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A Reflection on the Recent Nigerian Legislation Against Same Sex Marriage vis-à-vis Rising Gay Activism in the Western World

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THE UTAH CONSUMER CREDIT CODE:

WHERE DID IT COME FROM, WHY IS IT HERE, WHERE IS IT GOING?

On July 1, 1985, Utah enacted the Utah Consumer Credit Code, Utah Code Annotated (U.C.A.) Title 70C.[1] The new law completely replaces U.C.A. Title 70B, Utah's version of the Uniform Consumer Credit Code.[2] Although the notes accompanying the short title of Title 70C describe the adoption of the new code as "a revision of the Uniform Consumer Credit Code [U3C] and related provisions",[3] this description understates what has really occurred. While sections of the U3C remain, the new code only modestly resembles the uniform act promulgated during the late sixties by the National Conference of Commissioners On Uniform State Laws.[4] The new law is substantially different from its predecessor in both form and substance.[5]

The new legislation reflects the influence of three major forces currently affecting state consumer credit law. First, the code recognizes to an even greater degree than its predecessor the pervasive influence of Federal law on the consumer credit industry.[6] The new code relies heavily on Title I of the Federal Consumer Credit Protection Act (C.C.P.A.) for both its organization and definition.[7] The new Utah law also eliminates state

[1]1985 Utah Laws ch. 159, § 8.

[2]UTAH CODE ANN. § 70C-1-101 (Supp. 1985). The act repealed all of title 70B, effective July 1, 1985 except for sections 70B-2-210 and 70B-3-210 which were repealed effective September 1, 1985. These last two sections dealt with rebates upon prepayment for credit sales and consumer loans respectively.

[3]*Id.* § 70C-1-101, Title of Act.

[4]Utah enacted the Uniform Consumer Credit Code (U3C) on March 20, 1969. For an account of its passage *see* Bennett, *The Political History of the U3C in Utah*, 23 PERSONAL FINANCE L. Q. REP. 75 (1969). For a brief history of the Uniform Consumer Credit Code, *see infra* text accompanying note 30.

[5]Many of the differences between the U3C and the new Utah Consumer Credit Code are products of previous amendments to Utah law. For example, the ceilings on open-end consumer credit sales were lifted in 1981. *See infra*, note 135.

[6]For a discussion of the extent to which Federal law regulates consumer credit *see infra*, note 52 and accompanying text.

[7]Title I of the C.C.P.A., also known as the Truth in Lending Act, was enacted by Congress on May 29, 1968, 15 U.S.C. § 1601, Pub. L. No. 90-321, 82 Stat. 146 (1968). The Act was substantially amended on March 31, 1980 by Title VI of the Depository Institutions Deregulation and Monetary Control Act of 1980 (also known as the Truth in Lending Simplification and Reform Act), Pub. L. No. 96-221, tit. VI, 94 Stat. 132 (1980). *See infra*, note 52.

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regulation of credit discrimination and curtails the state's influence over credit disclosure.[8] Second, Title 70C reflects the current mood of the voting public and their elected representatives to decrease the size and complexity of laws and regulations generally.[9] Third, the code reflects the influence of increasing competition for consumer credit dollars.[10] In response to the beneficial effects of competition, Utah legislators have allowed for greater freedom of contract in consumer credit transactions. The substantive provisions of the new code are now based on the premise that parties to any consumer credit transaction are free to contract for any finance charge which they agree upon; finance charge ceilings have been completely removed.[11]

This article describes the forces and logic behind Utah's adoption of a new consumer credit code, summarizes the substantive differences between the old and the new law, and recommends changes in certain statutory and regulatory language.

I. [§1] BACKGROUND

A. [§ 1.1] CONSUMER CREDIT LAW BEFORE THE U3C

Prior to enacting the U3C in 1969, Utah was laden with a haphazard patchwork of consumer credit laws. The basic usury statute provided that the contract rate for any credit transaction could not exceed 10 per cent per annum.[12] This restriction was diluted, however, by numerous exceptions.[13] These exceptions allowed more than one half of the credit transactions in the state to fall beyond the reach of the usury law.[14]

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[8]By eliminating any reference to credit discrimination, the new Utah law gives deference to title VII of the C.C.P.A. which makes it unlawful for any creditor to discriminate against credit applicants on certain grounds. *See infra* note 52. The legislature has previously repealed other chapters which were duplicative of Federal law. For example, a chapter on Billing Errors and Credit Cards was repealed in 1983, avoiding conflict with chapter 4 of Title I of the C.C.P.A., the Fair Credit Billing Act. *See infra* note 52.

For a discussion of the extent to which the state has curtailed regulation of disclosure in consumer credit transactions *see infra*, text accompanying notes 277-282.

[9]*See* Garwood, *Regulatory Reform and Consumer Financial Services*, 28 BUS. LAW. 1295 (1983).

[10]*See infra* notes 89 and 93.

[11]UTAH CODE ANN. § 70C-2-101 (Supp. 1985). More detailed reasons for the elimination of finance charge ceilings are discussed below. *See infra* text accompanying notes 74-83.

[12]1965 Utah Laws, ch. 25, § 1, 75 (repealed 1969). The contract rate is the rate the parties have agreed on subject to any maximum prescribed by law. 1 CONSUMER CREDIT GUIDE (CCH) para. 510 (1985).

[13]*See* Comment, *The U.C.C.C. in Utah*, 1970 UTAH L. REV. 91, 93 (1970).

[14]*Id.* at 94.

Utah was not alone in its fragmented approach to consumer credit legislation. One of the stated purposes of the drafters of the U3C was to "abolish the crazy-quilt, patch-work welter" of state laws regulating consumer credit at the time.[15] Developed over a period of fifty years, the various state laws were adopted on a piecemeal basis to address new relationships between consumers and creditors brought about by changes in society and the economy. For example, as credit sales in the United States burgeoned after World War II,[16] states were forced to deal with the previously unaddressed dichotomy between lender and vendor credit.[17] The resulting retail installment sale legislation varied significantly from state to state.[18] States fashioned other laws ad hoc to deal with the wide variety of consumer credit arrangements created as various lending institutions either entered or increased their share of the developing consumer credit market.[19] Still other laws represented specific reactions to the needs of particular classes of consumers as perceived by various jurisdictions.[20]

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[15]WEST, SELECTED COMMERCIAL STATUTES, UNIFORM CONSUMER CREDIT CODE, Official 1974 Text, Prefatory Note, 890-91 (1985).

[16]Total outstanding consumer credit in the United States went from $7.2 billion at the end of 1939 to $113.2 billion at the end of 1968. 54 FED. RESERVE BULL. 987 (1968) *noted in* Comment, *supra* note 13, at 91.

[17]Credit arrangements have traditionally been classified within one of two major categories: lender credit and vendor credit. The distinction between the two types of credit centers on the kind of transaction in which each is used. The vendor, engaged primarily in the sale of goods, was thought to extend time for payment merely as an incident of the sale. Historically, credit extended by the seller was not subject to the restrictions of interest and usury statutes, since the seller was not thought of as engaged in lending money. Instead, the vendor was thought to have a "cash on the barrel head" price and a "time-sale" price. A finance or credit charge made in connection with a credit sale by a vendor was not thought of as interest but represented the difference between the time price and the cash price. The result of this "time-price" doctrine was to negate the application of all interest and usury statutes and other legislation regulating the making of loans with respect to vendor credit. B. CURREN, TRENDS IN CONSUMER CREDIT LEGISLATION 8, 13 (1965).

[18]Most state courts upheld the "time-price" doctrine, and consumer credit sales remained exempt from state usury laws. B. CURREN, *supra* note 17, at 84. However, other state laws developed to regulate various aspects of consumer installment credit sales contracts, emphasizing disclosure, rather than control, of terms and conditions of the contract. Most of this legislation was not adopted until the 1950's. *Id.* at 2. The extent to which credit sale arrangements were regulated varied widely from state to state. *Id.* at 91.

[19]For example, commercial banks were historically reluctant to participate in the consumer credit market. However, due to a scarcity of commercial funds during the 1930's, "banks became increasingly interested in loans to consumers on the installment basis and in acquiring consumer goods paper from vendors." B. CURREN, *supra* note 17, at 7. Banks became the primary beneficiaries of installment loan legislation. *Id.* at 65-75.

[20]The prime example of this type of legislation is the Uniform Small Loan Law

As consumer lending increased, credit arrangements offered by various groups of lenders began to overlap in both purpose and function.[21] Arrangements previously tailored to meet specific needs of individual lenders and consumers slowly merged into an aggregate of consumer services which could be identified generically as the consumer credit market.[22] Consumer credit, once thought of as "preponderantly small and local in both its nature and operation,"[23] emerged as an interstate and even national industry with common forms of financing.[24]

In contrast to this trend of consolidation within the industry, state laws remained on the books as either uniquely local reactions to the demand for consumer credit, as remedies for particular abuses, or as responses to consumer activism in a particular jurisdiction.[25] While legislation was amended from time to time, laws continued to focus on particular institutions, financing arrangements, or classes of consumers.[26] Understandably, these laws failed to keep pace with the need for an integrated approach to regulating the industry as a whole.

The hodgepodge of state laws provided uneven protection for consumers and created barriers to competition, allowing select groups of lenders to exceed the usury rate while keeping others within its confines.[27] Statutory restrictions on the number of lenders severely limited the ability of a newcomer to enter the marketplace.[28] And, with virtually every type

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(first draft 1916) which permitted interest rates in excess of the maximum permitted under general interest statutes to be charged for loans of $300 or less by licensed lenders. The laws were designed to protect borrowers of small sums of money from the evils of loan sharking. See B. CURREN, *supra* note 17, at 2.

[21]B. CURREN, *supra* note 17, at 3.

[22]*Id.*

[23]Malcolm, *Consumer Credit - Probings into the Future*, 26 BUS. LAW. 899, 900 (1971).

[24]The National Commission on Consumer Finance noted in its 1972 report that "the mobility of the population and the growth of credit cards demand a nationwide system of credit card information." NATIONAL COMMISSION ON CONSUMER FINANCE, CONSUMER CREDIT IN THE UNITED STATES 11 (1972).

[25]Davis, *Revamping Consumer Credit Contract Law*, 68 VIRGINIA L. REV. 1333, 1338 (1982).

[26]B. CURREN, *supra* note 17, at 3.

[27]Davis, *supra* note 25, at 1341; Crandall, *It Is Time for A Comprehensive Federal Consumer Credit Code*, 58 N.C. L. REV. 4-20, 25-32 (1979); *see generally* Comment, *supra* note 13, at 94; Rohner, *Problems of Federalism in the Regulation of Financial Services Offered by Commercial Banks: Part I*, 29 CATH. U.L. REV. 1 (1979).

[28]Utah followed the "convenience and advantage" test of the Uniform Small Loan Act, 1945 Utah Laws, ch. 15 § 4, 33-35 (repealed 1969), which all but eliminated outsiders from the Utah credit market. See Comment, *supra* note 13, at 94.

of common loan covered by its own narrow scheme, both lenders and consumers alike were faced with a confusing maze of consumer credit restrictions.[29]

B. [§ 1.2] ADOPTION OF THE U3C AND C.C.P.A.

Recognizing the need for an integrated approach to the regulation of the consumer finance industry, the Council of State Governments, in 1957, asked the National Conference of Commissioners On Uniform State Laws to produce model consumer finance legislation.[30] Nine years later, in 1966, the first draft of the U3C appeared.[31]

The drafters hoped that the U3C would replace the patchwork of existing state laws with a single, comprehensive statute covering all forms of consumer credit.[32] The basic premise of the code was that free market competition could control interest rates better than government price fixing.[33] To encourage competition, the U3C did away with such restrictions as the "convenience and advantage" test which required lenders desiring to enter the consumer credit market of a particular state to show that their receipt of a state credit license would operate to the "convenience and advantage" of the public.[34] The code also repealed existing usury limits on commercial credit, leaving interest rates in business transactions entirely subject to market determination.[35] With regard to consumer credit, the code retained the traditional approach of imposing ceilings on interest rates in consumer transactions.[36] Loans were limited by a graduated schedule of rate ceilings depending on the amount and type of credit.[37] However, the drafters did not intend to fix the cost of credit with these ceilings. Rather, the ceilings were meant to be "outer limits" beneath which free market competition could set actual rates.[38]

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[29]For a comprehensive state by state coverage of the various statutory schemes in place prior to the adoption of the U3C, *see* B. CURREN, *supra* note 17, at 137-368.

[30]Malcolm, *The Uniform Consumer Credit Code of the National Conference of Commissioners On Uniform State Laws,* 40 PA. B. ASSN. Q. 450, 456 (1969).

[31]HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 130 (1966) *noted in* Comment, *supra* note 13, at 92.

[32]Miller & Warren, *A Report On the Revision of the Uniform Consumer Credit Code*, 27 OKLA. L. REV. 1 (1974).

[33]*Id.* at 5.

[34]WEST, SELECTED COMMERCIAL STATUTES, UNIFORM CONSUMER CREDIT CODE, Official 1974 Text, § 2.201, Comment 3 (1985).

[35]*Id.* § 9.103 and Comment.

[36]*Id.* § 2.201, Comment 1(2).

[37]*Id.* Comment 1(3).

[38]Special Project, *Usury and the Monetary Control Act of 1980*, 1981 ARIZ. ST. L.J. 27, 100 n. 401 (1981).

Two years after the appearance of the first draft of the U3C, Congress responded to the need for unified consumer lending laws by enacting the Consumer Credit Protection Act.[39] This act was passed after several years of legislative study, fact finding and compromise, and represented a major victory for consumer advocates.[40] Title I of the legislation — the Truth in Lending Act (TIL) — was designed to provide uniform disclosure of terms in consumer credit transactions,[41] advertising,[42] and billing.[43] State laws were exempted from the TIL only if such laws were consistent with both the Act and its supporting regulation (known as regulation Z) and only if the state laws contained adequate provisions for enforcement.[44]

After the initial release of the U3C in 1966, the drafters amended it several times in an effort to make its disclosure rules conform to the developing Federal legislation.[45] A final revision was made in January of 1969 after the Federal Reserve Board issued regulation Z.[46] Utah enacted this version in May of 1969.[47]

C. [§ 1.3] AFTER THE U3C

Since Utah's enactment of the U3C in 1969, nine other states have adopted it in some version.[48] However, the U3C has not produced the uniformity of consumer credit laws which the drafters hoped it would achieve. The states initially enacting the code did not preserve it in its original form, and few states have considered adoption of the code as a whole in recent years.[49] The majority of states has retained the hodgepodge of laws which the code sought to replace, adding more

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[39]*See supra* note 7. The current statutes are 15 U.S.C. §§ 1601-93r (1982 & Supp. II, 1984).

[40]NATIONAL CONSUMER LAW CENTER, TRUTH IN LENDING IN TRANSITION para. 1.2.1 (1982 & Supp. 1985).

[41]15 U.S.C. §§ 1631-46 (1982 & Supp. II, 1984).

[42]*Id.* §§ 1661-65a.

[43]*Id.* § 1666-66j.

[44]Comment, *supra* note 13, at 92.

[45]*Id.* at 93. *See also* Malcolm, *supra* note 30, at 466-67.

[46]Comment, *supra* note 13, at 93.

[47]*Id.*

[48] 1 CONSUMER CREDIT GUIDE, *supra* note 12, at para. 4770. These states are Colorado, Idaho, Indiana, Iowa, Kansas, Maine, Oklahoma, South Carolina and Wyoming.

[49]Miller and Rohner, *In Search of a Uniform Policy - State and Federal Sources of Consumer Financial Services Law*, 37 BUS. LAW. 1415, 1418 (1981-82). However, while the U3C has not been widely adopted in its entirety, it has had a significant

legislation during the seventies and early eighties.[50] Despite the hopes for enactment of unified laws expressed when the code was first introduced, a vast and fragmented body of state consumer credit law still exists.[51]

Uniformity of consumer credit law has also eluded federal lawmakers. Since 1968, when Congress enacted the Consumer Credit Protection Act (C.C.P.A.), the federal government has been heavily involved in standard setting for consumer financial transactions. Federal law now covers every phase of the consumer credit transaction.[52] Despite this expansive coverage, two conditions have frustrated true uniformity of the various Federal statutes and regulations both among themselves and with corresponding state consumer credit regulation. First, Congress has held to a policy of limited preemption of state law in the area of consumer credit.[53] This deference to state law has often worked to create a "hybrid policy" between state and federal law, creating inconsistent and unwanted

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impact on the development of consumer credit law. *See infra* note 231.

