

## Chapter 16a. – CONSUMER CREDIT CODE

### Article 1. – GENERAL PROVISIONS AND DEFINITIONS

#### Part 1

#### SHORT TITLE, CONSTRUCTION, GENERAL PROVISIONS

##### **K.S.A. 16a-1-101. (UCCC) Short title.**

K.S.A. 16a-1-101 through 16a-9-102 shall be known and may be cited as the uniform consumer credit code.

**History:** L. 1973, ch. 85, § 1; Jan. 1, 1974. **Attorney General's Opinions:** Finance charges; additional charges not included therein. 81-209. Disclosure; discounts for cash purchases. 86-115. Consumer credit insurance; property and liability insurance. 87-3.

##### **KANSAS COMMENT, 2010**

The Kansas uniform consumer credit code (K.S.A. 16a-1-101 et seq.) is referred to in these comments as the U3C. The Kansas uniform commercial code (K.S.A. 84-1-101 et seq.) is referred to as the UCC. The Kansas consumer protection act (K.S.A. 50-623 et seq.) is referred to as the KCPA. The federal truth in lending act (15 U.S.C.A. § 1601 et seq.) is the TILA. "Regulation Z," when used in these comments, refers to the Federal Reserve Board's truth in lending regulations, 12 C.F.R. Part 226.

The scope and application of the U3C are determined by K.S.A. 16a-1-201 and by the various definitions in K.S.A. 16a-1-301.

These comments take into account all amendments through the 2009 Session Laws of Kansas. They should be read with caution, however, as future amendments are inevitable.

Additional guidance on the U3C may be found in Administrative Regulations, K.A.R. 75-6-1 et seq., and Administrative Interpretations, No. 1001 et seq. which can be found online at <http://www.osbckansas.org>. The U3C is administered by the Office of State Bank Commissioner—deputy commissioner of the division of consumer and mortgage lending. Recent Kansas legislative bills and supplemental notes can be accessed at <http://www.kslegislature.org>.

Some states' versions of the uniform act have been held not to be an unconstitutional burden on interstate commerce nor violative of the due process rights of the creditor. See *Quik Payday, Inc. v. Stork*, 509 F.Supp.2d 974 (D. Kan. 2007), *aff'd* 549 F.3d 1302 (10th Cir. 2008), cert. denied 129 S.Ct. 2062; and *Aldens, Inc. v. Miller*, 466 F.Supp. 379 (S.D. Iowa 1979), *aff'd* 610 F.2d 538, cert. denied 446 U.S. 919; *Aldens, Inc. v. Ryan*, 571 F.2d 1159 (10th Cir. 1978), cert. denied 99 S.Ct. 180.

##### **K.S.A. 16a-1-102. (UCCC) Purposes; rules of construction.**

(1) K.S.A. 16a-1-101 through 16a-9-102, and amendments thereto, 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 retail installment sales, consumer credit and consumer loans;
- (b) to provide rate ceilings to assure an adequate supply of credit to consumers;

- (c) to further consumer understanding of the terms of credit transactions and to foster competition among suppliers of consumer credit so that consumers may obtain credit at reasonable cost;
- (d) to protect consumer buyers, lessees, and borrowers against unfair practices by some suppliers of consumer credit, having due regard for the interests of legitimate and scrupulous creditors;
- (e) to permit and encourage the development of fair and economically sound consumer credit practices; and
- (f) to make uniform the law, including administrative rules and regulations, among the various jurisdictions.

(3) A reference to a requirement imposed by K.S.A. 16a-1-101 through 16a-9-102, and amendments thereto, includes reference to a related rule and regulation of the administrator adopted pursuant to this act.

**History:** L. 1973, ch. 85, § 2; L. 1981, ch. 93, § 2; L. 1988, ch. 85, § 1; July 1.

**Attorney General's Opinions:** Interest and charges; usury. 79-252. Limitations on consumer's liability; balloon payments; denial of right to refinance. 82-143. Consumer loans; finance charge; exemption of adjustable rate loans from maximum finance charge limits. 82-227. Property insurance; damage to property unrelated to credit transaction. 86-42. Attorney fees; national direct student loans. 86-113. Disclosure; discounts for cash purchases. 86-115. Authority of legislature to transfer money from special revenue funds into state general fund. 2002-45.

