

NATIONAL CONSUMER ACT

First Final Draft

OFFICIAL TEXT

With Comments



National Consumer Law Center

Boston College Law School

Brighton, Massachusetts 02135

**PREFATORY NOTE
TO THE FIRST FINAL DRAFT
OF THE
NATIONAL CONSUMER ACT**

Advocates of greater consumer protection for consumers in the United States long have known that extensive revision of the laws affecting consumers is necessary. The thrust of those laws necessarily must be to equalize the bargaining position between industry and consumers. One of the areas in which the greatest abuses have been practiced has been consumer credit. Consumer advocates waited with great hope for the work product of the National Conference of Commissioners on Uniform State Laws after the commencement of its consumer credit project some four years ago. Clearly that group had the experience, resources and expertise necessary to do the job. They produced at the end of 1968, with some revisions in early 1969, the Uniform Consumer Credit Code.

Unfortunately, the Special Committee responsible for drafting the Uniform Consumer Credit Code spent much of its time involved in political considerations. First, the repeated drafts reflected an effort to placate the credit industry which might oppose the Code upon its introduction in state legislatures. Thus, the Code reflects a series of compromises and, at best, is a codification of credit practices as they existed. Second, the Committee became concerned with action being taken at the federal level. The Special Committee devoted much energy to resisting the Federal Truth-in-Lending Act and, once that was enacted, to encouraging enactment of their Code so that the enacting state might thereby usurp the Federal law under Section 123 of the Federal Act. The fact that legislation continues to be introduced into Congress to deal with consumer credit problems is indicative of the omissions and weaknesses of the Credit Code.

At a conference of some fifty-five consumer experts from all over the country held in Washington on June 20, 1969, and co-sponsored by the

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Center and by the National Legal Aid and Defender Association, the consensus was that the Uniform Consumer Credit Code was inadequate and required substantial revision. The newly created National Consumer Law Center was asked to undertake this project with the aid of all of those experts who were willing to participate in the drafting. The National Consumer Act is the result.

While the Center sought the views of a wide spectrum of people during the course of drafting its Act, it relied heavily upon a special committee of experts who have devoted considerable amounts of time to the problems involved. Those people are as follows:

Erma Angevine, Executive Director, Consumer Federation of America

Berlin, Roisman and Kessler, a Washington law firm serving as counsel to the Consumer Federation of America and to the AFL-UAW

The Honorable George Brunn, Judge of the Municipal Court, Berkeley-Albany Judicial District, Berkeley, California

Ann Draper, Economist, AFL-CIO, Washington, D.C.

Richard A. Elbrecht, Coordinator of Research and Appeals, Legal Aid Society of Santa Clara County, San Jose, California

Meribeth Halloran, Staff Attorney, National Legal Services Project, Washington, D.C.

Robert J. Klein, Consumers Union, Mt. Vernon, N.Y.

Philip Schrag, Counsel, NAACP Legal Defense and Educational Fund, Inc., and Special Advisor to Mayor Lindsay on Consumer Affairs

THE RESEARCH REPORTED HEREIN WAS PERFORMED PURSUANT TO A GRANT WITH THE OFFICE OF ECONOMIC OPPORTUNITY, WASHINGTON, D.C. 20506. THE OPINIONS EXPRESSED HEREIN ARE THOSE OF THE AUTHOR AND SHOULD NOT BE CONSTRUED AS REPRESENTING THE OPINIONS OR POLICY OF ANY AGENCY OF THE UNITED STATES GOVERNMENT.

PREFATORY NOTE TO THE FIRST FINAL DRAFT

APPENDIX A

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**PREFATORY NOTE
TO THE FIRST FINAL DRAFT**

**APPENDIX B
POLICY ON REDRAFTING AND ADDITIONS**

January 1970

Dear Sir or Madam:

As the prefatory note indicates, this is the "First Final Draft" of the National Consumer Act. It is "final" in the sense that the committee of experts who drafted it felt that, with the voluminous experience and research dealing with consumer problems already extant, further study and discussion would serve no purpose. The problems themselves were never in dispute. Differences among committee members, when they existed, dealt with solutions, tended to be minimal, and were mostly a matter of degree.

The draftsmen are already aware that there are problems not dealt with in the Act which perhaps should have been. They also know that language in given cases may not be adequate to solve all of the problems intended. Still, the Act as written affords protection to consumers little thought of a decade, or even a few years, ago. At this writing, the Act is being considered for enactment in whole or in part in several states.

The National Consumer Law Center intends wide distribution of the Act over the next several months to all interested persons—far wider than the distribution of drafts of the Uniform Consumer Credit Code before it became "official" in 1968. If you have read this far, you are a person whose comments and suggestions concerning the Act are earnestly solicited. They need take no particular form and may deal with any part or all of the Act. When the comments tend to cease, the committee will reconsider each of the Act's provisions for possible redrafting and additions.

We at the Center and consumers everywhere are grateful for your interest.

Yours sincerely,
William F. Willier

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Graphic design and composition by The Heights, Boston College

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NATIONAL CONSUMER ACT

An Act

Relating to consumer transactions constituting the National Consumer Act; consolidating and revising certain aspects of the law relating to consumer credit transactions including consumer and other loans, consumer and other sales of goods, services and interests in land, and consumer leases; consolidating and revising certain aspects of the law relating to deceptive practises in consumer and other sales of goods, services and interests in land; revising the law relating to usury; regulating practices relating to insurance in consumer credit transactions; providing for administrative regulation of certain consumer credit transactions; regulating credit reporting; regulating the practices of debt collection; and repealing inconsistent legislation.

ARTICLE 1
GENERAL PROVISIONS
AND DEFINITIONS

PART 1

SHORT TITLE, CONSTRUCTION, GENERAL PROVISIONS

Section

- 1.101 Short Title
- 1.102 Purposes; Rules of Construction
- 1.103 Applicable Law
- 1.104 Construction Against Implicit Repeal
- 1.105 Severability
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- 1.102 Purposes; Rules of Construction
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- 1.106 Waiver; Agreement to Forego Rights; Settlement of Claims
- 1.107 Effect of Act on Powers of Organizations

Section 1.101 [SHORT TITLE]

This Act shall be known and may be cited as National Consumer Act.

Comment

1. Because the Center has substantially revised the scope and provisions of the Uniform Consumer Credit Code, the new title, "National Consumer Act" was given to this statute so that the two may be kept distinct.

Section 1.102 [PURPOSES; RULES OF CONSTRUCTION]

(1) This Act shall be liberally construed and applied to promote its underlying purposes and policies.

(2) The underlying purposes and policies of this Act are:

- (a) to simplify, clarify and modernize the law governing consumer sales, retail installment sales, consumer credit, small loans, usury, credit reporting and debt collections.
- (b) to protect consumers against unfair and deceptive practices by sellers, suppliers of consumer credit, debt collectors and credit reporting agencies;
- (c) to permit and encourage the development of fair and economically sound consumer credit practices; and
- (d) to conform the regulation of consumer credit transactions to the policies of the Federal Consumer Credit Protection Act.

(3) A reference to a requirement imposed by this Act includes reference to a related rule of the Administrator adopted pursuant to this Act.

Comment

1. A true consumer statute must take into account regional and state

needs. Therefore, some of the original purposes given for the Uniform Consumer Credit Code have been omitted, noticeably to create "uniformity". The thrust of the purposes stated above is to give protection to consumers and correct the one-sided bargaining position often held by merchants.

Section 1.103 [APPLICABLE LAW]

(1) Unless displaced by the particular provisions of this Act, the Uniform Commercial Code and the principles of law and equity, including the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause supplement its provisions.

(2) Unless terms used in this Act are defined by particular provisions of this Act, they shall have the meaning given them in the Uniform Commercial Code, if they are there defined.

(3) Unless displaced by the particular provisions of this Act, parties to a consumer transaction have all of the obligations, duties, rights and remedies provided in the Uniform Commercial Code which apply to the transaction.

Comment

1. Many of the definitions which appear throughout the Uniform Commercial Code have been well thought out and tested in practice. The National Consumer Act must necessarily work consistently with the Uniform Commercial Code. Therefore, the draftsmen have taken pains to use Commercial Code terminology wherever different terms or definitions were not required. This Section makes clear for others that the Code's definitions will apply.

Act completely displaces provisions of the Commercial Code, Subsection (3) makes it clear that parties retain all of the obligations, duties, rights and remedies under the Code. For example, the Act prohibits the disclaimer of implying warranties and the exclusion of remedies for the breach of new warranties. Those warranties and those remedies, to the extent that they are not specifically changed by this Act, are those provided for in the Commercial Code.

2. To avoid the argument that this

Section 1.104 [CONSTRUCTION AGAINST IMPLICIT REPEAL]

This Act being a general act intended as a unified coverage of its subject matter, no part of it shall be deemed to be impliedly repealed by subsequent legislation if such construction can reasonably be avoided.

Section 1.105 [SEVERABILITY]

If any provision of this Act or the application thereof to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this Act which can be given effect without

the invalid provision or application, and to this end the provisions of this Act are severable.

Section 1.106 [WAIVER; AGREEMENT TO FOREGO RIGHTS; SETTLEMENT OF CLAIMS]

(1) Except as otherwise provided in this Act, a consumer may not waive or agree to forego rights or benefits under this Act.

(2) A claim by a consumer against a creditor or seller for an excess charge, other violation of this Act, or civil penalty, or a claim against a consumer for default or breach of a duty imposed by this Act, if disputed in good faith, may be settled by agreement.

(3) A claim, whether or not disputed, against a consumer may be settled for less value than the amount claimed.

(4) A settlement in which the consumer waives or agrees to forego rights or benefits under this Act is invalid if the court as a matter of fact finds the settlement to be unconscionable. The competence of the consumer, any deception or coercion practiced upon him, the nature and extent of the legal advice received by him, and the value of the consideration are relevant to the issue of unconscionability.

Comment

1. The main change made in this Section is to provide that unconscionability in connection with a settlement is a matter of fact rather than of law. This should be read with the specific provisions dealing with unconscionability in Section 5.107 and with the Administrator's Powers in Section 6.109.

Section 1.107 [EFFECT OF ACT ON POWERS OF ORGANIZATIONS]

(1) This Act prescribes maximum charges for all creditors extending consumer credit including consumer credit sales, consumer loans and consumer leases and displaces existing limitations on the powers of those creditors based on maximum charges.

(2) With respect to sellers of goods or services, lessors of goods, small loan companies, licensed lenders, consumer and sales finance companies, industrial banks and loan companies, and commercial banks and trust companies, this Act displaces existing limitations on their powers based solely on amount or duration of credit.

(3) Except as provided in subsection (1) [and in the Article on Effective Date and Repealer (Article 9)], this Act does not displace limitations on powers of credit unions, savings banks, savings and loan associations, or other thrift institutions whether organized for the profit of shareholders or as mutual organizations.

(4) Except as provided in subsections (1) and (2) [and in the Article on Effective Date and Repealer (Article 9)], this Act does not displace:

- (a) limitations on powers of supervised financial organizations (subsection (38) of Section 1.301 with respect to the amount of a loan to a single borrower, the ratio of a loan to the value of collateral, the duration of a loan secured by an interest in land, or other similar restrictions designed to protect deposits, or
- (b) limitations on powers an organization is authorized to exercise under the laws of this State or the United States.

PART 2

SCOPE AND JURISDICTION

Section

- 1.201 Territorial Application
- 1.202 Exclusions
- 1.203 Jurisdiction and Service of Process

Section 1.201 [TERRITORIAL APPLICATION]

(1) Except as otherwise provided in this section, this Act applies to consumer transactions made in this State and to modifications including refinancings, consolidations, and deferrals, made in this State, of consumer credit transactions, wherever made.

(2) For the purposes of this Act a consumer transaction or modification of a consumer transaction is made in this State if

- (a) a writing signed by the consumer and evidencing the obligation is received by the merchant in this state;
- (b) the merchant negotiates in this state personally or by mail, telephone or otherwise, for a transaction with a consumer consummated outside the State for the purpose of evading or avoiding this Act.

(3) With respect to transactions entered pursuant to an open end credit plan, this Act applies if the consumer's communication or indication of his intention to establish the plan is received by the creditor in this State. If no communication or indication of intention is given by the consumer before the first transaction this Act applies if the creditor's communication notifying the consumer of the privilege of using the credit plan is mailed or personally delivered in this State.

(4) The Parts on Limitations on Creditors' Remedies (Parts 1 and 2) of the Article on Remedies and Penalties (Article 5) apply to actions or other proceedings brought in this State to enforce rights arising from consumer transactions or extortionate extensions of credit, wherever made.

(5) If a consumer transaction, or modification thereof, is made in another state to a person who is a resident of this State when the transaction or modification is made, the following provisions apply as though the transaction occurred in this State:

- (a) a creditor, or assignee of his rights, may not collect charges through actions or other proceedings in excess of those

permitted by the Article on Consumer Credit Transactions (Article 2); and

- (b) a merchant, or assignee of his rights, may not enforce rights against the consumer with respect to the provisions of agreements which violate the provisions on Limitations on Agreements and Practices (Part 4) of the Article on Consumer Credit Transactions (Article 2) and the Article on Sales Practices (Article 3).

(6) Except as provided in subsection (4) a consumer transaction, or modification thereof, made in another state to a person who was not a resident of this State when the consumer transaction or modification was made is valid and enforceable in this State according to its terms to the extent that it is valid and enforceable under the laws of the state applicable to the transaction.

(7) For the purposes of this Act, the residence of a consumer is the address given by him as his residence in any writing signed by him in connection with a consumer transaction. The given address is presumed to be unchanged until the merchant knows or has reason to know of a new or different address.

(8) Notwithstanding other provisions of this section:

- (a) except as provided in subsection (4), this Act does not apply if the consumer is not a resident of this State at the time of a consumer transaction and the parties then agree that the law of his residence applies; and
- (b) this Act applies if the consumer is a resident of this State at the time of a consumer transaction and the parties then agree that the law of this State applies.

(9) Except as provided in subsection (8), the following terms of a writing executed by a consumer are invalid with respect to consumer transactions, or modifications thereof, to which this Act applies:

- (a) that the law of another state shall apply;
- (b) that the consumer consents to the jurisdiction of another state; and
- (c) that fixes venue.

(10) The following provisions of this Act specify the applicable law governing certain cases:

- (a) applicability (Section 6.102) of the Part on Powers and Functions of Administrator (Part 1) of the Article on Administration (Article 6); and
- (b) applicability (Section 6.201) of the Part on Notification and Fees (Part 2) of the Article on Administration (Article 6).

Comment

1. The above section has been left largely intact as it appeared in the Uniform Consumer Credit Code.

2. The limitation to consumer credit transactions has been largely eliminated, and the term "consumer transaction" has been substituted, giving the provisions considerably larger scope. This is made necessary because the National Consumer Act includes within

its scope consumer transactions other than for credit.

3. Part 1 of Article 6 should be compared for the scope of the powers of the Administrator. They have been considerably expanded.

4. The provisions of this section should be compared with those on venue in Section 5.104.

Section 1.202 [EXCLUSIONS]

This Act does not apply to

- (1) extensions of credit to government or governmental agencies or instrumentalities; or
- (2) extensions of credit to organizations; or
- (3) transactions in which all parties are organizations; or
- (4) consumer credit transactions in which the amount financed exceeds \$25,000 or other consumer transactions in which the cash price exceeds \$25,000.

Comment

1. By combining the provisions of Articles 2 and 3 of the Uniform Consumer Credit Code and by including provisions, such as Article 3 dealing with sales practices, there is no longer any need to repeat the exclusions from the code in later articles. Therefore they are all included in Article 1.

2. Certain transactions excluded from the Uniform Consumer Credit Code and even from the Federal Consumer Protection Act are not excluded in the National Consumer Act. These are: transactions with utilities; sales of insurance by insurers; transactions with pawnbrokers; and transactions with small businessmen who have not "organized" into some legal entity. The only reason for excluding utilities is that they have extremely effective state and fed-

eral lobbies. Pawnbrokers, it is argued, operate outside the mainstream of consumer credit and are often allowed much higher finance charge by special statutes.

3. With the impetus of a number of agencies toward "black capitalism" and other "ghetto owned" businesses, the small businessman is in need of as much protection as the consumer. Still, there is no rational way to include the small businessman who has seen fit to organize himself, as by incorporation, without also including corporate giants who do not need the protection and would find the Act a hinderance. Therefore, this Act compromises by including individual businessmen but excluding organizations.

Section 1.203 [JURISDICTION AND SERVICE OF PROCESS]

(1) The [] court of this State may exercise jurisdiction over any merchant with respect to any conduct in this State governed by this Act or with respect to any claim arising from a transaction subject

to this Act. In addition to any other method provided by (rule or by) statute, personal jurisdiction over a merchant may be acquired in a civil action or proceeding instituted in the [] court by the service of process in the manner provided by this Section.

(2) If a merchant is not a resident of this State or is a corporation not authorized to do business in this State and engages in any conduct in this State governed by this Act, or engages in a transaction subject to this Act, he may designate an agent upon whom service of process may be made in this State. The agent shall be a resident of this State or a corporation authorized to do business in this State. The designation shall be in writing and filed with the Secretary of State. If no designation is made and filed or if process cannot be served in this State upon the designated agent, process may be served upon the Secretary of State, but service upon him is not effective unless the plaintiff or petitioner forthwith mails a copy of the process and pleading by registered or certified mail to the defendant or respondent at his last reasonably ascertainable address. An affidavit of compliance with this Section shall be filed with the clerk of the court on or before the return day of the process, if any, or within any further time the court allows.

(3) The agent designated under this Section or the Secretary of State, in the absence of the designation of an agent, shall constitute a proper person upon whom service of process may be made for the acquisition of personal jurisdiction over directors of the merchant in a cause of action brought pursuant to Article 5.

PART 3

DEFINITIONS

Section

1.301

General Definitions

- (1) "Actuarial method"
- (2) "Administrator"
- (3) "Agreement"
- (4) "Agricultural purpose"
- (5) "Amount financed"
- (6) "Cash price"
- (7) "Conspicuous"
- (8) "Consumer"
- (9) "Consumer credit sale"
- (10) "Consumer credit transaction"
- (11) "Consumer lease"
- (12) "Consumer loan"
- (13) "Consumer transaction"
- (14) "Credit"
- (15) "Creditor"
- (16) "Earnings"
- (17) "Finance charge"
- (18) "Goods"
- (19) "Lender"
- (20) "Lender credit card or similar arrangement"
- (21) "Loan"
- (22) "Merchandise certificate"
- (23) "Merchant"
- (24) "Official fees"
- (25) "Organization"
- (26) "Payable in installments"
- (27) "Person"
- (28) "Person related to"
- (29) "Personal property"
- (30) "Precomputable"
- (31) "Prepaid finance charge"
- (32) "Presumed" or "presumption"
- (33) "Required deposit balance"
- (34) "Sale of services"
- (35) "Security interest"
- (36) "Seller credit card"
- (37) "Services"
- (38) "Supervised financial organization"
- (39) "Transaction"

1.302 Definition: "Federal Consumer Credit Protection Act"

1.303 Index of Definitions in Act

Section 1.301 [GENERAL DEFINITIONS]

In addition to definitions appearing in subsequent Articles, in this Act

Comment

1. The definitions for an Act as comprehensive as the National Consumer Act or the Uniform Consumer Credit Code are probably its most vital provisions. All substantive provisions in the Act key to those definitions.

2. Because this Act removes the distinctions between sale credit and loan credit, Articles 2 and 3 of the Credit Code, many of the definitions which appeared scattered throughout those Ar-

ticles are here combined with the other general definitions. This procedure, of course, makes it very difficult to enact parts of a comprehensive statute to the exclusion of others. Thus, if a state legislature chose to enact a particular Article - for example, Article 3 on Sales Practices - relevant definitions from Section 1.301 would have to be included.

(1) "Actuarial method" means the method, defined by rules adopted by the Administrator, of allocating payments made on a debt between principal or amount financed and finance charge pursuant to which a payment is applied first to the accumulated finance charge and the balance is applied to the unpaid amount financed.

Comment

1. The "actuarial method" is that used most often in all kinds of credit transactions. It is typified by the ordinary home mortgage. In that case, finance charge is calculated on the unpaid

balance during each month. This is the method adopted by the Federal Truth in Lending Act and carried over into this Act.

(2) "Administrator" means the Administrator designated in the Article (Article 6) on Administration (Section 6.103).

(3) "Agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance.

Comment

1. The definition of "agreement" is probably one of the most vital in the National Consumer Act. By virtue of this definition and that of "transaction" (subsection (39)), the draftsmen have put great emphasis on the requirement

of "agreement" in its true sense between merchants and consumers. This, they believe, will remove the effectiveness of the typical 'boiler plate' or 'adhesion' contract.

(4) "Agricultural purpose" means a purpose related to the production, harvest, exhibition, marketing, transportation, processing, or

manufacture of agricultural products by a natural person who cultivates, plants, propagates, or nurtures the agricultural products. "Agricultural products" includes agricultural, horticultural, viticultural, and dairy products, livestock, wildlife, poultry, bees, forest products, fish and shellfish, and any products thereof, including processed and manufactured products, and any and all products raised or produced on farms and any processed or manufactured products thereof.

(5) "Amount financed" in a consumer credit transaction means the total of the following items from which any prepaid finance charge or required deposit balance has been excluded:

- (a) In a consumer credit sale, the cash price of the real or personal property or services, less the amount of any down payment whether made in cash or in property traded in, or, in the case of a consumer loan, the amount paid to, receivable by or paid or payable for the account of the consumer; and
- (b) In a consumer credit sale, the amount actually paid to or to be paid by the seller pursuant to an agreement with the buyer to discharge a security interest in or a lien on property traded in, and
- (c) If not included in the cash price or the amount of the loan,
 - (i) any applicable sales, use, excise, or documentary stamp taxes;
 - (ii) amounts actually paid or to be paid, by the creditor for registration, certificate of title, or license fees, and
 - (iii) additional charges permitted by Section 2.202.

Comment

1. Lacking in the Uniform Consumer Credit Code and, for that matter, in the Federal Act is a single term representing the amount of credit which the consumer actually will be getting. This Act adopts the term "amount financed" for any kind of consumer credit transaction. By and large, this is the amount to which finance charge is

added and upon which finance charge is usually computed.

2. "Amount financed" is especially important in Section 2.201, providing rate ceilings, and in Article 5 providing civil penalties based upon the "transaction total" which includes the amount financed.

(6) "Cash price" of real or personal property or services means the price at which such property or services is offered for sale by the seller to a cash buyer in the ordinary course of business, and may include

- (a) applicable sales, use, and excise and documentary stamp taxes,
- (b) the cash price of accessories or related services, such as

delivery, installation, servicing, repairs, alterations, and improvements, and

- (c) amounts actually paid or to be paid by the seller for registration, certificate of title, or license fees.

Comment

1. This definition is extremely important in consumer credit sales. A seller has an advantage over a lender in that he can increase his profit, even for the credit aspect of the transaction, simply by increasing his price. Lenders cannot increase the price of dollars. By using a single "cash buyer in the ordinary course of business" test, this definition affords the consumer and his attorney the opportunity to establish that credit sellers in fact charge higher

prices for credit sales than for cash sales. If they in fact do this, the difference constitutes finance charge which must be included and revealed as such, or else there will probably be a violation of the rate ceiling statute and no doubt a violation of the Federal Truth in Lending Act. Because sellers already have this advantage, the presumption that the stated cash price is in fact the cash price as it appears in the Credit Code has been omitted.

(7) "Conspicuous": A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. Whether a term or clause is conspicuous or not is for decision by the court.

(8) "Consumer" means a person other than an organization who seeks or acquires

- (a) business equipment for use in his business, or
- (b) real or personal property, services, money or credit for personal, family, household or agricultural purposes.

Comment

1. This is probably the most important definition in the entire Act. One definition after another and one substantive provision after another ties in to the concept of "consumer".

includes the small businessman acquiring business equipment. At the same time, all transactions with organizations as later defined are excluded, and business transactions even with individuals, other than farmers, are excluded if they involve such credit matters as acquisition of inventory, financing accounts receivable, and the like.

2. This definition expands the definition in the Credit Code by including transactions for agricultural purposes without exception. In addition, this Act

(9) "Consumer credit sale" includes any agreement in the form of a bailment of goods or lease of goods or real property if the bailee or lessee agrees to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the goods or real property involved and it is agreed that the bailee or lessee will become, or for no other or a nominal consideration has the option to become, the owner of the goods or real property upon full compliance with his obligations under the agreement.

Comment

1. This definition simply makes it clear that an installment sale which is put in the form of a bailment or lease is still a consumer credit sale for the purposes of this Act. This definition is a

combination of two definitions, one dealing with goods and the other with real estate, appearing in the Uniform Consumer Credit Code.

(10) "Consumer credit transaction" means a transaction between a merchant and a consumer in which real or personal property, services or money is acquired on credit and the consumer's obligation is payable in installments or for which credit a finance charge is or may be imposed, whether such transaction is pursuant to an open end credit plan or is a transaction involving other than open end credit. The term includes consumer credit sales, consumer loans, consumer leases and transactions pursuant to a seller or lender credit card.

Comment

1. This definition combines into one term what the Uniform Consumer Credit Code calls separately consumer credit sales, consumer loans, and consumer leases. By this definition the

single payment consumer credit transaction without any charge for that credit is excluded. This definition should be read in conjunction with the definition of "payable in installments".

(11) "Consumer lease" means a lease of real property or goods which a merchant makes to a consumer for a term exceeding four months.

(12) "Consumer loan" means a loan made by a lender to a consumer which is payable in installments or for which a finance charge is or may be imposed, and includes transactions pursuant to a lender credit card.

(13) "Consumer transaction" means a transaction in which one or more of the parties is a consumer.

(14) "Credit" means the right granted by a creditor to a consumer to defer payment of debt or to incur debt and defer its payment.

(15) "Creditor" means a person who regularly engages in consumer credit transactions or in arranging for the extension of consumer credit by, or procuring consumer credit from, third persons.

Comment

1. This definition includes the person who arranges for or procures credit as well as the person who actually extends the credit. This is essential if those who engage in, for example, credit sales also arrange for obtaining the down-payment from a lender. In this

case the seller is the creditor in both cases, and the lender is the creditor specifically with reference to the loan. This definition should be compared with the provisions on Interlocking Loans and Sales (Section 2.407).

(16) "Earnings" means compensation paid or payable to an individual or for his account for personal services rendered or to be rendered by him, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension, retirement, or disability program.

(17) "Finance charge" means the sum of all charges, payable directly or indirectly by the consumer as an incident to or as a condition of the extension of credit, whether paid or payable by the consumer, the creditor, or any other person on behalf of the consumer to the creditor or to a third party, including the following types of charges to the extent they are not permitted additional charges under Section 2.202:

- (a) Interest, time price differential, and any amount payable under a discount or other system of additional charges;
- (b) Service, transaction, activity, or carrying charge;
- (c) Loan fee, points, finder's fee, or similar charge;
- (d) Fee for an appraisal, investigation, or credit report;
- (e) Charges or premiums for credit life, accident, health or casualty insurance as provided in the Federal Consumer Credit Protection Act and Article 4 of this Act;
- (f) Charges or premiums for any other guarantee or insurance protecting the creditor against the consumer's default or other credit loss; and
- (g) Any charge imposed by a creditor upon another creditor for purchasing or accepting an obligation of a consumer if the consumer is required to pay any part of that charge in cash, as an addition to the obligation, or as a deduction from the proceeds of the obligation.

Comment

1. This definition is an exact copy of that appearing in Regulation Z issued by the Federal Reserve Board under the Truth in Lending Act. Probably the best generalization is that any charge made in connection with the transaction because it is a credit transaction is, and must be included in, the finance charge, and hence fall within the rate ceilings, unless it is specifically excluded under Section 2.202.