[50]Miller and Rohner, *supra* note 49, at 1418. *See also* Davis, *supra* note 25, at 1338-39.

[51]Miller and Rohner, *supra* note 50, at 1418.

[52]The C.C.P.A. initially contained five titles. The purpose of Title I (the Truth in Lending Act) was to protect consumers by requiring creditors to disclose all costs in a credit transaction in a uniform and meaningful way. FONSECA, HANDLING CONSUMER CREDIT CASES (Vol. 2) 385 (1980). The Truth in Lending Act is implemented by Regulation Z, 12 C.F.R. 226, which specifies the detailed disclosures that are outlined only generally in the act itself. Congress has since enacted two other chapters of Title I. Chapter 4, the Fair Credit Billing Act, was enacted to protect consumers against unfair and inaccurate credit billing and credit card practices. Chapter 5 was enacted to require disclosures for consumer leasing transactions.

Of the remaining original five titles of the C.C.P.A., Title II outlaws extortionate fees for extending credit, Title III imposes regulations on garnishment, Title IV establishes the National Commission on Consumer Finance, and Title V sets forth general provisions and effective dates.

Four other titles were ultimately added to the C.C.P.A.. Title VI, the Fair Credit Reporting Act, represents a congressional attempt to balance creditor needs for consumer credit information against the following two consumer rights: (1) the right to demand fair, relevant, credit information and (2) the right to be protected against damages incurred from the presence of incorrect and out of date information in credit bureau files. Title VII, the Equal Credit Opportunity Act, makes it unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction, on the basis of sex, marital status, race, color, religion, national origin, age, or the fact that all or part of an applicant's income is derived from a public assistance program. Title VIII, the Fair Debt Collection Practices Act, was enacted to eliminate abusive debt collection practices. Title IX is the Electronic Fund Transfer Act. *See* 1 CLONTZ, TRUTH-IN-LENDING MANUAL para. 1.01 (1982); CLONTZ, FAIR CREDIT REPORTING MANUAL 1-3 (1977).

[53]Miller and Rohner, *supra* note 49, at 1418, 1426-27. The article provides a good discussion of the reasons behind the lack of uniformity in both Federal and

results.[54] Second, Congress itself has reacted to consumer issues on a piecemeal basis and has delegated much of its own law-making authority to several federal agencies.[55] The result has been to create "conflicts, overlaps and gaps in the applicable standards; uneven compliance burdens for creditors; and lack of uniformity in the administration of consumer protections."[56] In addition to a lack of uniformity, the expansion of federal consumer credit laws has created an enormous amount of paperwork and litigation.[57] Described as "complex, costly and controversial,"[58] the consumer laws have often been accused of being a prime example of regulatory overkill.[59]

The complexity of and lack of uniformity among the various laws has led one commentator to describe the recent state of consumer credit law as follows:

> In summary, consumer credit law is today in a state of tumultuous disarray. The law of most states is maddening in its complexity, its inconsistency, and its confusing overlaps and unjustified gaps. . . . Multistate creditors are forced to keep track of extreme, arbitrary and constantly changing state-to-

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state laws and the failures associated with this lack of uniformity. *See also* Comment, *Regulation Z and the U.C.C.C.: the Bewildering Maze of Credit Disclosure Provisions*, 1979 B.Y.U.L. REV. 394 (1979).

[54]Miller and Rohner, *supra* note 49, at 1427-29.

[55]*Id.* at 1418.

[56]*Id.* at 1419.

[57]The Truth in Lending Act provides a good example. Between 1968, when the act was first adopted, and 1980, when Congress substantially amended it, over 1500 interpretations and letters were published by the Federal Reserve Board (FRB) and its staff. *See* NATIONAL CONSUMER LAW CENTER, *supra* note 40, at para. 1.2.2. The FRB made its own assessment of the value of those interpretations and letters: "The cumulative effect of the interpretations has been to complicate, rather than facilitate, compliance by layering one set of distinctions on top of another. Rather than resolving questions, this material in the aggregate has served to generate further questions." Proposed Official Staff Commentary, 46 Fed. Reg. 28,560, para. 51, Supplemental Information (1981) *noted in* NATIONAL CONSUMER LAW CENTER, *supra* note 40, at para. 1.2.2.

By mid 1979, TIL cases constituted 2% of all federal civil cases and over 50% of the caseload in some districts. FRB, Regulation Analysis of Revised Regulation Z, 46 Fed. Reg. 20,941, 20,942 (1981) *noted in* NATIONAL CONSUMER LAW CENTER, *supra* note 40, at para. 1.2.2. The enormous amount of paper generated by TIL and the great amount of money involved in litigating TIL issues moved Congress to amend Title I of the C.C.P.A. in 1980. *See supra* note 7. While this "simplification" has had some beneficial effects (*see* Garwood, *supra* note 9, at 1306) the problem of "information overload" still persists. *See* Davis, *supra* note 25, at 1346, 1347 n. 54.

[58]Garwood, *supra* note 9, at 1295.

[59]*Id.* at 1296.

state variations in consumer-credit law. The industry is saddled with reams of burdensome state and federal disclosure requirements, the administration of which has taken an extraordinary expenditure of societal energy and brought few benefits to the consumer.[60]

II. [§ 2] THE UTAH CONSUMER CREDIT CODE

A. [§ 2.1] ENACTMENT

In the summer of 1984, the Utah Department of Financial Institutions encouraged members of Utah's consumer credit industry to form a task force for the purpose of analyzing the effectiveness of Utah's U3C.[61] Various task force committees were subsequently organized.[62] Working in concert with the Department of Financial Institutions in the Fall of 1984, the committees made numerous recommendations for change. Recognizing that submitting a completely new code to the legislature would be more efficient than individually introducing the several amendments proposed, the task force subsequently worked through nine complete drafts of a new code.[63] The Department of Financial Institutions submitted a final draft to the legislature in December of 1984, and after two more drafts by the legislature, the new code became law.[64]

B. [§ 2.2] REASONS FOR CHANGE

The department of Financial Institutions (responsible for submitting the proposed consumer credit legislation to the Utah legislature) points to five major factors which led to the adoption of the new code.[65]

First, the new code reflects an effort to avoid duplication of other federal and state law related to consumer credit. Several sections of the prior code which duplicated either federal or state law do not appear in the new consumer credit code.[66]

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[60]Davis, *supra* note 25, at 1347. This state of affairs has resulted in recent calls for total federal preemption of consumer credit law. *See Id.* at 1353; Crandall, *supra* note 27; *but see* Rohner, supra note 27, at 49.

[61]Interview with Mr. George Sutton, Deputy Commisioner of the Department of Financial Institutions, in Salt Lake City, Utah (Nov. 5, 1985). Hereinafter referred to as "Department Interview".

[62]Department interview. This group included the Deputy Commissioner of the Department of Financial Institutions and the Utah Consumer Credit Advisory Counsel. *See infra* text accompanying notes 320-23. However, no consumer organizations were represented.

[63]Department interview.

[64]Department interview.

[65]Department interview.

[66]For example, prior law contained numerous definitions of terms throughout

Second, the new code responds to the unnecessary complexity of prior law. The old code was longer and more complex than it needed to be, in part because of the separate but virtually identical treatment of credit sales and loans.[67] By eliminating this distinction and its accompanying labyrinth of interest rate ceilings the drafters reduced both the size and complexity of the new consumer credit law.[68]

Third, the new legislation responds to legitimate complaints received by the Department of Financial Institutions during the past few years. Most of these complaints centered around the rebating of unearned and prepaid finance charges.[69] The new code addresses the unfair practices that were occurring in these and other areas.[70]

Fourth, the new code acts to make the powers of the Department of Financial Institutions consistent with its general powers authorized by Title 7 of the Utah Code.[71] The Department now has greater powers to both investigate and enjoin abusive practices.[72] In addition, the law eliminates burdensome requirements imposed by the prior code on the Department's rule making and investigative authority.[73]

Finally, the new code completes the deregulation of finance charge ceilings initiated in 1981. Several factors led to the elimination of these ceilings. First, when the ceilings on open-end credit sale finance charges were lifted in 1981, the charges remained at pre-deregulation levels, dispelling fears that elimination of the ceilings would lead to new rates which were oppressive to consumers.[74] The Department of Financial

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the code. The new code relies almost exclusively on definitions provided in the TIL and Regulation Z. *See infra* notes 132-34 and accompanying text.

[67]For example, the chapter on credit sales and the chapter on loans of Title 70B each had substantially identical provisions for Delinquency Charges, Deferral Charges, Advances to Perform Covenants of the Buyer, Right to Prepay, and Rebate Upon Prepayment. These provisions are consolidated in the new code. *See infra* text accompanying notes 147-48, 153, 158, and 203.

[68]For a discussion of the reasons behind the elimination of interest rate ceilings, *see infra* text accompanying notes 74-83.

[69]Department interview.

[70]*See infra* text accompanying notes 202-12.

[71]*See* UTAH CODE ANN. § 7-1-307 (1982 & Supp. 1985).

[72]*See infra* text accompanying notes 286-90.

[73]The code no longer requires the Department to consult with the code administrators of other U3C jurisdictions before adopting rules or regulations. *See* UTAH CODE ANN. § 70B-6-104(3) (a), (b) (Code*Co 1984-1985) (repealed 1985). Additionally, the Department is no longer required to "report to the governor and legislature on the operation of [the] office, on the use of credit in the state, and on the problems of persons of small means obtaining credit from persons regularly engaged in extending sales or loan credit." *See id.* § 70B-6-104(5).

[74]Department interview. For a discussion of both open-end and closed-end

Institutions received very few complaints about excessive rates after the ceilings were lifted.[75]

A second factor leading to the elimination of the finance charge ceilings was the response of creditors to the ceilings. Creditors often viewed the ceilings as state sanctioned interest rates. Rather than encourage competition, the ceilings merely invited creditors to charge the maximum interest that the state would allow.[76]

A third factor behind the decision to eliminate the finance charge ceilings relates to creditor operations. During recent periods of high inflation, ceilings made it impossible for certain creditors to earn reasonble profits from their consumer operations. In 1979 and 1980, interest rates rose to historic levels.[77] These interest rates were associated with a high rate of inflation.[78] The rising cost of funds, coupled with inflated operating costs, brought significant losses to the credit operations of most retailers and to the credit card departments of many banks.[79] The losses occurred because creditors were unable to pass on the increased costs to consumers in the form of higher finance charges.

A final factor which led to the elimination of the finance charge ceilings was the ineffectiveness of the ceilings during recent "tight" usury periods.[80] For example, during the 1979-1980 period of record interest rates some car dealers were able to circumvent the ceilings. During this period most dealers faced decreased demand for their automobiles. This decrease in demand resulted not only from the effects of high rates of interest but also from the fact that third party lenders were approving fewer loans.[81] Dealers were often forced to borrow funds themselves in

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credit, *see infra* text accompanying notes 191-99.

[75]Department interview.

[76]Department interview.

[77]The prime rate eventually reached 20% in April of 1980, the highest level in the nation's history. Wall St. J. Apr. 3, 1980 at 3, col. 1.

[78]Johnson, *The New Competition*, 37 BUS. LAW. 1363, 1364 (1982).

[79]*Id.*

[80]Tight usury periods are periods when the statutory interest ceiling constrains the market rate. *See* Boyes and Roberts, *Economic Effects of Usury Laws in Arizona*, 1981 ARIZ. ST. L.J. 35, 43 (1981). Some have questioned whether the rate ceilings serve any purpose at all. "If the rate ceilings get in the way of marketplace forces, credit becomes less available until the legislature comes to the rescue and raises the ceilings. If the rate ceilings are higher than those which the marketplace dictates, then nobody pays any attention to them anyway. What good purpose, then, do the rate ceilings serve?" Flynn and Haveman, *Colorado Usury*, 11 COLO. LAW. 2556, 2565 (1982).

[81]One study of Arizona usury law demonstrates that approval rates (percentage of high and low risk loans approved) for loans considered by both finance companies and commercial banks declined during this period. The study goes on

order to finance parties who otherwise would not be able to obtain funds.[82] In an effort to attract more customers and to avoid usury ceilings, some dealers would simply add part of their own high cost of credit to the cost of their automobiles. They could then advertise financing at rates far below those offered by competitors.[83] Comparisons between dealers using this ploy and dealers advertising higher rates of interest demonstrated that the loan with the lower rate was actually costing the consumer more money.

III. [§ 3] ANALYSIS OF THE UTAH CONSUMER CREDIT CODE

The new code is divided into nine chapters. The following analysis briefly summarizes each chapter and then addresses the areas of new law contained in the various parts.

A. [§ 3.1] CHAPTER ONE – GENERAL PROVISIONS AND DEFINITIONS

Similar to Chapter One of Title 70B, this chapter is divided into three parts dealing primarily with the following major topics: General Provisions,[84] Scope and Jurisdiction,[85] and Definitions.[86]

1.[§3.1.1] Short Title, Construction, and General Provisions

a. [§ 3.1.1.1] Purposes of the Code

Although the simplification of existing law is not listed as one of the stated policies or purposes of the new code,[87] this could possibly be its greatest achievement. Many of the new provisions are new only in the sense that they are better organized and more concise. These changes have already increased awareness of (and, hopefully, compliance with) the law.[88]

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to state that approval rates decline simply because usury restrictions do not allow the lending institutions to ration credit on the basis of interest rates. *See* Boyes and Roberts, *supra* note 80, at 46, 53-54.

[82]Department interview. During this period, dealers were often forced to bid a few points just to secure commercial financing. Commercial loans (not subject to interest ceilings) were thus made that much more expensive.

[83]Department interview.

[84]UTAH CODE ANN. § 70C-1-102 (Supp. 1985).

[85]*Id.* § 70C-1-103.

[86]*Id.* § 70C-1-104.

[87]*See* UTAH CODE § 70B-1-102(2)(a) (Code*Co 1984-1985) (Repealed 1985).

[88]The department of financial institutions reports that recently several cre-

Changes in the stated purposes and policies of the code, while slight, evidence the Legislature's increasing recognition of two major forces influencing consumer credit transactions: (1) competition among suppliers of credit;[89] and (2) regulation of consumer credit transactions by the federal government.[90] As to the first of these forces, the code no longer purports to "*protect* consumer buyers, lessees and borrowers against unfair practices."[91] The new language states simply that one of the purposes of the consumer credit law is "to prohibit *certain* unfair practices."[92] The implication from this language and from other new provisions in the code is that the state now takes a less patronizing approach to consumer protection. The hope is that market forces (by means of increasing competition for consumer credit)[93] and increased consumer awareness (by means of the broad reach of federal disclosure provisions) will serve to effectively protect consumers from oppressive contracts.[94]

As to regulation of consumer credit by the federal government, Utah's new code continues to clarify the distinction between the roles played by federal and state law. One of the purposes of the new law is "to supplement applicable federal laws and regulations."[95] This is explicit

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ditors have inquired about certain "new" provisions of the new code. The creditors were surprised to learn that these "new" provisions were not new at all; just new to them! Department interview.

[89]Economic, technological, and demographic changes have brought about dramatic increases in the competition for consumer credit. For a good discussion of these changes see Johnson, *supra* note 78, at 1363.

[90]See the discussion of Federal consumer credit law, *supra* note 52.

[91]UTAH CODE § 70B-1-102(2)(d) (Code*Co 1984-1985) (Repealed 1985) (emphasis added).

[92]UTAH CODE ANN. § 70C-1-102(2)(b) (Supp. 1985) (emphasis added).