#### **KANSAS COMMENT, 2000**

One of the primary purposes of the U3C is to provide a unified, functional framework for the entire subject of consumer credit. To this end, the U3C places all aspects of consumer credit under a single statutory umbrella. It replaces widely scattered pieces of legislation which were enacted by different Kansas legislatures, at different times, for different reasons: the 1955 consumer loan act, those portions of the 1958 sales finance act dealing with motor vehicles and those dealing with non-motor vehicles, the 1969 truth in lending act, part of the 1929 credit union law, various installment loan provisions, and part of the 1968 buyer protection act. In addition, the U3C alters several provisions in the UCC for transactions involving consumers. For a more detailed listing of statutes affected by the enactment of the U3C in Kansas, see the Kansas comment to K.S.A. 16a-9-101.

#### **K.S.A. 16a-1-103. (UCCC) Supplementary general principles of law applicable.**

Unless displaced by the particular provisions of K.S.A. 16a-1-101 through 16a-9-102, 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.

**History:** L. 1973, ch. 85, § 3; Jan. 1, 1974.

#### **KANSAS COMMENT, 2010**

Many transactions are subject both to the U3C and to other bodies of law, particularly the UCC. In the event of conflict, the U3C controls. See K.S.A. 84-9-201. In other cases, the U3C is supplemented by the UCC and other principles. For example, a consumer credit contract would be subject in appropriate cases to the UCC's general duty of good faith in the performance or enforcement of a contract or duty within the UCC. See K.S.A. 84-1-302(b). In general, such principles have not been repeated in the U3C. In addition, many consumer credit agreements will also be subject to the KCPA, and that act should be consulted in appropriate cases. Finally, consumer remedies under the UCC, the KCPA, and other laws generally supplement those that are available under the U3C. See the Kansas comment to K.S.A. 16a-6-115.

**K.S.A. 16a-1-104. (UCCC) Construction against implicit repeal.**

K.S.A. 16a-1-101 through 16a-9-102 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.

**History:** L. 1973, ch. 85, § 4; Jan. 1, 1974.

**K.S.A. 16a-1-105. (UCCC) 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.

**History:** L. 1973, ch. 85, § 5; Jan. 1, 1974.

**K.S.A. 16a-1-107. (UCCC) Waiver; agreement to forego rights; settlement of claims.**

(1) Except as otherwise provided in K.S.A. 16a-1-101 through 16a-9-102, a consumer may not waive or agree to forego rights or benefits under such sections of this act.

(2) A claim by a consumer against a creditor for an excess charge, other violation of K.S.A. 16a-1-101 through 16a-9-102, or civil penalty, or a claim against a consumer for default or breach of a duty imposed by such sections of 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 K.S.A. 16a-1-101 through 16a-9-102 is invalid if the court as a matter of law finds the settlement to have been unconscionable at the time it was made. 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.

**History:** L. 1973, ch. 85, § 6; Jan. 1, 1974. **Attorney General's Opinions:** Limitations on consumer's liability; balloon payments; denial of right to refinance. 82-143.

**KANSAS COMMENT, 2010**

Unlike the UCC, which broadly permits variation by agreement (K.S.A. 84-1-302(a)), the U3C starts from the premise that a consumer generally may not waive or agree to forego rights or benefits under the U3C. This provision is typical of consumer protection legislation; a similar section is contained in the KCPA. See K.S.A. 50-625; compare K.S.A. 84-9-602. In the absence of a provision of the U3C specifically authorizing a waiver, any waiver or agreement to forego must be part of a settlement, and settlements are subject to review as provided in this section.

**K.S.A. 16a-1-108. (UCCC) Effect of act on powers of organization.**

(1) K.S.A. 16a-1-101 through 16a-9-102, and amendments thereto, prescribes maximum charges for all creditors, except lessors and those excluded (K.S.A. 16a-1-202, and amendments thereto), extending consumer credit including consumer credit sales (subsection (14) of K.S.A. 16a-1-301, and amendments thereto) and consumer loans (subsection (17) of K.S.A. 16a-1-301, and amendments thereto), and displaces existing limitations on the powers of those creditors based on maximum charges.

(2) With respect to sellers of goods or services, 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), K.S.A. 16a-1-101 through 16a-9-102, and amendments thereto, 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), K.S.A. 16a-1-101 through 16a-9-102, and amendments thereto, does not displace:

- (a) Limitations on powers of supervised financial organizations (subsection (44) of K.S.A. 16a-1-301, and amendments thereto) 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.

**History:** L. 1973, ch. 85, § 7; L. 1981, ch. 93, § 3; L. 1993, ch. 200, § 2; L. 1999, ch. 107, § 6; July 1.

#### **KANSAS COMMENT, 2000**

1. This section states the policy of the U3C regarding the displacement of laws regulating suppliers of consumer credit. The U3C displaces many existing usury laws; in addition, subsection (1) displaces existing limitations on maximum charges for all suppliers of consumer credit except lessors and those excluded under K.S.A. 16a-1-202. In other respects, the U3C differentiates among creditors depending on their status as either being sellers or lenders; and among lenders as either being or not being supervised financial organizations as defined in K.S.A. 16a-1-301(44); and finally among supervised financial organizations depending on whether they are (1) commercial or industrial banks or trust companies, or (2) thrift institutions such as credit unions, savings banks and savings and loan associations whether mutual or not.