2. Under the Federal Act, a charge for credit life, accident, health or casualty insurance is part of the finance charge if it is a required charge. If it is

strictly voluntary, the consumer must sign an agreement to that effect. Further, under this Act such charges for insurance are part of the finance charge if the insurance is not one of the kind permitted by Article 4, exceeds the coverage or charges permitted by Article 4 or otherwise does not fall within the limitations of Article 4.

3. Subsection (g) deals with what are called "point of transaction" charges, but does not include the discount merchants pay when they transfer the obligations to the issuers of credit cards.

(18) "Goods" includes goods not in existence at the time the transaction is entered into and goods which are or are to become fixtures, but excludes money, chattel paper, documents of title, and instruments.

Comment

1. Under the Uniform Consumer Credit Code, "goods" included merchandise certificates. The effect of this inclusion was to treat them not as the equivalent of credit cards, which they are, but rather as tangible things. In this way the merchant could continue to

issue on other than open end credit. No such tacit approval should be permitted, and hence merchandise certificates are included within the definition of "seller credit card" and must be treated as open end transactions.

(19) "Lender" means a merchant regularly engaged in the business of making consumer loans.

(20) "Lender credit card or similar arrangement" means an arrangement or loan agreement other than a seller credit card, pursuant to which a lender gives a consumer the privilege of using a credit card, letter of credit, or other credit confirmation or identification in transactions out of which debt arises

- (a) by the lender's honoring a draft or similar order for the payment of money drawn or accepted by the consumer;
- (b) by the lender's payment or agreement to pay the consumer's obligations; or
- (c) by the lender's purchase from the obligee of the consumer's obligations.

(21) "Loan" includes

- (a) the creation of debt by the lender's payment of or agreement to pay money to the consumer or to a third party for the account of the consumer;
- (b) the creation of debt by a credit to an account with the lender upon which the consumer is entitled to draw immediately;
- (c) the creation of debt pursuant to a lender credit card or similar arrangement;
- (d) the forbearance of debt arising from a loan.

(22) "Merchandise certificate" means a writing issued by a seller not redeemable in cash and usable in its face amount in lieu of cash in exchange for goods or services.

(23) "Merchant" means a person who regularly advertises, distributes, offers, supplies or deals in real or personal property, services, money or credit in a manner which directly or indirectly results in or is

intended or designed to result in, lead to or induce a consumer transaction. The term includes but is not limited to a seller, lessor, manufacturer, arranger of credit, and any assignee of or successor to such person. The term also includes a person who by his occupation holds himself out as having knowledge or skill peculiar to such practices or to whom such knowledge or skill may be attributed by his employment as an agent, broker or other intermediary who holds himself out as having such knowledge or skill.

Comment

1. The definition of "merchant" is an extremely broad one and intentionally so. The term is used in connection with substantive provisions which are intended to affect all merchants subject to the Act. For example, it is used in connection with territorial jurisdiction, service of process, sales practices under Article 3, consumer remedies under Article 5 and the scope of jurisdiction and powers of the administrator under Article 6.

2. Necessarily the definition includes persons from out of state who attempt to affect consumers within the enacting state. This includes advertisers on a national basis, manufacturers who send products into a state, debt collectors operating from out of state, and credit reporting agencies who make reports concerning consumers within the state.

(24) "Official fees" means

- (a) fees and charges prescribed by law which actually are or will be paid to public officials for determining the existence of or for perfecting a security interest related to a consumer credit transaction; or
- (b) premiums payable for insurance in lieu of perfecting a security interest otherwise required by the creditor in connection with the consumer credit transaction, if the premium does not exceed the amount payable to the insurer and the fees and charges described in subsection (a) which would otherwise be payable.

Comment

1. This definition deviates from that in the Uniform Consumer Credit Code in two respects. First, the creditor may charge only for investigating and perfecting a security interest; charges for releasing or satisfying a security interest, as required by this Act, must be borne by the creditor. Second, he

may charge for premiums or insurance in lieu of perfecting, which does not include under the Commercial Code optional filing or additional protections (for example, filing for protection against another consumer buyer under Section 9-307(2)).

(25) "Organization" means a corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative, or association.

(26) "Payable in installments" means that payment is required or permitted by agreement to be made in

- (a) two or more periodic payments, excluding the down payment in a consumer credit sale, with respect to an obligation arising from a consumer credit transaction for which a finance charge is or may be imposed, or
- (b) four or more periodic payments, excluding the down payment in consumer credit sales, in any other consumer credit transaction. If any periodic payment other than the down payment under an agreement requiring or permitting two or more periodic payments is more than twice the amount of any other periodic payment, excluding the down payment, the consumer credit transaction is "payable in installments."

Comment

1. This definition is essential for inclusion within the scope of Article 2 credit transactions for which ostensibly there is no finance charge. By this definition, if the transaction is payable in four or more installments, it will be included with or without a finance

charge. This is in keeping with the Federal Truth in Lending Act which requires more than four installments for inclusion in such a case. In effect, then, the 30-60-90 day charge account will not be included if there is no finance charge.

(27) "Person" includes a natural person or an individual, and an organization.

(28) "Person related to" with respect to an individual means (a) the spouse of the individual, (b) a brother, brother-in-law, sister, sister-in-law of the individual, (c) an ancestor or lineal descendant of the individual or his spouse, and (d) any other relative, by blood or marriage, of the individual or his spouse who shares the same home with the individual. "Person related to" with respect to an organization means (a) a person directly or indirectly controlling, controlled by or under common control with the organization, (b) an officer or director of the organization or a person performing similar functions with respect to the organization or to a person related to the organization, (c) the spouse of a person related to the organization, and (d) a relative by blood or marriage of a person related to the organization who shares the same home with him.

(29) "Personal property" includes but is not limited to goods.

(30) "Precomputable" means that both the amount financed and the amount of finance charge can be computed at the time of the consumer credit transaction.

Comment

1. The term "precomputable" is used in only one place: to define credit "other than open end" in Section 2.104. It is simply one test for the typical installment credit transaction. The definition as it appears in the

Uniform Consumer Credit Code implies that the creditor must in fact make the computation. This may not be done in a given transaction, such as the typical real estate mortgage.

(31) "Prepaid finance charge" means any finance charge paid separately, in cash or otherwise, directly or indirectly to the creditor or with the creditor's knowledge to another person or withheld by the creditor from the proceeds of the credit extended.

Comment

1. This definition is taken verbatim from the Federal Act and Regulation Z. It refers in most instances to the discount kind of transaction where the finance charge is deducted from the "amount of the loan." It is important in determining the amount financed and the amount of finance charge. Under the Federal Act, to which this Act

refers, it is essential in calculating annual percentage rate since the rate will be determined on the amount of credit the consumer actually receives—i.e., a one hundred dollar loan at 8 per cent discount actually involves an amount financed of ninety-two dollars with a finance charge of eight dollars.

(32) "Presumed" or "presumption" means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its non-existence.

(33) "Required deposit balance" means any deposit balance or any investment which the creditor requires the consumer to make, maintain, or increase in a specified amount or proportion as a condition to the extension of credit except:

- (a) An escrow account which is a permitted additional charge under Section 2.202;
- (b) A deposit balance which will be wholly applied toward satisfaction of the consumer's obligation in the transaction;
- (c) A deposit balance or investment which was in existence [at least months] prior to the extension of credit and which is offered by the consumer as security for that extension of credit; and
- (d) A deposit balance or investment which was acquired or established from the proceeds of an extension of credit made for that purpose [which the creditor does not require as a condition to the extension of credit and] which is acquired or established at the written request of the consumer.

Comment

1. This definition is a variation of the definition in the Federal Act and Regulation Z. The bracketed language is an effort to close a potential loophole in the Federal definition. The transaction is one where the creditor requires a certain deposit to be left with the creditor during the period of the credit transaction. In effect, this is money or property of which the consumer does not have the use during that period and should be deducted from the amount of credit to determine the amount financed. Without some restriction on the

time during which the deposit was in existence, it will be a simple expedient for a creditor to require the deposit one day and then negotiate the credit transaction the following day without having to deduct the deposit balance. Further, if the creditor actually requires the deposit balance as a condition to the extension of credit, then it is essentially a credit requirement and should be taken into account in computing finance charge and annual percentage rate.

(34) "Sale of services" means furnishing or agreeing to furnish services and includes making arrangements to have services furnished by another.

(35) "Security interest" means any interest in property which secures payment or performance of an obligation. The term includes, but is not limited to, security interests under the Uniform Commercial Code, real property mortgages, deeds of trust, and other consensual or confessed liens whether or not recorded, mechanic's, materialmen's, artisan's, and other similar liens, vendor's liens in both real and personal property, the interest of a seller in a contract for the sale of real property, any lien on property arising by operation of law and any interest in a lease when used to secure payment or performance of an obligation.

Comment

1. The limited use of security interests in property of consumers in this Act refer to all kinds of interests in the consumer's property, whether consensual or not. Thus, this definition is the one

used in Regulation Z under the Federal Act and is not restricted to the type of security interest dealt with in Article 9 of the Uniform Commercial Code.

(36) "Seller credit card" means an arrangement pursuant to which a person gives to a consumer the privilege of using a credit card, letter of credit, merchandise certificate, or other credit confirmation or identification primarily for the purpose of purchasing or leasing goods or services from that person, a person related to that person, or others licensed or franchised to do business under his business or trade name or designation.

(37) "Services" includes

- (a) work, labor, and other personal services,
- (b) privileges with respect to transportation, hotel and restaur-

rant accommodations, education, entertainment, recreation, physical culture, hospital accommodations, funerals, cemetery accommodations, and the like, and

(c) insurance.

Comment

1. This definition is identical with that in the Uniform Consumer Credit Code except that insurance, even if supplied by an insurer, is included. Insurance is clearly a service and should be under the same kind of regulation as any other service. Throughout the Uniform Consumer Credit Code insurance is given deferential treatment. This Act removes all such treatment so that the consumer has maximum protection in procuring necessary insurance. The exception for insurance in the next definition, "supervised financial organization," has also been removed.

(38) "Supervised financial organization" means a person

- (a) organized, chartered, or holding an authorization certificate under the laws of this State or of the United States which authorize the person to make loans and to receive deposits, including a savings, share, certificate or deposit account, and
- (b) subject to supervision by an official or agency of this State or of the United States.

(39) "Transaction" means an agreement between two or more persons, whether or not the agreement is a contract enforceable by action, and includes the making of and the performance pursuant to that agreement.

Comment

1. "Transaction" is a vital term throughout the Uniform Consumer Code and this Act. It is nowhere defined in the Code. This definition ties it to the emphasis this Act places upon a true agreement by the consumer. To avoid allowing a merchant to use technicalities of contract law as a means of avoiding his obligations and responsibilities, this definition makes it clear that there need not be an enforceable contract so long as there is an agreement which is a "bargain of the parties in fact" (subsection (3)).

Section 1.302. [DEFINITION "FEDERAL CONSUMER CREDIT PROTECTION ACT"]

In this Act "Federal Consumer Credit Protection Act" means the Consumer Credit Protection Act (Public Law 90-321; 82 Stat. 146), as amended, and includes regulations issued pursuant to that Act.

Section 1.303 [INDEX OF DEFINITIONS IN ACT]

- "Accepted credit card" - Section 2.601(3)
- "Actuarial method" - Section 1.301(1)
- "Adequate notice" - Section 2.601(1)
- "Administrator" - Section 1.301(2)
- "Administrator" - Section 6.103

- "Agreement" - Section 1.301(3)
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- "Amount financed" - Section 1.301(5)
- "Business day" - Section 2.105
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- "Cardholder" - Section 2.601(4)
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- "Contested case" - Section 6.402(1)
- "Credit" - Section 1.301(14)
- "Credit card" - Section 2.601(2)
- "Credit Insurance Act" - Section 4.103(2)
- "Creditor" - Section 1.301(15)
- "Debt collection" - Section 7.103(2)
- "Debt collector" - Section 7.103(3)
- "Default" - Section 5.103(1)
- "Earnings" - Section 1.301(16)
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- "File" - Section 8.103(4)
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PART 1

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Section 2.101 [SHORT TITLE]

This Article shall be known and may be cited as National Consumer Act—Consumer Credit Transactions.

Section 2.102 [SCOPE]

This Article applies to consumer credit transactions.

Section 2.103 [DEFINITION: "OPEN END CREDIT PLAN"]

"Open end credit plan" means an account pursuant to a plan under which

(1) the creditor may permit the consumer to make purchases or obtain loans, from time to time, directly from the creditor or indirectly by use of a credit card, check, or other device, as the plan may provide;

(2) the consumer has the privilege of paying the balance in full or in installments; and

(3) a finance charge may be computed by the creditor from time to time on an outstanding unpaid balance.

The term does not include negotiated advances under an open end real estate mortgage or a letter of credit.

Comment

<p>1. This definition is taken verbatim from Regulation Z of the Federal Act. It includes so called revolving charge accounts at department stores, bank check credit, credit card transactions and any other transaction in which the</p>	<p>amount of credit the consumer uses and the finance charge is not computable in advance. The definitions of the Uniform Consumer Credit Code which vary from those of the Federal Law are omitted in this Act.</p>
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Section 2.104 [DEFINITION: "OTHER THAN OPEN END CREDIT"]

"Other than open end credit" means consumer credit other than an open end credit plan itself, or consumer credit transactions pursuant to an open end credit plan, and includes precomputable transactions.

Section 2.105 [DEFINITION: "BUSINESS DAY"]

"Business day" means any calendar day except Sunday, or the

following business holidays: New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Veteran's Day Thanksgiving, and Christmas.

PART 2

MAXIMUM CHARGES

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**Section 2.201. [FINANCE CHARGE FOR CONSUMER
CREDIT TRANSACTIONS]**

(1) With respect to a consumer credit transaction, the parties may agree, subsequent to full disclosure by the creditor pursuant to Part 3 of this Article, to the payment by the consumer of a finance charge not in excess of that permitted by this Section.

[Alternative A: (Note: States are to select either Alternative A, B or C for subsection (2).)]

(2) The finance charge, calculated according to the actuarial method, may not exceed [] per cent per year on the unpaid balance of the amount financed.]

[Alternative B:

(2) The finance charge, calculated according to the actuarial method, may not exceed the equivalent of the total of the following:

- (a) [] per cent per year on that part of the unpaid balance of the amount financed which is \$300 or less;
- (b) [] per cent per year on that part of the unpaid balance of the amount financed which is more than \$300 but does not exceed \$1000; and
- (c) [] per cent per year on that part of the unpaid balance of the amount financed which is more than \$1000.]

[Alternative C:

(2) The finance charge, calculated according to the actuarial method, may not exceed the equivalent of the greater of either of the following:

- (a) the total of
- (i) [] per cent per year on that part of the unpaid balance of the amount financed which is \$300 or less;
 - (ii) [] per cent per year on that part of the unpaid balance of the amount financed which is more than \$300 but does not exceed \$1000; and
 - (iii) [] per cent per year on that part of the unpaid balance of the amount financed which is more than \$1000; or

(b) [] per cent per year on the unpaid balance of the amount financed.]

(3) For the purposes of this Section

- (a) the finance charge may be calculated on the assumption that all scheduled payments will be made when due, and
- (b) the dollar amount of finance charge shall include the prepaid finance charge excluded from the amount financed in accordance with Section 1.301(5), and
- (c) the effect of prepayment is governed by the provisions on rebate upon prepayment (Section 2.210).

(4) For the purposes of this Section, the term of a consumer credit transaction other than that pursuant to an open end credit plan commences with the date the credit is granted or, if goods are delivered, services performed or proceeds of a loan paid 10 days or more after that date, with the date of commencement of delivery or performance. Differences in lengths of months are disregarded and a day may be counted as 1/30th of a month.

(5) Subject to classifications and differentiations the creditor may reasonably establish, he may make the same finance charge on all amounts financed within a specified range. A finance charge so made does not violate subsection (2) if

- (a) when applied to the median amount within each range, it does not exceed the maximum permitted by subsection (2), and
- (b) when applied to the lowest amount within each range, it does not produce a rate of finance charge exceeding the rate calculated according to paragraph (a) by more than 8 per cent of the rate calculated according to paragraph (a).

(6) Notwithstanding subsection (2), a creditor may contract for and receive a minimum finance charge,

- (a) with respect to a transaction other than that pursuant to an open end credit plan, of not more than \$5 when the amount financed does not exceed \$75, or \$7.50 when the amount financed exceeds \$75, or
- (b) with respect to transactions pursuant to an open end credit

plan, if there is an unpaid balance on the date as of which finance charge is applied, not exceeding \$.50 if the billing cycle is monthly or longer, or the pro rata part of \$.50 which bears the same relation to \$.50 as the number of days in the billing cycle bears to 30 if the billing cycle is shorter than monthly.

(7) With respect to transactions pursuant to an open end credit plan, a finance charge not in excess of that permitted by this Section may be made in each billing cycle which is a percentage of an amount no greater than

- (a) the unpaid balance of the account on the last day of the billing cycle calculated after first deducting all payments, credits and refunds to which the consumer is entitled during the billing cycle, or
- (b) the median amount within a specified range within which the unpaid balance calculated according to paragraph (a) is included. A charge may be made pursuant to this paragraph only if the creditor, subject to classifications and differentiations he may reasonably establish, makes the same charge on all balances within the specified range and if the percentage when applied to the median amount within the range falls within the limitations imposed by subsection (5).

For the purposes of this subsection, a variation of not more than 4 days from month to month for determining the last day of the billing cycle is permissible.

(8) A violation of this Section is subject to the provisions of Sections 5.304 and 5.305.

Comment

1. This Section of the National Act provides enacting states three alternatives: A flat rate ceiling, graduated rates, or graduated or flat rates as provided in the Uniform Consumer Credit Code. Any one of these can be justified as reasonable in a given state, often dependent upon the history of rate ceiling statutes in that state.

2. The draftsmen take no position on what the rate ceiling should be. It is probably not advisable to become involved in lengthy arguments with industry over rate ceilings. No available data adequately supports the need for the high rate ceilings proposed in the Uniform Consumer Credit Code, although such ceilings do exist in some states. The important matter is that a state adopt a unified and consistent rate

ceiling statute which applies across the board to all creditors. Discrimination in this respect often results in hardship to consumers. Existing rate ceiling statutes should provide the basis for the amounts which are included in the blanks. Only with convincing evidence that there is an inadequate supply of consumer credit because of unrealistically low rates, should consumer advocates support higher rates in a particular state.

3. This Section applies the same rate ceiling or ceilings to all kinds of credit, whether open-end or otherwise and whether sale or loan credit. The draftsmen have found no justification for the different set of rate ceilings applicable to open-end sale credit under the Uniform Code.

4. The minimum charges allowed by this Section are those provided in the Credit Code. These are tied into the Federal Consumer Credit Protection Act, which requires no disclosure of an annual percentage rate when only these minimum charges are made. This Act would require such disclosure even in that event (Section 2.307). If under existing state law, there are slightly different minimum charges permitted, these can be incorporated in this Section if that becomes a matter of issue.

5. For open-end credit, this Section fixes the date upon which the creditor is to calculate finance charge as the last date of his billing cycle. The Credit Code would give him two additional

options: the date at the beginning of the cycle or an average daily balance. By giving a creditor three options in such a case, he can so maneuver his operation so that the disclosure required by the Federal Act will not be meaningful. Furthermore, it is unfair that he should be able to apply a finance charge to a sum which includes payments and credits otherwise due to the consumer.

6. This Section continues to allow application of a finance charge on a range of balances. The finance charge is applied to the median amount in such a range, but the dollar gap in that range is limited in accordance with the provisions of the Federal Act and Regulation Z.

Section 2.202 [ADDITIONAL CHARGES]

(1) In addition to the finance charge permitted by this Part, a creditor may bargain for and receive the following additional charges in connection with a consumer credit transaction:

- (a) official fees and taxes;
- (b) charges for insurance as authorized and permitted by Article 4;
- (c) charges in real estate transactions as provided in subsection (2).

(2) With respect to a consumer credit transaction which involves the extension of credit secured by an interest in real property, the creditor may bargain for and receive in addition to the finance charge, the following additional charges

- (a) if they will be paid to persons not related to the creditor, are reasonable in amount, bona fide and not for the purpose of circumvention or evasion of this Part, and
- (b) if the security interest in the real property creates a first lien on the property and the credit extended is for the purpose of acquisition or substantial improvement of the property by the consumer, and
- (c) if the charges would customarily be borne by the consumer if the transaction were for cash instead of credit:
 - (i) Fees or premiums for title examination, title insurance or similar purpose;
 - (ii) Fees for preparation of a deed, settlement statement, or other documents;
 - (iii) Escrows for future payments of taxes and insurance;
 - (iv) Fees for notarizing deeds and other documents; and

(v) Appraisal fees.

(3) For the purposes of this Act any charge not authorized by this Section shall be considered part of the finance charge.

Comment

1. After much discussion, the draftsmen arrived at this Section as a compromise. There is no doubt that insurance related to the credit transaction, such as credit life, health and accident, and collision or casualty insurance, has to do with the fact that it is a credit and not a cash transaction. Therefore, these charges should be part of the finance charge. Article 4, as completely rewritten in this Act, places rather stringent limitations upon these kinds of insurance. With this in mind, charges for insurance are allowed separately from the finance charge. Of course, if such charges are required, they must be part of the finance charge, both under this Act and under the Federal Truth in Lending Act. The result is, that these charges can only be made if they are strictly voluntary and with the signed written agreement of the consumer. It may be that in a given state these charges could be eliminated

altogether, in which case Article 4 may also be omitted.

2. The same rule applies with reference to real estate transactions; some charges are clearly because it is a credit transaction while others would be incurred by the consumer even if it were a transaction for cash. This often differs from state to state. Therefore, the draftsmen's compromise is to allow such charges only in the case of purchase money credit transactions or transactions for substantial improvements, and if such charges are those which a cash customer would have to bear.

3. This Act does not provide for other vague charges "of benefit to the consumer" as does the Consumer Credit Code. This leaves too much to the imagination of a creditor and further, probably violates the Federal Truth in Lending Act which does not recognize such additional charges.

Section 2.203 [UNPAID OR LATE INSTALLMENTS]

With respect to a consumer credit transaction other than one pursuant to an open end credit plan, if the consumer has not made an installment payment on or before the tenth business day after its scheduled due date:

(1) The consumer may, at any time before the creditor is entitled to exercise any remedy in accordance with Article 5, elect

- (a) to enter into a deferral agreement in accordance with Section 2.205, or
- (b) to refinance the unpaid balance in accordance with Section 2.206, or
- (c) to consolidate the unpaid balance with the unpaid balance of another transaction in accordance with Section 2.207.

(2) The creditor shall before the due date of the next scheduled installment mail or deliver to the consumer at his residence a written notice informing the consumer:

- (a) that the installment is past due, and
- (b) that a delinquency charge has been or will be imposed, if that is the case, and the amount of such charge, and

(c) that the consumer may make an election as provided in subsection (1) and the time and means of making that election.

(3) The creditor may impose a delinquency charge in accordance with Section 2.204, but may not retain or collect such charge if the consumer makes an election provided in subsection (1).

(4) The creditor may take no action as a result of the unpaid or late installment payment except as provided in this Section, but nothing in this Section precludes any action permitted by this Act as a result of a subsequent unpaid or late installment payment.

Comment

1. This Section and the Sections which immediately follow establish several fundamental principles. First, when a consumer is in default under a consumer credit transaction, the creditor may act only as permitted under this Act. Second, only non-payment constitutes a default. Third, the creditor may not accelerate or otherwise take action to enforce the debt after default in the first payment; instead, he must wait until default following the ten day grace period on the second scheduled installment payment. Fourth, during the interval, he must give the consumer an opportunity to pay the delinquent installment. He must do this by written notice informing the consumer that he can pay the installment with a delinquency charge if that is the case or the consumer may elect, under this section, to a change in or modification of the

terms of the transaction.

2. The consumer may then elect to extend the time of the installment payments, to refinance the entire unpaid balance, or to consolidate the unpaid balance with other indebtedness. In this way he can choose the method which might best alleviate any financial difficulty he is having. The creditor has no choice in the matter.

3. If the consumer does not elect one of the ways to save the transaction, the creditor then is fully entitled after the second late installment to exercise his remedies as limited by this Act. Of course, he may still wish to persuade the consumer to enter into some kind of transaction which will avoid the uncollectability of the debt. In this case, he is again limited to the three kinds of modification provided in this section.

Section 2.204 [DELINQUENCY CHARGES]

(1) With respect to a consumer credit transaction other than one pursuant to an open end credit plan, the parties may agree to a delinquency charge on any installment not paid in full on or before the tenth business day after its scheduled due date in an amount, not exceeding \$3, which is 1 per cent of the unpaid amount of the installment.

(2) No delinquency charge may be collected on an installment which is paid in full on or before the tenth business day after its scheduled due date even though an earlier maturing installment or a delinquency charge on an earlier installment may not have been paid in full. For purposes of this subsection payments are applied first to current installments and then to delinquent installments.

(3) A delinquency charge under subsection (1) may be collected

only once on an installment however long it remains in default. A delinquency charge may not be collected for a late installment if, with respect to that installment, a deferral (Section 2.205), refinancing (Section 2.206) or consolidation (Section 2.207) agreement has been concluded by the parties or the creditor elects to exercise any remedy in accordance with Article 5.

(4) No security interest shall secure payment of obligations arising from unpaid delinquency charges imposed pursuant to this Section or deferral charges agreed upon pursuant to Section 2.205.

Comment

1. This Section allows a creditor a delinquency charge when an installment is not paid within ten business days after it is first due. This is in the form of a penalty, but also compensates the creditor for additional costs in his effort to straighten the matter out. The delinquency charge is limited by this Section.

It is a one time charge, and may not be assessed if the consumer elects one of his alternatives in the prior Section or such an agreement is worked out even at a later time. The delinquency charge is not one of those sums which the creditor can realize by enforcing any security interest.

Section 2.205 [DEFERRAL CHARGES]

(1) With respect to a consumer credit transaction other than one pursuant to an open end credit plan, the parties may agree in writing at any time subsequent to the transaction to a deferral of all or part of one or more unpaid installments to a charge not exceeding one percent of each installment or part thereof for each month from the date when such installment was due to the date when it is agreed to become payable.

(2) In addition to any requirements of form established by the Administrator, a deferral agreement shall

- (a) be in writing and signed by the parties;
- (b) incorporate by reference the transaction to which the deferral applies;
- (c) state each installment or part thereof in the amount to be deferred, the date or dates originally payable and the date or dates agreed to become payable; and
- (d) clearly set forth the fact of the deferral charge, if any, the dollar amount of the charge for each installment to be deferred and the total dollar amount to be paid by the consumer for the privilege of deferring payments.

(3) No term of a writing executed by the consumer shall constitute authority for a creditor unilaterally to grant a deferral and make charges under this section.

(4) A charge may not be collected for the deferral of an installment or any part thereof if, with respect to that installment, a refinancing (Section 2.206) or consolidation (Section 2.207) agreement is con-

cluded by the parties, a delinquency charge (Section 2.204) has been collected or the creditor elects to exercise any remedy in accordance with Article 5.

Comment

1. A deferral agreement simply means that the creditor allows the consumer to delay paying installments beyond the time when they are due. He is already collecting finance charge on those installments. This Section allows him an additional charge for the deferral, but not as great as the charge he would be collecting if the original rate applied. This Section also prescribes the form and content of the deferral agreement. By incorporating the original agreement into the deferral agreement, any protections the consumer had under the original carry over to the deferral.