[93]In Marquette National Bank of Minneapolis v. First of Omaha Corp., 439 U.S. 299 (1978) the U.S. Supreme Court held that a national bank based in one state may charge its out-of-state customers an interest rate on unpaid credit card balances allowed by its home state even where the home state rate is greater than the rate permitted by the state of the bank's non-resident customers. This license to export interest rates has led to the deregulation of interest rate limitations by a number of states. See Burke and Kaplinsky, *Unraveling the New Federal Usury Law*, 37 BUS. LAW. 1079, 1105 (1982). Resulting competition has caused interest rates to vary widely. A recent issue of CONSUMER REPORTS found that annual interest rates on *Visa, Mastercard, and American Express Gold Card* ran from 12 to 22 percent. CONSUMER REPORTS, 7 (January 1985). *See generally* Johnson, *supra* note 78, at 1363.

[94]The new code also provides, in a form virtually identical to that of prior law, a provision on unconscionability. *See infra* text accompanying note 263. In addition, the Utah Consumer Sales Practices Act provides other remedies for deceptive practices and unconscionable consumer transactions. *See* UTAH CODE ANN. §§ 13-11-4, 13-11-5 (Supp. 1985).

[95]UTAH CODE ANN. § 70C-1-102(2)(c) (Supp. 1985). This section also states that

recognition by the state that Federal law now dominates the regulation of consumer credit transactions.[96] An increased deference to federal law is noted throughout this analysis.

b. [§ 3.1.1.2] Indexing of Dollar Amounts

The new Utah Consumer Credit Code does away with the indexing of dollar amounts. This practice had previously caused Utah law to conflict with the TIL.[97]

c. [§ 3.1.1.3] Supplemental Law

As with prior law, the new code lists as supplemental law "the uniform commercial code and principles of law and equity".[98] Certain changes made by the drafters of the code relate directly to this supplemental law. First, the drafters deleted certain sections of the prior code to simply avoid duplicating either provisions of the Uniform Commercial Code (U.C.C.) or "principles of law and equity".[99] Second, by deleting prior provisions which restricted the ability of parties to consumer credit agreements to contract with each other, the drafters adopted by reference (wittingly or un-wittingly) the greater "freedom-of-contract" philosophy found in other law.[100]

d. [§ 3.1.1.4] Waiver by Agreement

Prior Utah law held that "except as otherwise provided," a debtor could not "waive or agree to forgo rights or benefits" under the consumer credit code.[101] Absence of this provision from the new code raises an interesting question related to language in the Uniform Commercial Code (U.C.C.). As noted above, the new code specifically designates the

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another purpose of the code is "to avoid the duplication of laws and regulations pertaining to consumer credit between state and federal authorities." The need to avoid duplication of laws was a major force behind the adoption of the new code. *See supra* note 66 and accompanying text.

[96]While Federal law continues to be concerned primarily with matters of disclosure, recent attempts in Congress to preempt state consumer credit interest rates is an indication to some that Federal law will eventually preempt not only disclosure but also substantive portions of consumer transactions. *See* Davis, *supra* note 25, at 1340 n. 30.

[97]See Comment, *supra* note 53, at 402-03.

[98]UTAH CODE ANN. § 70C-1-103 (Supp. 1985). *See also* UTAH CODE § 70B-1-103 (Code*Co 1984-1985) (repealed 1985).

[99]For example, the prior provision on severability (UTAH CODE § 70B-1-105 (Code*Co 1984-1985) (repealed 1985)) does not appear in the new code. The provision was duplicative of a similar provision in the Uniform Commercial Code, UTAH CODE ANN. § 70A-1-108 (1980).

[100]*See e.g. infra* text accompanying notes 101-05, 119-20, 167-69, and 177-79.

[101]UTAH CODE § 70B-1-107(1) (Code*Co 1984-1985) (repealed 1985).

U.C.C. as supplemental law.[102] With regard to waiver of specific code provisions, the Utah version of the U.C.C. states that "the provisions of this act may be varied by agreement, except as otherwise provided in this act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this act may not be disclaimed by agreement. . . ."[103] Drafters of the original U3C specifically included a provision on waiver in the model legislation to avoid this broad variation-by-agreement language of the U.C.C.[104] By deleting the U3C waiver provision, drafters of the new Utah code appear to endorse the less restrictive U.C.C. approach. According to the Department of Financial Institutions, however, the drafters did not intend this endorsement.[105] The law is therefore ambiguous and the legislature should act to restore the original provision on waiver.

2. [§ 3.1.2] Scope and Jurisdiction

a. [§ 3.1.2.1] Covered Transactions

Replacing the detailed, transaction-specific provisions of the former law,[106] § 70C-1-201 states simply that, subject to certain exemptions, the provisions of the new law apply to "all credit offered or extended by a creditor to an individual person primarily for personal, family, or household purposes."[107] Section 70C-1-202 provides specific exemptions to this general rule, adding four new exemptions to those retained from prior law.

The first new exemption, § 70C-1-202(1), excludes from the reach of the code all extensions of credit for primarily business or commercial purposes. This exemption is also the first major area of exemption under the TIL.[108] The official Federal Reserve Board commentary to the TIL (Commentary) states that decisions as to whether an extension of credit is exempt must be made on a case by case basis.[109] The Commentary then gives several factors to consider in determining whether a credit extension

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[102]*See supra* text accompanying note 98.

[103]UTAH CODE ANN. § 70A-1-102(3) (1980).

[104]WEST, SELECTED COMMERCIAL STATUTES, UNIFORM CONSUMER CREDIT CODE, Official 1974 Text, § 1.107 and Comment (1985).

[105]Telephone conversation with the Deputy Commissioner of the Utah Department of Financial Institutions (hereinafter "telephone interview"), Feb. 7, 1986.

[106]UTAH CODE § 70B-1-201 (Code*Co 1984-1985) (Repealed 1985).

[107]UTAH CODE ANN. § 70C-1-201 (Supp. 1985).

[108]*See* 15 U.S.C. § 1603(1) (1982 & Supp. II, 1984); 12 C.F.R. § 226.3(a) (1985)).

[109]Official Staff Interpretations, 12 C.F.R. § 226, Supp. I, § 226.3(a)(1) (1985). This commentary is the vehicle by which the staff of the Division of Consumer and

is primarily for business or commercial purposes.[110] Section 70C-1-202(1) also exempts the extension of credit to other than natural persons. The Commentary refers to this exemption as "organizational credit" and lists as examples "loans to corporations, partnerships, associations, churches, unions and fraternal organizations".[111] A transaction remains organizational in character notwithstanding the purpose of the loan and regardless of the fact that a natural person may guarantee or provide security for the loan.[112]

A second new exemption, § 70C-1-202(2), excludes closed-end extensions of credit secured by a first lien or equivalent interest on a dwelling or building lot. While this provision is really not new, it consolidates two sections of the old code which only partially excluded such transactions from the reach of the law.[113]

The third new exemption, § 70C-1-202(4), excludes all extension of credit in which the amount financed is in excess of $25,000 and is not secured by the consumer's principal dwelling. This dollar amount was present in the original 1969 version of the U3C. However, the old law thereafter increased the base amount on a biannual basis according to fluctuations in the Consumer Price Index.[114] These adjustments in dollar amounts caused the Utah exemption to be greater than the exemption provided by the TIL.[115] The exemption was completely deleted from the

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Community Affairs of the Federal Reserve Board issues official staff interpretations of Regulation Z. *See infra* note 130.

[110]Official Staff Interpretations, 12 C.F.R. 226, Supp. I, § 226.3(a)(2) (1985).

[111]*Id.* § 226.3(a)(7).

[112]*Id.*

[113]Utah Code §§ 70B-2-104 and 70B-3-104 (Code*Co 1984-1985) (repealed 1985). Section 70B-2-104 excluded from the definition of consumer credit sale "a sale secured by a first lien or an equivalent security interest on a dwelling or a consumer credit sale secured by a first lien or an equivalent security interest in a building lot." Section 70B-3-104 provided a similar exclusion for consumer loans. However, these exclusions were not applicable with respect to maximum charges, disclosures, and debtors remedies.

The new law exempts only qualifying closed-end extensions of credit. This type of credit is regulated extensively by federal law. *See e.g.* 12 U.S.C. § 2601 et seq. (1982) (codification of the Real Estate Settlement Procedure Act of 1974); 12 C.F.R. § 226.26(a) (1985) (TIL recission provisions); 45 Fed. Reg. 24,113 (1985) (to be codified at 12 C.F.R. § 590(b)) (federal preemption of all state interest ceilings applicable to Federally-related residential first mortgage loans). *See also* the discussion of closed-end and open-end credit, *infra* text accompanying notes 186-99.

[114]The amount was subject to Utah Code § 70B-1-106(1) (Code*Co 1984-1985) (repealed 1985) which provided for adjustments to dollar amounts based on changes in the Consumer Price Index.

[115]*See* Comment, *supra* note 53, at 403.

Utah code in 1983, but reappears in the new law in complete harmony with the TIL.[116]

The final new exemption excludes federally insured or guaranteed student loans authorized by Title IV of the Higher Education Act of 1965.[117] Federal law provides detailed substantive and disclosure requirements for these loans.[118]

b. [§ 3.1.2.2] Territorial Application

The new code does not include the detailed provisions of prior law which set forth the territorial application of the consumer credit code.[119] Apparently, the law now defers to general conflicts-of-law rules.[120] However, the new code does deal specifically with one question of its territorial application. The code requires that its provisions establishing limitations on creditors remedies[121] apply to actions or proceedings brought in Utah to enforce rights arising out of consumer credit contracts or transactions

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[116]The exemption was deleted by 1983 Utah Laws ch. 343, § 8. However, it was reinstated shortly thereafter by administrative regulation. *See* UTAH ADMIN. R. UCCR:012 (1983) (repealed July 15, 1985). The Federal provision is found in 15 U.S.C. § 1603(3) (1982) and 12 C.F.R. § 226(b) (1985).

[117]UTAH CODE ANN. § 70C-1-202(8) (Supp. 1985).

[118]*See* 20 U.S.C. §§ 1070 et seq. (1982).

[119]*See* UTAH CODE § 70B-1-201 (Code*Co 1984-1985) (repealed 1985).

[120]Utah courts apply the principle of *lex loci contractus* to choice of law determinations in contract disputes. Gressler v. New York Life Insurance Co., 108 Utah 173, 177, 156 P.2d 212, 214 (1945) *reh'g granted*, 108 Utah 182, 163 P.2d 324 (1945); Crofoot v. Thatcher, 19 Utah 212, 57 P. 171 (1899); Chevron Chemical v. Mecham, 536 F. Supp. 1036, 1040 (D. Utah 1982); Trans-American Collections, Inc. v. Continental Account Servicing House, Inc., 342 F. Supp. 1303, 1305 (D. Utah 1972). This means the place of the execution of the contract whether or not the contract is performed in Utah. *See Gressler* at 177 and *Trans-American Collections* at 1305.

A related question is the extent to which the new consumer credit code will allow parties to a consumer credit transaction to agree to which state's law will apply to the terms of their contract. Prior law specifically prohibited such agreements (*see* UTAH CODE § 70B-1-201(9)(a) (Code*Co 1984-1985) (repealed 1985), while the new code is silent on the issue. However, the UCC, which supplements the new Utah law, states that "[e]xcept as provided . . . when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this act applies to transactions bearing an appropriate relation to this state." UTAH CODE ANN. § 70A-1-105(1) (1980). It is not clear whether the drafters intended this provision to apply (Telephone interview, Feb. 7, 1986) and the issue should be promptly addressed by the Utah Legislature.

[121]*See* UTAH CODE ANN. §§ 70C-7-101 through 70C-7-106 (Supp. 1985).

regardless of where the contract was made or where the transaction occurred.[122]

3. [§ 3.1.3] Definitions

The new code specifically defines the following terms: agreement,[123] contract,[124] creditor,[125] earnings,[126] installment,[127] and party.[128] As with prior law, terms and definitions found elsewhere in the code are to have the same meaning as when used in the C.C.P.A. and Regulation Z.[129] While the new code makes no mention of the official staff commentary, it should be considered an integral part of the federal law. The commentary represents the sole vehicle for Federal Reserve Board interpretation of Regulation Z[130] and is given great weight by the United States Supreme Court.[131]

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[122]*Id.* § 70C-1-203.

[123]*Id.* § 70C-1-302(1).

[124]*Id.* § 70C-1-302(2).

[125]*Id.* § 70C-1-302(3).

[126]*Id.* § 70C-1-302(4).

[127]*Id.* § 70C-1-302(5).

[128]*Id.* § 70C-1-302(6).

[129]*Id.* § 70C-1-301. Prior law did not specifically mention regulation Z, however. *See* UTAH CODE § 70B-1-301 (Code*Co 1984-1985) (repealed 1985).

[130]The commentary itself states that "no official staff interpretations are expected to be issued other than by means of this commentary." Official Staff Interpretations, 12 C.F.R. 226, Supp. I, Introduction (2). *See also* NATIONAL CONSUMER LAW CENTER, *supra* note 40, at para. 1.3.1.

[131]Ford Motor Credit Co. v. Milhollin, 444 U.S. 555 (1980). The court stated:

> [A] high degree of deference to administrative interpretation is warranted.
>
> . . Credit transactions defy exhaustive regulation by a single statute. Congress therefore delegated expansive authority to the Federal Reserve Board to elaborate and expand the legal framework governing commerce in credit.
>
> Unless demonstrably irrational, Federal Reserve Board staff opinions construing the act or regulation should be dispositive. . . .

Id. at 557, 559-60, 565.

In an opinion rendered after enactment of the TIL Simplification and Reform Act (*see supra* note 7) the Court gave "great weight" to the Proposed Official Staff Commentary accompanying the new act in deciding an issue involving a *pre-simplification* contract. Anderson Bros. Ford v. Valencia, 452 U.S. 205 (1981). The Sixth Circuit recently limited the holding of *Valencia* to those situations where

The new code, unlike prior law,[132] does not include an index of other terms defined elsewhere in the code for the simple reason that other definitions generally do not appear. Many of the definitions indexed by prior law were rendered obsolete by the elimination of interest ceilings[133] and most of the terms used in other parts of the new code are defined by federal law.[134].

B. [§ 3.2] CHAPTER TWO – FINANCE CHARGES AND RELATED PROVISIONS

Chapter Two is at the heart of the major changes and simplification brought about by the new code. Divided into two parts, the chapter completes the elimination of interest ceilings begun in 1981[135] and also consolidates the previously scattered treatment of delinquency charges,[136] deferral charges,[137] advances to perform covenants of the buyer,[138] attorneys fees,[139] and limitations on certain agreements and practices.[140]

1. [§ 3.2.1] Consumer Credit Agreements

a. [§ 3.2.1.1] Finance Charge Ceilings

Prior law provided separate finance charge limits and/or methods of calculating balances for six types of consumer credit.[141] The language of §

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either the language of the old and new acts is identical, or where there is explicit language in the new act covering a violation not explicity addressed in the old Act. Cox v. National Bank of Cincinnati, 751 F.2d 815 (6th Cir. 1985). *See also* NATIONAL CONSUMER LAW CENTER, *supra* note 40, 1985 Cum. Supp. at para. 1.3.2.

[132]UTAH CODE § 70B-1-303 (Code*Co 1984-1985) (repealed 1985).

[133]For example, the elimination of finance charge ceilings makes the distinction between "regulated" and "supervised" lenders unnecessary. *See id.* §§ 70B-3-501(2) and 70B-3-501(4). Neither of these terms is included in the new code.

[134]A notable exception is the term "default". Generally, default in a consumer credit transaction is what the creditor says it is. Several independent bodies have called for a statutory definition of the term because of the potential for creditor abuse in defining the term too restrictively. *See* Crandall, *supra* note 27, at 26-27.

[135]Ceilings on open-end consumer credit sales were eliminated by 1981 Utah Laws ch. 278 § 1.

[136]UTAH CODE §§ 70B-2-203, 70B-3-203 (Code*Co 1984-1985) (repealed 1985).

[137]*Id.* §§ 70B-2-204, 70B-3-204.

[138]*Id.* §§ 70B-2-208, 70B-3-208.

[139]*Id.* §§ 70B-2-413, 70B-3-404, 70B-3-514.

