional charges.

Regulation Z is the Federal Reserve Board's regulation that implements the federal Truth in Lending Act. Regulation Z states that fees for voluntary debt cancellation products may be excluded from the finance charge for disclosure purposes if: (1) debt cancellation is not required by the creditor in order to obtain credit; (2) the voluntary nature of the product and its cost are disclosed in writing; and (3) the consumer affirmatively indicates in writing his or her desire to purchase the product after receipt of the disclosures. 12 C.F.R. section 226.4(d)(3). Regulation Z and TILA are primarily disclosure laws and do not determine whether the cost for debt cancellation and suspension agreements must be included in the finance charge for state rate ceiling and usury purposes.

As of this date, the federal financial institution regulators have authorized federally chartered institutions to offer debt cancellation and suspension products on loans they make with certain conditions. This authorization has been in the form of a Comptroller of the Currency regulation for national banks, 12 C.F.R. sections 37.1 to 37.8, a National Credit Union Administration regulation on incidental powers of federal credit unions, 12 C.F.R. sections 721.1 to 721.7, and letters issued by the Office of Thrift Supervision for federal savings banks on September 15, 1993 and December 18, 1995.

Colorado's financial institution regulators have taken similar positions. The Colorado Division of Financial Services issued a January 15, 2003 Bulletin authorizing the sale of debt cancellation agreements by state-chartered credit unions as part of their authority to make loans, subject to treatment under the UCCC and other applicable laws. The Bulletin also required adequate insurance purchased from a third party to cover losses, disclosure provisions similar to

[3] A supervised lender may not conduct other business to evade or violate the UCCC nor require the purchase of goods or services as a condition for making a loan. Section 5-2-309, C.R.S.

Regulation Z, and safety and soundness compliance.[4] The Colorado Bank Commissioner issued a May 3, 2004 Operating Memorandum authorizing Colorado-chartered banks and industrial banks to offer debt cancellation and suspension agreements if they comply with the rules for national banks referenced above at 12 C.F.R. sections 37.1 to 37.8.

For the time being, the Administrator will allow the institutions subject to these bulletins and memorandums – Colorado-chartered banks, industrial banks, and credit unions – to finance debt cancellation and suspension agreements in their direct consumer loans as permitted additional charges without adoption of a rule pursuant to section 5-2-202(1)(d), C.R.S. Those institutions should comply with all requirements of the Colorado Divisions of Banking and Financial Services. This advisory opinion applies only to consumer loans made directly by these entities and not to consumer loans, consumer credit sales, or consumer leases that these entities may purchase or take by assignment from other non-Colorado depository institutions or non-depository lenders or creditors.

In addition to the above requirements, the Administrator recommends that Colorado-chartered depository institutions provide at least a 30-day right to cancel any debt cancellation or suspension agreement for a full refund and that this right be clearly disclosed. A 30-day right to cancel is common and required for other products under UCCC Rules 3, 4, and 8. Further, to the extent that a debt cancellation or suspension product is generally similar to a type of credit or non-credit insurance, the cost for the cancellation or suspension should not exceed the cost of similar insurance.

Colorado-chartered depository institutions should be cautious in offering debt cancellation and suspension agreements in consumer loans. If the consumer loan is subject to the federal Home Ownership and Equity Protection Act (HOEPA) for high-cost loans, the cost of any single-payment debt cancellation or suspension agreement must be included in the points and fees calculation for HOEPA purposes. 12 C.F.R. section 226.32(b)(1)(iv). In addition, if the consumer loan is subject to the Colorado Consumer Equity Protection Act (CCEPA), the sale of single-premium or single-payment debt cancellation or suspension agreements is prohibited. Section 5-3.5-103(1)(f), C.R.S. CCEPA has lower points and fees triggers than does HOEPA and covers a larger number of loans. For these reasons, Colorado-chartered depository institutions may decide against financing debt cancellation and suspension agreements on a single-payment basis.

The Administrator reiterates that this advisory opinion applies only to direct consumer loans made by Colorado-chartered banks, industrial banks, and credit unions. In all other consumer credit transactions, the cost of debt cancellation and suspension agreements must be included in the finance charge and APR for Colorado rate ceiling and usury purposes and is not a permitted

[4] The Administrator is unaware of any memorandum or bulletin by the Colorado Division of Financial Services authorizing state-chartered savings and loan associations to offer debt cancellation and suspension products but assumes a similar result might be reached. If so, the Administrator's advisory opinion would also apply to these entities.

additional charge until if and when the Administrator adopts a rule on this matter.

/s/ Laura E. Udis

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