Section 2.206 [FINANCE CHARGE ON REFINANCING]

(1) With respect to a consumer credit transaction other than one pursuant to an open end credit plan, the creditor may by agreement with the consumer refinance the unpaid balance and may bargain for and receive a finance charge based on the amount financed resulting from the refinancing at a rate not exceeding that stated to the consumer in the original transaction pursuant to the provisions on disclosure in Part 3 of this Article.

(2) For the purpose of determining the finance charge permitted in refinancing, the amount financed resulting from the refinancing shall constitute the total of the following:

- (a) the amount which the consumer would have been required to pay upon prepayment pursuant to the provisions on rebate upon prepayment (Section 2.210) on the date of refinancing, except that for the purpose of computing this amount no minimum finance charge (subsection (5) of Section 2.210) shall be allowed; and
- (b) appropriate additional charges (Section 2.202), included for the period of refinancing.

Comment

1. This Section simply codifies the existing practice with reference to refinancing or, put differently, rewriting the entire transaction as if it were a new one with a new schedule of payments and additional finance charges. The finance charge may be at the rate for the original transaction, but must be applied after a rebate of unearned finance charge applicable to that original transaction. In refinancing, no minimum charge is permitted since, of course, the creditor is obtaining a much larger additional finance charge by virtue of the refinancing.

Section 2.207 [FINANCE CHARGE ON CONSOLIDATION]

(1) If a consumer owes an unpaid balance to a creditor with respect to a consumer credit transaction and becomes obligated on another consumer credit transaction with the same creditor, the parties may agree to a consolidation resulting in a single schedule of payments.

(2) The consolidated obligation shall comprise the following:

- (a) a finance charge agreed to by the parties, not in excess of that permitted by the provisions on finance charge for consumer credit transactions (Section 2.201), calculated on the basis of the unpaid balance of the subsequent transactions;
- (b) the unpaid balance of the subsequent transaction; and
- (c) the unpaid balance of the prior transaction as of the date of consolidation.

Comment

1. A creditor may not use refinancing when he wishes to combine one or more obligations of the same consumer. Instead, he must utilize consolidation under this Section. By this method, a finance charge is assessed only to the new obligation and the total is then added to the unpaid balances prior obligations. Payment periods and their amounts are rescheduled according to the new obligation. This kind of transaction is more advantageous to the consumer since inevitably it results in less finance charge simply by virtue of the fact that his prior obligations may be paid over a longer period of time than originally agreed.

Section 2.208 [ADVANCES TO PERFORM AGREEMENTS OF CONSUMER]

(1) With respect to a consumer credit transaction the parties may, to the extent permitted by the Act, agree that the consumer is to perform certain duties with respect to preserving or insuring collateral, provided that such duties are reasonable in relation to the risk of loss of or damage to the collateral. In the event of the consumer's failure to perform the creditor may, if authorized by the agreement, pay for the performance of such duties on behalf of the consumer. The amount paid may be added to the unpaid balance of the consumer's obligation, provided that the creditor has given the consumer written notice of his non-performance, reasonable opportunity after such notice to so perform, and, in the absence of performance, has made all expenditures on behalf of the consumer in good faith and in a commercially reasonable manner.

(2) Within a reasonable time after advancing any sums pursuant to subsection (1), the creditor shall state to the consumer in writing the amount of the sums advanced, any charges with respect to this amount, and any revised payment schedule and, if the duties of the consumer performed by the creditor pertain to insurance, a brief description of the insurance paid for including the type and amount of coverages.

(3) A finance charge may be made for sums advanced pursuant to subsection (1) at a rate not exceeding the rate stated to the consumer pursuant to the provisions on disclosure in Part 3 of this Article, except that with respect to an open end credit plan the amount of the advance may be added to the unpaid balance of the account and the creditor

may make a finance charge not exceeding that permitted by the provisions on finance charge for consumer credit transactions (Section 2.201).

Comment

1. This Section is slightly modified from that which appears in the Uniform Consumer Credit Code. It is conceivable that a creditor will want a consumer to do certain things to protect and preserve the collateral. Rather than allow the creditor to declare a default and begin enforcement procedures, this allows him to take the action to which the consumer agreed and which he has not performed. The consumer must first have an opportunity to perform after notice to him, but otherwise is obligated for

the advances made by the creditor. This Section should be read in connection with the limitations on insurance in Article 4.

2. Nonperformance by the consumer of the obligations dealt with by this Section would not itself constitute a default; rather, the creditor would have to perform those obligations, add the advances to the debt and then have the consumer fail to pay within the provisions of Section 2.203.

Section 2.209 [RIGHT TO PREPAY]

Subject to the provisions on rebate upon prepayment (Section 2.210), the consumer may prepay in full or in any part the unpaid balance of a consumer credit transaction at any time without penalty.

Section 2.210 [REBATE UPON PREPAYMENT]

(1) Upon prepayment in full or in any part of the unpaid balance of a consumer credit transaction, an amount not less than the unearned portion of the finance charge calculated according to this Section shall be rebated to the consumer. If the total of all rebates, refunds and credits to be paid to the consumer is less than \$1, no payment need be made.

(2) The unearned portion of the finance charge is the difference between the total amount of the finance charge and the amount of finance charge earned up to and including the date of payment calculated according to the actuarial method.

(3) Except as provided in subsection (4) with respect to unearned insurance premiums, reasonable sums actually paid or payable to third persons not related to the creditor as additional charges permitted under Section 2.202 need not be rebated to the consumer.

(4) If the consumer credit transaction included an amount for insurance premiums the consumer is entitled upon prepayment to a refund from the creditor of the unearned premium as calculated according to the provisions on refund (Section 4.107).

(5) Upon prepayment in full of the consumer's obligation by the proceeds of consumer credit insurance (Section 4.103), the consumer or his estate is entitled to the same rebate as though the consumer had prepaid the agreement on the date satisfactory proof of loss is furnished to the creditor or the insurance company.

(6) If a deferral (Section 2.205) has been agreed to, the unearned portion of the finance charge shall be computed without regard to the deferral. The amount of deferral charge earned at the date of prepayment shall also be calculated. If the deferral charge earned is less than the deferral charge paid, the difference shall be added to the unearned portion of the finance charge. If any part of a deferral charge has been earned but has not been paid, that part shall be subtracted from the unearned portion of the finance charge.

(7) This section does not preclude the collection or retention by the creditor of delinquency charges (Section 2.204) for delinquencies or payments due prior to prepayment.

(8) If the creditor brings an action on the obligation and judgment is obtained, the consumer is entitled to the same rebate as if payment had been made on the date the action was brought.

Comment

1. Sections 2.209 and 2.210 give the consumer the right to prepay an installment obligation at any time without penalty. They also entitle the consumer to a rebate of finance charge calculated by the actuarial method. In this respect, this Section deviates from the Uniform Consumer Credit Code. That Code adopts the so called "rule of 78." A look at the intricate provisions of the Credit Code and the comment which follows indicates that that pro-

cedure serves no useful purpose. Furthermore, since rate ceilings and rates and finance charge must be calculated both under this Act and the Federal Act according to the actuarial method, then rebate should be calculated accordingly. With proper tables and charts, this will provide no difficulty to the creditor. This can and should be done to the day of repayment.

PART 3

DISCLOSURE AND FORM OF WRITINGS

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Section 2.301 [GENERAL REQUIREMENTS AND PROVISIONS]

(1) The information required by the provisions of this Part to be disclosed by the creditor to the consumer to whom credit is extended or otherwise to be included within the writing evidencing the transaction:

- (a) shall be made clearly and conspicuously;
- (b) shall be in writing, exact copies of which shall be given to the consumer at the time the transaction is consummated with records of all such information retained by the creditor for a period of one year after the last payment scheduled under the transaction;
- (c) except as provided in Section 2.302 and in rules adopted by the Administrator, need not be contained in a single writing or made in the order set forth in this Act;
- (d) may be supplemented by additional information or explanations supplied by the creditor so long as the additional information or explanations do not have the effect of circumventing, evading, or unduly complicating the information required by this Part to be disclosed;
- (e) need be made only to the extent applicable and only as to those items for which the creditor makes a charge to the consumer which is separate from and in addition to the cash price or amount of the credit extended.

(2) The creditor shall comply with the provisions of this Part requiring information to be disclosed or otherwise included within the writing evidencing the consumer credit transaction before the consumer signs any writing, but may be made on the face of the writing evidencing the transaction.

(3) The provisions of this Part requiring information to be disclosed shall apply with respect to all persons who are to sign the

writing, including anyone acting as surety, whether as a comaker, endorser, guarantor, or other similar party. Irrespective of his signature, no such person shall be obligated under the transaction until the creditor establishes compliance with the provisions of this Part.

Comment

1. The Uniform Consumer Credit Code contains elaborate provisions scattered throughout the Code designed to replace those of the Federal Truth in Lending Act. Their purpose, along with a set of model regulations to be adopted by the Administrator under Article 6, is to allow a state to apply to the Federal Reserve Board for exemption of credit transactions covered by the Credit Code from application of the Federal Act under Section 123 of that Act. It is highly doubtful that such an exemption could ever be granted since there are many inconsistencies between the Credit Code and the Federal Act which regulation probably cannot cure. In any event, this is unnecessary redundancy since the Federal Act, with few exceptions, is quite adequate for the purpose. No state agency or Administrator could have the technical expertise of the federal agencies charged with regulation and enforcement.

2. The simple solution which this Act adopts is to incorporate the provisions of the Federal Act as part of the State statute. This is done in Section 2.306. In that way, the Administrator under Article 6 has enforcement powers within the State even under the Federal

Act. In addition, under Article 3, a violation of the Federal Act is a violation of that Article. In fact, the Uniform Consumer Credit Code contains a provision which states that compliance with the Federal statute constitutes compliance with the disclosure provisions of that Code. This is a kind of "self protection" in case there will be no exemption.

3. This Act attempts to strengthen the Federal Act in areas where there are exceptions to disclosure. For example, disclosure of annual percentage rate and dollar finance charge must be made in all transactions; the Federal Act exempts transactions where only a statutory minimum charge is made.

4. The Federal Act, at least technically, deals only with disclosure of credit cost and other terms. It does not directly deal with the substance of the consumer credit transaction. This Act deals with problems of the transaction itself. For example, this Section and those which follow prescribe what must be contained in any writing evidencing the agreement which is the basis of the credit transaction. Thus it fixes substantive rights and duties of the parties.

Section 2.302 [SINGLE WRITING: CONTENTS]

(1) Every consumer credit transaction shall be evidenced by a single writing and shall be signed by both parties. All terms, printed or written, shall appear on only one side of each page. Printed terms shall be printed in eight point standard type.

(2) In addition to the disclosures required by this Part, every writing evidencing a consumer credit transaction shall include the date when signed, the name and address of the consumer and the creditor, a description of the subject matter of the transaction, and a description of the collateral, if any, securing the consumer's obligations.

(3) Every writing evidencing a consumer credit transaction shall include immediately above the place for the signatures of the parties, the following notice printed in 12 point bold face type:

NOTICE TO CONSUMER

- (a) Do not sign this if it contains any blank spaces.
- (b) You are entitled to an exact copy of all papers you sign or are shown.
- (c) You have the right at any time to pay in advance the unpaid balance due under this agreement and to receive a partial refund of the finance charge.

Comment

1. This section prohibits the use of multiple writings evidencing the credit transaction itself. Frequently a number of writings are "shuffled" between the parties so as to create confusion.

Section 2.303 [PROHIBITION OF BLANK WRITINGS]

Every writing evidencing a consumer credit transaction shall be completed as to all essential provisions prior to the signing thereof by the parties. No creditor shall induce, encourage or otherwise permit the consumer to sign a writing containing blank spaces. Blanks inapplicable to a transaction must be completed in a manner which reveals their inapplicability.

Comment

1. This provision is typical of many retail installment sales acts. Its intent is to prevent agreements in writing in which blanks are later filled in after the consummation of the transaction. This Section requires that blanks which are not relevant to a transaction—i.e., where there is no charge for insurance—be obliterated or otherwise filled in to indicate that they do not apply.

Section 2.304 [PAYMENTS; DUE DATES; REGULAR SCHEDULE]

(1) With respect to a consumer credit transaction other than one pursuant to an open end credit plan, every writing evidencing the transaction shall specify the maximum number of payments required, the amount of each payment and the exact dates upon which each payment is due.

(2) Payments shall be scheduled in the writing to be payable in substantially equal installments at equal period intervals, and

- (a) over a period of not more than 25 months if the outstanding balance is \$700 or less; or
- (b) over a period of not more than 37 months if the outstanding balance is more than \$700 but does not exceed \$2000.

(3) Payments shall be payable only in successive, equal monthly, semi-monthly or weekly periods.

(4) For the purposes of this Section, the amount and number of periodic payments shall be determined on the basis of a finance charge

calculated on the assumption that all scheduled payments shall be made when due.

(5) To the extent that the schedule of payments is adjusted to the seasonal or intermittent income of the consumer in a separate writing pursuant to Section 2.402(2) the number, amounts, and dates upon which each payment is due shall be set forth in the separate writing immediately below the following notice printed in no less than 12 point bold type.

WARNING

THE AMOUNTS OF PAYMENTS OR THE DATES THEY ARE PAYABLE UNDER THIS AGREEMENT ARE NOT EQUAL. DO NOT SIGN THIS PAPER UNLESS YOU ARE CERTAIN THAT THIS ARRANGEMENT MEETS YOUR NEEDS.

Comment

1. This section elaborates on the Federal Act in a substantive way. First, exact payment dates and amounts must be spelled out, which is not uncommon in most transactions. This requirement would be met by the typical payment coupon book. Second, this Act abandons the distinction between "supervised" loans and "regulated" loans found in the Uniform Consumer Credit Code. In that Code for regulated loans there were restrictions on the duration of a loan of certain amounts. This Section incorporates a similar principle, but makes it applicable to all loans. This is intended to prevent extending loans of relatively moderate amounts over an excessive period to the detriment of the consumer in planning his financial matters and in increasing the profit to the creditor unnecessarily. Third, payments must be on some regular period of a year basis. Finally, this section requires a warning in the event of a permitted balloon payment in addition to the disclosure of such a payment under the Federal Act. This is to prevent surprise. Balloon or irregular payments are permitted under Section 2.402(2) only in the case of the intermittent or seasonal income of the consumer to which the payments are adjusted.

Section 2.305 [RECEIPTS; ACCOUNTING; EVIDENCE OF PAYMENT]

(1) The creditor shall give or forward to the consumer, without request, a written receipt for each payment made in cash.

(2) At any time after consummation of the transaction the creditor shall, upon request by the consumer, give or forward to the consumer a written statement specifying the dates and amounts of payments received and the principal unpaid balance remaining at that time.

(3) Within 30 days after payment by the consumer of all sums for which he is obligated under the agreement in accordance with this Act, the creditor shall give or forward to the consumer instruments which acknowledge payment in full and the release or termination of security interests which are satisfied by that payment, and which evidence the fact of the perfection or recordation of such instruments.

Section 2.306 [DISCLOSURE: REQUIREMENTS OF FEDERAL ACT]

(1) In accordance with the provisions of this Part the creditor shall disclose to the consumer to whom credit is extended the information required by this Part and by the Federal Consumer Credit Protection Act.

(2) Except as provided in Section 2.307 all information required to be disclosed by the Federal Consumer Credit Protection Act shall be required to be disclosed by this Part. Information which would otherwise be required pursuant to the Federal Consumer Credit Protection Act shall be required by this Part, even though the transaction is one of a class of transactions exempted from that Act by provisions of the Act or pursuant to Regulation of the Board of Governors of the Federal Reserve System.

(3) Except as provided in subsection (2) and in Section 2.307, the Regulations of the Board of Governors of the Federal Reserve System promulgated pursuant to the authorization contained in the Federal Consumer Credit Protection Act shall be presumed to be valid and binding interpretations of the requirements of disclosure incorporated into and made a part of this Act by this Section.

(4) Violations of the requirements of the Federal Consumer Credit Protection Act as incorporated into and made a part of this Act by this Section shall be a violation of this Act enforceable in the appropriate courts of this state in accordance with the measure of recovery provided in Section 5.303.

Comment

1. This Section incorporates into this Act the requirements of the Federal Truth in Lending Act. The next Section, Section 2.307, imposes additional requirements. Violation of that Act constitutes a violation of this Act. This gives the consumer an option not only in terms of the forum, but in terms of the recovery he may seek.

Section 2.307 [DISCLOSURE: ADDITIONAL REQUIREMENTS]

(1) In addition to the requirements of disclosure of the Federal Consumer Credit Protection Act incorporated into and made a part of this Act by Section 2.306, a creditor shall disclose the following information to the consumer to whom credit is extended in all consumer credit transactions without exception as to the type of transaction or the amount of the finance charge concerned:

- (a) the total amount of the finance charge in dollars; and
- (b) the finance charge expressed as an annual percentage rate.

(2) For the purpose of this Part the finance charge, whether expressed as the amount in dollars or as an annual percentage rate shall be the finance charge calculated in accordance with the provisions of the Federal Consumer Credit Protection Act.

Comment

1. The Federal Act does not require disclosure of an annual percentage rate where the finance charge is within certain minimums. These are the minimums adopted by this Act. However, under this Section an annual percentage rate must be disclosed under the Federal Act in all cases irrespective of the amount of the finance charge. The Federal Act in certain real estate transactions does not require disclosure of the total dollar amount of finance charge. This Act requires such disclosure. These exceptions under the Federal Act are simply deferential, and have no justification in fact. The rationale is that in the one case, the annual percentage rate would be shockingly high, while in the other the dollar amount of finance charge would be equally shocking to the consumer. This Act adopts the principle that the consumer is prepared to be shocked.

Section 2.308 [ESTIMATES OR APPROXIMATIONS]

If at the time disclosures must be made an amount or other item of information required to be disclosed or needed to determine a required disclosure is unknown or not available to the creditor, and a reasonable effort has been made to ascertain it, the creditor may use an estimated amount of approximation of the information, provided:

- (a) the estimate or approximation is clearly identified as such, is reasonable, and is based on the best information available to the creditor;
- (b) the estimate or approximation is not used for the purpose of circumventing or evading the disclosure requirements of this Part; and
- (c) to the extent that the estimate or approximation made pertained to the finance charge expressed either as an amount or as the annual percentage rate, the consumer:
 - (i) shall not be obligated to make any payment under the transaction until he has been furnished the correct information by the creditor; and
 - (ii) shall be obligated under the transaction to pay the lessor of the actual or the estimated or approximated finance charge.

Comment

1. The Federal Act allows estimates to be disclosed where facts are not available to a creditor. It takes no position on what the result will be when accurate figures are available. This section adopts the principle that in terms of cost of credit, the consumer should pay the lessor of the estimated amount or the actual amount. Further, it puts a duty upon the creditor to furnish the accurate information when it is available, which the Federal Act does not do.

PART 4

LIMITATIONS ON AGREEMENTS AND PRACTICES

Section

- 2.401 Scope
- 2.402 Balloon Payments Prohibited
- 2.403 Assignment of Earnings Prohibited
- 2.404 Authorization to Confess Judgment Prohibited
- 2.405 Negotiable Instruments Prohibited
- 2.406 Assignee Subject to Defenses
- 2.407 Interlocking Loans and Sales
- 2.408 Notice of Assignment
- 2.409 Statements of Compliance or Performance
- 2.410 Attorney's Fees
- 2.411 Restriction on Liability in Consumer Lease
- 2.412 Limitation on Default Charges
- 2.413 Use of Multiple Agreements
- 2.414 Changes In Open End Credit Terms
- 2.415 Referral Transactions Prohibited
- 2.416 Restrictions on Security Interests
- 2.417 Security Interests: Consolidations; Open End Credit Plans

Section 2.401 [SCOPE]

This Part applies to consumer credit transactions.

Section 2.402 [BALLOON PAYMENTS PROHIBITED]

With respect to a consumer credit transaction other than one pursuant to an open end credit plan:

(1) No creditor shall at any time enter into an agreement which contains or anticipates a schedule of payments under which any one payment is not equal or substantially equal to all other payments, excluding any down payment received by the creditor contemporaneously with or prior to the consummation of the transaction, or under which the intervals between any consecutive payments differ substantially.

(2) Notwithstanding any provision of this Section, where a consumer's livelihood is dependent upon seasonal or intermittent income, the parties may agree in a separate writing that one or more payments or the intervals between one or more payments may be reduced or expanded in accordance with the needs of the consumer if such payments or intervals are expressly related to the consumer's income.

(3) In the event that the provisions of subsection (2) apply, the consumer shall have the right at any time, without further cost or obligation, to revise the schedule of payments to conform both as to amounts and intervals to the average of all installments and intervals.

(4) A violation of this Section shall be subject to the provisions of Sections 5.302 and 5.305.

Section 2.403 [ASSIGNMENT OF EARNINGS PROHIBITED]

(1) A creditor may not take an assignment of earnings of the consumer for payment or as security for payment of an obligation arising out of a consumer credit transaction or a consumer lease.

(2) An assignment of earnings in violation of this Section is subject to the provisions of Sections 5.302 and 5.305.

Section 2.404 [AUTHORIZATION TO CONFESS JUDGMENT PROHIBITED]

(1) The creditor may not take or accept from the consumer a warrant or power of attorney or other authorization for the creditor, or other person acting on his behalf, to confess judgment or otherwise act as the agent for the consumer in any respect.

(2) An authorization in violation of this Section is subject to the provisions of Sections 5.302 and 5.305.

Section 2.405 [NEGOTIABLE INSTRUMENTS PROHIBITED]

(1) No merchant shall take or otherwise arrange for the consumer to sign an instrument payable "to order" or "to bearer" as evidence of the credit obligation of the consumer in a consumer credit transaction.

(2) Any holder of an instrument, contract or other writing evidencing an obligation of the consumer takes it subject to all claims and defenses of the consumer up to the amount of the transaction total arising out of the transaction whether or not it is payable "to order" or "to bearer".

(3) Taking or otherwise arranging for the consumer to sign an instrument in violation of this Section shall be subject to the provisions of Section 5.304.

Comment

1. In order to avoid the doctrine of "holder in due course", the Uniform Consumer Credit Code pretends to prohibit the use of negotiable instruments in consumer credit sales. It acknowledges that such instruments can still be used in violation and that there

can be holders in due course. Further, it does not apply even this restriction to consumer loans.

2. This section prohibits the taking of instruments payable "to order" or "to bearer". Under Article 3 of the

Uniform Commercial Code, this destroys the negotiability of such instruments, although they are still subject to other provisions of Article 3. This gives some certainty to the law of transfer of such instruments, even though there can be no holder in due course under Section 3-805 of that statute. Sub-

section (2) of this section subjects a holder taking an instrument in violation to all defenses of the consumer. Such holder is liable up to the "transaction total" which is the total amount of the transaction at its inception. Thus, this Act destroys once and for all the doctrine of "holder in due course".

Section 2.406 [ASSIGNEE SUBJECT TO DEFENSES]

Notwithstanding any term or agreement to the contrary, an assignee of the rights of the creditor is subject to all claims and defenses of the consumer, up to the amount of the transaction total, arising out of a consumer credit transaction.

Comment

1. This Section makes ineffective and unenforceable agreements of consumers in form contracts which waive their defenses against assignees. Thus,

the subterfuge used even when holder in due course does not apply is not permitted at all.

Section 2.407 [INTERLOCKING LOANS AND SALES]

(1) The creditor in consumer loan transactions shall be subject to all of the claims and defenses of the consumer up to the total amount financed, arising from the consumer sale or lease for which the proceeds of the loan are used, if the creditor participated in or was connected with the consumer sale or lease transaction.

(2) Without limiting the scope of subsection (1), the creditor participates in or is connected with a consumer sale or lease transaction when:

- (a) the creditor is a person related to the seller or lessor; or
- (b) the seller or lessor prepares documents used in connection with the loan; or
- (c) the creditor supplies forms to the seller or lessor used by the consumer in obtaining the loan; or
- (d) the creditor makes 20 or more loans in any calendar year, the proceeds of which are used in transactions with the same seller or lessor, or with a person related to the same seller or lessor; or
- (e) the consumer is referred to the creditor by the seller or lessor; or
- (f) the creditor, directly or indirectly pays the seller or lessor any consideration whether or not it is in connection with the particular transaction; or
- (g) the creditor is the issuer of a credit card which may be used

by the consumer in the consumer sale or lease as a result of a prior agreement between the issuer and the seller or lessor.

Comment

1. This section is new. It allows claims and defenses against creditors who pretend to insulate themselves from sales transactions by claiming that they are merely lenders having nothing to do with the seller. It adopts the new concept of creditors who are "connected with" or "participate in" sales transactions, setting out criteria for determining that fact. These criteria are not radically new, and have been used by courts in holding that a holder is not a holder in due course.

2. There is no reason why the same criteria should not apply to transactions which are only formally different. The effect of this section should ultimately

be that creditors who pretend only to be lenders will be selective and careful in the merchants with whom they choose to deal. Merchants with a history of unscrupulousness will thus be unable to find sources of credit for their customers. Creditors, of course, are better able to make this judgment about merchants than are consumers.

3. One typical illustration of the effect of this section is the transaction in which the seller tells the consumer that he can get a loan of the cash price from a particular lender whom the seller recommends he see. This is almost inevitably by prearrangement between the seller and that lender.

Section 2.408 [NOTICE OF ASSIGNMENT]

The consumer is authorized to pay the original creditor until the consumer receives notification of assignment of the rights to payment pursuant to a consumer credit transaction and that payment is to be made to the assignee. A notification which does not reasonably identify the rights assigned is ineffective. If requested by the consumer, the assignee must seasonably furnish reasonable proof that the assignment has been made and unless he does so the consumer may pay the original creditor.

Section 2.409 [STATEMENTS OF COMPLIANCE OR PERFORMANCE]

Statements in the form of acknowledgements, certificates of performance or otherwise, signed by the consumer, to the effect that there has been compliance with any of the requirements of this Act or performance by the other party or parties to the transaction shall create no presumption that the facts recited in such statements are true.

Comment

1. There is no equivalent of this section in the Uniform Consumer Credit Code. Merchants of all kinds attempt to defeat legal requirements, especially of regulatory statutes, by having the consumer sign a pro forma statement that they have been complied with. Even the Federal Truth in Lending Act gives some importance to such statements

with reference to compliance with that Act. This section gives such statements no special evidentiary meaning. It applies as well to so called certificates of performance often used by home improvement merchants to facilitate their transfer of credit paper to financing institutions. The paper would contain, even the day after it was signed, a

statement that the work had been | held consumers to that statement.
completely performed, and courts often

Section 2.410 [ATTORNEY'S FEES]

(1) With respect to a consumer credit transaction no term of a writing may provide for the payment by the consumer of attorney's fees.

(2) A provision in violation of this Section is subject to the provisions of Section 5.303.

Comment

1. The Uniform Consumer Credit | creditors. This section simply prohibits
Code allows enacting states an option | them.
with reference to attorney's fees for

**Section 2.411 [RESTRICTION ON LIABILITY
IN CONSUMER LEASE]**

The obligation of a consumer upon expiration of a consumer lease may not exceed the average payment allocable to a monthly period under the lease. This limitation does not apply to charges for damages to the leased property occasioned by other than normal use or for other default.

Section 2.412 [LIMITATION ON DEFAULT CHARGES]

Except for reasonable expenses incurred in disposition of collateral (Section 5.211), no term of a writing evidencing a consumer credit transaction may provide for any charges as a result of default by the buyer other than those authorized by this Act.

Comment

1. The charges permitted by this | lateral, and charges in the event of a
Act upon default of a consumer in a | modification in the form of deferral,
credit transaction are, in general, delin- | consolidation or refinancing. The credi-
quency charges, charges for the credi- | tor may not provide for "trumped up"
tor's performance of the consumer | charges in the agreement and collect
agreement to protect or preserve col- | them.