[140]*Id.* §§ 70B-2-401 through 70B-2-412, 70B-2-414, 70B-2-415.

[141]Graduated rate structures were imposed on consumer credit sales other than sales pursuant to open-end accounts (*Id.* § 70B-2-201) and on supervised loans (*Id.*

70C-2-101 eliminates the need for this complex and confusing structure of credit. That section states simply that "parties to a consumer credit agreement may contract for payment by the debtor of any finance charge and other charges or fees."[142] By adopting this provision, Utah joins eight other states who have abolished interest ceilings for contract rates.[143]

As mentioned previously, the legislature eliminated interest ceilings on open-end credit in 1981.[144] Favorable market response to that change led to the final abolition of the remaining maximum rate structure described above.[145] The Department of Financial Institutions regards the elimination of these remaining ceilings as an experiment and plans to closely monitor transactions likely to be affected by the change.[146]

b. [§ 3.2.1.2] Delinquency Charges

Section 70C-2-102 limits the amount of delinquency charges which a creditor may impose on a debtor for the debtor's failure to pay any installment within ten days after its scheduled due date. The charge cannot exceed $15 or 5% of the delinquent unpaid amount of the installment, whichever is greater.[147] The new code deletes an additional ceiling imposed by prior law. Prior law stated that a creditor could not impose a delinquency charge in excess of the deferral charge which a debtor would be required to pay the creditor to defer the unpaid amount of an installment.[148]

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§ 70B-3-508). Regulated loans not made pursuant to an open-end account were subject to a schedule of maximum loan terms (*Id.* § 70B-3-511). Consumer loans other than supervised loans or open-end loans were subject to a flat ceiling of 18% per year on the unpaid balance of principal (*Id.* § 70B-3-201(1)). Consumer loans and consumer credit contracts made under open-end accounts were not subject to finance charge ceilings. Sections 70B-201(1), 70B-3-201(4)(a)). However, they were regulated as to the method for calculating account balances to which an interest rate could be applied. *See infra* text accompanying note 230. For the distinction between open-end and closed-end accounts *see infra* text accompanying notes 186-99.

[142]UTAH CODE ANN. § 70C-2-101 (Supp. 1985).

[143]1 Consumer Credit Guide, *supra* note 12, at para. 510. These states are Arizona, Idaho, Maine, Massachussets, Nevada, New Hampshire, New Mexico and Wisconsin. Federal law has also entered the picture by permanently pre-empting all state interest ceilings applicable to Federally-related residential first mortgage loans. *See* U.S. Fed. Reg. 24,113 (1985) (to be codified at 12 C.F.R. § 590(b)).

[144]*See supra* note 135. For a discussion of closed-end and open-end credit *see infra* text accompanying notes 191-99.

[145]*See supra* text accompanying note 74.

[146]Department interview.

[147]UTAH CODE ANN. § 70C-2-102(1) (Supp. 1985).

[148]See UTAH CODE §§ 70B-2-103(1)(b) and 70B-3-103(1)(b) (Code*Co 1984-

c. [§ 3.2.1.3] Conversion of Loans in Default

Section 70C-2-102(4) slightly alters the prior provision for conversion of a closed-end loan where two or more loan installments are in default.[149] Under those circumstances, a closed-end loan may be converted from a loan which is *not* based on unpaid daily balances to one which is.[150] The new law provides that the unpaid balance of the debt in this situation is to be calculated according to provisions on prepayment of debt found in chapter 3.[151] Any finance charge on the unpaid balance cannot exceed the annual rate originally contracted for by the parties.[152]

d. [§ 3.2.1.4] Deferral Charges

Section 70C-2-103 is the new law's provision for deferral charges. As with prior law, the parties may agree in writing to defer all or part of one or more unpaid installments.[153] The creditor is allowed "to collect a reasonable charge which the debtor expressly agrees to pay as consideration for a deferral."[154] Provisions for the unilateral grant of deferral by the creditor,[155] the elimination of any delinquency charge when a deferral charge is agreed to by the parties,[156] and the disallowance of any deferral when the creditor accelerates the maturity of the debt,[157] are all consistent with prior law.

e. [§ 3.2.1.5] Advances to Perform Covenants of the Buyer

Section 70C-2-104 provides that where the creditor, pursuant to the agreement of the parties, pays for duties of the debtor pertaining to insuring or preserving collateral, the amounts paid on behalf of the debtor may be added to the unpaid principal of the debt. The new law eliminates a prior requirement that the creditor furnish the buyer with a

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1985) (repealed 1985).

[149]*Id.* § 70B-3-203(4).

[150]UTAH CODE ANN. § 70C-2-102(4) (Supp. 1985).

[151]*Id.* This means that the unpaid balance of the debt can be calculated only under the actuarial or United States rule method. *See infra* notes 203-05 and accompanying text.

[152]UTAH CODE ANN. § 70C-2-102(4) (Supp. 1985).

[153]*See* UTAH CODE §§ 70B-2-204, 70B-3-204 (Code*Co 1984-1985) (repealed 1985).

[154]Prior law required the rate to be applied to the deferred amount "proportionately for a part of a month." *Id.* § 70B-2-204(1).

[155]UTAH CODE ANN. § 70C-2-103(1) (Supp. 1985).

[156]*Id.* § 70C-2-103(2).

[157]*Id.*

written statement containing various items of information relating to any advances made.[158]

f. [§ 3.2.1.6] Attorneys Fees in the Event of Default

Section 70C-2-105 states that a consumer credit agreement may provide for reasonable attorneys fees in the event of default. Unlike prior law, these fees may now be paid to an attorney who is a salaried employee of the creditor or its assignee.[159]

2. [§ 3.2.2.] Limitations on Agreements and Practices

a. [§ 3.2.2.1] No Authorization to Confess Judgment

The new law continues to prohibit any authorization to confess judgment. However, the burden is now on the "creditor or its successor in interest" to avoid taking or receiving from a debtor "an obligation which constitutes or contains . . . a waiver of the right to notice and the opportunity to be heard" should a lawsuit arise over the obligation.[160] The law under the previous code required the "buyer or lessee" to avoid authorizing "any person to confess judgment."[161]

b. [§ 3.2.2.2] Assignment of Wages

The new code prohibits a creditor from taking, directly or indirectly, from a debtor an obligation that constitutes or contains an assignment of wages or other earnings.[162] This rule is subject to three exceptions, two of which are new.[163] First, as with prior law, the general rule is not applicable if the assignment is revocable. The new law requires that the assignment must be revocable "by its own terms" and "at the will of the debtor."[164] Under the second exception, an assignment will not be prohibited if it represents "a payroll deduction plan" which commences "at the time of the transaction."[165] Finally, where the assignment is of wages or other

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[158]*See* UTAH CODE §§ 70B-2-208(1) and 70B-3-208(1) (Code*Co 1984-1985) (repealed 1985).

[159]*See id.* §§ 70B-2-413, 70B-3-404, 70B-3-514.

[160]UTAH CODE ANN. § 70C-2-201 (Supp. 1985).

[161]UTAH CODE ANN. § 70B-2-415 (Code*Co 1984-1985) (repealed 1985).

[162]UTAH CODE ANN. § 70C-2-202 (Supp. 1985).

[163]The new exemptions correspond to similar exemptions provided by Federal Law. *See* 50 Fed. Reg. 16,695 (1985) (to be codified at 12 C.F.R. § 227.13(c)) and 16 C.F.R. 444.2(3) (1985).

[164]UTAH CODE ANN. § 70C-2-202(1) (Supp. 1985); *see also* UTAH CODE § 70B-2-410 (Code*Co 1984-1985) (repealed 1985).

[165]UTAH CODE ANN. § 70C-2-202(2) (Supp. 1985).

earnings earned *before* the time of assignment, a creditor is not prohibited from taking the underlying obligation.[166]

c. [§ 3.2.2.3] Security Interests

The new code significantly alters Utah consumer credit law relating to security interests in consumer credit transactions. Prior law restricted the types of property in which a creditor could take a security interest and imposed a floor on the amount of debt which could be secured in certain consumer credit transactions.[167] Under the new law, aside from one narrow provision for a consumer lease set forth in § 70C-2-203, these restrictions no longer appear.[168] Section 70C-2-203 prohibits a lessor from taking a security interest in the dwelling of the lessee to secure a debt arising from a consumer lease. This differs significantly from prior law which prohibited the lessor from taking a security interest in *any* property of the lessee.[169]

d. [§ 3.2.2.4] Obligation at the End of A Consumer Lease

Prior law prohibited the obligation of a lessee at the end of a con-

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[166]*Id.* § 70C-2-202(3).

[167]Security interests in credit sales were limited to three categories: (1) the goods sold; (2) goods upon which services were performed or in which the goods sold were installed or annexed when the debt secured exceeded $840; and (3) land to which the goods sold were affixed or land which was maintained, repaired or improved as a result of the sale of goods or services, and in which the debt secured exceeded $2,800. UTAH CODE § 70B-2-407(1) (Code*Co 1984-1985) (repealed 1985). These restrictions were imposed to avoid the potential for abuse from blanket liens by article 9 creditors on household goods with little or no market value (*see* Crandall, *supra* note 27, at 28-30) and to keep creditors from taking security interests in goods or land which were unrelated to the goods sold or services performed (*see* WEST, SELECTED COMMERCIAL STATUTES, UNIFORM CONSUMER CREDIT CODE, Official 1974 Text, § 3.301, Comments 1 & 2 (1985)).

The Federal Trade Commission's Credit Practices Rule (effective March 1, 1985) makes it an unfair act or practice for a lender or a retail installment seller to take or receive from a consumer an obligation that is secured by a non-purchase money, non-possessory security interest in household goods. 16 C.F.R. § 444.2(4) (1985). The Federal Reserve Board has adopted an identical rule which is applicable to Banks (effective January 1, 1986). 50 Fed. Reg. 16,695 (1985) (to be codified at 12 C.F.R. 227.13(d)). *See also* 5 CONSUMER CREDIT GUIDE, *supra* note 12, at para. 10,511.

[168]UTAH CODE ANN. § 70C-2-203 appears to be the last vestige of three sections of prior law relating to security interests: security in consumer sales or leases (UTAH CODE § 70B-2-407(1),(4) (Code*Co 1984-1985) (repealed 1985)), cross collateral (*id.* § 70B-2-408), and debt secured by cross collateral (*id.* § 70B-2-409). The drafters of the new code felt that these provisions were generally duplicative of protections offered under the bankruptcy laws and the new FTC and FRB regulations (*see supra* note 167). Telephone interview, Feb. 11, 1986.

[169]*See* UTAH CODE § 70B-2-407(2) (Code*Co 1984-1985) (repealed 1985).

sumer lease from exceeding twice the average monthly payment under the lease.[170] The new code does not include this provision.

e. [§ 3.2.2.5] Holder-in-Due-Course Provisions

Section 70C-2-204 prevents a seller in a consumer credit sale[171] "not involving real property" from taking a negotiable instrument other than a check as evidence of the obligation of the buyer.[172] A holder who takes a

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[170]*Id.* § 70B-2-406. This section was designed to protect consumer lessees against abuses associated with certain "open-end" leases. Under an "open-end" lease, the parties agree that at the expiration of the lease, the article leased will have a certain depreciated value and will be sold. If the sale of the article brings less than the agreed depreciated value, the lessee is liable for the difference. If it brings more, the lessee is entitled to the surplus. The drafters of the U3C felt that this limitation on the lessee's liability would not only avoid the possibility of a large contingent liability at the end of the lease term but would also give the lessee a basis for comprehending how much the lease would actually cost him. WEST, SELECTED COMMERCIAL STATUTES, UNIFORM CONSUMER CREDIT CODE, Official 1974 Text, § 3.401 and Comment (1985).

The consumer leasing portions of the TIL are implemented by Regulation M, 12 C.F.R. § 213 (1985). In the case of an open-end lease the regulation requires the following information to be disclosed (in addition to other information required of all lessors):

> 1. A statement that the lessee shall be liable for the difference between the estimated value of the property and its realized value at early termination or the end of the lease term.
> 2. Where the lessee's liability at the early termination or at the end of the term is based on the estimated value of the property, a statement that the lessee may obtain at his or her expense a professional appraisal of the value of the property by an independent third party.
> 3. The disclosure of the value of the property at the beginning of the lease term, the total lease obligation and the difference between them.
> 4. That there is a rebuttable presumption that the estimated value of the property at the end of the term is unreasonable to the extent that it exceeds the actual value by more than three times the average monthly payment, and that the lessor cannot collect the amount of excess liability unless he brings a successful court action in which he pays the lessee's attorneys fees.
> 5. A statement that the lessee may make any mutually agreeable final adjustment regarding the excess liability.

Id. §§ 213.4(g)(13), (14), (15)(i)-(iii).

The drafters apparently felt that these requirements were adequate to protect consumers from the abuses which Section 70B-2-406 was designed to prevent.

[171]Prior law referred to both a consumer sale and a consumer lease. Under the TIL Act the term credit sale also includes a bailment or lease if certain conditions are met. *See infra* note 189.

[172]UTAH CODE ANN. § 70C-2-204 (Supp. 1985). Prior law did not include the

negotiable instrument other than a check with notice that the instrument was issued in violation of this section will not be considered a holder in due course and thus will not be free from the claims of the buyer.[173]

Section 70C-2-205 makes an assignee of the rights of a seller subject to all defenses of the buyer against the seller arising from a credit sale.[174] The language of this new section differs from prior law in two significant respects. First, prior law subjected the assignee not only to the defenses of the buyer but also to any claims the buyer might have against the seller.[175] The new code only subjects the assignee to the buyer's *defenses.*[176] Second, prior law provided that the assignee was subject to claims and defenses of the buyer "notwithstanding an agreement to the contrary."[177] The new code does not contain this language and, absent some other provision, the parties could apparently agree to limit the buyers defenses to the seller

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real property exception. The drafters felt that not including this exception would unduly restrict second mortgage transactions. Telephone interview, Feb. 11, 1986.

[173]This restriction on the protections offered to a holder in due course and the restriction on the protection offered to a creditor's assignee (*see infra* text accompanying notes 174-79) represented significant modifications of both the common law and provisions in the Uniform Commercial Code in place before Utah adopted the U3C. *See* Comment, *supra* note 13, at 98-99; Comment, *Utah's UCCC: Boon, Boondoggle, or Just Plain Doggle*, 1972 UTAH L. REV. 133, 142-43 (1972).

[174]As with prior law, the rights of the buyer under this section can only be raised as a matter of defense to or setoff against a claim by the assignee. UTAH CODE ANN. § 70C-2-205 (Supp. 1985). *But see infra* note 176.

[175]UTAH CODE § 70B-2-404 (Code*Co 1984-1985) (repealed 1985).

[176]UTAH CODE ANN. § 70C-2-205 (Supp. 1985). Because many claims which buyers assert are to recover penalties imposed on the seller for failure to comply with the law, the drafters felt that allowing such claims against assignees was unfair. Consequently, they deleted the reference to claims. However, the drafters apparently failed to consider the question of whether a buyer may assert a claim against a financing agency to recover payments made to the financing agency in ignorance of a defense available. Telephone interview, Feb. 11, 1986. Even in the case of an assignee of a simple contract right (as opposed to a direct lender affiliated with the seller) the availability of this remedy to the buyer is not free from dispute. *See* FARNSWORTH, COMMERCIAL PAPER 82 (3rd ed. 1984). However, the FTC's holder-in-due-course rule states that the financing agency is subject to all "*claims* and defenses which the debtor could assert against the seller." 16 C.F.R. § 433.2 (1985) (emphasis added). This is true even with regard to direct purchase-money lenders who are affiliated with the seller in some way. *Id.* § 433.2(b); *see infra* note 179. The extent to which courts have interpreted these statements as giving a buyer the right to restitution of payments made in ignorance of an inherent defense is discussed in Garner & Dunham, *FTC Rule 433 and the Uniform Commercial Code: An Analysis of Current Lender Status*, 43 MO. L. REV. 199, 227-32 (1978).

[177]UTAH CODE § 70B-2-404 (Code*Co 1984-1985) (repealed 1985).

alone. The law which ostensibly prevents this result is Federal Trade Commission Rule 433 (also known as the FTC Holder-in-Due-Course regulations).[178] The rule requires a seller or lessor to incorporate specific language in a consumer credit contract preserving the debtor's claims and defenses against assignees of the contract.[179]

f. [§ 3.2.2.6] Settlement of Claims

Section 70C-2-206 provides that a claim by a debtor against a creditor may be settled out of court for less value than the amount claimed. The agreement is subject to the review of a court and may be set aside if the court finds the agreement to be unconscionable.[180]

g. [§ 3.2.2.7] Referral Sales

Section 70C-2-207 prevents a seller from offering rebates or discounts to a buyer in return for the buyer supplying the seller with a prospective customer list.[181] Under prior law, if the buyer was induced by the seller into such an agreement, the buyer had the option to either rescind the contract *or* retain the goods delivered and the benefit of any

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[178]16 C.F.R. § 433 (1985).

[179]If the transaction is one in which the seller assigns the contract with the buyer to a financing agency, the contract must include the following legend in ten point, bold-face type:

NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

Id. § 433.2(a) (1985).

The FTC rule imposes a similar requirement upon sellers who accept proceeds from a purchase money loan as full or partial payment for a consumer credit sale or lease. *Id.* § 433.2(b). A purchase money loan is a loan made to the buyer by a creditor to whom the seller refers consumers or with whom the seller is affiliated by common control, contract, or business arrangement. *Id.* § 433.1(d). Failure to include the specified language in either of the situations is regarded as a deceptive act or practice by the seller. *Id.* § 433.2. *See also* text accompanying note 271.

[180]UTAH CODE ANN. § 70C-2-206(1) (Supp. 1985).

[181]This practice is also prohibited by the Utah Consumer Sales Practices Act which makes it a deceptive act or practice for a supplier in a consumer transaction to, with intent to decieve, "indicate that the consumer will receive a rebate, discount, or other benefit as an inducement for entering into a consumer transaction in return for giving the supplier the names of prospective consumers. . . ." UTAH CODE ANN. § 13-11-4(2)(k) (Supp. 1985).

services performed.[182] The new law expands this remedy, providing that the buyer can both rescind the contract *and* retain the goods received under the contract. However, the buyer is allowed to retain the goods only in the event that the seller has not restored his (the buyer's) previous payments on the contract.[183] The code then goes on to state, in a totally separate sentence, that a buyer may retain the benefit of any services performed without obligation to pay for them.[184] The code makes the remedies of § 70C-2-207 inapplicable if the goods delivered to the buyer are damaged while in the buyer's possession or if the buyer fails to return the goods to the seller within a reasonable time after the seller tenders or delivers a full refund of the buyer's payments.[185]

C. [§ 3.3] CHAPTER THREE - CLOSED-END CONSUMER CREDIT DEBT

Prior law segregated consumer credit sales from consumer loans. This segregation added unnecessary complexity to the law since sales and loans were treated in virtually identical fashion.[186] Rather than segregate the treatment of consumer sales and consumer loans, the new code provides separate chapters for closed-end consumer credit debt[187] and open-end credit contracts.[188] This distinction mirrors the categorization of credit set forth by subparts B and C of Regulation Z which deal with open-end and closed-end credit respectively.[189] Federal disclosure requirements for these two kinds of credit are very different.[190]

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[182]UTAH CODE § 70B-2-411 (Code*Co 1984-1985) (repealed 1985).

[183]UTAH CODE ANN. § 70C-2-207 (Supp. 1985).

[184]*Id.*

[185]*Id.*

[186]*See supra* note 67 and accompanying text. Both open-end sales and open-end loans were exempt from finance charge ceilings. The rate structures for closed-end sales and closed-end loans constituted the major difference between treatment of the two types of credit.

[187]UTAH CODE ANN. Title 70C, Chapter 3 (Supp. 1985).

[188]*Id.* Title 70C, Chapter 4.

[189]Open-end credit is treated in subpart B of Regulation Z, 12 C.F.R. § 226.5-16 (1985). Closed-end credit is treated in subpart C, *Id.* § 226.17-24. Notwithstanding this new approach to credit categories, the new code frequently refers to the term "consumer credit sale". Regulation Z defines a credit sale as any sale where the seller is also a creditor. 12 C.F.R. § 226.2(a)(16) (1985). The term includes a bailment or lease (other than bailments or leases terminable at any time by the consumer) under which the consumer (1) agrees to pay as compensation for use a sum substantially equivalent to, or in excess of, the total value of the property and services involved; and (2) will become (or has the option to become) for no additional consideration or nominal consideration, the owner of the property upon compliance with the agreement. *See Id.* § 226.2(a)(16)(i)(ii).

[190]Low income consumers are most often involved in closed-end credit transac-

Regulation Z defines closed-end credit as "consumer credit" other than "open-end credit."[191] Thus, the determination of whether a particular credit offering is closed-end credit is essentially a determination that the offering is *not* open-end credit. Open-end credit is defined as follows:

> "*Open-end credit*" means consumer credit extended by a creditor under a plan in which —
>
> (i) The creditor reasonably contemplates repeated transactions;
>
> (ii) The creditor may impose a finance charge from time to time on an outstanding unpaid balance; and
>
> (iii) The amount of credit that may be extended to the consumer during the term of the plan (up to any limit set by the creditor) is generally made available to the extent that any outstanding balance is repaid.[192]

The definition first requires that credit be offered "under a plan". The Commentary states that the word "plan" connotes a contractual arrangement between the creditor and consumer. This might be a program containing a number of credit features. Where such a program is subject as a whole to prescribed terms and otherwise meets the definition of open-end credit, it will be considered a single, multi-featured plan.[193]

The definition of open-end credit next requires that the creditor reasonably contemplate repeated transactions. According to the Commentary, two factors are very important to this determination. First, the plan must have the structural capability of repeated transactions.[194] Second, the creditor must have the subjective belief that repeated transactions will occur.[195] Each plan must be analyzed on an individual basis to determine the subjective motivation of each creditor.[196]

The second requirement for open-end credit in effect demands that a creditor be *unable* to predict the finance charge, total payments, or the payment schedule for any specific amount financed.[197]

The final requirement essentially requires that a consumer be able to

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tions and these transactions are subject to greater scrutiny by Federal Law. *See* NATIONAL CONSUMER LAW CENTER, *supra* note 40, at para. 1.7.

[191] 12 C.F.R. § 226.2(10) (1985).

[192] *Id.* § 226.2(20).

[193] Official Staff Interpretations, 12 C.F.R. § 226, Supp. I, § 226.2(a)(20)(2).

[194] *Id.* § 226.2(a)(20)(3). Where much of the customer base of a store "makes repeat purchases, the fact that some consumers only use the plan once would not affect the characterization of the store's plan as open-end credit."

[195] *Id.* "The creditor must legitimately expect that there will be repeat business rather than a one-time credit extension."

[196] *Id.* "The criterion regarding repeated transactions is a question of fact to be decided in the context of the creditor's type of business and the creditor's relationship with the consumer."

[197] *Id.* § 226.2(a)(20)(4).

use and re-use an account to its limit. In other words, there must be unlimited availability of credit to the extent of the credit limit.[198]

Failure to meet any one of the three requirements for open-end credit will cause the credit offering to be classified as closed-end credit.[199]

The topics addressed by chapters three and four of the new code are better addressed with the above definitions of closed-end and open-end credit in mind. Chapter Three deals with closed-end consumer credit debt and contains only two sections: prepayment of debt[200] and balloon payments.[201]

1. [§ 3.3.1] Prepayment of Debt

Section 70C-3-101 allows a buyer to prepay in full the unpaid balance of a closed-end consumer credit debt at any time without penalty. The Department of Financial Institutions reports that most of the legitimate complaints received under the old code during the past few years centered on two areas related to the prepayment of closed-end debt: rebating of unearned finance charges and rebating of prepaid finance charges.[202]

a. [§ 3.3.1.1] Rebates of Unearned Finance Charges

Prior law allowed a creditor to calculate a rebate of unearned finance charges connected with the prepayment of precomputed loans by using the rule of 78s.[203] With the rebate calculated under this method, most of the finance charge is earned by the lender at the front of the loan.[204] In

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[198]*Id.* § 226.2(a)(20)(5).

[199]*Id.* § 226.2(a)(20)(1).

[200]UTAH CODE ANN. § 70C-3-101 (Supp. 1985).

[201]*Id.* § 70C-3-102.

[202]Department interview.

[203]UTAH CODE §§ 70B-3-210(3)(b) and 70B-2-210(3)(b) (Code*Co 1984-1985) (repealed 1985). A precomputed loan (also referred to as an add-on loan) is a loan on which interest is calculated in advance. The interest is then added to the principal amount borrowed which results in a sum representing the total amount of the debt. Perna, *Computing Interest Rebates Under the Rule of 78ths: A Formula for Usury Upon Default in Maximum-Interest Precomputed Credit Transactions*, 10 ST. MARY'S L. J. 94, 95 nn. 4 & 5 (1978). Special Project, *supra* note 38, at 117, n. 44. When such loans are extended on the installment basis, they ignore the decreasing effect of installment payments on the principal. The result is an annual percentage rate which is significantly higher than the rate used to precompute the interest. *See* Special Project, *supra* note 38, at 114-15.

The rule of 78s is one of two methods allowed by prior law to calculate "the rebate on a monthly amortizing" precomputed loan. The alternative to the rule was the actuarial or United States rule method discussed infra note 205. *See* UTAH Code §§ 70B-2-210(3)(b),(c) and to 70B-3-210(3)(b),(c) (Code*Co 1984-1985) (repealed 1985).

[204]Under the rule of 78s (or sum-of-the-digits) method, an arithmetic progres-

several instances where the rule of 78s was used to compute unearned finance charges, debtors complained to the Department of Financial Institutions that the remaining principal balance of their loan at the time of prepayment was greater than the original amount they had financed.[205]

The new law does away with the rule of 78s as a method of computing the rebate of unearned interest from prepaid closed-end consumer credit debt. Subject to the new provisions on prepaid finance charges,[206] any earned finance charge and unpaid principal can now be calculated only by the actuarial or United States Rule method.[207]

b. [§ 3.3.1.2] Rebates of Prepaid Finance Charges

The second practice commonly complained of relates to prepaid finance charges. Prior law stated that unearned interest did not include amounts which were part of prepaid finance charges or other expenses

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sion is derived for earning the finance charge each month. On a 12 month loan, 12 units of principle are outstanding the first month, 11 units the next, then 10 and so on down to the last month with one unit of principal. The sum of the numbers from 12 down to 1 is 78, hence the name of the rule. Total interest for a 12 month loan is divided into 78 parts, with 12/78 being earned in the first month, 11/78 in the second and so forth until maturity. Scott, *Answering Questions about the "Rule of 78ths"*, BANKING, 124 (September 1976). The number 78 is appropriate only for 12 month loans. The sum of the digits for a 24 month loan is 300, 666 for a 36 month loan, and 1,176 for a 48 month loan. Some commentators prefer the designation "Sum-of-the-digits" method. *See* Perna, supra note 204, at 102 n.36.

[205]Under the rule of 78s there are certain combinations of interest rates, amounts financed, and loan terms which will cause the first month's finance charge to exceed the regular payment. "Whenever earnings exceed payments, it is customary to let the loan balance increase by the earnings deficiency. If the loan is prepaid after the loan balance increases, not only is there no rebated charge, the borrower owes a greater loan balance than was originally received." Scott, *supra* note 204, at 126.

In addition to this increased loan balance problem (which is really a problem of disclosure), the rule of 78s can also create problems with respect to the amount of interest charged. The rule was introduced during the 1930s "in an era when anything more extensive than simple calculations was beyond the capability of the lenders. The stress was on simplicity." Scott, *supra* note 204, at 124. The alternative to the rule, the Actuarial method, is based on a complex mathematical formula and is inherently more precise than the rule of 78s. Perna, *supra* note 203, at 105, 109. When interest rates are low, amounts financed small, and loan terms short the rule of 78s produces a finance charge only slightly higher than that produced by the actuarial method. However, as interest rates, amounts financed, and loan terms increase the difference in amounts produced by the two methods can be significant. Scott, *supra* note 204, at 124-26.

[206]UTAH CODE ANN. § 70C-3-101(2)(c) (Supp. 1985) *See infra*, notes 208-12.

[207]*Id.* § 70C-3-101(2)(b). The earned finance charge is to be calculated "from the date the credit is first extended to the debtor" but the creditor may accrue

associated with the cost of setting up the credit.[208] This provision essentially made prepaid finance charges non-refundable. As a result, some creditors, anticipating that the debt would be prepaid, were charging as many as 15 points on a transaction.[209]

The new law states that any prepaid finance charge not exceeding 5% of the original principal amount of the debt is deemed to be fully earned on the date the credit is extended.[210] The provision is applicable only where the parties expressly agree that the prepaid finance charge is nonrefundable in the event of prepayment.[211] The code deems prepaid finance charges in excess of 5% of the original amount to be earned proportionately over the entire term of the loan. In the event of prepayment, the unearned portion of these "excess" prepaid finance charges is to be rebated.[212]

c. [§ 3.3.1.3] Rebates of Amounts Paid to Third Parties

Another provision of the new code limits the rebate of any "costs, charges or fees paid to third parties in connection with setting up the credit."[213] In the event of prepayment by the buyer, such amounts cannot be rebated unless the creditor is entitled to receive them from third parties as a result of the repayment.[214]

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finance charges during any period in which the debtor has the right of recision.

[208]UTAH CODE §§ 70B-2-210(3)(a) and 70B-3-210(3)(a) (Code*Co 1984-1985) (repealed 1985).

[209]Department interview. The TIL requires creditors to disclose prepaid finance charges as part of the annual percentage rate (APR). *See* Official Staff Interpretations, 12 C.F.R. § 226, Supp. I, § 226(2)(a)(23) (1985). A creditor could thus disclose an APR of 16% but have 15% of the rate represented by prepaid finance charges. If a debtor were to subsequently prepay the loan, most of the unearned finance charge would not be refundable.

[210]UTAH CODE ANN. § 70C-3-101(2)(c) (Supp. 1985). The first regulation issued by the Department of Financial Institutions under the new code is UTAH ADMIN. R. UCCR:018 (1985) (effective Sept. 4, 1985). Its purpose is to clarify the nature of the non-refundable prepaid finance charge. The rule defines the term "prepaid finance charge" by referring to regulation Z. Regulation Z defines the term as follows: "[A]ny finance charge paid separately in cash or by check before or at consumation of a transaction, or withheld from the proceeds of the credit at any time." 12 C.F.R. § 226.2(23) (1985).

The official staff commentary gives the following examples of prepaid finance charges: buyers points, service fees, loan fees, finders fees, loan guarantee insurance, and credit investigation fees. Official Staff Interpretation, 12 C.F.R. § 226, Supp. I, § 226.2(a)(23) (1985). The commentary goes on to state that "finance charges are not 'prepaid' merely because they are precomputed whether or not a portion of the charge will be rebated to the consumer upon prepayment." *Id.* § 226.2(a)(23)(3).

[213]*Id.* § 70C-3-101(2)(d).

[214]*Id.*

2. [§ 3.3.2] Balloon Payments

The second and final section of chapter three carries forward the prior law dealing with balloon payments.[215] If any scheduled payment of a closed-end consumer debt is more than twice as large as the average of all earlier scheduled payments then the debtor has the right to refinance the payment.[216] This right is subject to the following criteria: (1) The creditor must still be offering the type of credit offered on the original loan; and (2) the debtor must be credit worthy.[217] The credit terms must be no less favorable to the consumer than the terms offered by the creditor to the general public at the time the creditor accepts the debtor's request for refinancing.[218]

D. [§ 3.4] Chapter Four – Open-End Consumer Credit Contracts

Chapter four provides substantive limitations peculiar to open end contracts. The chapter consists of the following three sections: Minimum Billing Cycle Charge,[219] Change of Terms of Open-End Credit Contracts,[220] and Finance Charge for Open-End Accounts.[221]

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[211]The new Utah regulaton states that for a prepaid finance charge to be nonrefundable, the consumer credit contract must expressly state the amount of the prepaid charge and must state that no portion of the charge will be refunded in the event of prepayment. Utah Admin. R. UCCR:018.2 (1985).