Section 2.413 [USE OF MULTIPLE AGREEMENTS]

(1) No creditor shall divide, refinance, consolidate or otherwise permit the consumer or consumers to become obligated with respect to a consumer credit transaction or transactions with the result of obtaining a higher rate of finance charge than would otherwise be permitted under this Act.

(2) Transactions split between a husband and wife which arise out of substantially the same transaction shall be presumed to be in violation of this Section.

(3) Transactions in violation of this Section are subject to the provisions of Section 5.305.

Comment

1. This section is substantially the | Federal Act. Subsection (2) provides for
same as that which appears in the Credit | the specific case of a multiple agreement
Code and in the regulations under the | with a husband and a wife.

Section 2.414 [CHANGES IN OPEN END CREDIT TERMS]

(1) With respect to an open end credit plan a creditor shall not, without the agreement of the consumer, make a change in the terms of the credit plan which is adverse to the interests of the consumer with respect to any outstanding obligation.

(2) No term of a writing executed by the consumer shall constitute authorization for a creditor unilaterally to make changes in the terms of the credit plan which are prohibited by this Section.

Comment

1. The Federal Act implies and the | ly affect the rights of the consumer and
Credit Code appears to be more explicit | also renders ineffective any advance
that a creditor may unilaterally change | agreement to those changes. Thus, a
terms of an open end credit plan, such | change such as an increased rate of
as a revolving charge account, which | finance charge requires the agreement,
may be retroactive in their effect. This | as defined in Section 1.301, of the
section prohibits changes which adverse- | consumer.

Section 2.415 [REFERRAL TRANSACTIONS PROHIBITED]

(1) With respect to a consumer credit transaction the creditor may not give or offer to give a rebate or discount or otherwise pay or offer to pay value to the consumer as an inducement for a consumer transaction in consideration of his giving to the creditor the names of prospective consumers, or otherwise aiding the creditor in entering into a transaction with another consumer or, without being limited by any of the foregoing, performing any other act or the occurrence of any other event, if the earning of the rebate, discount, or other value is contingent upon the occurrence of an event subsequent to the time the consumer enters into the agreement.

(2) A violation of this Section is subject to the provisions of Sections 5.303 and 5.305.

Section 2.416 [RESTRICTIONS ON SECURITY INTERESTS]

(1) With respect to a consumer credit sale a creditor may take a security interest in the property sold.

(2) With respect to a consumer credit transaction, no security interest other than a purchase money security interest may be taken in

household furnishings, appliances and clothing of the consumer and his dependents.

(3) With respect to a consumer loan no creditor shall secure the obligation:

- (a) with an interest in real property where the amount financed is \$3000 or less, or
- (b) with an interest in personal property the fair market value of which exceeds one and one half times the amount financed.

(4) With respect to a consumer lease a creditor may not take a security interest in any property of the consumer to secure the debt arising from the lease.

(5) No merchant shall take or acquire as a result of a consumer transaction a security interest in goods upon which goods are installed, or to which they are annexed, or in real property to which the goods are affixed or which is maintained, repaired or improved as a result of the sale of the goods or services, unless:

- (a) in the case of a security interest in real property the obligation secured is \$3000 or more, or
- (b) in the case of a security interest in goods, the obligation secured is \$500 or more.

(6) Except as otherwise provided in Section 2.417 with respect to consolidation agreements and open end credit plans, no merchant shall take or acquire as a result of a consumer transaction a security interest in:

- (a) goods other than those sold, worked upon or in which goods sold are installed unless such goods become annexed to the described property;
- (b) goods subject to a prior transaction with the creditor or a persons related thereto;
- (c) goods acquired or to be acquired in the future.

Comment

1. A creditor or other merchant is entitled to some means whereby he can reduce the risk that he will not be paid. One of those means is the taking of, or acquiring, a security interest in property, real or personal, of the consumer. This has acquired a certain legitimacy, and the draftsmen are not prepared at this stage of economic development to abandon it.

2. This section is designed to pre-

vent a merchant from protecting himself excessively at the expense of the consumer. Thus, the circumstances under which security interests may be acquired and the extent of such interests are limited. In subsections (1) and (2) deference is paid to the creditor who supplies the purchase money allowing a consumer to acquire property. Further, while many exemption statutes exempt certain kinds of property of a consumer

debtor from execution by a creditor, a creditor can circumvent such limitations by an agreement granting a consensual interest. This section prohibits that practice in the case of certain kinds of personal property.

3. In other than purchase money credit transactions this section forbids security interests in real property for loans of \$3000 or less and in other property the value of which exceeds the amount of the loan by fifty per cent. This latter restriction is not unique; the Law of Fraudulent Conveyances often has declared excessive security fraudu-

lent as against other creditors. This makes it improper as against the consumer himself.

4. Finally, this section prohibits security interests in goods of the consumer other than those as to which the transaction has some relationship. The only exception is with reference to consolidation transactions as restricted by Section 2.417. Otherwise, after-acquired consumer goods may not be the subject of a security interest, which only furthers the limitation already present in Section 9-204 of the Uniform Commercial Code.

Section 2.417 [SECURITY INTERESTS: CONSOLIDATIONS; OPEN END CREDIT PLANS]

(1) The parties may agree in a consolidation agreement (Section 2.207) that the creditor may secure the consolidated obligation by a security interest in property sold prior thereto if he has an existing security interest in that property as a result of the prior transaction and the obligation remaining on that prior sale is one of those agreed to become consolidated.

(2) For the purpose of determining the amount of the consolidated obligation secured by the various security interests, payments received by the creditor after a consolidation agreement are deemed to have been first applied to the payment of obligations arising from the transactions first made. To the extent that obligations are paid pursuant to this section, security interests in items of property terminate as the obligation originally incurred with respect to each item is paid.

(3) Payments received by the creditor upon an open end credit plan are deemed, for the purpose of determining the amount of the unpaid balance secured by the various security interests, to have been applied first to the payment of finance charges in the order of their entry to the account, and then to the payment of the respective amounts financed in the order in which the entries to the account were made.

(4) If obligations consolidated or financed pursuant to an open end credit plan arise from two or more transactions made on the same day, payments received by the creditor are deemed, for the purpose of determining the amount of the obligation secured by the various security interests, to have been applied first to the payment of the smallest obligation.

Comment

1. Consolidation of two or more | existing credit transactions with the

same creditor involves rescheduling of the amount of payments and the number of payments and the addition of finance charge. Not infrequently, the creditor has taken security interests in the goods sold under each transaction. In its original concept, consolidation allowed a creditor to retain security interests in all goods under all transactions even though the amount of the credit had long ago been paid as to the earlier transactions.

2. This section allows the practice of consolidating security interests when obligations are consolidated. It establishes, however, a first-paid-first-terminated rule, which means that as payments pay off prior obligations, security interests also terminate. Other provisions of this Act require that the creditor deliver to the consumer instruments evidencing termination of those security interests and perfection thereof by public recordation of the like.

PART 5

CONSUMER APPROVAL TRANSACTIONS

Section

- 2.501 Definitions: "Inside Approval Transaction"; "Outside Approval Transaction"
- 2.502 Requirement of Affirmation
- 2.503 Manner of Affirmation
- 2.504 Transactions Not Affirmed
- 2.505 Cancellation of Inside Consumer Approval Transactions

Section 2.501 [DEFINITIONS: "INSIDE APPROVAL TRANSACTION"; "OUTSIDE APPROVAL TRANSACTION"]

(1) "Inside approval transaction" means a consumer transaction initiated by the consumer and consummated at the merchant's place of business in which the dollar amount the customer pays, will pay, has paid or is obligated to pay exceeds fifty dollars.

(2) "Outside approval transaction" means a consumer transaction initiated or consummated personally by a merchant at a place other than the merchant's place of business.

Comment

1. "Sales on approval" have long been recognized in the law of contracts and provisions dealing with such sales are codified in the Uniform Commercial Code. This appears to be a more logical approach to the problem of "home solicitation sales", as used in Uniform Consumer Credit Code, than the Code's concept of cancellation. The usual approach to these transactions is that the consumer is bound by them but should have some kind of "cooling off period" in which to change his mind. The approach of this Act is that the consumer should have a period of time in which to make up his mind, on the theory that he has not exercised full volition when being pressured in his own home or away from a merchant's

place of business.

2. So-called "direct sellers" have complained that this approach to the problem discriminates against the age-old kind of doing business—going from door to door and dealing directly with the consumer. In keeping with this, this Act adopts also the "inside approval transaction" giving certain limited rights to the consumer to reverse a transaction entered into at a merchant's place of business. Most reputable merchants allow this action irrespective of any rights the consumer may have. Therefore, this Act merely codifies what reputable merchants do as a matter of good business practice.

Section 2.502 [REQUIREMENT OF AFFIRMATION]

(1) Except as provided in subsection (5), in addition to any right otherwise to revoke an offer or to rescind the transaction or to exercise

any remedy for the merchant's breach, a consumer is not obligated under an outside approval transaction until he has affirmed the transaction in accordance with the provisions on manner of affirmation (Section 2.503).

(2) A merchant shall not change the terms of any transaction or avoid the transaction for three business days after giving notice to the consumer in accordance with the provisions on manner of affirmation (Section 2.503).

(3) Affirmation occurs when the consumer gives written notice of affirmation to the merchant at the address stated in writing provided by the merchant.

(4) Notice of affirmation, if given by mail, is given when it is received by the merchant to whom it is addressed.

(5) Notice of affirmation need not take a particular form and is sufficient if it indicates by any form of written expression the intention of the consumer to affirm the transaction.

(6) The consumer need not affirm an outside approval transaction if the consumer requests the services, property, money or credit without delay in the event of an emergency, the nature of which is prescribed by regulation of the Administrator.

Comment

1. This Section requires for a consumer to be bound to an "outside approval transaction" that he affirm the transaction or, in the language of the Uniform Commercial Code, approve it. In short, a direct transaction with a consumer which the consumer has not initiated by going to the merchant's place of business is not made legally enforceable until the consumer affirms in the manner provided under this Part. The consumer must affirm in writing, which need not be in any particular form. Affirmation by mail occurs upon receipt of the affirmation by the merchant and hence precludes any claim of affirmation merely by delivery through the mails.

Section 2.503 [MANNER OF AFFIRMATION]

(1) In an outside approval transaction, unless the consumer requests the credit without delay in an emergency, the consumer is not obligated under the transaction until he has affirmed the transaction in writing.

(2) The merchant must provide the consumer with a statement of his need to affirm the transaction. The statement must:

(a) appear under the conspicuous caption: "CONSUMER'S NEED TO AFFIRM THE TRANSACTION";

(b) read as follows: "If you were first contacted or if this agreement was completed by the merchant at a place other

than his place of business and you wish to go through the transaction, you must tell the merchant by a letter in order to be obligated. The merchant may not change the terms or get out of the transaction for three business days after you receive this notice. The letter must be mailed to [name and address of merchant]"; and

(c) be in the language in which the transaction originally took place.

(3) Until the merchant has complied with this action, any affirmation by the consumer is revocable by him.

(4) A violation of this Section is subject to the provisions of Section 5.305.

Comment

1. This Section requires that the consumer's affirmation be in writing. It requires that the merchant give written notice of the consumer's need to affirm the transaction and how he may do so. In addition, the notice must be in the language of the transaction—that is, a sale of books or installation of siding or otherwise making it clear what the transaction is that the consumer is empowered to affirm.

Section 2.504 [TRANSACTIONS NOT AFFIRMED]

(1) If a consumer does not affirm an outside approval transaction, the merchant must within 10 days after he knows of the failure of the consumer to affirm, return any money or property he has received from the consumer in connection with the transaction.

(2) If the property received from the consumer was traded in, it must be returned in substantially as good condition as when it was received. If the merchant fails to tender the property received the consumer may elect to recover an amount equal to the greater of the trade-in allowance or fair market value.

(3) Upon failure to affirm the consumer must upon demand tender to the merchant any money or property received in connection with the transaction, but only at the consumer's residence. If no demand is made within a reasonable time, the consumer may keep the money or property without obligation.

(4) The merchant is not entitled to compensation for any services performed pursuant to a transaction that is not affirmed.

(5) Until the merchant has complied with the obligations imposed by this section the consumer may retain possession of property or money delivered to him and has a lien on such property or money for any recovery to which he is entitled.

(6) A violation of this Section is subject to the provisions of Section 5.304.

Comment

1. The merchant must return money or property to the consumer within ten days after he knows that the consumer has not affirmed. This means that he either can wait the three days or a reasonable time afterward and, receiving nothing in the mail, conclude that there was no affirmation, or he may call the consumer or otherwise get a statement that there has been no affirmation. Upon tender by the merchant, the consumer in turn must tender back any property received by him, but only at his residence. He need not take it to the merchant. Services performed by the merchant are not compensable by the consumer. The practical result of this Section should be that the merchant will not part with any money, property or services until he is certain that the consumer has affirmed.

Section 2.505 [CANCELLATION OF INSIDE CONSUMER APPROVAL TRANSACTIONS]

(1) In an inside consumer approval transaction, unless the consumer requests credit, money, property or services without delay in an emergency, the merchant must present to the consumer a written statement of the consumer's right to cancel the transaction.

(2) The statement must

(a) appear under the conspicuous caption: "CONSUMER'S RIGHT TO CANCEL," and

(b) read as follows: "If you do not want the credit, money, property, or services, you may cancel this transaction by mailing or otherwise giving written notice to the merchant. The notice must say that you do not want the credit, money, property or services and must be mailed, telegraphed or delivered before midnight of the third business day after you enter into this agreement. This notice must be mailed to [name and address of merchant]. You may use this form to cancel by signing it below and mailing it to the merchant"; and

(c) be in the language in which the transaction originally took place.

(3) Until the merchant has complied with this section the consumer may cancel by notifying the merchant in any manner and by any means of his intention to cancel.

(4) A violation of this Section is subject to the provisions of Section 5.302.

Comment

1. An "inside approval transaction" is one which the consumer initiates

upon his own intention and violation by going to the merchant's place of business. In this case the transaction is usually consummated at the time and frequently goods, if a sale, are taken by the consumer. Therefore, the concept of cancellation is more accurate than the

concept of affirmation.

2. This Section allows the consumer to cancel after receiving notice of his right to cancel within three business days after he has entered into the agreement, meaning in most cases after the purchase of goods.

PART 6

LIABILITY FOR USE OF CREDIT CARDS

Section

- 2.601 Definitions
- 2.602 Rules and Regulations
- 2.603 Liability of Holder of Credit Card
- 2.604 Establishing Authorized Use
- 2.605 Violation

Section 2.601 [DEFINITIONS]

(1) "Adequate notice" means a printed notice on any credit card issued to a cardholder, or on each periodic statement setting forth the account of a cardholder, which is set forth clearly and conspicuously, in accordance with rules prescribed by the Administrator, so that a person against whom it is to operate could reasonably be expected to have noticed it and understood its meaning.

(2) "Credit card" means any card, plate, coupon book or other like credit device existing for the purpose of obtaining money, property, labor, or services on credit.

(3) "Accepted credit card" means any credit card which the cardholder has requested in writing and has signed or has used, or authorized another to use, for the purpose of obtaining money, property, labor, or services on credit. A renewal credit card shall be deemed to be accepted if it is issued within one year after a prior card has been paid for or used. A new credit card issued in substitution for an accepted credit card as a result of a change in the corporate structure or ownership of a card issuer shall be deemed to be an accepted credit card.

(4) "Cardholder" means any person to whom a credit card is issued or any person who has agreed with the card issuer to pay obligations arising from the issuance of a credit card to another person.

(5) "Card issuer" means any person who issues a credit card.

(6) "Unauthorized use" means a use of a credit card by a person other than the cardholder who does not have actual, implied, or apparent authority for such use and from which the cardholder receives no benefit.

Section 2.602 [RULES AND REGULATIONS]

The Administrator shall prescribe rules and regulations governing the conditions under which card issuers may issue credit cards. Such

regulations shall prescribe minimum standards to be followed by all card issuers.

Section 2.603 [LIABILITY OF HOLDER OF CREDIT CARD]

(1) A cardholder shall be liable for the unauthorized use of a credit card only if:

- (a) the liability is not in excess of fifty dollars;
- (b) the card is an accepted credit card;
- (c) the card issuer gives adequate notice to the cardholder of the potential liability;
- (d) the card issuer has provided a method whereby the user of the credit card can be identified as the person authorized to use it;
- (e) the unauthorized use occurs before the cardholder has notified the card issuer that an unauthorized use of the credit card has occurred or may occur as the result of loss, theft, or otherwise; and
- (f) the card issuer has taken such action, after being so notified by the cardholder, as is reasonably designed to advise those merchants or others with whom the credit card is likely to be used of the possibility that an unauthorized use thereof may occur.

(2) For the purposes of this Section, a cardholder notifies a card issuer by taking such steps as may be reasonably required in the ordinary course of business to provide the card issuer with the pertinent information whether or not any particular officer, employee, or agent of the card issuer does in fact receive such information.

(3) A cardholder shall in no event be liable to the card issuer until the credit card is in fact used, whether or not such use is authorized, and then for no more than the credit extended as a result of such use.

Section 2.604 [ESTABLISHING AUTHORIZED USE]

(1) A card issuer shall have the burden of establishing the liability of the cardholder as provided in Section 2.603.

(2) Unless the card issuer is capable of establishing the cardholder's liability, the card issuer shall give no information concerning the liability of the cardholder to a credit reporting agency.

Section 2.605 [VIOLATION]

A violation of this Part is subject to the provisions of Section 5.302.

Comment

1. This Part deals with liability for use of credit cards. Primarily it is concerned with the unauthorized use of credit cards which have been lost, stolen or not even received by the intended recipient.

2. First of all, there is no liability for use of a credit card which the holder did not accept. He can not accept a credit card unless he requested it in writing and then followed that request with its use or with his signature upon it. The end result of this is that there will never be liability for totally unsolicited credit cards. Unsolicited cards may certainly be sent, but before there will be liability the holder must in writing indicate his request for the card.

3. Section 2.603 imposes additional conditions for the liability of a credit cardholder, which include the existence of a method of identifying the user

(such as a picture or signature); the fact that the use occurred before notice was given by the holder of the card's loss or theft; the fact that after such notice, the issuer took reasonable steps to prevent the unauthorized use; and, finally, that the agreed liability does not exceed fifty dollars.

4. This Part defines credit cards so as to include merchandise certificates. Section 2.603 makes it clear that there will be no liability if such certificates are never used, a provision commonly found in the writings used in connection with such transactions. Furthermore, the creditor has the burden of proving that there is liability under Section 2.603. He may not take action to affect the cardholders credit record adversely unless he is capable of proving the cardholder's liability. This ties in with Article 8 regulating credit reporting agencies.

ARTICLE 3

SALES PRACTICES

PART 1

GENERAL PROVISIONS

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3.102	Scope

PART 2

UNFAIR AND DECEPTIVE TRADE PRACTICES

3.201	Unlawful Sales Practices
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3.203	Remedies and Penalty

PART 3

WARRANTIES AND ADVERTISING

3.301	Definitions: "Warranty"; "Merchantable"
3.302	Disclaimer of Warranties and Remedies Prohibited
3.303	Violations
3.304	Breach of Warranty: Privity Abolished
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3.306	Remedies and Penalty

PART 1

GENERAL PROVISIONS

Section

- 3.101 Short Title
3.102 Scope

Section 3.101 [SHORT TITLE]

This Article shall be known and may be cited as the National Consumer Act - Sales Practices.

Section 3.102 [SCOPE]

This Article applies to unfair and deceptive sales practices, warranties and advertising.

PART 2

UNFAIR AND DECEPTIVE TRADE PRACTICES

Section

- 3.201 Unlawful Sales Practices
3.202 Rules and Regulations
3.203 Remedies and Penalty

Section 3.201 [UNLAWFUL SALES PRACTICES]

(1) The following unfair methods of competition and unfair or deceptive acts or practices undertaken by a merchant are hereby declared to be unlawful and prohibited:

- (a) Passing off goods or services as those of another;
- (b) Causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
- (c) Causing likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another;
- (d) Using deceptive representations or designations of geographic origin in connection with goods or services;
- (e) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have;
- (f) Representing that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used or secondhand;
- (g) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;
- (h) Disparaging the goods, services, or business of another by false or misleading representation of fact;
- (i) Advertising goods or services with intent not to sell them as advertised;
- (j) Advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;
- (k) Making false or misleading statements of fact concerning reasons for, existence of, or amounts or price reductions;

- (l) Representing that the consumer transaction confers or involves rights, remedies or obligations that it does not have or involve or which are prohibited by law;
 - (m) Representing that a part, replacement or repair service is needed when it is not;
 - (n) Representing that the subject of a consumer transaction has been supplied in accordance with a previous representation when it has not;
 - (o) Representing that the consumer will receive a rebate discount or other economic benefit as an inducement for entering into a consumer transaction if the earning of the benefit is contingent on an event to occur subsequent to the consummation of the transaction;
 - (p) Causing likelihood of confusion or of misunderstanding with respect to the authority of a salesman, representative or agent to negotiate the final terms of a transaction with a consumer;
 - (q) Engaging in any other conduct which similarly creates a likelihood of confusion or of misunderstanding; or
 - (r) Engaging in any act or practice which is unfair or deceptive to the consumer.
- (2) Without limiting the scope of subsection (1), an act or practice is a violation of this section if:
- (a) It is oppressive or otherwise unconscionable in any respect; or
 - (b) It fails to comply with [existing state consumer protection statutes], the Federal Trade Commission Act, the Federal Consumer Credit Protection Act, or other Federal consumer protection statutes.

Comment

1. The Uniform Consumer Credit Code contains no equivalent to Article 3 of this Act. Article 3 of the Credit Code deals with consumer loans, which are included within the scope of Article 2 of this Act. By failing to provide protections to the consumer against unfair and deceptive trade practices, the draftsmen of the Credit Code completely ignored the fact that these practices often accompany credit transactions. Thus, the Credit Code is too limiting in its scope. Furthermore, since many credit transactions are in fact sales of goods,

there is need to afford the consumer additional warranty protection.

2. Subsection (1) contains an exhaustive list of deceptive sales and trade practices. The list is not exclusive, and a consumer may establish in court other unfair and deceptive practices. The Administrator is also entitled to establish such practices by rule or regulation. Many of the prohibited practices are already prohibited under the Federal Trade Commission Act and under State deceptive practices acts. What this Article does is provide the consumer

with a remedy under State law.

3. Subsection (2) makes "oppressive" and "unconscionable" actions unfair and deceptive within the meaning of this Article. It also incorporates by reference existing Federal and State

laws for the protection of the consumer. These in addition to the obvious would include laws regulating weights and measures, quantity, labeling, quality of food stuffs and the like.

Section 3.202 [RULES AND REGULATIONS]

(1) It is the intent of the legislature that in construing Section 3.201 due consideration and great weight shall be given to the interpretation of the Federal Trade Commission and the Federal courts relating to Section 5(a) (1) of the Federal Trade Commission Act (15 U.S.C. 45(a) (1)), as from time to time amended.

(2) The [Administrator] may make rules and regulations interpreting the provisions of Section 3.201 of this Act. Such rules and regulations shall be not inconsistent with the rules, regulations and decisions of the Federal Trade Commission and the Federal courts in interpreting the provisions of Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended.

Section 3.203 [REMEDIES AND PENALTY]

In addition to any other remedy provided by law, a consumer who has been induced to participate in a consumer transaction as a result of an act or practice undertaken by a merchant in violation of the provisions on unlawful sales practices (Section 3.201) shall be entitled to a recovery from the merchant in accordance with the provisions of Section 5.304.

Comment

1. Rather than allow the consumer trouble damages, a remedy open to merchants under certain Federal statutes, this Act would give a consumer adversely affected by an unfair or

deceptive practice the maximum civil penalty allowed under Article 5. This not only would deprive the offending merchant of his profit, but would constitute a monetary penalty.

PART 3

WARRANTIES AND ADVERTISING

Section

- 3.301 Definitions: "Warranty"; "Merchantable"
- 3.302 Disclaimer of Warranties and Remedies Prohibited
- 3.303 Violations
- 3.304 Breach of Warranty: Privity Abolished
- 3.305 False, Misleading or Deceptive Advertising
- 3.306 Remedies and Penalty

Section 3.301 [DEFINITIONS: "WARRANTY"; "MERCHANTABLE"]

(1) "Warranty" means (a) express and implied warranties as defined in [Section 2-313, 2-314 and 2-315 of the Uniform Commercial Code] and (b) expressions or action of a merchant which assure or purport to assure the consumer, directly or indirectly that the goods have described qualities or will perform in a described manner.

(2) "Merchantable" means in addition to the qualities prescribed in [Section 2-314 of the Uniform Commercial Code] that (a) the goods conform in all material respects to applicable State and Federal statutes and regulations establishing standards of quality and safety of goods and (b) in the case of goods with mechanical, electrical or thermal components, the goods are in good working order and will operate properly in normal usage for a reasonable period of time.

Comment

1. These definitions are intended to expand the warranty obligations of a seller of merchandise. They incorporate the definitions and concepts in the Uniform Commercial Code, but add additional concepts to clarify the scope of the undertakings of the seller.

"Merchantable" now includes compliance with statutes designed to set standards for products sold or furnished to consumers. This could include the safety provisions for automobiles under the Federal Act, standards of grading for meat and food stuffs, useful life of products that are dated and the like.

2. The definition of "Merchant-

Section 3.302[DISCLAIMER OF WARRANTIES AND REMEDIES PROHIBITED]

Notwithstanding any other provisions of law, with respect to goods which are the subject of or are intended to become the subject of a consumer transaction, no merchant shall:

- (1) Exclude, modify or otherwise attempt to limit any warranty,

express or implied, including the warranties of merchantability and fitness for a particular purpose; or

- (2) Exclude, modify or attempt to limit any remedy provided by law, including the measure of damages available, for a breach of warranty, express or implied.

Comment

1. There are decisions of courts which hold that because implied warranties are created by law, the parties are not free to exclude or modify them. Of course, Section 2-316 of the Uniform Commercial Code seems to hold otherwise. Under this Section, a merchant may not disclaim either express or implied warranties. Actually, this changes the law only with respect to the implied warranty of merchantability, since a merchant need not make a warranty of fitness for a particular purpose or any express warranty. In short, he may still disclaim or avoid those warranties simply by not making them. However, if he does make them,

then he should abide by them.

2. Another provision often appearing in boiler plate forms is one which limits the remedy a consumer has even from breach of an express warranty. This Section prohibits any exclusion or modification of the remedies the consumer has at law. Nothing, of course, prohibits a merchant from giving additional remedies, such as replacement or repairs. These, however, may not displace the other remedies. Already, limitation of remedy for personal injury is unconscionable under Section 2-718 of the Uniform Commercial Code, so this Section is not as radical as it may first appear.

Section 3.303 [VIOLATIONS]

A violation of the provisions of Section 3.302 shall be subject of the provisions of Section 5.303.

Section 3.304 [BREACH OF WARRANTY: PRIVACY ABOLISHED]

Notwithstanding any provision of law, no action by a consumer for breach of warranty or for negligence with respect to goods subject to a consumer transaction shall fail because of a lack of privity between the consumer and the party against whom the claim is made. An action against any person for breach of warranty or for negligence with respect to goods subject to a consumer transaction shall not of itself constitute a bar to the bringing of an action against another person.

Comment

1. This Section is designed clearly and succinctly to "topple the citadel of privity" once and for all.

Section 3.305 [FALSE, MISLEADING OR DECEPTIVE ADVERTISING]

No merchant shall advertise, print, display, publish, distribute or broadcast or cause to be advertised, printed, displayed, published, distributed, or broadcast in any manner, any statement or representation with regard to the sale of goods or the extension of consumer

credit including the rates, terms or conditions for the sale of such goods or the extension of such credit, which is false, misleading, or deceptive, or which omits to state material information that is necessary to make the statements therein not false, misleading or deceptive.