[212]Utah Code Ann. § 70C-3-101(2)(c) (Supp. 1985).

[215]*See* Utah Code §§ 70B-2-405 and 70B-3-402 (Code*Co 1984-1985) (repealed 1985).

[216]Utah Code Ann. § 70C-3-102 (Supp. 1985).

[217]*Id.*

[218]Prior to 1983, the section stated that the credit terms could be no less favorable to the buyer than the terms of the *original* sale. This provision was temporarily preempted by the Federal Alternative Mortgage Transaction Parity Act of 1982, Pub. L. No. 97-320, § 802, 96 Stat. 1545 (1982) (codified as amended at 12 U.S.C. §§ 3801-3805 (1982 & Supp. 1984)). The Federal law allowed refinancing of a demand or balloon payment at a rate not necessarily equivalent to the original terms for certain alternative mortgage transactions. *See* 12 U.S.C. 3802(1) (1982). The law specifically provided, however, that its provisions would not apply to any alternative mortgage transaction in any state made on or after the effective date of a state law enacted within three years of the effective date of the Federal law. The act required state law to "explicitly and by its terms" reject the Federal preemption. *Id.* at § 3804(a). Utah chose to follow Federal law and amended the balloon payment provision in 1983. 1983 Utah Laws ch. 343, § 20.

[219]Utah Code Ann. § 70C-4-101 (Supp. 1985).

[220]*Id.* § 70C-4-102.

[221]*Id.* § 70C-4-103.

1. [§ 3.4.1] Minimum Billing Cycle Charge

Section 70C-4-101 provides that when a finance charge is applied to an unpaid balance in an open-end account and the resulting charge "does not exceed $1 for billing cycles which are monthly or longer, the creditor may assess a minimum charge of not more than $1 for those periods." Prior law limited the minimum billing cycle charge to $.50.[222]

2. [§ 3.4.2] Change of Terms of Open-End Contracts

Section 70C-4-102 provides for change in the terms of open-end contracts. This is a new and controversial provision of the code.[223] A creditor is now authorized by law to change any written term of an open-end consumer contract by giving not less than 15 days advance written notice to all parties who may be affected. This rule only applies if the contract expressly provides that the creditor can change the terms of the agreement from time to time.[224]

Notwithstanding the language that a creditor may change "any" written term of the contract after giving notice to the debtor, under certain circumstances the code requires express agreement by the debtor or other action on his part. If the creditor has a security interest in any real property of the debtor as security for the debt, and if the change "affects the method for calculating minimum payments, or is part of the finance charge" then, before the creditor can apply the new term to an *existing* balance, one of the following must occur:

> [T]he debtor *expressly* . . . agrees [to allow the new term to be applied to an existing balance] after notice [from] the creditor; *or*
>
> [T]he creditor notifies the debtor [1] that further extensions of

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[222]UTAH CODE § 70B-207(5) (Code*Co 1984-1985) (repealed 1985). "[I]f there is an unpaid balance on the date as of which the finance charge is applied, the seller may contract for and receive a charge not exceeding $.50 if the billing cycle is monthly or longer. . . ."

[223]The new provision is patterned after a similar rule in Regulation Z which requires creditors to notify consumers of a change in any term previously disclosed to the consumer in the initial disclosure statement. *See* 12 C.F.R. 226.9(c) (1985). The inference many creditors took from the language of the regulation was that creditors could unilaterally make changes in open-end consumer contracts if notice were mailed to the consumer at least 15 days prior to the effective date of the change. However, the Federal Reserve Board informed the Department of Financial Institutions that the rule was not intended to convey such substantive authority to creditors. The drafters of the new code vigorously debated the issue of whether the new Utah code should expressly give creditors the power to change the terms of existing open-end contracts according to the pattern set out in Regulation Z. Section 70C-4-102 is the result of that debate. Telephone interview, Feb. 11, 1985.

[224]UTAH CODE ANN. § 70C-4-102 (Supp. 1985).

> credit will *not* be permitted unless the debtor agrees that the new term may be applied to an existing account balance, *and* [2] [that] any future charges [by the debtor] to the account will constitute such an agreement[.] [T]he debtor [must then make] a charge or charges to the account after receiving . . . notice.[225]

In contrast to these extra requirements imposed by § 70C-4-102(1), the new code allows the creditor to make certain changes without giving any notice to the consumer. Section 70C-4-102(2) of the new code lists certain circumstances under which a creditor need *not* give notice to "other parties who may be affected" by a change in terms. The code divides these circumstances into two groups. First, no notice is required when a change involves: "(i) late payment charges, charges for documentary evidence, or over-the-limit charges, (ii) a *reduction* of any component of a finance charge or other charge, [or] (iii) suspension of future credit privileges or termination of an account or plan."[226] Second, the creditor need not give notice when a change results from: "[1] . . . an agreement involving a court proceeding, or [2] . . . the consumer's default or delinquency, other than an increase in the periodic rate or other finance charge."[227]

Two other exemptions deal with actual terms of the credit agreement. First, § 70C-4-102(3)(a) states that, for purposes of section 70C-4-102, the "actual unpaid balance of the account at any point in time" is not to be considered a term of the credit agreement. Second, § 70C-4-102(3)(b) provides that a periodic change in a variable or adjustable rate of interest is not subject to § 70C-4-102 "if no term of the credit agreement pertaining to calculation of the applicable rate is changed."[228]

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[225]*Id.* § 70C-4-102(1)(a) (emphasis added). This provision is essentially targeted at the use of home equity as security for an open-end line of credit. Telephone interview, Feb. 11, 1985. Home equity lending currently has wide acceptance in the credit industry. *See generally* Brayshaw, *An Overview of Home Equity as Security for A Line of Credit*, 14 COLO. LAW. 226 (1985).

[226]UTAH CODE ANN. § 70C-4-102(2)(a) (Supp. 1985).

[227]*Id.* § 70C-4-102(2)(b).

[228]The Department of Financial Institutions has proposed an amended rule which prescribes allowable terms and disclosure requirements for variable and adjustable interest rates in consumer credit contracts. UTAH ADMIN. R. UCCR:014 (1985) (proposed Dec. 3, 1985), Utah Admin. Bull. 85-24, 42-44 (December 15, 1985). The proposed rule amends a previous rule which was issued under the old code. UTAH ADMIN. R. UCCR:014 (1984). The rule distinguishes variable interest rates from other kinds of rate formulas or provisions. In addition, the rule describes the permissible indices which may be used in a variable rate formula.

Under the proposed amended rule, any index may be used in a variable or adjustable rate formula if it falls into one of the following three groups: (1) any index independent of the lender; (2) any index based upon a weighted cost of

3. [§ 3.4.3] Finance Charges for Open-End Accounts

Section 70C-4-103 sets forth the method which may be used by creditors to calculate account balances for open-end accounts upon which a finance charge will be assessed. Prior law provided three methods for calculating these balances: average daily balance, adjusted balance ("unpaid balance of the account on the last day of the billing cycle after deducting payments and credits"), and a median amount within a specified range.[229] The new code eliminates the "median amount" method but states that an "*actual* daily balance" method, in addition to the average daily balance and adjusted balance methods, may now be used.[230]

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funds formula; (3) any index based on a lender's internal rate if that rate is the same as the rate used for non-consumer loans and if at least 50% of the lender's total outstanding credit is *not* consumer credit. UTAH ADMIN. R. UCCR:014.3(A) (1985) (proposed Dec. 3, 1985). Use of one of these indices will assure that the interest rate is truly variable and not subject to lender control. The distinction is an important one since under Regulation Z the terms of a true variable rate loan need only be disclosed when the credit contract is first entered into. Subsequent changes in the applicable interest rate resulting from fluctuations of the index do not have to be disclosed in advance. *See* Official Staff Interpretations, 12 C.F.R. § 226, Supp. I §§ 226.6 Comment 6(a)(2)-9 and 226.9 Comment 9(c)(1) (1985). With regard to the specific disclosures required by the proposed rule *see infra* note 282.

In addition to setting forth the mandatory categories of indices for computing variable rates, the new rule also requires (as did its predecessor) that adjustments to the interest rate occur automatically according to a specified schedule. Any credit agreement containing a variable or adjustable rate must include a schedule on which the rate will be adjusted and must require adjustment of the rate in accordance with that schedule. UTAH ADMIN. R. UCCR:014.6. (1985) (proposed Dec. 3, 1985).

[229]UTAH CODE §§ 70B-2-207(2)(a),(b) and 70B-3-201(4)(a)(i)-(iii). (Code*Co 1984-1985) (repealed 1985).

[230]UTAH CODE ANN. 70C-4-103(1),(2) (Supp. 1985). The "actual daily balance method" is apparently just that — daily application of an interest rate to the balance of an account after all additions to and subtractions from the account have occurred. Telephone conversation with Mr. Bob Clemenson of Valley Bank in Salt Lake City, Utah, Feb. 20, 1986. The code defines the adjusted balance method just like prior law, i.e., "the unpaid balance of the account on the last day of the billing cycle after deducting payments and credits received during the same cycle." The following examples of the average daily balance method are based on model clauses set forth in appendix G-1 of Regulation Z:

> (1) Average Daily Balance (excluding current transactions) - the average daily balance is computed by taking the beginning balance of the account each day and subtracting any payments or credits. No new [purchases, advances or loans] are added in. All daily balances for the billing cycle are added together and divided by the total number of days in the billing cycle. The result of this division is the average daily balance.
>
> (2) Average Daily Balance (including current transactions) - same as

E. [§ 3.5] CHAPTER FIVE - HOME SOLICITATION SALES

This chapter represents one of the more enduring contributions of the U3C to state law.[231] The home solicitation sale provisions of the new code are almost identical to those of prior law. However, one change is important to note. Prior law defined a home solicitation sale as " a consumer credit sale of goods . . . or services in which the seller or person acting for him engages in a personal solicitation of the sale. . . . "[232] Section 70C-5-101 substitutes in place of the word "personal" the words "face-to-face".[233]

F. [§ 3.6] CHAPTER SIX — INSURANCE

This chapter follows the design of prior law, retaining the same three parts: Insurance in General, Consumer Credit Insurance, and Property and Liability Insurance. There are relatively few changes from prior law.

1. [§ 3.6.1] Insurance in General

a. [§ 3.6.1.1] Definition of Consumer Credit Insurance

Section 70C-6-102 provides a definition of consumer credit insurance. As with prior law, the term was not meant to include insurance procured by a creditor to guard against the uncollectibility of his accounts or insurance indemnifying the creditor against loss due to non-filing of instruments.[234] The kind of insurance intended to be covered by this chapter is insurance which provides benefits conditioned on the death or disability of a debtor, financed by a creditor.[235] However, the definition of

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(1) except new [purchases, advances, or loans] are added in.

See 12 C.F.R. § 226, Appendix G-1 (1985).

[231]Although not widely adopted in its entirety, the U3C has had an impact on the development of consumer credit law. Many provisions of the Truth-in-Lending Act and Regulation Z are traceable to the U3C. The laws of many states include several adaptations of its provisions; the home solicitation sale provisions are perhaps the best illustration. *See* WEST, SELECTED COMMERCIAL STATUTES, UNIFORM CONSUMER CREDIT CODE, Official 1974 Text, Prefatory Note, 890-91 (1985). The home solicitation sale rules give residential buyers subjected to high pressure sales techniques a limited right to cancel a sale entered into. *Id.* at § 3.501, Comment 1.

[232]UTAH CODE § 70B-2-501 (Code*Co 1984-1985) (repealed 1985).

[233]According to the Department of Financial Institutions, the drafters replaced the term "personal solicitation" with the term "face-to-face" to emphasize that telephone solicitations are not covered by this chapter of the code. Telephone interview, Feb. 11, 1985.

[234]*See* WEST, SELECTED COMMERCIAL STATUTES, UNIFORM CONSUMER CREDIT CODE, Official 1974 Text, § 4.103 & Comment 1 (1985).

[235]*Id.*

consumer credit insurance under prior law also specifically excluded any insurance related to long term credit, i.e., insurance provided in relation to a transaction in which a payment is scheduled more than ten years after the extension of credit.[236] Current law does not include this exclusion.[237]

b. [§ 3.6.1.2] Consumer Credit Insurance Disclosures

Under prior law, a creditor was not required "to make a separate charge for insurance provided *or* required by him."[238] Under the new law, a creditor is required to "separately disclose any charge for insurance required *and* provided by it."[239] Where insurance is not required, the charge for the insurance is to be "separate from and in addition to other charges."[240]

c. [§ 3.6.1.3] Credit Insurance and Unconscionability

Prior law set forth a list of factors to be considered when applying the provisions of the unconscionability clause[241] to a separate charge for insurance.[242] Current law does not include this list of factors.

d. [§ 3.6.1.4] Refund of Prepaid Insurance Charges

Prior law stated that, upon prepayment in full of a consumer credit sale or loan out of the proceeds of consumer credit insurance, a debtor or his estate was entitled to a refund or rebate of any unearned portion of a separate charge for insurance previously paid by the debtor. This rule did not apply to the extent that the refunds or rebates were less than $1.00.[243] The new code does not require the prepayment to be made out of consumer credit insurance proceeds. Additionally, the new code increases the *de minimis* amount to $5.00.[244]

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[236]UTAH CODE § 70B-4-103(1)(a) (Code*Co 1984-1985) (repealed 1985).

[237]UTAH CODE ANN. § 70C-6-102 (Supp. 1985). The drafters thought the prior provision was arbitrary. Many consumer credit offerings now extend beyond 10 years. Telephone interview, Feb. 11, 1985.

[238]UTAH CODE § 70B-4-104(1) (Code*Co 1984-1985) (repealed 1985) (emphasis added).

[239]UTAH CODE ANN. § 70C-6-103(1) (Supp. 1985) (emphasis added).

[240]UTAH CODE ANN. § 70C-6-103(1) (Supp. 1985). Premiums paid for consumer credit insurance are very high in contrast to premiums paid for comparable non-consumer credit insurance. The drafters felt that these provisions were necessary, in addition to the disclosures required by Regulation Z (see 12 C.F.R. 226.4(d) (1985)), to adequately inform consumers about the often oppressive cost of credit insurance. Telephone interview, Feb. 11, 1986.

[241]The unconscionability clause is discussed *infra*, text accompanying note 263.

[242]UTAH CODE § 70B-4-106(1) (Code*Co 1984-1985) (repealed 1985).

[243]*Id.* § 70B-4-108(2).

[244]UTAH CODE ANN. § 70C-6-106(1) (Supp. 1985). The Department of Financial

2. [§ 3.6.2] Consumer Credit Insurance

The language of this part is substantially the same as the language of prior law.[245] Provisions with respect to the maximum amount of insurance are different only to the extent that the kinds of insurance are now categorized according to whether they are connected with closed-end or open-end credit agreements.[246]

3. [§ 3.6.3] Property and Liability Insurance

Prior law stated that a creditor could not "receive a separate charge for insurance against loss of or damage to property unless the amount financed . . ." was "$300 or more and the value of the property" was "$300 or more."[247] This provision no longer appears in the new code and its removal represents the only real change in this part from prior law.

G. [§ 3.7] CHAPTER SEVEN – REMEDIES AND PENALTIES

Chapter seven retains parts one and two from chapter five of Title 70B. However, part three, Criminal Penalties, does not appear in the new code.