Section 3.306 [REMEDIES AND PENALTY]

In addition to any other remedy provided by law, a consumer who has been induced to participate in a consumer transaction as a result of advertising in violation of Section 3.305 shall be entitled to a recovery from the merchant in accordance with the provisions of Section 5.302.

Comment

1. Many states already have statutes similar to Section 3.305. Often they are not as inclusive as this Section. Such provisions began with the old "printer's ink" statutes. The definition of "merchant" in Section 1.301 is broad enough to include not just the merchant for whom the advertisement is prepared but also the agency responsible for violating the statute.

2. This Section does not and can

not replace the advertising restrictions of the Federal Truth in Lending Act. They are not subject to exemption by State action. That Act and the provisions of Regulation Z are rather precise in the requirements for advertising terms of consumer credit transactions. A violation of the Federal Act would constitute a violation of this Section and this Act as well (Section 2.306).

ARTICLE 4
INSURANCE

PART 1

INSURANCE IN GENERAL

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4.102	Scope; Relation to Credit Insurance Act; Applicability to Parties
4.103	Definitions: "Consumer Credit Insurance"; ["Credit Insurance Act"]
4.104	Creditor's Provision of and Charge for Insurance; Excess Amount of Charge
4.105	Conditions Applying to Insurance to be Provided by Creditor
4.106	Maximum Charge by Creditor for Insurance
4.107	Refund or Credit Required; Amount
4.108	Existing Insurance; Choice of Insurer
4.109	Deferral, Refinancing and Consolidation Agreements; Duplicate Charges; Open End Credit Plans
4.110	Fees or Commissions
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PART 2

CONSUMER CREDIT INSURANCE

4.201	Term of Insurance
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4.203	Filing and Approval of Rates and Forms
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NATIONAL CONSUMER ACT
PART 3

Art. 4

PROPERTY AND LIABILITY INSURANCE

- 4.301 Property Insurance
- 4.302 Insurance on Creditor's Interest Only
- 4.303 Liability Insurance
- 4.304 Cancellation by Creditor

Pt. 1

INSURANCE
PART 1

Sec. 4.101

INSURANCE IN GENERAL

Section

- 4.101 Short Title
- 4.102 Scope; Relation to Credit Insurance Act;
Applicability to Parties
- 4.103 Definitions: "Consumer Credit Insurance";
["Credit Insurance Act"]
- 4.104 Creditor's Provision of and Charge for Insurance:
Excess amount for Charge
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- 4.109 Deferral, Refinancing and Consolidation Agreements;
Duplicate Charges; Open End Credit Plans
- 4.110 Fees or Commissions
- 4.111 Cooperation Between Administrator and
[Commissioner] of Insurance
- 4.112 Administrative Action of [Commissioner] of Insurance

Section 4.101 [SHORT TITLE]

This Article shall be known and may be cited as National Consumer Act - Insurance.

**Section 4.102 [SCOPE; RELATION TO CREDIT INSURANCE ACT;
APPLICABILITY TO PARTIES]**

(1) Except as provided in subsection (2), this Article applies to insurance provided or to be provided in relation to a consumer credit transaction.

(2) The provision on cancellation by a creditor (Section 4.304) applies to loans the primary purpose of which is the financing of insurance.

[(3) This Article repeals the Credit Insurance Act.]

**Section 4.103 [DEFINITIONS: "CONSUMER CREDIT INSURANCE";
["CREDIT INSURANCE ACT"]]**

[(1)] "Consumer credit insurance" means insurance, other than

insurance on property, by which the satisfaction of the consumer's obligation in whole or in part is a benefit provided.

[(2) "Credit Insurance Act" means [NAIC Model Act, or any similar statute].]

Section 4.104 [CREDITOR'S PROVISIONS OF AND CHARGE FOR INSURANCE: EXCESS AMOUNT OF CHARGE]

(1) Except as otherwise provided in this Article and subject to the provisions on additional charges (Section 2.202) and maximum charges (Section 2.201) the consumer and creditor may agree that the creditor will provide insurance, and the creditor may contract for and receive a charge for insurance separate from and in addition to other charges, unless the creditor requires the insurance in connection with the credit transaction.

(2) The parties may agree that the creditor shall provide credit life and health and accident insurance in connection with a consumer credit transaction, but the creditor may not provide any other kind of coverage of credit insurance. A creditor need not make a separate charge for insurance so provided.

(3) This Act does not authorize the issuance of any insurance prohibited under any statute, or rule thereunder, governing the business of insurance.

Section 4.105 [CONDITIONS APPLYING TO INSURANCE TO BE PROVIDED BY CREDITOR]

If the parties agree that insurance shall be provided:

(1) The creditor must disclose to the consumer, in writing, before any obligation is incurred, full details of the policy, including the scope and amount of coverage of the policy, the protections it provides as well as its exceptions, if any, and the cost to the creditor of such insurance.

(2) The insurance shall be evidenced by an individual policy or certificate of insurance as approved by the Administrator, delivered to the consumer, or mailed to him, within fifteen days after the term of the insurance commences under the agreement.

(3) The creditor shall promptly notify the consumer of any failure or delay in providing the insurance.

(4) A violation of this Section is subject to the provisions of Section 5.303.

Section 4.106 [MAXIMUM CHARGE BY CREDITOR FOR INSURANCE]

If a creditor contracts for or receives a separate charge for insurance, the amount charged for the insurance must have a reasonable relation to the debt and may not exceed the premium to be charged by the insurer, conforming to any rate filings required by law and made by the insurer with the [Commissioner] of Insurance.

Section 4.107 [REFUND OR CREDIT REQUIRED; AMOUNT]

(1) Upon prepayment in full of a consumer credit transaction by the proceeds of consumer credit insurance, the consumer or his estate is entitled to a refund of any portion of a separate charge for insurance which by reason of prepayment is retained by the creditor or returned to him by the insurer.

(2) This Article does not require the creditor to grant a refund or credit if all refunds and credits due to the consumer under this Act amount to less than \$1.

(3) Except as provided in subsection (2), the creditor shall promptly make or cause to be made an appropriate refund or credit to the consumer with respect to any separate charge made to him for insurance if:

(a) the insurance is not provided or is provided for a shorter term than that for which the charge to the debtor for insurance was computed; or

(b) the insurance terminates prior to the end of the term for which it was written because of prepayment in full or otherwise.

(4) A refund or credit required by subsection (3) is appropriate as to amount if it is computed according to a method prescribed or approved by the [Commissioner] of Insurance.

(5) If the consumer is entitled to a refund, the creditor must provide written notification to the consumer of the fact, amount and reason for any credit given under this Section.

(6) A violation of this Section is subject to the provisions of Section 5.302.

Section 4.108 [EXISTING INSURANCE: CHOICE OF INSURER]

(1) If the creditor requires that credit insurance should be provided, upon notice to the creditor the consumer shall have the option of providing the insurance through an existing policy of

insurance owned or controlled by the consumer, or through a policy to be obtained and paid for by the consumer.

(2) The creditor shall, at the time of entering into the original contract, disclose to the consumer conspicuously, in writing, his right, if he so desires, to provide the insurance himself.

(3) A violation of Subsection (2) is subject to the provisions of Section 5.303.

Section 4.109 [DEFERRAL, REFINANCING AND CONSOLIDATION AGREEMENTS; DUPLICATE CHARGES; OPEN END CREDIT PLANS]

(1) The creditor may not receive a separate charge for insurance in connection with a deferral (Section 2.205), a refinancing (Section 2.206) or a consolidation (Section 2.207) unless

(a) the consumer agrees in writing at the time of deferral, refinancing, or consolidation that a specific charge may be made;

(b) the consumer is to be provided with insurance for an amount or a term, or insurance of a kind, in addition to that to which he would have been entitled had there been no deferral, refinancing, or consolidation;

(c) the consumer receives a refund or credit on account of any unexpired term of existing insurance in the amount that would be required if the insurance were terminated (Section 4.107); and

(d) the charge does not exceed the amount permitted by this Article (Section 4.106).

(2) A creditor may not receive a separate charge for insurance which duplicates insurance with respect to which the creditor has previously contracted for or received a separate charge.

(3) A creditor may not contract for or receive a separate charge for insurance with respect to an open end credit plan.

(4) A violation of this Section is subject to the provisions of Section 5.302.

Section 4.110 [FEES OR COMMISSIONS]

(1) No creditor may receive any fee, commission, or benefit, directly or indirectly for any insurance provided for the consumer nor may any creditor provide or agree to provide any insurance for the consumer under a contract of insurance issued by the creditor or by any insurance carrier related to the creditor.

(2) A violation of this Section is subject to the provisions of Section 5.304.

Section 4.111 [COOPERATION BETWEEN ADMINISTRATOR AND [COMMISSIONER] OF INSURANCE]
[COMMISSIONER] OF INSURANCE]

The Administrator and the [Commissioner] of Insurance are authorized and directed to consult and assist one another in maintaining compliance with this Article. They may separately or jointly pursue investigations, prosecute suits, and take other official action, as may seem to them appropriate. If the Administrator is informed of a violation or suspected violation by an insurer of this Article, or of the insurance laws, rules, and regulations of this State, he shall advise the [Commissioner] of Insurance of the circumstances.

Section 4.112 [ADMINISTRATIVE ACTION OF [COMMISSIONER] OF INSURANCE]

(1) To the extent that his responsibility under this Article requires, the [Commissioner] of Insurance shall issue rules with respect to insurers and with respect to refunds (Section 4.107), forms, schedules of premium rates and charges (Section 4.203), and his approval or disapproval thereof and, in case of violation, may make an order for compliance.

(2) [The State administrative procedure act] [Each provision of the Part on Administrative Procedures and Judicial Review (Part 4) of the Article on Administration (Article 6) which applies to and governs administrative action taken by the Administrator] applies to and governs all administrative action taken by the [Commissioner] of Insurance pursuant to this section.

PART 2

CONSUMER CREDIT INSURANCE

Section

- 4.201 Term of Insurance
- 4.202 Amount of Insurance
- 4.203 Filing and Approval of Rates and Forms
- 4.204 Regulation of Maximum Premiums

Section 4.201 [TERM OF INSURANCE]

(1) Consumer credit insurance provided by a creditor may be subject to the furnishing of evidence of insurability satisfactory to the insurer. Whether or not such evidence is required, the term of the insurance shall commence no later than when the consumer becomes obligated to the creditor or when the consumer applies for the insurance, whichever is later, except as follows:

- (a) if any required evidence of insurability is not furnished until more than 30 days after the term would otherwise commence, the term may commence on the date when the insurer determines the evidence to be satisfactory; or
- (b) if the creditor provides insurance not previously provided covering debts previously created, the term may commence on the effective date of the policy.

(2) In the case where the commencement of the insurance is delayed, the consumer, to the extent he has paid a premium charge for any period of time before the insurance became effective, shall be entitled to a rebate or credit of such premium according to Section 4.107.

(3) The originally scheduled term of the insurance shall extend at least until the due date of the last scheduled payment of the obligation, except that if the consumer is advised in writing that the insurance will be written for a specified shorter time and signs such writing, or otherwise separately agrees to the shorter term, the term need extend only until the end of the specified time.

(4) The term of the insurance shall not extend more than ten business days after the originally scheduled due date of the last scheduled payment of the debt unless it is extended without additional cost to the consumer or as an incident to a deferral, refinancing, or consolidation agreement.

Section 4.202 [AMOUNT OF INSURANCE]

(1) In the case of consumer credit insurance providing life coverage, the amount of insurance shall equal but not exceed the greater of the scheduled or actual amount of the debt at any time during the period the obligation is outstanding.

(2) In the case of consumer credit insurance providing disability coverage, the amount of the insurance shall equal the total of all installments of interest and principal which come due during the pendency of the disability.

Section 4.203 [FILING AND APPROVAL OF RATES AND FORMS]

(1) A creditor may not use a form or a schedule of premium rates or charges, the filing of which is required by this section, if the [Commissioner] of Insurance has disapproved the form or schedule and has notified the insurer of his disapproval. A creditor may not use a form or schedule unless:

- (a) the form or schedule has been on file with the [Commissioner] of Insurance for 30 days, or has earlier been approved by him; and
- (b) the insurer has complied with this section with respect to the insurance.

(2) Except as provided in subsection (3), all policies, certificates of insurance, notices of proposed insurance, applications for insurance, endorsements and riders relating to consumer credit insurance delivered or issued for delivery in this State, and the schedules of premium rates or charges pertaining thereto, shall be filed by the insurer, including a creditor who acts as a self-insurer, with the [Commissioner] of Insurance. Within 30 days after the filing of any form of schedule, he shall disapprove it if the premium rates or charges are unreasonable in relation to the benefits provided under the form, or if the form contains provisions which are unjust, unfair, inequitable, or deceptive, or encourage misrepresentation of the coverage, or are contrary to any provisions of the [Insurance Code] or of any rule or regulation promulgated thereunder.

(3) If a group policy has been delivered in another state, the forms to be filed by the insurer with the [Commissioner] of Insurance are the group certificates and notices of proposed insurance. He shall approve them if:

- (a) they provide the information that would be required if the group policy were delivered in this State; and
- (b) the applicable premium rates or charges do not exceed those established by his rules or regulations or by this Act.

Section 4.204 [REGULATION OF MAXIMUM PREMIUMS]

(1) Not later than one year following the date of enactment of this Act, the Commissioner of Insurance shall, by rule or regulation, limit the maximum premiums which may be charged consumers directly or indirectly for life, health, and accident insurance, and such other lines of insurance, when such insurance is provided or arranged for by a creditor pursuant to a consumer credit transaction. In prescribing such regulations, the [Commissioner] of Insurance shall ensure that the maximum premiums so established are reasonable in relation to the benefits conferred and that consumers are adequately protected against excessive premium charges.

(2) During the first year after enactment of this Act or until the [Commissioner] of Insurance has promulgated regulations pursuant to subsection (1) the maximum charge for credit life or credit accident and health insurance shall not exceed \$.25 per hundred dollars of coverage per annum.

(3) Maximum premiums established under this section shall be based upon a ratio of losses to premiums which is reasonable and which protects consumers against excessive premium charges as determined by the [Commissioner] of Insurance. However, it is presumptive evidence that a rate for credit life or credit accident and health insurance producing a loss ratio of under 65 per cent should be considered to be excessive and unreasonable. In determining such a ratio, the [Commissioner] of Insurance shall consider:

- (a) the ratio of losses to premiums experienced by other lines of insurance marketed on a group basis;
- (b) the ratio of losses to premiums experienced by creditors who provide life, health, and accident insurance pursuant to consumer credit transactions in which the cost of such insurance is included in the finance charge paid by the consumer and is not a separate charge paid by the consumer, and
- (c) the actual losses and expenses experienced by insurance companies and the actual incremental administrative expenses experienced by creditors in the sale of such insurance.

(4) The [Commissioner] of Insurance may prescribe such maximum premiums for particular creditors, classes of creditors, or transactions based upon the loss ratio determined under subsection (3) and actual loss experience.

(5) The [Commissioner] of Insurance shall from time to time raise

or lower the maximum premium charges permitted for such insurance for any particular class of creditor or class of transactions whenever the [Commissioner] of Insurance determines that the actual loss experience for the particular creditor, class of creditor, or class of transactions produces a ratio of losses to premiums which differs substantially and systematically based on credible data from the loss ratio established by the [Commissioner] of Insurance under subsection (3).

(6) In order to implement this section, insurers shall, under regulations of the [Commissioner] of Insurance, file an annual report setting forth data pertaining to actual losses in relation to premiums and such other information as may be required by the [Commissioner] of Insurance to further the purposes of this Act. Such information shall be made available to the general public upon request.

PART 3

PROPERTY AND LIABILITY INSURANCE

Section

- 4.301 Property Insurance
- 4.302 Insurance on Creditor's Interest Only
- 4.303 Liability Insurance
- 4.304 Cancellation by Creditor

Section 4.301 [PROPERTY INSURANCE]

(1) A creditor may not receive a separate charge for insurance against loss of or damage to property unless:

- (a) the insurance covers a risk of loss of or damage resulting from fire, theft, or collision as applicable to property or any other substantial risk which the creditor has the burden of establishing;
- (b) the amount, terms, and conditions of the insurance are reasonable in relation to the character and value, including any change in the character and value over the term of the credit, of the property insured or to be insured; and
- (c) the term of the insurance is reasonable in relation to the terms of credit, but in no event extends beyond the due date of the last scheduled prepayment.

(2) A creditor may not receive a separate charge for insurance against loss of or damage to property unless the amount financed for any single transaction, exclusive of charges for the insurance, is \$300 or more, and the cash price of the property is \$300 or more.

Section 4.302 [INSURANCE ON CREDITOR'S INTEREST ONLY]

If a creditor receives a separate charge for insurance against loss of or damage to property, the risk of loss or damage not willfully caused by the consumer is on the consumer only where he is responsible for a deficiency in the effective coverage of the insurance and then only to the extent of such deficiency.

Section 4.303 [LIABILITY INSURANCE]

A creditor may not receive a separate charge for insurance against liability.

Section 4.304 [CANCELLATION BY CREDITOR]

(1) A creditor shall not request cancellation of a policy or property

or liability insurance except after the consumer's default (Section 5.103), or in accordance with a written agreement by the consumer at any time other than when the original transaction is entered into. In either case the cancellation does not take effect until written notice is delivered to the consumer or mailed to him. The notice shall state that the policy may be canceled on a date not less than 60 days after the notice is delivered, or, if the notice is mailed, not less than 63 days after it is mailed.

(2) Following cancellation, the consumer shall be entitled to a rebate or credit for any prepaid charges which represent the premium for a period following cancellation. The rebate or credit shall be governed by Section 4.107.

ARTICLE 5
REMEDIES AND PENALTIES

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PART 1

LIMITATIONS ON CREDITORS' REMEDIES

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Section 5.101 [SHORT TITLE]

This article shall be known and may be cited as National Consumer Act - Remedies and Penalties.

Section 5.102 [SCOPE]

This part applies to actions or other proceedings brought by a creditor to enforce rights arising from consumer credit transactions and to extortionate extensions of credit (Section 5.108).

Section 5.103 ["DEFAULT"; ACCRUAL OF CAUSE OF ACTION]

(1) "Default" with respect to a consumer credit transaction means the failure without justification under any provision of law of the consumer to pay:

- (a) three successive installments within the period of time allowable by this Act, or
- (b) any remaining balance within three months after the due date of the final installment, or
- (c) an amount resulting from the total of unpaid delinquent installments constituting 30% of the amount financed.

(2) Upon the default of the consumer with respect to a consumer credit transaction, the creditor shall be entitled to recover the amount which the consumer would have been entitled to pay, on the date the action was brought, upon prepayment pursuant to the provision on rebate upon prepayment (Section 2.210). No cause of action shall accrue in favor of the creditor with respect to the obligation of the consumer except by reason of his default as defined in subsection (1).

(3) A cause of action arising from a consumer credit transaction

which creates a security interest in personal property shall be subject to the limitations provided in Part 2 of this article, whether or not the creditor is seeking or has sought to realize upon the security interest.

Comment

1. This section attempts to solve one of the major recurring problems in consumer credit – the definition of default. It has long been settled in contract law that only a substantial breach gives rise to a cause of action. Yet the Uniform Commercial Code purported to deal with the concept of default in credit transactions without attempting to equate it to substantiality of breach. The Uniform Consumer Credit Code continues to build upon this same inadequacy.

2. Under this section the only default of the consumer which shall give rise to a cause of action in favor of the creditor is the consumer's failure to pay the specified amount of installment. Clearly, one unpaid installment is too insubstantial to constitute a material breach. Moreover, definitions of default commonly found in credit contracts which talk in terms of the insecurity of the creditor, removal of the property

from the jurisdiction, or failure to keep the property insured, are not realistic in light of normal consumer behavior or the actual needs of creditors. Late or unpaid installments falling short of the definition of default can be adequately handled within the context of the provisions in Part 2 of Article 2 on deferral, consolidation or refinancing agreements and delinquency charges.

3. Subsection (3) provides that a credit transaction which is secured by a security interest in goods shall be subject to the provisions of Part 2 of this Article. Part 2 of this Article does allow a secured creditor to waive his security interest and proceed in accordance with this section. However, it is felt that this provision will provide incentive to creditors to make a more careful decision as to the kinds of transactions in which security interests will originally be taken.

Section 5.104 [VENUE; PLEADING; STAY OF ENFORCEMENT]

(1) An action brought by the creditor arising from a consumer credit transaction shall be commenced in the county in which the transaction was entered into, in the county in which the consumer resided at the time the transaction was entered into, in the county in which the consumer resides at the commencement of the action, or, where the transaction is secured by an interest in real property, in the county in which the real property is located.

(2) In an action brought by the creditor arising from a consumer credit transaction the complaint shall set forth specifically the circumstances constituting the default of the consumer and the figures necessary for computation of damages and shall be accompanied by an accurate copy of the writing evidencing the transaction. A judgment entered upon a complaint which fails to comply with this section shall be void.

(3) A stay of enforcement of a judgment against a consumer in an action arising from a consumer credit transaction may be ordered by the court on condition that the consumer pay to the creditor such

amounts at such times as the court deems it to be in the mutual best interests of the parties. The court may make such order for good cause on its own motion, or on the application of any party upon reasonable notice to the other party, either at the time of the making of the judgment or at any time thereafter, and may modify or revoke such order for good cause on its own motion, or on the application of any party upon reasonable advance notice to the other party, at any time thereafter.

Comment

1. It was not the intent of the draftsmen to involve this Act on the intricacies of the rules of procedure. However, sufficient abuses persist throughout the country with regard to credit transactions as to deserve reform of certain aspects of civil procedure. One of the most obvious of these is the matter of venue. Subsection (1) limits the counties in which an action may be brought so that the consumer can have a realistic opportunity to defend himself.

2. Subsection (2) simply requires that sufficient information be contained

in the complaint to enable the court to fairly evaluate the claim. Since most judgments obtained by creditors as a result of credit transactions occur by reason of the default of a consumer, it is necessary that sufficient information be required to be included in the complaint to prevent abuses by unscrupulous creditors.

3. Subsection (3) establishes an equitable procedure whereby courts may tailor the consumer's payment of a judgment to his particular needs and resources.

Section 5.105 [ATTACHMENT BEFORE JUDGMENT PROHIBITED]

(1) Prior to entry of judgment in an action against a consumer arising from a consumer credit transaction, the creditor may not attach any property, including unpaid earnings, of the consumer, whether by attachment or garnishment or other like process.

(2) An order or process in violation of this section is void.

Section 5.106 [EXEMPT PROPERTY]

(1) The following property of the consumer shall be exempt from levy, execution, sale, and other similar process in satisfaction of a judgment for an obligation arising from a consumer credit transaction:

- (a) unpaid earnings;
- (b) household furnishings, appliances and clothing of the consumer and his dependents;
- (c) real property used as the principal residence of the consumer or his dependents;
- (d) other property necessary for the maintenance of a moderate standard of living for the consumer and his dependents.

(2) Nothing in this section shall be construed to displace other

provisions of law which afford additional or greater protection to the consumer.

(3) An order or process in violation of this section is void.

Comment

1. Sections 5.105 and 5.106 combine to make it clear that the consumer shall be able to retain all of his earnings free of any outstanding judgment for a consumer obligation. The Uniform Consumer Credit Code prohibits pre-judgment garnishment of earnings, and exempts earnings equivalent to forty times the minimum hourly wage from post-judgment garnishment. The Federal Consumer Credit Protection Act exempts thirty times the minimum hourly wage. The several states which exempt earnings altogether enjoy the lowest per

capita rates of bankruptcy in the country. Therefore, the draftsmen have chosen to provide a complete exemption.

2. The balance of Section 5.106 designates other property to be exempt from levies of execution to satisfy judgments for consumer debts. All such property was selected with the goal of enabling the consumer to retain property sufficient to enable him to provide himself and his dependents with an adequate standard of living.

Section 5.107 [UNCONSCIONABILITY]

(1) If it is found as a matter of fact that a consumer credit transaction, any aspect of the transaction, any conduct directed against the consumer by a party to the transaction, or any result of the transaction is unconscionable, the court shall, in addition to the penalty authorized in subsection (4), either refuse to enforce the transaction against the consumer, or so limit the application of any unconscionable aspect or conduct to avoid any unconscionable result.

(2) Specific practices forbidden by the Administrator in regulations promulgated pursuant to Section 6.109 shall be presumed to be unconscionable.

(3) Without limiting the scope of subsection (1), the trier of fact shall be entitled to consider, among other things, the following as pertinent to the issue of unconscionability:

- (a) The degree to which the practice unfairly takes advantage of the lack of knowledge, ability, experience, or capacity of consumers;
- (b) Knowledge by those engaging in the practice of the inability of consumers to receive benefits properly anticipated from the goods or services involved;
- (c) Gross disparity between the price of goods or services and their value as measured by the price at which similar goods or services are readily obtainable by other consumers, or by other tests of true value;
- (d) The fact that the practice may enable merchants to take

advantage of the inability of consumers reasonably to protect their interests by reason of physical or mental infirmities, illiteracy or inability to understand the language of the agreement, ignorance or lack of education or similar factors;

- (e) The degree to which terms of the transaction require consumers to waive legal rights;
- (f) The degree to which terms of the transaction require consumers to jeopardize money or property beyond the money or property immediately at issue in the transaction;
- (g) The degree to which the natural effect of the practice is to cause or aid in causing consumers to misunderstand the true nature of the transaction or their rights and duties thereunder;
- (h) The extent or degree to which the writing purporting to evidence the obligation of the consumer in the transaction contains terms or provisions or authorizes practices prohibited by law; and
- (i) Definitions of unconscionability in statutes, regulations, rulings and decisions of legislative, administrative or judicial bodies in this state or elsewhere.

(4) In addition to the protections afforded in subsection (1), the consumer shall be entitled upon a finding of unconscionability to recover from the creditor or the person responsible for the unconscionable conduct a penalty in accordance with the provisions of Section 5.304.

Comment

1. This section is derived for the most part from Section 2-302 of the Uniform Commercial Code. Nearly fifteen years of experience with this latter section has shown that "unconscionability" is so broad and undefined as to enable courts to run roughshod over the legitimate interests of merchants. In fact, the experience has been quite to the contrary; the few cases reported on Section 2-302 have been markedly conservative in their interpretation.

2. It is impossible to anticipate all of the factors and considerations which

may support a conclusion of unconscionability in a given instance. The cases under Section 2-302 of the Uniform Commercial Code, together with the rulings of the Federal Trade Commission as to "unfair and deceptive" practices, do provide identifiable criteria which could support a finding of unconscionability. This, together with the regulations of the Administrator, should provide adequate substantive content to the meaning of unconscionability in the consumer context. See the comment to Section 6.109.

Section 5.108 [EXTORTIONATE EXTENSIONS OF CREDIT]

(1) If it is the understanding of the creditor and the consumer

during any time that an extension of credit is outstanding, that delay in making repayment could result in the use of violence or other illegal means to cause harm to the person, reputation, or property of any person, the extension of credit shall be unenforceable in accordance with the provisions of Section 5.305 and the consumer shall additionally recovery triple the penalty provided in Section 5.304.

(2) If it is shown that an extension of credit was made at an annual rate exceeding that permitted by the provisions on maximum charges (Section 2.201) and that the creditor had a reputation for the use or threat of use of violence or other illegal means to cause harm to the person, reputation, or property of any person to collect extensions of credit or to punish the nonrepayment thereof, it shall be presumed that the extension of credit was a violation under subsection (1).

Comment

1. This section is derived from the Federal Consumer Credit Protection Act. A similar provision was also included in the Uniform Consumer Credit Code.

PART 2

ENFORCEMENT OF SECURITY INTERESTS IN COLLATERAL

Section

- 5.201 Scope
- 5.202 Definition: "Collateral"
- 5.203 Enforcement of Security Interests; Remedies
- 5.204 Nonjudicial Enforcement Prohibited
- 5.205 Voluntary Surrender of Collateral
- 5.206 Process for Possession: Pleadings
- 5.207 Consumer's Right to Cure Default
- 5.208 Hearing on Issue of Default
- 5.209 Consumer's Right to Redeem
- 5.210 Disposition of Collateral after Redemption Period
- 5.211 Restrictions on Deficiency Claims
- 5.212 Computation of Deficiency

Section 5.201 [SCOPE]

This Part applies to actions brought to enforce security interests in goods which arise from a consumer credit transaction.

Comment

1. This Part introduces a totally new concept for consumer legislation. The typical legislation concerned with the subject of repossession offered little protection to the consumer other than imposing overly technical, often meaningless, notice requirements on creditors. The Uniform Commercial Code attempted to eliminate these technical requirements by building into Part 5 of Article 9 of that Code a series of general requirements measured in terms of "good faith" and "commercially reasonable". Accumulated experience with this approach has proved to be equally unsatisfactory from the standpoint of protecting consumers. Accordingly, in keeping with the approach of this Act with regard to security interests (Sections 2.416 and 2.417) and to the concept of "default" (Section 5.103), the draftsmen have introduced a separate set of proceedings with regard to the enforcement of security interests. Since no distinction is made in this Act with regard to goods securing the obligation arising from a loan or a sale (Article 2), the proceedings with regard to enforcing security interests are identical.

Section 5.202 [DEFINITION: "COLLATERAL"]

"Collateral" means goods subject to a security interest arising from a consumer credit transaction.

Comment

1. The definition of "collateral" is derived from Section 9-105(1)(c) of the Uniform Commercial Code. It includes goods subject to a purchase money

security interest, goods in which a security interest is taken or acquired pursuant to Section 2.416, and goods given by a consumer as security for the repayment of a loan.

Section 5.203 [ENFORCEMENT OF SECURITY INTERESTS; REMEDIES]

(1) Subject to the provisions on security interests (Sections 2.416 and 2.417) the creditor may acquire a security interest in goods to secure the obligation of the consumer arising from a consumer credit transaction.

(2) Upon the default (Section 5.103) of the consumer the creditor shall have only those rights and remedies provided in this Article. Subject to the limitations contained in this Part, the creditor may waive his security interest and pursue his claim to judgment as unsecured, or foreclose or otherwise enforce the security interest by any available judicial procedure.

(3) Each requirement of this Part is a condition precedent for a proper taking of collateral.

Comment

1. Subsection (1) restates the authorization for the acquisition of a security interest in goods contained in Section 2.416.

2. Subsection (2) makes it clear that the secured creditor is restricted to the rights and remedies of this Article. The creditor may waive his security interest and pursue his claim in accordance with Section 5.103. Otherwise, if the creditor desires to pursue his remedies as a secured creditor he must proceed in accordance with the provi-

sions of this Part. Therefore, the provisions of Part 5 of Article 9 of the Uniform Commercial Code are superceded by this Part.

3. The Uniform Consumer Credit Code makes no provisions for resolving problems inherent in the enforcement of security interests. By implication therefore the sponsors of that Code are satisfied with the provisions presently contained in the Uniform Commercial Code.

Section 5.204 [NONJUDICIAL ENFORCEMENT PROHIBITED]

Notwithstanding any other provision of law no term of a writing shall constitute authorization for a creditor to take possession of collateral by other than legal process in accordance with this Part.

Section 5.205 [VOLUNTARY SURRENDER OF COLLATERAL]

Notwithstanding a waiver by the creditor of the security interest in collateral (Section 5.203(2)) or any other provision of law, the consumer shall have the right at any time to voluntarily surrender all of his rights and interests in the collateral to the creditor. For the purposes of this Article a voluntary tender by the consumer to the creditor of

the collateral shall be the equivalent of the enforcement of the security interest by the creditor.

Section 5.206 [PROCESS FOR POSSESSION: PLEADINGS]

(1) In an action brought to enforce a security interest in collateral no process shall issue to take possession of the goods until the expiration of 15 days from the service of the complaint on the consumer or until the issue of the consumer's default has been resolved in favor of the creditor after a hearing (Section 5.208).

(2) In an action brought to enforce a security interest in collateral the complaint shall be accompanied by an accurate copy of the writing evidencing the transaction and shall set forth specifically:

- (a) the circumstances constituting the default of the consumer;
- (b) the amount itemized that the consumer is required to pay to cure the default (Section 5.207);
- (c) the amount, itemized which the consumer will be required to pay to redeem the collateral (Section 5.209) if his default is not cured; and
- (d) in the event that the unpaid balance of the obligation is such that it may give rise to a claim for a deficiency (Section 5.211), the amount claimed by creditor (Section 5.212) if the default is not cured or the collateral is not redeemed.

Comment

1. Section 5.206 sets out the basic procedure for the enforcement of a security interest arising from a consumer credit transaction. A period of 15 days is allowed the consumer after his receipt of the complaint to cure his default. No process shall issue with regard to the possession of the collateral until this period of time has elapsed. In effect, the creditor is granted an extra period of time with the persuasion of the judicial process to assist him in his goal of obtaining the payments. Similarly, the consumer has a period of time to accomplish his goal of retaining the collateral.

2. In keeping with the approach of Section 5.104(2), the complaint brought by the creditor must be sufficiently detailed to provide adequate information for the court to evaluate its validity. Also, information is required to

be set forth in the complaint to give the consumer adequate notice of the alternatives available for him, and to encourage either the curing of his default or ultimately his redemption of the collateral.

3. Section 5.205 gives the consumer the opportunity to "throw in the towel" in those cases where the curing of the default or redemption of the collateral is out of the question. The voluntary surrender of the collateral by the consumer effectively terminates the consumer's interest in the proceedings. The tender by the consumer is treated as the effective surrender, rather than its acceptance by the creditor, in order to preclude the possibility that the creditor may seek higher damages by waiving the security interest and proceeding in accordance with Section 5.103.

Section 5.207 [CONSUMER'S RIGHT TO CURE DEFAULT]

(1) The consumer may cure his default by tendering fulfillment of his current obligation to the creditor at any time before the expiration of the 15 days from service of the complaint or, in any event, at any time before process issues for the taking of the collateral.

(2) For the purposes of this Part the current obligation of the consumer means the aggregate of all installments scheduled to be due at the time of the tender, plus any unpaid delinquency or deferred charges.

(3) Once the consumer has cured his default pursuant to this Section the complaint of the creditor shall be dismissed.

Comment

1. The notion of the consumer curing his default is essentially one of restoring the state of affairs that existed prior to the default. The measure of the amount which the consumer must pay is basically what he owes up to and including the date the default is cured.

This prevents the operation of an "acceleration" of installments not yet due, owing or unpaid or any other type of penalty which may make it impossible for the consumer to retain the collateral and still bring his obligation current.

Section 5.208 [HEARING ON ISSUE OF DEFAULT]

(1) Before process shall issue with regard to the collateral, the consumer shall be entitled to an expedited hearing on the issue of his default or any other matter which questions the validity of the creditor's claims. This right shall be disclosed in the summons or other process accompanying the complaint. If he desires a hearing the consumer shall, with reasonable notice to the creditor and other parties to the action, file his demand for a hearing within 5 days of the service of the complaint. Upon the filing of the consumer's demand the hearing shall be scheduled by the court as soon as possible.

(2) If it appears at the hearing that there is a substantial question as to the default of the consumer or the validity of the creditor's claim no process shall issue with regard to the collateral until the matter is resolved at a final hearing. If no substantial question is raised the creditor shall be entitled to have process issue immediately, providing a period of 15 days has elapsed since the service of the complaint.

Comment

1. The decision of the United States Supreme Court in *Sniadach v. Family Finance Corporation of Bay View* raises a substantial question as to the constitutionality of any process which authorizes the deprivation of the property

interest of the defendant. At the very least, that case can be interpreted as holding there must be a preliminary hearing wherein the probable validity of the underlying claim must be established before the defendant can be

deprived of his property interests. This Section provides such a hearing.

2. Under this Section, the burden is placed on the consumer to demand this hearing within 5 days of the service of the complaint, a procedure not unlike that commonly found in summary eviction proceedings. It is not contemplated that this should be a final hearing but

rather one which provides the opportunity whereby the validity of the underlying claim can be examined. It is likely that court procedures will have to be changed to accommodate such an expedited hearing. However, the specific mechanics of the administration of the court system are considered to be beyond the purview of this Act.

Section 5.209 [CONSUMER'S RIGHT TO REDEEM]

(1) For a period of thirty days following the issue of process with regard to the collateral the consumer shall be entitled to redeem the goods by tendering the amount constituting his current obligation (Section 5.207(2)) together with the court costs incurred by the creditor, and a performance deposit, not to exceed the total of three installments, equal to one third of the total obligation remaining with respect to the consumer credit transaction.

(2) Upon payment by the consumer of the amount necessary for redemption, the process under which the collateral has been held shall be dissolved, the action shall be dismissed, and the goods shall be returned.

(3) The performance deposit shall be held by the creditor against the remaining obligation of the consumer. Upon regular performance by the consumer throughout the duration of the obligation the deposit shall be credited to the consumer's account at the time it becomes equal to the remaining balance. In the event of a subsequent default, prepayment, or any other occurrence which requires the computation under this Act of the outstanding obligation of the consumer, the deposit shall be credited to the amount paid for the purposes of the computation.

Section 5.210 [DISPOSITION OF COLLATERAL AFTER REDEMPTION PERIOD]

In the absence of the consumer's payment of an amount necessary to redeem the collateral within the period provided in Section 5.208 the creditor shall take all rights and interests in the collateral.

Comment

1. Section 5.209 recognizes a concept of redemption which is presently found in Section 9-506 of the Uniform Commercial Code. The Uniform Consumer Credit Code would have left the procedure under that section intact. The major differences suggested here pertain

to the limited amount of time offered (30 days), the fact that the procedure under this Section would be totally under judicial supervision, and the difference in the measure of the amount necessary for redemption.

2. The Uniform Commercial Code measures redemption in terms of the total unfulfilled obligation of the consumer, i.e., the "accelerated" obligation. The draftsmen agree that the consumer should be required to pay something beyond that necessary to bring his obligation current but are unable to accept the hardship inherent in the acceleration of the due dates of all the remaining unpaid installments. Therefore, a "performance deposit" has been substituted in an attempt to accommodate all legitimate interests concerned. In that the performance deposit will not exceed the total of three installments it should not work a severe hardship on the conscientious consumer. On the other hand, it is sufficiently great to give substantial assurance to the creditor that the problem of default will not be recurring.

3. In Section 5.210 it is provided that the creditor will take all rights and interests in the collateral upon the expiration of the 30 day redemption period. A final hearing will be necessary to adjudicate this fact with the legal finality that the creditor is entitled to. However, in keeping with the desire of the draftsmen to refrain from becoming enmeshed in the mechanics of judicial administration, no set standards are contained in the Act which defines the nature or content of this final hearing. Once the consumer has failed to cure his default or to redeem the collateral it is considered that the administration of the final judgment will become an established routine in the same vein as is presently experienced with regard to default and deficiency proceedings.

Section 5.211 [RESTRICTIONS ON DEFICIENCY CLAIMS]

(1) If the creditor takes possession of property which was collateral under a consumer credit transaction, the consumer shall not be personally liable to the creditor for any unpaid balance of the obligation unless the unpaid balance was \$2000 or more at the time of default.

(2) For purposes of this Part, the unpaid balance of the obligation is that amount which the consumer would have been required to pay upon prepayment pursuant to the provisions on rebate upon prepayment (Section 2.210). For the purpose of determining the unpaid balance of consolidated debts or debts pursuant to open end credit plans, the allocation of payments to a debt shall be determined in the same manner as provided for determining the amount of the obligation secured by various security interests (Section 2.417).

Comment

1. This Section continues the policy of the Consumer Credit Code with regard to deficiency judgments. Unlike that Code which prohibits deficiency judgments in terms of the cash price of the transaction, the draftsmen felt that the more equitable approach was to draw the line in terms of the dollar amount of the unpaid balance at the time of default. The major concern of a legitimate creditor is with respect to the rare consumer who defaults on one of the early payments leaving used collat-

eral and a rather substantial unpaid balance. It is felt that this concern is legitimate and should be accommodated, but only to the extent that a significant transaction is involved. By definition of the \$2000 standard, transactions involving household furnishings and appliances are excluded. Transactions in which deficiency judgments could still occur are those which involve automobiles and other major purchases and loans.

Section 5.212 [COMPUTATION OF DEFICIENCY]

(1) If the unpaid balance of the consumer's obligation at the time of default was \$2000 or more the creditor shall be entitled to recover from the consumer the deficiency, if any, resulting from deducting the fair market value of the collateral from the unpaid balance due, provided he has complied with all provisions of this Part.

(2) In a proceeding for a deficiency the fair market value of the collateral shall be a question for the trier of fact. Periodically published trade estimates of the retail value of goods shall, to the extent they are recognized in the particular trade or business, be presumed to be the fair market value of the collateral.

Comment

1. This Section provides the standard for computation of a deficiency. The sale provisions of the Uniform Commercial Code have proved to be totally inadequate for these purposes. Therefore, the draftsmen have chosen to resort to the "fair market value" of the

collateral as the measuring point of the deficiency as a far more equitable standard. Subsection (2) provides that "blue books" and other publications of estimated retail values of goods shall be presumed to be the fair market value.

PART 3

CONSUMERS' REMEDIES

Section

- 5.301 Remedies to be Liberally Administered:
"Transaction Total" Defined
- 5.302 Penalty for Certain Violations
- 5.303 Remedy for Certain Violations
- 5.304 Penalties for Certain Violations
- 5.305 Transactions which are Void
- 5.306 Terms and Action which are Void
- 5.307 Consumer's Attorney's Fees: Time Limitations
- 5.308 Class Actions
- 5.309 Liability of Corporate Officers

**Section 5.301 [REMEDIES TO BE LIBERALLY ADMINISTERED:
"TRANSACTION TOTAL" DEFINED]**

(1) The remedies provided by this Part shall be liberally administered to the end that the consumer as the aggrieved party shall be put in at least as good a position as if the creditor had fully complied with this Act. Except as is otherwise specifically provided consequential and special damages may be had in lieu of the specific penalties allowed, and in addition punitive damages may be had as indicated.

(2) Any right or obligation declared by this Act is enforceable by action unless the provision declaring it specifies a different and limited effect.

(3) "Transaction total" means

(a) in the case of transactions pursuant to open end credit plans, the total of the following calculated as if the amount or amounts financed were paid over the maximum period of the plan or, if there is no such period, over twelve months beginning with the next billing cycle or cycles following the transaction or transactions:

- (i) The amount financed, plus any down payment or required deposit balance, and
- (ii) The total finance charge, including any prepaid finance charge;

(b) in the case of other than open end transactions, the total of the following:

- (i) The amount financed, plus any down payment or required deposit balance, and
- (ii) The amount of all precomputed or precomputable finance charge, including any prepaid finance charge.

Comment

1. Subsection (1) and (2) simply copy into this Act provisions that are already in the Uniform Commercial Code. They are directed to courts who will be enforcing the statute, and indicate to them that the remedies are to be construed to benefit the consumer. Further, they make it clear that the consumer has an affirmative right of action and not simply one of defense or set-off.

2. The definition in subsection (3), "transaction total", is new. This is the amount by which penalties are determined for consumer remedies under the following sections. This amount was

chosen in lieu of the provisions in the Uniform Consumer Credit Code and in other statutes basing recovery upon finance charge. Some transactions are not credit transactions at all; and some credit transactions, at least ostensibly, do not involve finance charge. Furthermore, the nature of the transaction may be such that finance charge will be less in one case, even though the violation is severe, and more in another where the violation is less severe. The transaction total bases the penalty upon the total amount of money involved for the consumer.

Section 5.302 [PENALTY FOR CERTAIN VIOLATIONS]

(1) A consumer may recover from the person violating this Act the damages the law otherwise allows, ten percent of the transaction total, if applicable, or \$100, whichever is greater, for violations to which this Section applies.

(2) This Section also applies to all violations for which no other remedy is specifically provided.

Comment

1. This is the minimum monetary penalty which a consumer can recover. It is referred to specifically for specific violations in given sections. Subsection

(2) makes it applicable to any violation for which there is no specific penalty provided.

Section 5.303 [PENALTIES FOR CERTAIN VIOLATIONS]

A consumer may recover from the person violating this Act the damages which the law otherwise allows, twenty percent of the transaction total, if applicable, or \$200, whichever is greater, for violations to which this Section applies.

Section 5.304 [REMEDY FOR CERTAIN VIOLATIONS]

A consumer may recover from the person violating this Act actual and punitive damages, thirty percent of the transaction total, if applicable, or \$300, whichever is greater, for violations to which this Section applies.

Comment

1. Sections 5.303 and 5.304 provide penalties more severe than the previous section's penalties. This Act does not adopt the treble damage concept which is found in some federal statutes and in the Uniform Consumer Credit Code. Rather, Section 5.304 is a severe monetary penalty which not only will deprive merchant of his profit, but also penalize him for a violation to which it applies. Furthermore, it provides for punitive damages at the discretion of the court in cases where they apply.

Section 5.305 [TRANSACTIONS WHICH ARE VOID]

The consumer shall be entitled to retain the goods, services or money received pursuant to the transaction without obligation to pay any part of the transaction total for violations to which this Section applies. In addition, he shall be entitled to recover any sums paid to the creditor or merchant pursuant to the transaction.

Comment

1. Section 5.305 is cumulative with the prior remedies for consumers. It declares that not only must the merchant pay a penalty for his violation, but he is entitled to absolutely no recovery for the transaction in which there has been a violation.

Section 5.306 [TERMS AND ACTION WHICH ARE VOID]

Any charge, practice, term, clause, provision, security interest or other action or conduct in violation of the provisions of this Act shall confer no rights or obligations enforceable by action.

Section 5.307 [CONSUMER'S ATTORNEY'S FEES: TIME LIMITATIONS]

(1) In any action to enforce a consumer's remedy under this Part, or to enforce any other consumer's right with respect to any transaction subject to this Act, whether as an original claim, set-off or counterclaim, a consumer who prevails shall be awarded reasonable attorney's fees. Fees shall be measured by the amount of time reasonably expended by the consumer's attorney and not by the amount of the recovery. If the consumer is represented by a non-profit organization in such a case, the organization shall be awarded a service fee, in lieu of attorney's fees, equal to the amount of fees a private attorney would be awarded for the same services.

(2) Any action brought by a consumer to enforce rights pursuant to this Act may be commenced within one year after the due date of the last scheduled payment of the transaction in question or four years after consummation of the agreement, whichever is later. Rights under this Act may be asserted as a defense, set-off or counterclaim to an action against the consumer without regard to this time limitation.

Comment

1. This Section provides that a consumer who prevails in an action under this Act is entitled in all cases to reasonable attorney's fees. It deviates from similar statutes by (1) allowing the consumer attorney's fees based upon the time and effort spent by the attorney rather than the amount of recovery; and (2) making clear that fees for legal services will be payable to non-profit organizations such as legal services programs.

2. Subsection (2) makes it clear that the consumer has an affirmative right of action, as well as the right to assert his claim by way of counterclaim, set-off, or defense.

Section 5.308 [CLASS ACTIONS]

(1) Any person may bring a civil action on behalf of himself and all other persons in the state similarly situated to restrain a person from violating this Act or from engaging in a course of fraudulent or unconscionable conduct and for other appropriate relief including damages and penalties provided in this Act.

(2) At the time of filing the class action the plaintiff shall notify the Administrator of the action, and the Administrator shall be permitted, upon application, to join as party plaintiff in accordance with the provisions of Section 6.111.

(3) The proceeding of the class action shall be governed by the standards set forth in Section 6.111 whether or not the Administrator joins the action.

(4) The plaintiff may apply for temporary relief, and if the court finds after hearing held upon notice to the defendant that there is reasonable cause to believe that the defendant is engaging in or is likely to engage in conduct sought to be restrained, it may grant any temporary relief or restraining order it deems appropriate.

Comment

1. This section provides for class actions for consumers. It is in keeping with similar provisions now in existence in the states of Massachusetts and North Carolina. Section 5.308 makes it possible to prosecute class actions in state courts for violations of the Federal Act.

2. Under Federal law, it is possible to prosecute class actions in the Federal

Section 5.309 [LIABILITY OF CORPORATE OFFICERS]

Damages or penalties awarded to a consumer for a violation of this Act which cannot be collected from a corporation by reason of its insolvency may be assessed against the principal officers of the corporation.

Comment

<p>1. Frequently a consumer's rights, whatever they might be under existing law, are against a corporate merchant. That merchant may well be insolvent when those rights are asserted, and under existing corporation laws, the</p>	<p>officers will not be held responsible. This section "pierces the corporate veil" and holds responsible the individual officers of the corporation for violations of this Act if the corporation becomes insolvent.</p>
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PART 4

CRIMINAL PENALTIES

Section

- 5.401 Willful Violations: Misdemeanor
- 5.402 Disclosure Violations

Section 5.401 [WILLFUL VIOLATIONS: MISDEMEANOR]

A person who willfully engages in any conduct or practice in violation of this Act is guilty of a misdemeanor and upon conviction may be sentenced to pay a fine not exceeding [\$2000].

Section 5.402 [DISCLOSURE VIOLATIONS]

A person who willfully violates the provisions on disclosure (Part 3) of the Article on Consumer Credit Transactions (Article 2) is guilty of a [misdemeanor] and upon conviction may be sentenced to pay a fine not exceeding \$5000, or to imprisonment not exceeding one year, or both.

Comment

<p>1. Sections 5.401 and 5.402 provide criminal penalties for violations of this Act. The first section provides that a person is guilty of a misdemeanor if he willfully violates the Act. The second section provides a penalty for violation of the disclosure provisions which is</p>	<p>identical to that provided in the Federal Truth in Lending Act. Under the second section, local and state enforcing officers may prosecute violations of the Federal statute, since they also constitute violations of this Act (Section 2.306).</p>
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ARTICLE 6
ADMINISTRATION

PART 1

POWERS AND FUNCTIONS OF ADMINISTRATOR

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- 6.101 Short Title
- 6.102 Applicability
- 6.103 Administrator
- 6.104 Powers of Administrator; Duty to Report
- 6.105 Administrative Powers with Respects to
Supervised Financial Organizations
- 6.106 Investigatory Powers
- 6.107 Application of [Administrative Procedure Act]
[Part on Administrative Procedure and
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- 6.108 Administrative Enforcement Orders
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- 6.110 Temporary Relief; Injunctions
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PART 1

POWERS AND FUNCTIONS OF ADMINISTRATOR

Section

- 6.101 Short Title
- 6.102 Applicability
- 6.103 Administrator
- 6.104 Powers of Administrator; Duty to Report
- 6.105 Administrative Powers with Respects to Supervised Financial Organizations
- 6.106 Investigatory Powers
- 6.107 Application of [Administrative Procedure Act] [Part on Administrative Procedure and Judicial Review]
- 6.108 Administrative Enforcement Orders
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- 6.110 Temporary Relief; Injunctions
- 6.111 Class Actions
- 6.112 Venue
- 6.113 Debtors' Remedies not Affected

Section 6.101 [SHORT TITLE]

This article shall be known and may be cited as National Consumer Act – Administration.

Section 6.102 [APPLICABILITY]

This Article applies to a merchant whose activities are directed toward or affect consumers in this State, to a person who takes assignments of and undertakes direct collection of payments from or enforcement of rights against consumers, to a person engaged in the business of debt collection and to a person engaged in the business of furnishing consumer reports.

Section 6.103 [ADMINISTRATOR]

Administrator means [].

Comment

1. Effective and energetic administration is vital to the Act. Since each state has a different structure in its executive branch, the Act does not specifically identify the Administrator. However, the draftsmen are concerned that traditional regulatory agencies have often become the servants rather than the policemen of the industries they have been charged with supervising. This has been particularly true of licensing agencies. Therefore the draftsmen

recommend that where possible the administering agency be a new office, directly responsible to the Governor, with no duties other than administration of this Act and other consumer protection legislation. We discourage extending the responsibilities of banking, insurance and other existing departments to include administration of this act.

Section 6.104 [POWERS OF ADMINISTRATOR;
DUTY TO REPORT]

(1) In addition to other powers granted by this Act, the Administrator within the limitations provided by law shall:

- (a) receive and act on complaints, take action designed to obtain voluntary compliance with this Act, or commence proceedings on his own initiative;
- (b) counsel persons and groups on their rights and duties under this Act;
- (c) establish programs for the education of consumers with respect to consumer practices and problems;
- (d) make studies appropriate to effectuate the purposes and policies of this Act and make the results available to the public;
- (e) hold such public or private hearings as he deems necessary or proper to effectuate the purposes and policies of this Act;
- (f) subpoena witnesses, compel their attendance, adduce evidence and require the production of such relevant matter as he deems necessary or proper to effectuate the purposes and policies of this Act;
- (g) adopt, amend, and repeal rules and regulations to carry out the purposes and policies of this Act, to prevent circumvention or evasion thereof, or to facilitate compliance therewith. These rules and regulations may contain such classifications, differentiations or other provisions and may provide for such adjustments or exceptions as in the judgment of the Administrator are necessary or proper to effectuate the purposes of this Act;
- (h) maintain such offices as he deems necessary within this State; and
- (i) appoint such attorneys, hearing examiners, clerks, and other employees and agents as in the judgment of the Administrator are reasonably necessary to perform his functions under this Act; fix their compensation; and authorize such attorneys to appear for and represent the Administrator in court.

(2) The Administrator shall report annually [on or before January 1] to the [Governor and/or Legislature] on the operation of his office, on practices in consumer transactions, on the use of consumer credit in the State, on problems attending the collection of debts, on reporting agencies, on the problems of persons of limited means in consumer transactions, and on the operation of this Act. For the purpose of making the report, the Administrator is authorized to conduct research and make appropriate studies. The report shall include:

- (a) a description of the examination and investigation procedures and policies of his office;
- (b) a statement of policies followed in deciding whether to investigate or examine the offices of persons subject to this Act;
- (c) a statement of policies followed in deciding whether to bring any action authorized under this Act;
- (d) a statement of the number and percentages of classes of merchants registered under this Act which are periodically investigated or examined;
- (e) a statement of the types of consumer problems of both consumers and merchants which have come to his attention and the disposition of them under existing law;
- (f) a complete survey of the costs of various types of credit available in the State to the consumer and the cost to the creditor of each such type of credit, with a comparison of each with the prevailing rates of charges for credit, both the maximums permitted by law and the amounts actually charged if below the maximums;
- (g) a statement reviewing creditor profits from credit operations;
- (h) a statement of sales and advertising practices tending to promote debt in such a way as to jeopardize the financial security of consumers;
- (i) a list of all persons who have challenged any action of the Administrator in a public hearing or in a judicial proceeding and a brief description of the facts in each case;
- (j) a list of all persons against whom complaints have been filed or investigations commenced along with a brief description of the facts of each case and the action taken in each, if such case has not been resolved within three months from the filing of the complaint or the commencement of the investigation, whichever is earlier.

- (k) such recommendations for modifications or additions to this Act as in the experience and judgment of the Administrator are necessary; and
- (l) such other statements as are necessary or proper to achieve the purposes or policies of this section or to effectuate the purposes of policies of this Act.

(3) Within 10 days following its submission to the [Governor and/or Legislature], the Administrator shall publish and make available to the communications media and other interested parties sufficient copies of his report.