1. [§ 3.7.1] Limitation On Creditors' Remedies

a. [§ 3.7.1.1] Deficiency Judgments and Repossession

Section 70C-7-101(1) operates to impose a floor on deficiency judgments against debtors where the creditor has repossessed or voluntarily accepted the surrender or return of goods "which were the subject of a consumer credit sale and in which the seller has a security interest to secure a debt arising from the sale of goods or services or a combined sale

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Institutions has proposed an amended rule relating to the refund of unearned credit insurance premiums. The new rule requires "all consumer creditors, including assignees or other successors in interest," to notify borrowers who have prepaid a consumer credit obligation in full that they (the borrowers) may be entitled to separate refunds of unearned credit insurance premiums. UTAH ADMIN. R. UCCR:019,:019(1)(C) (1985) (proposed Dec. 3, 1985), Utah Admin. Bull. 85-24, 40-41 (Dec. 15, 1985). If the debtor does not receive a refund or credit of the unearned insurance premiums at the time of prepayment, then "the party receiving the final payment or the party to whom the obligation was last owed" is to notify the debtor that he or she may be entitled to a refund of unearned insurance premiums. The debtor should receive from the notifying party the name and address (if known) of each party who should be contacted about obtaining the refund. *Id.* UCCR:019.2.

[245]*See* UTAH CODE Title 70B, Chapter 4, part 2 (Code*Co 1984-1985) (repealed 1985).

[246]UTAH CODE ANN. §§ 70C-6-201(2),(3), and 70C-6-202 (Supp. 1985).

[247]UTAH CODE § 70B-4-301(3) (Code*Co 1984-1985) (repealed 1985). The intent of the prior law was to prevent creditors from charging for property

of goods and services."[248] When the cash price of the sale from which the debt arose was $3,000 or less, any debt remaining is completely satisfied, i.e., the creditor cannot obtain a deficiency judgment against the consumer debtor. In addition, the seller has no further obligation to the buyer with respect to the goods.[249] The floor imposed by prior law was $1,000 or less.[250]

Section 70C-101(2) carries forward the limitation imposed by prior law on creditors who have obtained a judgment against a debtor and who are not entitled to a deficiency judgment under § 70C-7-101(1) because of the statutory floor. In such a situation, the creditor can neither repossess the collateral nor subject the collateral to levy or sale under the judgment.[251] Combined with the previous subsection, this means that, when the cash price of the sale from which the debt arose was $3,000 or less, the creditor can either repossess the collateral or he can obtain a deficiency judgment, but he cannot do both.

b. [§ 3.7.1.2] Buyer's Wrongful Damage of Collateral

Section 70C-7-101(3) clarifies a previously vague section of the old code dealing with a buyer's liability. Prior law stated that a buyer *may* be liable in damages where he has wrongfully damaged the collateral or where he has refused to release the collateral to the creditor after default and demand.[252] The first sentence of 70C-7-101(3) provides that none of section 70C-7-101 applies if goods which were the subject of *the* sale and which secured a debt arising from a consumer credit sale are damaged (through no fault of the creditor) to a significant degree after the goods are delivered to the buyer.[253] In other words, a creditor may obtain a deficiency judgment *and* repossess the goods in such a situation, even where the cash sale price is below the statutory floor imposed by § 70C-7-101(1). However, the new code fails to answer the question of what

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insurance when either the amount of debt or the value of the property was relatively small. *See* WEST, SELECTED COMMERCIAL STATUTES, UNIFORM CONSUMER CREDIT CODE, Official 1974 Text, § 4-301 & Comment 3 (1985). The drafters felt that few, if any, transactions would ever require the protections of this provision. Telephone interview, Feb. 11, 1986.

[248]The thrust of this language is that while the goods must be goods which were obtained in a consumer credit sale, it is not necessary that they be the subject of a purchase money security interest.

[249]UTAH CODE ANN. § 70C-7-101(1) (Supp. 1985).

[250]UTAH CODE § 70B-5-103(2),(3) (Code*Co 1984-1985) (repealed 1985). However, this amount was subject to the prior provision on indexing. *See infra* text accompanying note 97.

[251]UTAH CODE ANN. § 70C-7-101(2)(a),(b) (Supp. 1985).

[252]UTAH CODE § 70B-5-103(5) (Code*Co 1984-1985) (repealed 1985).

[253]UTAH CODE ANN. § 70C-7-101(3) (Supp. 1985).

remedy is available to a creditor where the goods, although the subject of *a* consumer credit sale, are not the subject of *the* sale from which the debt arose, a requirement which § 70C-7-101(3) appears to mandate.[254] As it is presently written, the code does not appear to give preferential treatment to creditors who, though suffering wrongful damage to their collateral, are not secured by a purchase money security interest.

c. [§ 3.7.1.3] Buyer's Failure to Deliver Collateral After Default and Demand

The second sentence of § 70C-7-101(3) provides that where a buyer has wrongfully failed to deliver the collateral after default and demand, the limitation of § 70C-7-101(2) does not apply, and the creditor may repossess the collateral or subject it to levy or sale pursuant to a judgment.[255]

d. [§ 3.7.1.4] Definitions - Limitations On Garnishment

Section 70C-7-103 provides definitions related to the statutory limitation on garnishment of wages. Subsection 2 of that section defines the maximum amount of an individual's disposable earnings which may be subjected to garnishment.[256] The limitation imposed under prior law was the lesser of 25% of disposable earnings for a week or the amount by which disposable earnings for that week exceeded 40 times the federal minimum hourly wage.[257] Current law retains the 25% limitation (for the applicable pay period) but increases the second limitation to the excess of disposable income for a particular pay period over 30 times the federal minimum hourly wage.[258]

e. [§ 3.7.1.5] No Discharge from Employment for Garnishment

Under prior law, an employer could not fire an employee because the employee's earnings had been subjected to garnishment for any one indebtedness.[259] Current law expands this restriction on an employer's actions to earnings "subject to garnishment in connection with any one *judgment*."[260] Presumably, an employee could have more than one indebtedness become subject to one judgment and be protected by the new provision.

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[254]*Id.*

[255]*Id.*

[256]*Id.* § 70C-7-103(2)

[257]UTAH CODE § 70B-5-105(2)(a),(b) (Code*Co 1984-1985) (repealed 1985). In the event that a pay period was other than a week, the Department of Financial institutions was authorized to prescribe by rule a multiple of the Federal minimum hourly wage equivalent in effect to the limitation under paragraph b. *Id.* § 70B-5-105(2)(c).

[258]UTAH CODE ANN. § 70C-7-103(2)(a),(b) (Supp. 1985).

[259]UTAH CODE § 70B-5-106 (Code*Co 1984-1985) (repealed 1985).

[260]UTAH CODE ANN. § 70C-7-104 (Supp. 1985) (emphasis added).

f. [§ 3.7.1.6] Extortionate Extensions of Credit

Prior law provided that prima facie evidence of an extortionate extension of credit was established where a debtor could show that an extension of credit was made at an annual rate in excess of 45% and that the creditor had a reputation for the use or threat of use of violence or other criminal means to collect extensions of credit.[261] This provision does not appear in the new code.[262]

g. [§ 3.7.1.7] Unconscionability

Section 70C-7-106 is the new code's unconscionability clause and its language is almost identical to that of prior law. However, one new subsection has been added. Subsection 5 provides that the penalties for unconscionability may not be imposed upon an assignee of the creditor's rights "unless the debtor establishes by a preponderance of the evidence that the assignee knew the agreement was a consumer credit contract at the time the assignment occurred and also knew of the facts or circumstances on which the court based its finding of unconscionability."[263]

2. [§ 3.7.2] Debtors' Remedies

a. [§ 3.7.2.1] Excess Charges

Many of the changes to this section from prior law come in the form of deletions due to the elimination of interest rate ceilings and their accompanying loan categories.[264] However, the provision creating a

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[261]UTAH CODE § 70B-5-107(2) (Code*Co 1984-1985) (repealed 1985).

[262]The drafters eliminated the interest rate element of the extortionate credit test since the new code permits any interest rate which the parties agree to. Additionally, the drafters believed that certain situations might arise in which such high rates would be warranted. Telephone interview, Feb. 12, 1986. The code remains the same as prior law with regard to the extension of credit where "delay in making repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person." *See* UTAH CODE ANN. § 70C-7-105 (Supp. 1985); UTAH CODE § 70B-5-107(1) (Code*Co 1984-1985) (repealed 1985). Federal law provides criminal penalties for extortionate extensions of credit. *See* 18 U.S.C. §§ 891-96 (1982).

[263]UTAH CODE ANN. § 70C-7-106(5) (Supp. 1985).

[264]For example, prior law set forth specific rights for the debtor where the creditor had violated certain provisions related to regulated and supervised loans. See UTAH CODE § 70B-5-202(1),(2) (Code*Co 1984-1985) (repealed 1985).

However, the new code fails to mention remedies for certain violations of debtors' rights even though the related prohibitions are still in effect. For example, prior law provided that when a creditor had violated the negotiable instrument rule (*id.* § 70B-2-303; *see also* UTAH CODE ANN. § 70C-2-204 (Supp. 1985)) the debtor was not obligated to pay the credit service charge or loan finance charge. UTAH CODE § 70B-5-202(1) (Code*Co 1984-1985) (repealed 1985). Provi-

debtor's right to a refund in the event of excess charges[265] and the provision for a penalty in the event the creditor fails to refund the excess charges within a reasonable time[266] remain the same as in prior law.[267]

b. [§ 3.7.2.2] Assignees of the Creditor

Section 70C-7-202 provides that where a civil action may be brought against the creditor for violations under title 70C, the action may be brought against the creditor's assignee if the violation "is apparent on the face of the instrument assigned."[268]

c. [§3.7.2.3] Refunds and Penalties as Set-Off to Obligations

Section 70C-7-203 enables a debtor to set off against the debtor's obligation any refunds or penalties to which the debtor is entitled under part 2 of chapter 7. This section also allows the debtor to raise as a defense to a suit on the obligation the refunds or penalties due without regard to the statute of limitations prescribed by § 70C-7-205.[269]

d. [§ 3.7.2.4] Statute of Limitations

Section 70C-7-205 states that no action under title 70C may be brought more than one year after the occurrence of the violation. This provision differs significantly from previous law which provided a confusing array of different limitation periods for the different kinds of loans.[270] The new limitation does not bar a person from asserting a violation of the title as a matter of defense by way of set-off or recoupment.[271]

e. [§ 3.7.2.5] Creditors' Defenses

Section 70C-7-206 allows a creditor to avoid liability for violation of title 70C by showing that the violation was unintentional or the result of

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sion for this remedy does not appear in the new code.

Prior law also set forth the rights of an employee whose employer had discharged him in violation of the single indebtedness rule (*id.* § 70B-5-106). *Id.* § 70B-5-202(6). While the new code includes a rule similar to the single indebtedness rule (UTAH CODE ANN. § 70C-7-104 (Supp. 1985)), it does not contain a provision describing an aggrieved employee's rights.

[265]UTAH CODE ANN. § 70C-7-202(1)(Supp. 1985)

[266]*Id.* § 70C-7-202(2).

[267]UTAH CODE § 70B-5-202(3),(4) (Code*Co 1984-1985) (repealed 1985).

[268]*See supra* notes 174-79 and accompanying text.

[269]UTAH CODE ANN. § 70C-7-203 (Supp. 1985).

[270]UTAH CODE § 70B-5-202(1),(2),(4) (Code*Co 1984-1985) (repealed 1985).

[271]UTAH CODE ANN. § 70C-7-205 (Supp. 1985).

bona fide error.[272] The new code also provides that if, within 60 days after discovering an error and before the institution of an action under chapter 7 or the receipt of notice of the error from the debtor, the creditor notifies the debtor of the error and takes the steps necessary to correct the account, then the creditor has no liability.[273]

f. [§ 3.7.2.6] Civil and Criminal Penalties

Prior law set out detailed civil penalties for violation of state and federal disclosure provisions.[274] These penalties are not imposed by the new code. Also, as previously mentioned, the new code does away with the previous section on criminal penalties.[275]

H. [§ 3.8] CHAPTER EIGHT – ADMINISTRATION

Chapter 8 consists of two parts: Powers and Functions of the Department of Financial Institutions, and Notification and Fees.

1. [§ 3.8.1] Powers and Function of the Department

a. [§ 3.8.1.1] State Regulation of Disclosure

The disclosure and advertising provisions under the Utah U3C were eliminated in 1983, requiring creditors to look solely to the TIL for basic statutes governing disclosure in consumer credit transactions.[276] This action eliminated the confusing overlap of state and federal statutory disclosure provisions. However, until the recent enactment of the new code, the Department of Financial Institutions ("Department") retained the mandate from the legislature to "adopt rules not inconsistent with the Federal Consumer Credit Protection Act to assure a meaningful disclosure of credit terms."[277] Creditors were thus faced with the prospect of complying with two sets of regulations.[278]

The new code does not contain language requiring the Department to adopt a separate scheme of state rules regulating disclosure in con-

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[272]*Id.* § 70C-7-206(1).

[273]*Id.* § 70C-7-206(2).

[274]UTAH CODE § 70B-5-203 (Code*Co 1984-1985) (repealed 1985). Current law does away with most state regulation of disclosure requirements. *See infra* text accompanying notes 276-82.

[275]UTAH CODE, Chapter 7, Part 3 (Code*Co 1984-1985) (repealed 1985). However, the law relative to fraud, misrepresentation, duress and coercion is specifically intended as part of the underlying policy of the code. *See supra* text accompanying note 98.

[276]Repealed by 1983 Utah Laws ch. 343, § 37. *See* UTAH CODE § 70B-3-301 (Code*Co 1984-1985) (repealed 1985).

[277]UTAH CODE § 70B-6-104(2) (Code*Co 1984-1985) (repealed 1985).

[278]Comment, *supra* note 53, at 402.

sumer credit contracts. Section 70C-8-102 states simply that the Department may "adopt, amend, and repeal rules to supplement, interpret, or carry out the provisions of this title."[279] Since title 70C contains only minor provisions regulating disclosure of credit terms,[280] the inference is that few, if any, Utah regulations governing disclosure will be required or permitted. In addition, the new code reinforces its recognition of Federal law in the area of disclosure (including regulation Z) by giving the Department authority to "adopt rules that supersede any provisions" of title 70C which are in or come into conflict with the C.C.P.A. or regulation Z.[281] Notwithstanding this apparent deference to Federal law, the Department of Financial Institutions has recently published state rules prescribing additional disclosure requirements for variable interest rates and for refunds of unearned credit insurance premiums.[282]

b. [§ 3.8.1.2] Evidence of Violations

The new code states that "the department shall conduct studies and examinations of parties subject to this title it deems necessary and appropriate . . . to determine whether violations of this title . . . are occurring."[283]

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[279]UTAH CODE ANN. § 70C-8-102(1)(e) (Supp. 1985).

[280]*See e.g. supra* notes 238-40 and accompanying text.

[281]UTAH CODE ANN. § 70C-8-102(2) (Supp. 1985).

[282]Proposed rule UCCR:014 prescribes allowable terms and disclosure requirements for variable and adjustible interest rates in consumer credit contracts. UTAH ADMIN. R. UCCR:014 (1985) (proposed Dec. 3, 1985). *See supra* note 228. With regard to initial disclosures of indices used in variable rate formulas (other than internal indices), the new rule requires disclosure of both the method used to calculate a particular index and the rates and/or values from which the index is derived. UTAH ADMIN. R. UCCR:014.4 (1985) (proposed Dec. 3, 1985). The official staff commentary to Regulation Z states that the creditor "need not give . . . an explanation of how the index is determined or provide instructions for obtaining it." Official Staff Interpretations, 12 C.F.R. § 226, Supp. I § 226.6 Comment 6(a)(2)-5 (1985). The Utah rule appears to require greater disclosure than Regulation Z.

With regard to subsequent disclosures, the proposed rule requires that each regular statement of account disclose "the rate or weighted average of rates applicable to the account during the period covered by the statement." *Id.* UCCR:014.5(B). The creditor is also required to make "[a]ll information pertinent to setting or calculating the rate available to the borrower at all times during the term of the credit agreement." *Id.* UCCR:014.3(B).

A second proposed amended rule recently issued by the Department of Financial Institutions requires that creditors or their assignees make certain disclosures to debtors who are entitled to refunds of unearned consumer credit insurance premiums. For a discussion of the specific disclosures required by this rule *see supra* note 244.

[283]UTAH CODE ANN. § 70C-8-103(1) (Supp. 1985)

c. [§ 3.8.1.3] Investigatory Powers

The new code retains the broad investigatory powers given to the administrator in the previous statute.[284] Based on probable cause, the Department may administer oaths, subpoena witnesses, adduce evidence under penalty of perjury, and require the production of any matter which is relevant to its investigation into whether a violation has occurred.[285]

d. [§ 3.8.1.4] Enforcement Powers

Section 70C-8-104 is the new code's provision for the enforcement power of the Department and represents a significant departure from prior law. Prior law allowed the Department to order a creditor to cease and desist from engaging in violations of title 70B only "after notice and hearing."[286] The new code does away with the "notice and hearing" requirement, stating simply that if the Department "determines" that violations are occurring or have occurred, it may give a cease and desist order.[287] In addition, even where the Department has reasonable cause to believe that a violation is *about* to occur, it may issue the order.[288] Violations include violation of "any rule, regulation, order, or any condition imposed in writing in connection with the granting of any application or other request by the party, or any federal statute, rule, or regulation pertaining to consumer credit. . . ."[289] Where there have been serious violations, the Department may keep the party from making further extensions of credit.[290]

The Department is required to afford an opportunity for a hearing only if the party who has allegedly violated title 70C makes a request for a hearing within 30 days after receiving notice of the allegations.[291]

The Department's powers with respect to temporary orders are also expanded under the new code. Prior law required the Department to "apply to the court for appropriate temporary relief . . . pending final

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[284]*See* UTAH CODE § 70B-6-106 (Code*Co 1984-1985) (repealed 1985).

[285]UTAH CODE ANN. § 70C-8-103(2) (Supp. 1985).

[286]UTAH CODE § 70B-6-108(1) (Code*Co 1984-1985) (repealed 1985).

[287]UTAH CODE ANN. § 70C-8-104(1) (Supp. 1985).

[288]*Id.*

[289]*Id.*

[290]*Id.* The new code makes clear, however, that while the Department has power to issue cease and desist orders and, in some instances, to keep a party from extending credit, it cannot award damages or penalties against a creditor. *Id.* § 70C-8-104(4).

[291]*Id.* § 70C-8-104(2). As previously mentioned, prior law forced the department to conduct a hearing before any order could be issued. *See supra* text accompanying note 286.

determination of proceedings."[292] The new code allows the *Department* to issue the temporary order "at the commencement of proceedings or at any time thereafter" when the Department determines that a practice is unlawful and should be enjoined during the pendency of proceedings incident to the allegation.[293] The order is "fully binding" on the party charged with a violation until either the proceedings are concluded or the order is dissolved by the Department.[294]

A party against whom the temporary order is brought can appeal the order and the Department has only 10 days after the party's request is received to convene a hearing (unless a mutual agreement to hold the hearing at another time is reached).[295] The order must be accompanied by findings and conclusions in support of it and cannot be issued unless the Department finds from statements of facts supported by a sworn statement or the records of the party subject to the order that consumers will be irreparably harmed if the order is not issued.[296]

All orders by the Department must be in writing, served "upon the party affected," and specify the effective date of the order.[297] An order continues until it is dissolved by the Department or terminated by court order.[298] Orders may be enforced ex parte and without notice only after the Department makes application to a court of general jurisdiction in the county in which an office or residence of the affected party is located and after the court issues an order to comply.[299]

e. [§ 3.8.1.5] Judicial Review

Section 70C-8-105 sets forth the requirements for judicial review of Department action. Any party aggrieved by any rule, order, temporary order, decision, ruling or other act or failure to act is entitled to judicial review.[300] The aggrieved party must apply for review either within 30 days after receiving notice of "a rule, order, temporary order, decision, or other ruling" or, if the Department has failed to act upon the aggrieved

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[292]UTAH CODE § 70B-6-112 (Code*Co 1984-1985) (repealed 1985). An order could be issued only after the court found that there was reasonable cause to believe that a party was engaging in or was likely to engage in the conduct sought to be restrained.

[293]UTAH CODE ANN. § 70C-8-104(3) (Supp. 1985).

[294]*Id.*

[295]*Id.*

[296]*Id.*

[297]*Id.* § 70C-8-104(5).

[298]*Id.*

[299]*Id.*

[300]*Id.* § 70C-8-105(1).

party's request or application, then within 120 days after the Department has failed to act upon the request or application.[301] The application for review by the court may be made in either a court of competent jurisdiction in the county in which the party is located or in the Third District Court.[302]

A party need not exhaust its administrative remedies where it can show to the court "that it may be subject to potential irreparable injury" from "any proposed rule or order of the department."[303] Such a showing must be made in the Third District Court.[304]

All reviews of Department action are to be made "based on the record made before the department" unless the court finds good cause to admit additional evidence.[305]

The new code provides that the mere filing of an application for judicial review will not act to stay such actions if it finds that possible harm to all interested parties will be less if the stay is imposed or if the applicant and the Department stipulate to the stay.[307]

2. [§ 3.8.2] Notification and Fees

a. [§ 3.8.2.1] Applicability

The notification and fee requirements of the new code apply to "all creditors" and to "all parties having an office or place of business" in Utah who take assignment of payments from debtors and who undertake the direct collection of those payments or the enforcement of rights arising from consumer credit transactions.[308]

b. [§ 3.8.2.2] Notification

Parties subject to the notification and fee requirements must file notification with the Department at least 30 days *before* commencing business in the state.[309] After that, filing is required on or before January 31 of each year.[310]

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[301]*Id.* Prior law forced the department to send the entire record upon which its order was based into a court of competent jurisdiction within 30 days after the petition for review was received. *See* UTAH CODE § 70B-6-108(2) (Code*Co 1984-1985) (repealed 1985).

[302]UTAH CODE ANN. § 70C-8-105(1) (Supp. 1985).

[303]*Id.* § 70C-9-105(2).

[304]*Id.*

[305]*Id.* § 70C-8-105(3).

[306]*Id.* § 70C-8-105(4).

[307]*Id.*

[308]*Id.* § 70C-8-201.

[309]*Id.* § 70C-8-202(1). Prior law stated that filing had to be made "within 30 days *after* commencing business in the state." UTAH CODE § 70B-6-202(1) (Code*Co 1984-1985) (repealed 1985). (Emphasis added).

[310]UTAH CODE ANN. § 70C-8-202(1) (Supp. 1985).

The code lists the items which the notification must contain.[311] These are substantially the same as required by the old code.[312] Failure to file the notification and to pay the fees required by Part 2 of Chapter 8 means that the non-complying party is prohibited from extending credit to consumers in the state of Utah.[313] Willful violation of the notification and fee requirements makes the violating party guilty of a class A misdemeanor.[314]

c. [§ 3.8.2.3] Fee Requirements

The new law subjects all persons subject to Part 2 of Chapter 8 to a $25 base annual fee.[315] A party will be required to pay an additional $7 for each $100,000 or part thereof in excess of $100,000 of the original principal balance of all consumer credit it extended during the preceding calendar year.[316]

In addition to filing a notification, a party may be required to "make its books and records relating to consumer credit available to the department or its authorized representatives for examination."[317] If this should occur, the party will be required to pay the Department a fee, based on the hourly rate set by the Department, for each examiner sent by the Department to examine the party's books.[318]

Fees paid or owed to the Department are not refundable, even when a party ceases to extend credit to consumers during the period covered by the fee.[319]

I. [3.9] CHAPTER NINE – COUNCIL OF ADVISORS ON CONSUMER CREDIT

Prior law created a council of advisors on consumer credit.[320] The statute designated the number of members, specified that a chairman be selected, and directed that the governor seek members of the council from the various segments of the consumer credit industry and the public in order "to achieve a fair representation."[321] Prior law also set forth the

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[311]*Id.* § 70C-8-202(1)(a)-(g).

[312]*See* UTAH CODE § 70B-6-202(1)(a)-(g) (Code*Co 1984-1985) (repealed 1985).

[313]UTAH CODE ANN. § 70C-8-202(3) (Supp. 1985).

[314]*Id.*

[315]*Id.* § 70C-8-203(1).

[316]*Id.*

[317]*Id.* § 70C-8-203(2). This section is also applicable to any depository institution subject to Title 70C.

[318]*Id.*

[319]*Id.* § 70C-8-203(3).

[320]UTAH CODE § 70B-6-301(1) (Code*Co 1984-1985) (repealed 1985).

[321]*Id.* § 70B-6-301(2).

term of office for council members and set out procedures for filling vacancies.[322]

In contrast to prior law, § 70C-9-107 states simply that the Governor "may convene a council of advisors on consumer credit" and that he "determines when a council should be convened, how long it will function, who will be its members, how long each member will serve, and what matters will be considered and reported on."[323]

IV. [§ 4] CONCLUSION

The success of the new Utah Consumer Credit Code will eventually be measured by comparing its stated objectives with the degree to which those objectives are achieved. The objectives will be achieved only to the extent that the underlying structure of the new code permits them to be. The critical question then is whether the new code provides an adequate framework for achieving its "underlying purposes and policies."

A. [§ 4.1] WILL THE NEW CODE PROMOTE CONSUMER UNDERSTANDING?

The first stated purpose of the code is "to further consumer understanding of the terms of credit transactions."[324] The new law addresses this objective in three ways. First, the new code continues to deal with the disclosure of terms in consumer credit contracts. Although it does not contain any *general* provisions regarding disclosure, the new code does contain enough *specific* disclosure requirements to give the impression that the state has not totally relinquished its control over credit disclosures.[325] In addition, as noted previously, the Department of Financial Institutions continues to play a role in credit disclosure by issuing regulations which are more extensive than federal disclosure requirements.[326] Though arguably curtailed, the framework for continued state regulation of credit disclosure appears to be alive and well. Whether these extra state disclosures are necessary is a subject of current debate.[327]

Second, the new code addresses the issue of "consumer understanding" by simply being less complex than the prior law. Characterized as "unintelligible to the average consumer and to many creditors,"[328] the

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[322]*Id.*

[323]UTAH CODE ANN. § 70C-9-101 (Supp. 1985).

[324]*Id.* § 70C-1-102(2)(a).

[325]*See supra* text accompanying notes 276-82.

[326]*See supra* note 282.

[327]The issue is whether the benefits of the additional state disclosures outweigh the costs imposed. *See e.g.* Miller and Rohner, *supra* note 49, at 1428-29. *See also infra* text accompanying note 344.

[328]Department interview.

length and complexity of the prior code was a barrier to credit awareness. The new code is better organized than prior law and the statutory language is more concise. The code has already proven to be more accessible than its predecessor.[329]

Third, the new code addresses the issue of "consumer understanding" by specifically authorizing the Department of Financial Institutions "to counsel with persons and groups on their rights and duties" under the code,[330] and to "establish programs for the education of consumers with respect to credit practices and problems."[331] Whether the Department will have the resources or will perceive the need to achieve these commissions from the legislature remains to be seen.

B. [§ 4.2] WILL THE NEW CODE FOSTER COMPETITION?

Consumer understanding bears directly on the next stated purpose of the code which is "to foster competition among suppliers of credit."[332] The notion is that informed consumers are likely to search out the most economical credit available. The extent to which consumers are informed about credit is in part a function of federal and state disclosure provisions and state consumer credit education. Thus, to the extent the state is involved in regulating disclosure and in educating its citizenry, it may have an impact on competition.

The elimination of finance charge ceilings may also have an effect on the competition among suppliers of consumer credit. However, the current competition in the market for consumer credit is largely the result of various economic, technological, and demographic factors mostly beyond the state's control. Recent elimination of finance charge ceilings is really just a delayed response to these forces which had been building for some time.[333]

C. [§ 4.3] WILL THE NEW CODE PROHIBIT UNFAIR PRACTICES?

A third stated purpose of the code is "to prohibit certain unfair practices."[334] The new code presents a mixed bag of benefits and concerns in this area, strengthening certain consumer protections while decreasing others. For example, the code gives the Department of Financial Institu-

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[329]*See supra* note 88.

[330]UTAH CODE ANN. § 70C-8-102(a) (Supp. 1985).

[331]*Id.* § 70C-8-102(c).

[332]*Id.* § 70C-1-102(a).

[333]*See* Johnson, *supra* note 78, at 1366.

[334]UTAH CODE ANN. § 70C-1-102(b) (Supp. 1985).

tions greater powers with respect to enjoining unfair practices. Where serious violations have occurred, the Department may even keep a creditor from making further extensions of credit.[335] It remains to be seen, however, whether the Department will have the resources or the need to employ its new found power. With regard to specifically prohibited practices, the new code disallows the use of the rule of 78s in computing unearned interest and protects consumers who prepay closed-end debt from the non-refundability of pre-paid finance charges.[336] The new code also requires certain new disclosures beyond those required by federal law.[337] Additionally, the code places restrictions on creditors who desire to change the terms of open-end credit contracts secured by real property.[338]

In contrast to these new protections, the new code deletes several limitations which prior law imposed on consumer credit contracts. Some of these deletions, like the elimination of the final balance limitation on consumer leasing transactions,[339] are in deference to the code's fourth objective, discussed below, which is to avoid duplication of the various consumer credit laws. Other deletions, such as the elimination of remaining interest ceilings,[340] reflect policy decisions on the part of state legislators to decrease state control over the ability of parties to contract with each other. There are some deletions, however, which leave the law ambiguous and invite litigation. In particular, the removal of the anti-waiver-by-agreement clause from the code opens up the issue of whether parties may agree to vary application of code provisions under authority of supplemental law.[341] Still other deletions leave questions about adequate consumer protection. Of particular concern is the absence of specific language prohibiting parties to consumer credit sales contracts from making any agreement which would limit the buyer's defenses against a subsequent assignee of the seller.[342] Finally, a few deletions leave questions about certain remedies previously available under the old code.[343]

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[335]*See supra* text accompanying note 290.

[336]*See supra* text accompanying notes 203-12.

[337]*See supra* note 228 and text accompanying notes 238-40.

[338]*See supra* text accompanying note 225.

[339]*See supra* text accompanying note 170.

[340]*See supra* text accompanying notes 74-83.

[341]*See supra* text accompanying notes 101-05.

[342]*See supra* text accompanying notes 177-79.

[343]*See supra* note 364.

D. [§ 4.4] WILL THE NEW CODE AVOID THE DUPLICATION OF LAW?

The fourth objective of the new code is "to avoid the duplication of laws and regulations pertaining to consumer credit between state and federal authorities and to supplement applicable federal laws and regulations."[344] The overlap between state and federal law in the area of consumer credit generates complexity and a lack of certainty for suppliers of consumer credit. The complex and uneven laws in turn increase the cost of consumer credit protection. The new Utah code does eliminate much of the duplication between state and federal law which was a hallmark of the prior code. Additionally, with no general provision for the regulation of consumer credit disclosure, the code appears to completely defer to the federal law in this area. However, as previously discussed, the state still retains a hold on disclosure of terms in consumer credit transactions. The real question is whether these extra state disclosures are worth the additional costs which they impose.[345] For example, the disclosures imposed by the Department of Financial Institutions on creditors who offer variable rates of interest are greater than those required by federal law.[346] One must wonder whether consumers will even notice, much less be able to appreciate, such information. If the indices required by the state will adequately protect consumers from variable rates which are subject to the control of the lender then why are the extra disclosures necessary?

An additional concern related to the duplication of laws is the extent to which the consumer credit law is repetitive of other state law. The new code does away with several prior code sections which were duplicative of the common law and provisions in the U.C.C.. However, elimination of certain language related to the territorial application of the new code leaves an important conflicts-of-law question unanswered.[347]

The new code represents a great improvement over prior law in terms of organization and clarity. It also provides several important consumer protections and marks a positive step toward eliminating the duplication between Utah consumer credit provisions and other provisions of federal and state law. However, by failing to include certain language contained in the prior code, the present structure of the code creates needless ambiguity and in certain instances fails to answer real questions about consumer protection and remedies. In addition, by keeping the door open to further state regulation of consumer credit disclosure, the new code's objective of achieving uniformity between state and federal law may be circumvented.

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[344]UTAH CODE ANN. § 70C-1-102(c) (Supp. 1985).

[345]*See supra* note 327.

[346]*See supra* note 228.

[347]*See supra* note 120.