Comment

1. The Administrator is required under this section and other sections of this Article to perform a broad range of duties. To carry out his functions he is given ample general powers here and some specific powers elsewhere. The granting of specific powers anywhere in this Article is not intended to diminish in any way the general grant of powers which should be construed broadly to achieve the purposes of this Act. The Administrator is the watchdog for the consuming public and his powers must of necessity be equal to the scope of his task.

Section 6.105 [ADMINISTRATIVE POWERS WITH RESPECT TO SUPERVISED FINANCIAL ORGANIZATIONS]

(1) All powers and duties of the Administrator under this Act shall be exercised by him with respect to a supervised financial organization.

(2) If the Administrator receives a complaint or other information concerning non-compliance with this Act by a supervised financial organization, he shall inform the official or agency having supervisory authority over the organization concerned. The Administrator may request information about supervised financial organizations from the officials or agencies supervising them.

(3) The Administrator and any official or agency of this State having supervisory authority over a supervised financial organization are authorized and directed to consult and assist one another in maintaining compliance with this Act. They may jointly pursue investigations, prosecute suits, and take other official action, as they deem appropriate, if either of them otherwise is empowered to take the action.

Comment

1. Although "supervised financial organizations" are subject to supervision by an official or agency other than the Administrator, the purposes for such supervision differ from that of administration of this Act. There is, therefore, no reason why all of the powers of the Administrator should not apply to all whose conduct is regulated under this Act. The administration of this Act can

best be accomplished by a single agency, | to promote uneven and unequal en- and division of responsibility will tend | forcement.

Section 6.106 [INVESTIGATORY POWERS]

(1) If the Administrator has reason to believe that a person has engaged in an act which is subject to action by the Administrator, he may make an investigation to determine if the act has been committed and, to the extent necessary for this purpose, may administer oaths or affirmations, and, upon his own motion or upon request of any party, may subpoena witnesses, compel their attendance, adduce evidence, and require the production of any matter which is relevant to the investigation, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things, and the identity and location of persons having knowledge of relevant facts, or any other matter reasonably calculated to lead to the discovery of admissible evidence, and he shall have the right of access to and of examination of such books, documents or other tangible things. In any civil action brought by the Administrator following such an investigation, the Administrator may recover his costs of making the investigation if he prevails in the action.

(2) If ten or more consumers file a signed complaint with the Administrator alleging that a person has engaged in an act which is subject to action by the Administrator, he shall immediately commence an investigation pursuant to Subsection (1).

(3) If the person's records are located outside this State, the person at his option shall either make them available to the Administrator at a convenient location within this State or pay the expenses reasonably and necessarily incurred by the Administrator or his representative to examine them at the place where they are maintained. The Administrator may designate representatives, including comparable officials of the State in which the records are located, to inspect them on his behalf.

(4) The Administrator may by rule or regulation require that certain records be kept within this State and that he be notified of their location.

(5) Upon failure without lawful excuse to obey a subpoena or to give testimony and upon reasonable notice to all persons affected thereby, the Administrator may apply to [] court for an order compelling compliance.

Comment

1. The Uniform Consumer Credit | commence an investigation only if he Code permitted the Administrator to | had probable cause to believe that a

violation had occurred. There is no reason given by the draftsmen of the Code, nor is any apparent, for subjecting the Administrator in an administrative proceeding to the harsh standards of the criminal law regarding probable cause. This section permits the Administrator in his discretion to make whatever investigations are needed for enforcement, provided only that the Administrator has reason to believe that a person has engaged in an act which is

subject to action by the Administrator. Ample protection is provided for an overzealous administrator in the political and governmental process, and the history of administrative agencies at any governmental level does not support an argument that they harass or too zealously oversee the industry they regulate. The Administrator is also required to make such investigations where he receives a complaint signed by at least ten members of the consuming public.

Section 6.107 [APPLICATION OF [ADMINISTRATIVE PROCEDURE ACT] [PART ON ADMINISTRATIVE PROCEDURE AND JUDICIAL REVIEW]]

Except as otherwise provided, the [State administrative procedure act] [Part on Administrative Procedure and Judicial Review (Part 4) of this Article] applies to and governs all administrative action taken by the Administrator pursuant to this Act.

Section 6.108 [ADMINISTRATION ENFORCEMENT ORDERS]

(1) After notice the Administrator may order a person subject to this Act or a person acting in his behalf to cease and desist from engaging in violations of this Act or from engaging in unfair, deceptive, fraudulent or unconscionable conduct. If, after the order is made, a written request for a hearing is filed and no hearing is held within 30 days thereafter, the order is rescinded. A respondent aggrieved by an order of the Administrator may obtain judicial review of the order and the Administrator may obtain an order of the court for enforcement of its order in the [] court. The proceeding for review or enforcement is initiated by filing a petition in the court. Copies of the petition shall be served upon all parties of record.

(2) Within 30 days after service of the petition for review upon the Administrator, or within any further time the court may allow, the Administrator shall transmit to the court the original or a certified copy of the entire record upon which the order is based, including any transcript of testimony, which need not be printed. By stipulation of all parties to the review proceeding, the record may be shortened. After hearing, the court may:

- (a) reverse or modify the order if the findings of fact of the Administrator are clearly erroneous in view of the evidence on the whole record;
- (b) grant any temporary relief or restraining order it deems just; and,

(c) enter an order enforcing, modifying, and enforcing as modified, or setting aside in whole or in part the order of the Administrator, or remanding the case to the Administrator for further proceedings.

(3) An objection not urged at the hearing shall not be considered by the court unless the failure to urge the objection is excused for good cause shown. A party may move the court to remand the case to the Administrator in the interest of justice for the purpose of adducing additional specified and material evidence and seeking findings thereon upon good cause shown for the failure to adduce this evidence before the Administrator.

(4) The jurisdiction of the court shall be exclusive and its final judgment or decree shall be subject to review by the [] court in the same manner and form and with the same effect as in appeals from a final judgment or decree in a [special proceeding]. The Administrator's copy of the testimony shall be available at reasonable times to all parties for examination without cost.

(5) A proceeding for review under this section must be initiated within 30 days after a copy of the order of the Administrator is received. If no proceeding is so initiated, the order is a lawfully made final order.

Section 6.109 [UNCONSCIONABLE CONDUCT]

The administrator shall promulgate rules and regulations declaring specific practices in consumer transactions and the collection of debts arising therefrom to be unconscionable and prohibiting the use thereof. In promulgating such regulations the Administrator shall consider, among other things:

(1) The degree to which the practice unfairly takes advantage of the lack of knowledge, ability, experience, or capacity of consumers;

(2) Knowledge by those engaging in the practice of the inability of consumers to receive benefits properly anticipated from the goods or services involved;

(3) Gross disparity between the price of goods or services and their value as measured by the price at which similar goods or services are readily obtainable by other consumers, or by other tests of true value;

(4) The fact that the practice may enable merchants to take advantage of the inability of consumers reasonably to protect their interests by reason of physical or mental infirmities, illiteracy or inability to understand the language of the agreement, ignorance or lack of education or similar factors;

(5) The degree to which terms of the transaction require consumers to waive legal rights;

(6) The degree to which terms of the transaction require consumers to jeopardize money or property beyond the money or property immediately at issue in the transaction;

(7) The degree to which the natural effect of the practice is to cause or aid in causing consumers to misunderstand the true nature of the transaction or their rights and duties thereunder;

(8) The extent or degree to which the writing purporting to evidence the obligation of the consumer in the transaction contains terms or provisions or authorizes practices prohibited by law; and

(9) Definitions of unconscionability in statutes, regulations, rulings and decisions of legislative, administrative or judicial bodies in this state or elsewhere.

Comment

1. This section gives the Administrator the authority to issue regulations which would outlaw certain types of practices on the basis that they are unconscionable. Moreover, under Article 5, the trier of fact in a consumer's remedy civil action is directed to consider the action of the Administrator and the criteria established by this section in determining unconscionability. The criteria outlined in this section for the Administrator to consider in promulgating the regulations reflect the most common factors that society would recognize as probably unconscionable in consumer transactions.

Section 6.110 [TEMPORARY RELIEF; INJUNCTIONS]

(1) The Administrator or any consumer may bring a civil action to restrain a person from violating this act or the rules and regulations promulgated pursuant thereto, or to restrain a merchant or a person acting on behalf of a merchant from engaging in unfair, deceptive, fraudulent, or unconscionable conduct.

(2) The Administrator or consumer may seek a temporary restraining order without written or oral notice to the adverse party or his attorney. If the court finds that there is reasonable cause to believe that the respondent is engaged in the conduct sought to be restrained, it may grant a temporary restraining order or any temporary relief it deems appropriate. A temporary restraining order granted without notice shall expire by its terms within a stated time after entry, not to exceed 30 days, as the court fixes, unless within this time it is extended by the court, or unless the party against whom the order is directed consents that it may be extended for a longer period. When a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for a hearing at the earliest

possible time. On five days notice to the party who obtained the temporary restraining order without notice, the adverse party may appear and move its dissolution or modification, and in this event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

Section 6.111 [CLASS ACTIONS]

(1) Either the Administrator, or any consumer affected by a violation of this Act or of the rules and regulations promulgated pursuant thereto, or by an unfair, deceptive, fraudulent, or unconscionable practice may sue, on behalf of all persons similarly situated, regardless of the amount in controversy, for the relief to which such persons would be entitled under the provisions of this Act. A private party filing such an action must give prompt notice thereof to the Administrator, who shall be permitted upon application within 30 days to join as a party plaintiff. For purposes of apportionment or cost, the Administrator need not be a party to the action.

(2) The court shall permit the suit to be maintained on behalf of all members of the represented class if:

- (a) the class is so numerous that joinder of all members is impracticable;
- (b) the questions of law and fact common to the class are substantially similar and predominate over the questions affecting individual members;
- (c) the claims or defenses of the representative plaintiffs are typical of the claims or defenses of the class;
- (d) if the Administrator is not a party plaintiff, the representative parties will fairly and adequately protect the interests of the class.

(3) As soon as practicable after the commencement of a class action brought under this section, the court shall hold a preliminary hearing to determine whether it is to be so maintained. An order following such hearing may be conditional, and may be altered or amended before the decision on the merits.

(4) If the action is to be permitted as a class action, the court shall direct the defendant to serve upon each member of the class the best possible notice of the action, including individual notice to all members who can be identified through reasonable effort, which states that:

- (a) the court will exclude him from the class if he so requests by a specified date;
- (b) the judgment, whether favorable or not, will include all members who do not request exclusion;

(c) any member who does not request exclusion, may, if he desires, enter an appearance through counsel.

(5) When appropriate, an action may be brought or maintained as a class action with respect to particular issues, or a class may be divided into subclasses and each subclass treated as a class, and the provisions of this Section shall then be construed and applied accordingly.

(6) A class action shall not be dismissed, settled, or compromised without the approval of the court and the best possible notice of the proposed dismissal, settlement, or compromise shall be given to all members of the class in such manner as the court directs, and the court shall apportion all costs of notice between the Administrator and the defendant in such manner as it deems equitable and appropriate.

(7) The judgment in a class action shall describe those to whom the notice was directed and who have not requested exclusion, and those the court finds to be members of the class; the best possible notice of the judgment shall be given in such manner as the court directs to each person who received the original notice and has not requested exclusion; if the judgment is for the plaintiff the court shall direct the defendant to reimburse the Administrator for all costs of notice.

(8) A plaintiff who prevails in a class action under this Act shall be awarded reasonable attorney's fees, to be specified in the judgment, which shall equal ten per cent of the gross judgment unless the court finds a different amount to be more equitable. A legal aid society or legal services program which represents a class shall be awarded a reasonable service fee in lieu of reasonable attorney's fees, equal in amount to the attorney's fees as measured by this subsection.

(9) The Administrator, whether or not a party to an action, shall bear the costs of notice except that he may recover such costs from the defendant as provided in subsections (6) and (7).

Comment

1. This section provides for genuine class actions on behalf of consumers by either the Administrator or a consumer. The Uniform Consumer Credit Code permits an extremely limited action and then only with respect to excess charges. Class actions are more needed in consumer transactions than almost anywhere else, because the amount of

the individual recovery will frequently be so small as to make it an expensive hardship for a single individual to pursue his legal rights. Under this section, costs of notice are borne by the Administrator, although he may recover these from a defendant who does not prevail; and attorney's fees are awarded to a successful plaintiff.

Section 6.112 [VENUE]

The Administrator or consumer may bring actions or proceedings in a court in a county in which an act on which the action or proceeding is

based occurred, or in a country in which the defendant resides or transacts business.

Section 6.113 [DEBTORS' REMEDIES NOT AFFECTED]

The grant of powers to the Administrator in this Article does not affect remedies available to consumers under this Act or under other principles of law or equity.

PART 2

NOTIFICATION AND FEES

Section

6.201	Notification
6.202	Debt Collection—Notification
6.203	Fees

Section 6.201 [NOTIFICATION]

(1) Persons subject to this Article shall file notification with the Administrator within 30 days after commencing business in this State, and thereafter, on or before January 31 of each year. The notification shall state:

- (a) name of the person;
- (b) name in which business is transacted if different from (a);
- (c) if a partnership, the name and address of each partner;
- (d) if a corporation, the name and address of each officer, director, and each stockholder holding five per cent or more of the voting stock;
- (e) if an association other than in (c) or (d), the names and addresses of such persons as the Administrator shall by regulation prescribe;
- (f) address of principal office, which may be outside this State;
- (g) address of all offices or retail stores, if any, in this State;
- (h) if consumer transactions or other business subject to this Article are made otherwise than at an office or retail store in this State, a brief description of the manner in which they are made;
- (i) address of designated agent upon whom service of process may be made in this State (Section 1.203); and
- (j) such other information as the Administrator may from time to time require to effectuate the purposes and policies of this Act.

(2) The Administrator shall adopt rules and regulations governing the filing of changes, additions, or modifications of the notification required by this Section, and shall adopt regulations pertaining to form, verification and similar matters pertaining to the notification.

(3) The Administrator shall adopt such rules and regulations governing the posting on business premises of information to the

consumer as are necessary or proper for purposes of service of process.

Section 6.202 [DEBT COLLECTION – NOTIFICATION]

(1) Any person having an office or place of business in this State and who engages in the business of debt collection (Section 7.103) is subject to this Section.

(2) Persons subject to this Section shall file notification with the Administrator within 30 days after commencing business in this State, and thereafter, on or before January 31 of each year.

(3) Any person subject to both the preceding section and this section may include the information required to be disclosed in a single notification but shall otherwise be subject to the requirements of this Section.

(4) The notification shall be verified and shall contain:

- (a) the name of the person;
- (b) name in which business is transacted if different than (a);
- (c) if a partnership, the name and address of each partner;
- (d) if a corporation, the name and address of each officer, director, and each stockholder holding five per cent or more of the voting stock;
- (e) if an association other than (c) or (d), the names and addresses of such persons as the Administrator shall by regulation prescribe;
- (f) address of principal office, which may be outside this State;
- (g) address of all offices or places of business at or from which debt collection occurs;
- (h) address of designated agent upon whom service of process may be made in this State (Section 1.203);
- (i) the name and residence address of the person in actual and personal charge of the business and personnel of each office or place of business;
- (j) the full name, residence address, residence telephone number, and social security number of each employee or agent engaged in debt collection;
- (k) such other information as the Administrator may from time to time require to effectuate the purposes and policies of this Act.

(5) Information under subsections (4) and (5) shall not be required for employees who are engaged exclusively in stenographic, typing, filing or other clerical activities.

(6) The Administrator shall be notified in writing within 15 days of any changes, additions, or modifications relative to information required by Subdivisions (h), (i) or (j) or subsection (4). The Administrator shall adopt rules and regulations governing the filing of changes, additions, or modifications of the information otherwise required by subsection (4).

(7) The following persons shall not be subject to this section unless they employ or otherwise contract for the services of any person for the purpose of engaging in the business of debt collection:

- (a) attorneys authorized to practice law in this State;
- (b) duly licensed real estate brokers;
- (c) duly licensed insurance companies subject to the supervision of the [Commissioner] of Insurance; and
- (d) supervised financial organizations.

Section 6.203 [FEES]

(1) A person required to file notification shall on or before January 31 of each year pay to the [Administrator] an annual fee of [\$10] for that year.

(2) Persons required to file notification shall pay an additional fee at the time and in the manner stated in subsection (1) of [\$10] for each \$100,000, or part thereof, in excess of \$100,000, of the original unpaid balances arising from consumer credit transactions made in this State within the preceding calendar year and held by the creditor for more than 30 days after the inception of the transaction giving rise to the obligations, or by an assignee who has not filed notification. A refinancing of a consumer credit transaction resulting in an increase in the amount of an obligation is considered a new transaction to the extent of the amount of the increase.

(3) Persons required to file notification who are assignees shall pay an additional fee at the time and in the manner stated in subsection (1) of [\$10] for each \$100,000, or part thereof, of the unpaid balances at the time of obligations arising from consumer credit transactions made in this State and taken by assignment during the preceding calendar year, but an assignee need not pay a fee with respect to an obligation on which the assignor or other person has already paid a fee.

(4) Persons required to file notification who are engaged in the business of debt collection or the business of reporting agency shall pay an additional fee at the time and in the manner stated in subsection (1) of [\$10] for each \$100,000, or part thereof, in excess of \$100,000, of their gross volume from such business, but such fee shall be reduced by

the amount paid as a fee under subsection (3) by the person engaged in the business of debt collection or the business of reporting agency.

(5) A person required to file notification shall submit such financial and other data as the Administrator may require which will support the computation of the amount of the fee.

(6) The Administrator shall bring an action in the [] court to recover any fees that he determines are due and owing under this section.

PART 3

COUNCIL OF ADVISORS ON CONSUMER AFFAIRS

Section

- 6.301 Council of Advisors on Consumer Affairs
- 6.302 Functions of Council: Conflict of Interest
- 6.303 Meetings

Section 6.301 [COUNCIL OF ADVISORS ON
CONSUMER AFFAIRS]

(1) There is hereby created the Council of Advisors on Consumer Affairs consisting of twenty-five members, who shall be appointed by the Governor. In appointing members of the Council, the Governor shall seek to achieve a fair representation from the various segments of the consumer industry and the public, but the representatives of the public shall never be less than a majority. One of the Advisors representing the public shall be designated by the Governor as Chairman. The Chairman shall serve for [one year - two years] and is eligible for appointment as Chairman.

(2) The term of office of each member of the Council is [4] years. Of those members first appointed, [six] shall be appointed for a term of [1] year, [six] for a term of [2] years, [six] for a term of [3] years, and [seven] for a term of [4] years. A member chosen to fill a vacancy arising otherwise than by expiration of term shall be appointed for the unexpired term of the member whom he is to succeed. A member of the Council is eligible for reappointment.

(3) Members of the Council shall serve without compensation but are entitled to reimbursement of expenses incurred in the performance of their duties.

Section 6.302 [FUNCTION OF COUNCIL; CONFLICT OF
INTEREST]

The Council shall advise and consult with the Administrator concerning the exercise of his powers under this Act and shall make recommendations to him. Members of the Council may assist the Administrator in obtaining compliance with this Act. Since it is an objective of this Part to obtain competent representatives of industry and the public to serve on the Council and to assist and cooperate with the Administrator in achieving the objectives of this Act, service on the Council shall not in itself constitute a conflict of interest regardless of the occupations or associations of the members.

Section 6.303 [MEETINGS]

The Council and the Administrator shall meet together at a time and place designated by the Chairman at least twice each year. The Council shall hold additional meetings with the Administrator when called by the Chairman or when requested by the Administrator or by at least five members of the Council.

PART 4

ADMINISTRATIVE PROCEDURE AND JUDICIAL REVIEW

Section

- 6.401 Applicability and Scope
- 6.402 Definitions in Part: "Contested Case"; "Party"; "Rule"
- 6.403 Public Information; Adoption of Rules;
Availability of Rules and Orders
- 6.404 Procedure for Adoption of Rules
- 6.405 Filing and Taking Effect of Rules
- 6.406 Publication of Rules
- 6.407 Petition for Adoption of Rules
- 6.408 Declaratory Judgment on Validity or Applicability
of Rules
- 6.409 Declaratory Rulings by Administrator
- 6.410 Contested Cases; Notice; Hearing; Records
- 6.411 Rules of Evidence; Official Notice
- 6.412 Decisions and Orders
- 6.413 Judicial Review of Contested Cases
- 6.414 Appeals

Section 6.401 [APPLICABILITY AND SCOPE]

This Part applies to the Administrator, prescribes the procedures to be observed by him in exercising his powers under this Act, and supplements the provisions of the Part on Powers and Functions of Administrator (Part 1) of this Article.

Section 6.402 [DEFINITIONS IN PART: "CONTESTED CASE"; "PARTY"; "RULE"]

In this Part:

(1) "Contested case" means a proceeding, including but not restricted to one pursuant to the provisions on administrative enforcement orders [Subsection (1) of Section 6.108], in which the legal rights, duties, or privileges of a party are required by law to be determined by the Administrator after the opportunity for hearing.

(2) "Party" means the Administrator and each person named or admitted as a party, or who is aggrieved by action taken and seeks to be admitted as a party.

(3) "Rule" means each rule or regulation authorized by this Act that applies generally and implements, interprets or prescribes law or policy, or each statement by the Administrator that applies generally

and describes the Administrator's procedure or practice requirements or the organization of his office. The term includes the amendment or repeal of a prior rule but does not include:

- (a) statements concerning only the internal management of the Administrator's office and not affecting private rights or procedures available to the public;
- (b) intro-office memoranda

Section 6.403 [PUBLIC INFORMATION; ADOPTION OF RULES; AVAILABILITY OF RULES AND ORDERS]

(1) In addition to other rule-making requirements imposed by law, the Administrator shall:

- (a) adopt as a rule a description of the organization of his office, stating the general course and method of the operations of his office and the methods whereby the public may obtain information or make submissions or requests;
- (b) adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available, including a description of all forms and instructions used by the Administrator or his office;
- (c) make available for public inspection all rules and all other written statements of policy or interpretations formulated, adopted, or used by the Administrator in the discharge of his functions;
- (d) make available for public inspection all final orders, decisions, and opinions.

(2) No rule, order, or decision of the Administrator is valid or effective against any person or party, nor may it be invoked by the Administrator for any purpose, until it has been made available for the public inspection as herein required. This provision is not applicable in favor of any person or party who has actual knowledge thereof.

Section 6.404 [PROCEDURE FOR ADOPTION OF RULES]

(1) Prior to the adoption, amendment, or repeal of any rule, the Administrator shall:

- (a) give at least 20 days' notice of his intended action. The notice shall include a statement of either the terms or substance of the intended action or a description of the subjects and issues involved, and the time when, the place where, and the manner in which interested persons may present their views thereon. The notice shall be mailed to all

persons who have made timely request of the Administrator for advance notice of his rule-making proceedings and shall be published in [here insert the medium of publication appropriate for the adopting State];

- (b) afford all interested persons reasonable opportunity to submit data, views, or arguments, orally or in writing. In case of substantive rules, opportunity for oral hearing must be granted if requested by 25 persons, by a governmental subdivision or agency, or by an association having not less than 25 members. The Administrator shall consider fully all written and oral submissions respecting the proposed rule. Upon adoption of a rule the Administrator, if requested to do so by an interested person either prior to adoption or within 30 days thereafter, shall issue a concise statement of the principal reasons for and against its adoption, incorporating therein his reasons for overruling the considerations urged against its adoption.

- (2) No rule is valid unless adopted in substantial compliance with this section. A proceeding to contest any rule on the ground of non-compliance with the procedural requirements of this section must be commenced within 2 years from the effective date of the rule.

Section 6.405 [FILING AND TAKING EFFECT OF RULES]

- (1) The Administrator shall file in the office of the [Secretary of State] a certified copy of each rule adopted by him. The [Secretary of State] shall keep a permanent register of the rules open to public inspection.

- (2) Each rule hereafter adopted is effective 20 days after filing, except that, if a later date is specified in the rule, the later date is the effective date.

Section 6.406 [PUBLICATION OF RULES]

- (1) The [Secretary of State] shall compile, index, and publish all effective rules adopted by the Administrator. Compilations shall be supplemented or revised as often as necessary.

- (2) Compilations shall be made available upon request to [agencies and officials of this State] free of charge and to other persons at prices fixed by the [Secretary of State] to cover mailing and publication costs.

Section 6.407 [PETITION FOR ADOPTION OF RULES]

An interested person may petition the Administrator requesting the

promulgation, amendment, or repeal of a rule. The Administrator shall prescribe by rule the form for petitions and the procedure for their submission, consideration, and disposition. Within 30 days after submission of a petition, the Administrator either shall deny the petition in writing (stating his reasons for the denials) or shall initiate rule-making proceedings in accordance with the provisions on procedure for adoption of rules (Section 6.404).

Section 6.408 [DECLARATORY JUDGMENT ON VALIDITY OR APPLICABILITY OF RULES]

The validity or applicability of a rule may be determined in an action for declaratory judgment in the [] court if it is alleged that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair the legal rights or privileges of the plaintiff. The Administrator shall be made a party to the action. A declaratory judgment may be rendered whether or not the plaintiff has requested the Administrator to pass upon the validity or applicability of the rule in question.

Section 6.409 [DECLARATORY RULINGS BY ADMINISTRATOR]

The Administrator shall provide by rule for the filing and prompt disposition of petitions or declaratory rulings as to the applicability of any statutory provision or of any rule of the Administrator. Rulings disposing of petitions have the same status and decisions as orders in contested cases.

Section 6.410 [CONTESTED CASES; NOTICE; HEARING; RECORDS]

- (1) In a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice.

- (2) The notice shall include:

- (a) a statement of the time, place, and nature of the hearing;
- (b) a statement of the legal authority and jurisdiction under which the hearing is to be held;
- (c) a reference to the particular provisions of the statutes and rules involved;
- (d) a short and plain statement of the matters asserted.

If the Administrator or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon application, a more definite and detailed statement shall be furnished.

(3) Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved.

(4) Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default.

(5) The record in a contested case shall include:

(a) all pleadings, motions, intermediate rulings;

(b) evidence received or considered;

(c) a statement of matters officially noticed;

(d) questions and offers of proof, objections and rulings thereon;

(e) proposed findings and exceptions;

(f) any decision, opinion, or report by the officer presiding at the hearing;

(g) all staff memoranda or data submitted to the hearing officer or members of the office of the Administrator in connection with their consideration of the case.

(6) Oral proceedings or any part thereof shall be transcribed on request of any party [,but at his expense].

(7) Findings of fact shall be based exclusively on the evidence and on matters officially noticed.

Section 6.411 [RULES OF EVIDENCE; OFFICIAL NOTICE]

In contested cases:

(1) Irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The rules of evidence as applied in [non-jury] civil cases in the [] court of this State shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. The Administrator shall give effect to the rules of privilege recognized by law. Objections to evidentiary offers may be made and shall be noted in the record. Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form;

(2) Documentary evidence may be received in the form of copies or excerpts, if the original is not readily available. Upon request, parties shall be given an opportunity to compare the copy with the original;

(3) A party may conduct cross-examinations required for a full and true disclosure of the facts;

(4) Notice may be taken of judicially cognizable facts. In addition, notice may be taken of generally recognized technical or scientific facts within the Administrator's specialized knowledge. Parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material noticed, including any staff memoranda or data, and they shall be afforded an opportunity to contest the material so noticed. The Administrator's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence.

Section 6.412 [DECISIONS AND ORDERS]

A final decision or order adverse to a party in a contested case shall be in writing or stated in the record. A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If, in accordance with rules of the Administrator, a party submitted proposed findings of fact, the decision shall include a ruling upon each proposed finding. Parties shall be notified either personally or by mail of any decision or order. Upon request a copy of the decision or order shall be delivered or mailed forthwith to each party and to his attorney of record.

Section 6.413 [JUDICIAL REVIEW OF CONTESTED CASES]

(1) A person who has exhausted all administrative remedies available before the Administrator and who is aggrieved by a final decision in a contested case is entitled to judicial review under this Part. This section does not limit utilization of review, redress, relief, or trial de novo provided by law. A preliminary, procedural, or intermediate action or ruling of the Administrator is immediately reviewable if review of the final decision of the Administrator would not provide an adequate remedy.

(2) Proceedings for review are instituted by filing a petition in the [] court within [30] days after [mailing notice of] the final decision of the Administrator or, if a rehearing is requested, within [30] days after the decision thereon. Copies of the petition shall be served upon the Administrator and all parties of record.

(3) The filing of the petition does not itself stay enforcement of the decision of the Administrator. The Administrator may grant, or the reviewing court may order, a stay upon appropriate terms.

(4) Within [30] days after the service of the petition, or within further time allowed by the court, the Administrator shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review. By stipulation of all parties to the review proceedings, the record may be shortened. A party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record.

(5) If, before the date set for hearing, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the Administrator, the court may order that the additional evidence be taken before the Administrator upon conditions determined by the court. The Administrator may modify his findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.

(6) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the Administrator, not shown in the record, proof thereon may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

(7) The court shall not substitute its judgment for that of the Administrator as to the weight of the evidence on questions of fact. The court may affirm the decision of the Administrator or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (a) in violation of the constitutional or statutory provisions;
- (b) in excess of the statutory authority of the Administrator;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion of clearly unwarranted exercise of discretion.

Section 6.414 [APPEALS]

An aggrieved party may obtain a review of any final judgment of

the [] court under this Part by appeal to the [] court. The appeal shall be taken as in other civil cases.

PART 5

VIOLATIONS AND ENFORCEMENT

Section

- 6.501 Violations and Enforcement
- 6.502 Fees and Recoveries

Section 6.501 [VIOLATIONS AND ENFORCEMENT]

(1) The Administrator shall recover by rule and order (Section 6.107) from a person who violates any provision of this Act or any rule or regulation made pursuant to any authority granted in this Act a sum equal to the value that accrued to such person as a consequence of each violation.

(2) In addition to the amount to which he shall be entitled under subsection (1) the Administrator may recover in a civil action from a person who violates any provision of this Act or any rule or regulation made pursuant to any authority granted in this Act a civil penalty of not less than [one hundred dollars] and not more than [one thousand dollars] for each violation.

(3) In addition to the amount to which he shall be entitled under subsections (1) and (2) the Administrator may recover in a civil action from a person who knowingly or willfully violates any provision of this Act or any rule or regulation made pursuant to any authority granted in this Act a civil penalty of not less than [one thousand dollars] and not more than [ten thousand dollars] for each violation.

Section 6.502 [FEES AND RECOVERIES]

(1) Any sums of money recovered by the Administrator pursuant to this Part or obtained or recovered by the Administrator pursuant to this Act shall be retained by the Administrator unless a different disposition is expressly provided for by this Act.

(2) Any sums of money retained by the Administrator pursuant to subsection (1) shall be used by him in the administration of this Act.

ARTICLE 7

DEBT COLLECTION

PART 1

GENERAL PROVISIONS

Section

- 7.101 Short Title
- 7.102 Scope
- 7.103 Definitions: "Claim"; "Debt Collection"; "Debt Collector"

PART 2

PROHIBITED PRACTICES

- 7.201 Practice of Law by Debt Collectors
- 7.202 Threats or Coercion
- 7.203 Harassment; Abuse
- 7.204 Unreasonable Publication
- 7.205 Fraudulent, Deceptive or Misleading Representations
- 7.206 Unfair or Unconscionable Means
- 7.207 Postal Violations
- 7.208 Certain Assignments
- 7.209 Rules and Regulations

PART 3

REMEDIES

- 7.301 Defense to Claim
- 7.302 Compensatory Damages
- 7.303 Punitive Damages

PART 1

GENERAL PROVISIONS

Section

- 7.101 Short Title
 7.102 Scope
 7.103 Definitions: "Claim"; "Debt Collection"; "Debt Collector"

Section 7.101 [SHORT TITLE]

This article shall be known and may be cited as National Consumer Act – Debt Collection.

Section 7.102 [SCOPE]

This article applies to conduct and practices in connection with the collection of obligations arising from consumer transactions.

Section 7.103 [DEFINITIONS: "CLAIM"; "DEBT COLLECTION"; "DEBT COLLECTOR"]

(1) "Claim" means any obligation, or alleged obligation, arising from a consumer transaction.

(2) "Debt Collection" means any action, conduct or practice in connection with the solicitation of claims for collection or in connection with the collection of claims, that are owed or due, or are alleged to be owed or due, a merchant by a consumer.

(3) "Debt Collector" means any person engaging directly or indirectly in debt collection, and includes any person who sells or offers to sell forms represented to be a collection system, device, or scheme intended or calculated to be used to collect claims.

PART 2

PROHIBITED PRACTICES

Section

- 7.201 Practice of Law by Debt Collectors
 7.202 Threats or Coercion
 7.203 Harassment; Abuse
 7.204 Unreasonable Publication
 7.205 Fraudulent, Deceptive or Misleading Representations
 7.206 Unfair or Unconscionable Means
 7.207 Postal Violations
 7.208 Certain Assignments
 7.209 Rules and Regulations

Section 7.201 [PRACTICE OF LAW BY DEBT COLLECTORS]

Unless a licensed attorney in this State, no debt collector shall engage in conduct deemed the practice of law. Without limiting the general application of the foregoing, the following conduct is deemed the practice of law:

(1) the performance of legal services, furnishing of legal advice, or false representation, direct or by implication, that any person is an attorney;

(2) the solicitation of assignments of claims for the purpose of suit or at the instigation of an attorney;

(3) the institution of judicial proceedings on behalf of other persons except on an assigned claim;

(4) any communication with debtors in the name of an attorney or upon stationery or other written matter bearing an attorney's name; and

(5) any demand for or payment of money constituting a share of compensation for services performed or to be performed by an attorney in collecting a claim.

Section 7.202 [THREATS OR COERCION]

No debt collector shall collect or attempt to collect any money alleged to be due and owing by means of any threat, coercion or attempt to coerce. Without limiting the general application of the foregoing, the following conduct is deemed to violate this Section:

(1) The use, or express or implicit threat of use, of violence or

other criminal means, to cause harm to the person, reputation or property of any person;

(2) The accusation or threat to accuse any person of fraud or any crime, or any conduct which, if true, would tend to disgrace such other person or in any way subject him to ridicule, or any conduct which, if true, would tend to disgrace such other person or in any way subject him to ridicule or contempt of society;

(3) False accusations made to another person, including any credit reporting agency, that a consumer is willfully refusing to pay a just debt, or the threat to so make false accusations;

(4) The threat to sell or assign to another the obligation of the consumer with an attending representation or implication that the result of such sale or assignment would be that the consumer would lose any defense to the claim or would be subjected to harsh, vindictive or abusive collection attempts;

(5) The threat that non-payment of an alleged claim will result in the arrest of any person or the seizure, garnishment, attachment or sale of any property or wages of that person without there being in effect a court order permitting such action; and

(6) The threat to take any action prohibited by this Act or other law regulating the debt collector's conduct.

Section 7.203 [HARASSMENT; ABUSE]

No debt collector shall unreasonably oppress, harass, or abuse any person in connection with the collection of or attempt to collect any claim alleged to be due and owing by that person or another. Without limiting the general application of the foregoing, the following conduct is deemed to violate this Section:

(1) The use of profane or obscene language or language that is intended to unreasonably abuse the hearer or reader;

(2) The placement of telephone calls without disclosure of the caller's identity and with the intent to annoy, harass or threaten any person at the called number;

(3) Causing expense to any person in the form of long distance telephone tolls, telegram fees or other charges incurred by a medium of communication, by concealment of the true purpose of the notice, letter, message or communication; and

(4) Causing a telephone to ring or engage any person in telephone conversation repeatedly or continuously, or at unusual times or at times known to be inconvenient, with intent to annoy, harass, or threaten any person at the called number.

Section 7.204 [UNREASONABLE PUBLICATION]

No debt collector shall unreasonably publicize information relating to any alleged indebtedness or debtor. Without limiting the general application of the foregoing, the following conduct is deemed to violate this Section:

(1) The communication of any information relating to a consumer's indebtedness to any employer or his agent;

(2) The disclosure, publication, or communication or information relating to a consumer's indebtedness to any relative or family member of the consumer, except through proper legal action or process or at the express and unsolicited request of the relative or family member;

(3) The disclosure, publication, or communication of any information relating to a consumer's indebtedness to any other person, by publishing or posting any list of consumers, commonly known as "deadbeat lists", by advertising for sale any claim to enforce payment thereof, or in any other manner other than through proper legal action, process or proceeding; and

(4) The use of any form of communication to the consumer, which ordinarily may be seen by any other persons, that displays or conveys any information about the alleged claim other than the name, address, and phone number of the debt collector.

Section 7.205 [FRAUDULENT, DECEPTIVE OR MISLEADING REPRESENTATIONS]

No debt collector shall use any fraudulent, deceptive or misleading representation or means to collect or attempt to collect claims or to obtain information concerning consumers. Without limiting the general application of the foregoing, the following conduct is deemed to violate this Section:

(1) The use of any name, while engaged in debt collection, other than the debt collector's true name;

(2) The failure to clearly disclose in all communications made to collect or attempt to collect a claim or to obtain or attempt to obtain information about a consumer, that the debt collector is attempting to collect a claim and that any information obtained will be used for that purpose;

(3) Any false representation that the debt collector has in his possession information or something of value for the consumer, that is made to solicit or discover information about the consumer;

(4) The failure to clearly disclose the name and full business

address of the person to whom the claim has been assigned for collection, or to whom the claim is owed, at the time of making any demand for money;

(5) Any false representation or implication of the character, extent or amount of a claim against a consumer, or of its status in any legal proceeding;

(6) Any false representation or false implication that any debt collector is vouched for, bonded by, affiliated with or an instrumentality, agent or official of this State or any agency of the Federal, State or local government;

(7) The use or distribution or sale of any written communication which simulates or is falsely represented to be a document authorized, issued or approved by a court, an official, or any other legally constituted or authorized authority, or which creates a false impression about its source, authorization or approval;

(8) Any representation that an existing obligation of the consumer may be increased by the addition of attorney's fees, investigation fees, service fees or any other fees or charges when in fact such fees or charges may not legally be added to the existing obligation; and

(9) Any false representation or false impression about the status or true nature of or the services rendered by the debt collector or his business.

Section 7.206 [UNFAIR OR UNCONSCIONABLE MEANS]

No debt collector shall use unfair or unconscionable means to collect or attempt to collect any claim. Without limiting the general application of the foregoing, the following conduct is deemed to violate this Section:

(1) The seeking or obtaining of any written statement or acknowledgement in any form that specifies that a consumer's obligation is one incurred for necessities of life where the original obligation was not in fact incurred for such necessities;

(2) The seeking or obtaining of any written statement or acknowledgement in any form containing an affirmation of any obligation by a consumer who has been declared bankrupt, without clearly disclosing the nature and consequences of such affirmation and the fact that the consumer is not legally obligated to make such affirmation;

(3) The collection or the attempt to collect from the consumer all or any part of the debt collector's fee or charge for services rendered;

(4) The collection of or the attempt to collect any interest or other charge, fee, or expense incidental to the principal obligation unless such

interest or incidental fee, charge, or expense is expressly authorized by the agreement creating the obligation and legally chargeable to the consumer; and

(5) Any communication with a consumer whenever it appears that the consumer is represented by an attorney and the attorney's name and address are known.

Section 7.207 [POSTAL VIOLATIONS]

No debt collector shall use, or distribute, sell or prepare for use, any written communication that violates or fails to conform to United States Postal Laws and Regulations.

Section 7.208 [CERTAIN ASSIGNMENTS]

No debt collector shall take or accept for assignment any of the following:

(1) An assignment contemplating the filing of attachment or garnishment of the consumer's property on a claim arising out of an obligation made and to be performed outside this State;

(2) An assignment of any claim for attorney's fees which have not been lawfully provided for in the writing evidencing the obligation; or

(3) An assignment for collection of any claim upon which suit has been filed or judgment obtained, without the debt collector first making a reasonable effort to contact the attorney representing the consumer.

Section 7.209 [RULES AND REGULATIONS]

The Administrator may establish rules and regulations providing further definitions and prescribing other conduct deemed in violation of this Part.

PART 3

REMEDIES

Section

- 7.301 Defense to Claim
 7.302 Compensatory Damages
 7.303 Punitive Damages

Section 7.301 [DEFENSE TO CLAIM]

Proof that a debt collector has violated any provision of Part 2 of this Article shall constitute a complete defense to any legal action undertaken by any person to enforce the claim that was being collected at the time the violation or violations occurred, and shall be deemed to constitute full satisfaction of a judgment on such claim properly obtained before the occurrence of the violation or violations.

Section 7.302 [COMPENSATORY DAMAGES]

In addition to the remedy provided in Section 7.301, a debt collector shall be liable to any person affected by a violation of Part 2 of this Article for all damages proximately caused by the violation, including but not limited to damages for emotional distress or mental anguish suffered with or without accompanying physical injury.

Section 7.303 [PUNITIVE DAMAGES]

Punitive damages shall be awarded to any person affected by a violation of Part 2 of this Article, when and in such amount as is deemed appropriate by the court and trier of fact.

ARTICLE 8

CREDIT REPORTING AGENCIES

PART 1

GENERAL PROVISIONS

Section

- 8.101 Short Title
 8.102 Scope
 8.103 Definitions: "Consumer Report"; "Investigating Consumer Report"; "Reporting Agency"; "File"

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 8.202 Access to Files
 8.203 Correction of Inaccurate Information
 8.204 Public Record Information
 8.205 Keeping Information Current
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PART 3

REMEDIES AND PENALTIES

- 8.301 Civil Penalties
 8.302 Criminal Penalties
 8.303 Defamation Actions

PART 1

GENERAL PROVISIONS

Section

- 8.101 Short Title
 8.102 Scope
 8.103 Definitions: "Consumer Report"; "Investigating Consumer Report"; "Reporting Agency"; "File"

Section 8.101 [SHORT TITLE]

This Article shall be known and may be cited as National Consumer Act – Credit Reporting Agencies.

Section 8.102 [SCOPE]

This Article applies to credit reporting agencies who prepare or supply investigative consumer reports.

Section 8.103 [DEFINITIONS: "CONSUMER REPORT"; "INVESTIGATING CONSUMER REPORT"; "REPORTING AGENCY"; "FILE"]

(1) "Consumer report" means any written, oral, or other communication of any information bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living and which is used or expected to be used as a factor in establishing a consumer's eligibility for (a) credit, (b) insurance or (c) employment; but such term shall not include any report containing information solely as to transactions between such consumer and the person making such report.

(2) "Investigative consumer report" means a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics or mode of living is obtained through personal interviews with neighbors, friends or associates of the consumer or with others who have direct knowledge of his behavior or with whom he is acquainted.

(3) "Reporting agency" means any person who regularly engages in whole or in part in the business of furnishing consumer reports.

(4) "File" when used in connection with information about a consumer includes all of the information obtained by a reporting agency about the consumer, regardless of how the information is stored.

PART 2

DISCLOSURE AND LIMITATION ON USE OF INFORMATION

Section

- 8.201 Disclosure by Users of Consumer Reports
 8.202 Access to Files
 8.203 Correction of Inaccurate Information
 8.204 Public Record Information
 8.205 Keeping Information Current
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 8.207 Preserving Confidentiality
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 8.209 Access by Governmental Agencies
 8.210 Restrictions on Investigative Reports
 8.211 Relevance of Information

Section 8.201 [DISCLOSURE BY USERS OF CONSUMER REPORTS]

(1) No person shall procure or cause to be prepared an investigative consumer report on any consumer unless the details and scope of the investigation are disclosed in advance to him and his written permission is obtained. Whenever the information contained in such report is transmitted on a standardized form, a blank copy of such form shall be furnished the consumer at the time the details and scope of the investigation are disclosed.

(2) Any person who denies credit, insurance, or employment to a consumer or who increases his charge for such credit or insurance either wholly or partly because of the information contained in a consumer report received from a reporting agency shall promptly notify such consumer in writing of the action taken and that such action was due in whole or in part to a consumer report. Such notification shall also include the name and address of the reporting agency furnishing such report.

(3) Any creditor who denies consumer credit to a consumer or who increases his charge for such credit either wholly or partly because of information obtained from a person other than a reporting agency bearing upon the consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living shall promptly disclose in writing the nature of such information to the consumer.

Section 8.202 [ACCESS TO FILES]

(1) A reporting agency shall permit any consumer to examine the information in his file and, except as provided in subsection (3), the sources thereof, and shall provide trained personnel during normal business hours and on reasonable notice to explain the information. Such information shall include the names and addresses of all persons to whom a consumer report has been furnished on such individual for the preceding five years or since the effective date of this Act, whichever period is the shortest. Before making such disclosure, the reporting agency shall require the consumer to furnish full identification. The consumer shall be permitted to be accompanied by no more than two other persons of his choosing, to read his file, and to make copies or take notes if he so requests. The reporting agency may make no charge for such disclosure.

(2) No reporting agency shall require a consumer to grant immunity from legal action to the reporting agency or its sources of information as a condition for obtaining access to his file.

(3) In making the disclosures required under subsection (1), a reporting agency must disclose its sources of information, when such information was acquired in connection with the preparation of an investigative consumer report, only if the consumer disputes allegations made by the unidentified sources but is unable to refute such allegations with evidence sufficient to convince the reporting agency to expunge the allegations from the individual's file and notify all previous recipients of the deletion, and if the consumer requests that the sources be identified so that he may better counter the allegations.

Section 8.203 [CORRECTION OF INACCURATE INFORMATION]

(1) A reporting agency shall afford consumers a reasonable opportunity to correct any inaccurate or misleading information in the file. Whenever a consumer disputes the accuracy of any item of information in his file, the reporting agency shall promptly investigate the matter and if it finds that the item is in error or if it is unable to verify the item's validity, the reporting agency shall, without charge to the consumer:

- (a) Promptly expunge such item from the file;
- (b) Refrain from reporting such item on future reports; and
- (c) Promptly notify all prior recipients that the item had been reported in error and was being expunged from the consumer's record.

(2) If a consumer disputes the accuracy of an item of information

obtained by a reporting agency and if, after checking its sources and making a reasonable effort to ascertain the facts, the reporting agency is unable to resolve any differences still remaining between the allegations made by its sources and the consumer, the reporting agency shall, without charge to the individual:

- (a) Plainly mark the item as disputed on all subsequent reports;
- (b) Permit the consumer to file a statement containing his version of the dispute;
- (c) Send a copy of such statement to all previous recipients of the disputed item if the consumer so requests; and
- (d) Include such statement in all subsequent reports.

(3) If a consumer contends that a specific item of information obtained by a reporting agency is misleading because of the omission of certain relevant facts and if the reporting agency is unwilling to expunge such item from the file and refrain from including it on subsequent reports, the reporting agency shall, without charge to the consumer:

- (a) Clearly mark the item as disputed;
- (b) Permit the consumer to file a statement containing the additional facts;
- (c) Send a copy of such statement to all previous recipients of the item in question if the consumer so requests; and
- (d) Include such statement in all subsequent reports.

Section 8.204 [PUBLIC RECORD INFORMATION]

(1) A reporting agency which compiles and reports items of information on consumers when such items are matters of public record and are likely to have an adverse effect upon an individual's ability to obtain credit, insurance, or employment shall:

- (a) notify in writing the consumer on whom the adverse public record information has been obtained that the information is being reported to a client of the reporting agency together with the name and address of the client at the time such information is reported; and
- (b) maintain strict procedures designed to insure that whenever such information is reported it is complete and up-to-date.

(2) For purpose of this section, items of public record relating to arrests, indictments, convictions, suits, tax liens, and outstanding judgments shall not be considered up-to-date unless the current disposition of the item at the time of the report is reported.

Section 8.205 [KEEPING INFORMATION CURRENT]

(1) A reporting agency shall maintain reasonable procedures designed to keep its information current and up-to-date.

(2) With respect to information to the effect that a consumer's account is past due or that an attempt to collect the account has been made:

- (a) A merchant who reports such information to a reporting agency shall promptly report the disposition of the account;
- (b) Upon the receipt of such information a reporting agency shall immediately notify the merchant reporting the information of his duty to promptly report the disposition of the account;
- (c) No reporting agency shall report such information to persons other than the consumer until the subsequent information as to the disposition of the account has been received.

Section 8.206 [DISCARDING OBSOLETE INFORMATION]

(1) A reporting agency shall maintain procedures designed to discard information in its files after it has become obsolete or after the expiration of a reasonable period of time. For the purposes of this Section the following information shall not be reported after the period so indicated and shall be removed from the file as soon as practical after the expiration of such period:

- (a) bankruptcies of all types shall not be reported for longer than seven years from the date of adjudication of the most recent bankruptcy;
- (b) Records of accounts placed for collection and records of accounts charged to profit and loss shall not be reported for longer than three years;
- (c) Suits, judgments and tax liens shall not be reported for longer than seven years from date of entry;
- (d) Records of arrest, indictment, or conviction of crimes shall not be reported for longer than three years from the date of release or parole if the offense is a misdemeanor and seven years if the offense is a felony. Such items shall no longer be reported if at any time it is learned that in the case of a conviction a full pardon has been granted, or in the case of an arrest or indictment a conviction did not result;
- (e) Derogatory information obtained pursuant to an investiga-

tive consumer report shall not be included on subsequent reports unless the information has been reverified;

(f) Any other adverse data not otherwise specified in this section shall not be reported for longer than three years.

(2) A reporting agency shall delete as soon as practical any items of derogatory information from an individual's file whenever it is ascertained that the source of the information can no longer verify the item in question.

Section 8.207 [PRESERVING CONFIDENTIALITY]

A reporting agency shall maintain procedures designed to preserve the confidentiality of information in its files. Such procedures shall include limiting access to information only to authorized employees and maintaining training programs to acquaint employees with the need for preserving confidentiality. Whenever a reporting agency transmits information by telegraphic, telephonic, radio, or similar means, it shall take steps to prevent unauthorized access to such communications.

Section 8.208 [USES OF INFORMATION]

(1) A reporting agency shall maintain procedures designed to limit the furnishing of credit reports to those with a legitimate business need for the information. Such procedures shall require that prospective users of the information identify themselves, certify the purposes for which the information is sought and certify that the information will be used for no other purpose. A reporting agency shall make a reasonable effort to verify the identity of a new prospective user and the uses certified by such prospective user prior to furnishing such user a report.

(2) No reporting agency shall furnish a report to a prospective user, if it has reasonable grounds for believing that the report will not be used for a legitimate business need.

(3) For the purposes of this section, legitimate business need includes the following:

- (a) determining a consumer's eligibility for credit;
- (b) determining a consumer's eligibility for insurance;
- (c) determining a consumer's eligibility for employment, promotion, reassignment, or retention;
- (d) determining a consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status.

(4) For the purpose of this section, legitimate business need does not include the following:

- (a) furnishing information for market research or marketing purposes;
- (b) furnishing information to a private detective or a private detective agency for use in investigations conducted or to be conducted by the detective agency;
- (c) furnishing information to an attorney for use in a legal matter unless the consumer on whom the information is furnished is a client of the attorney and agrees in writing to the furnishing of such report.

Section 8.209 [ACCESS BY GOVERNMENTAL AGENCIES]

A reporting agency shall not furnish information on individuals in its files to a governmental agency for purposes other than those authorized in subsection (3) of Section 8.208 unless pursuant to legal process, except that identifying information such as names, addresses, former addresses, places of employment or former places of employment may be supplied to such agencies.

Section 8.210 [RESTRICTIONS ON INVESTIGATIVE REPORTS]

Whenever a reporting agency prepares an investigative consumer report for the purpose of establishing eligibility for credit or insurance, no information on such report shall be included in a subsequent report furnished for determining the consumer's eligibility for employment, promotion, reassignment, or retention unless it has been reverified in the process of making such subsequent report.

Section 8.211 [RELEVANCE OF INFORMATION]

No reporting agency shall report information which is not reasonably relevant, based on objective criteria, to the purpose for which it is sought or which constitutes an undue infringement of the individual's right to privacy.

PART 3

REMEDIES AND PENALTIES

Section

- 8.301 Civil Penalties
- 8.302 Criminal Penalties
- 8.303 Defamation Actions

Section 8.301 [CIVIL PENALTIES]

(1) Any reporting agency or user of information who fails to comply with any requirement imposed under this Article with respect to any consumer is liable to the consumer in amount equal to the sum of

- (a) any actual damages sustained as a result of the failure, or \$100, whichever is greater; and
- (b) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by court.

(2) Any reporting agency or user of information who willfully fails to comply with any requirement imposed under this chapter with respect to any individual is liable to that individual in an amount equal to the sum of

- (a) any actual damages sustained as a result of the failure, or \$250, whichever is greater; and
- (b) such amount of punitive damages as the trier of fact may allow; and
- (c) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(3) Any person who obtains information on a consumer from a reporting agency under false pretenses is liable to the consumer in an amount equal to the sum of

- (a) any actual damages sustained as a result of the failure, or \$250, whichever is greater; and
- (b) such amount of punitive damages as the trier of fact may allow; and
- (c) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(4) Any action under this section may be brought within five years from the date of the occurrence of the violation, or two years after its discovery, whichever is later.

Section 8.302 [CRIMINAL PENALTIES]

(1) Any person who knowingly and willfully obtains or in any way uses information on a consumer from a reporting agency under false pretenses shall be fined not more than \$5,000 or imprisoned not more than one year, or both.

(2) Any officer or employee of a reporting agency who knowingly and willfully provides information on an individual from the agency's files to a person not authorized to receive that information shall be fined not more than \$5,000 or imprisoned not more than one year or both.

Section 8.303 [DEFAMATION ACTIONS]

Notwithstanding any other provision of law, any consumer who brings an action against a reporting agency or its informants for communicating defamatory information shall have a claim against that reporting agency or its informants notwithstanding any defense based on qualified privilege if the consumer can show the reporting agency or its informants failed to exercise due care.

ARTICLE 9

EFFECTIVE DATE AND REPEALER

Section

- | | |
|-------|--|
| 9.101 | Time of Taking Effect; Provisions for Transition |
| 9.102 | Specific Repealer and Amendments |
| 9.103 | General Repealer |

Section 9.101 [TIME OF TAKING EFFECT; PROVISIONS FOR TRANSITION]

(1) Except as otherwise provided in this Section, this Act takes effect at 12:01 a.m. on []. It applies to transactions entered into and events occurring after that date, including, but not limited to

- (a) refinancings, consolidations, and deferrals made after this Act takes effect of consumer transactions whenever made; and
- (b) open end credit plans entered into, arranged or contracted for before this Act takes effect.

(2) This Act applies to all consumer transactions made before this Act takes effect insofar as the Article on Remedies and Penalties (Article 5) and the Article on Debt Collection (Article 7) limit the remedies of merchants.

(3) To the extent appropriate to permit the Administrator to prepare for operation of this Act when it takes effect, the Article on Administration (Article 6) takes effect [insert either "immediately" or the earliest time possible under the constitutional or statutory requirements of the enacting State].

Section 9.102 [SPECIFIC REPEALER AND AMENDMENTS]

- (1) The following acts and parts of acts are repealed:
 - (a) []
 - (b) []
 - (c) [and so on]
- (2) The following acts and parts of acts are amended:

(a) []

(b) []

(c) [and so on]

Section 9.103 [GENERAL REPEALER]

Except as provided in the preceding Section, all Acts and Parts or acts inconsistent with this Act are hereby repealed.

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