2. Subsection (2) frees commercial and industrial banks and trust companies and all creditors other than thrift institutions from existing limitations on their powers based solely on the amount or duration of credit they may extend.

3. Subsection (3) retains all existing limitations on powers of thrift institutions, other than those based on maximum charges, on the theory that those limitations may be required for the protection of their depositors or shareholders. Similarly, subsection (4) retains limits on the powers of supervised financial organizations such as loans-to-one-borrower limits, maximum loan-to-value ratios and the like that are designed to protect deposits.

#### **K.S.A. 16a-1-109. (UCCC) Transactions subject to act by agreement.**

The parties to a sale, lease, or loan or modification thereof, which is not a consumer credit transaction may agree in a writing signed by the parties that the transaction is subject to the provisions of K.S.A. 16a-1-101 through 16a-9-102 applying to consumer credit transactions. If the parties so agree the transaction is a consumer credit transaction for the purposes of K.S.A. 16a-1-101 through 16a-9-102.

**History:** L. 1973, ch. 85, § 8; Jan. 1, 1974. **Attorney General's Opinions:** Interest rates applicable to certain real estate mortgages; loan agreements applying consumer credit code (UCCC) rates. 97-99.

#### **KANSAS COMMENT, 2010**

The consumer purpose test is the basic standard for determining the coverage of the U3C. This section permits creditors, by inserting an appropriate clause in the contract, to be certain that the

transaction is a consumer credit sale, lease or loan for the purposes of the U3C. See K.A.R. 75-6-1. Creditors often contract into the U3C in order to charge the higher rates of finance charges it permits. Of course, contracting into the U3C to take advantage of its higher rate ceilings makes the creditor subject to all of the U3C's restrictions. Thus, the creditor must weigh the costs of complying with the U3C, such as its limits on additional charges (including strict limits on the recovery of attorneys' fees) and its consumer protective default and right to cure provisions against the benefits of the higher finance charge rates it authorizes.

Since the general reform of Kansas usury laws in the early 1980's, there have been no interest rate ceilings on business and agricultural loans. See K.S.A. 16-207(f). In some cases, business creditors have inadvertently subjected themselves to the restrictions of the U3C by using forms designed primarily for consumer loans which contained language bringing the transactions within the U3C. See, e.g., *United Kansas Bank & Trust Co. v. Rixner*, 4 Kan. App. 2d 662, 610 P.2d 116 (1980), *aff'd* 228 Kan. 633, 619 P.2d 1156; *Farmers State Bank v. Haflich*, 10 Kan. App. 2d 333, 699 P.2d 533 (1985). Compare *Farmers State Bank v. Cooper*, 227 Kan. 547, 608 P.2d 929 (1980), where the printed form was ambiguous because the parties had typed in the words "business loan," and the court allowed the intent of the parties to control.

Creditors might want to contract into the U3C to justify charging a higher rate — in the case of first mortgage loans, purchase money or "margin" loans for securities and transactions that otherwise would be governed by the U3C but for the fact that the amount financed exceeds \$25,000. First mortgage loans are generally exempt from the U3C (see K.S.A. 16a-1-301(17)(b) and the Kansas comment to that section), and are subject to their own floating interest rate ceilings. K.S.A. 16-207(b). In addition, while certain high loan-to-value first mortgage loans are covered by the U3C, those loans remain subject to the floating interest rate ceilings of K.S.A. 16-207(b), rather than the U3C's rate ceilings. See K.S.A. 16-207(i)(1) and 16a-2-401(8). If the rates permitted by the floating rate ceilings of K.S.A. 16-207(b) are lower than the rates allowed by the U3C, and the lender wants to charge the higher U3C rates, it can do so by inserting a clause in the agreement making the transaction subject to the U3C. See also the Kansas comment to K.S.A. 16a-2-401.

Similarly, advances by a broker-dealer used by the borrower to buy or carry securities pledged to secure those advances are subject to a floating rate ceiling based on the broker-dealer's own bank loans, although those loans may carry rates up to 10% in any case. K.S.A. 16-214. Those loans are expressly exempted by that section from all aspects of the U3C. Again, however, a broker-dealer can charge the higher U3C rates by contracting into the U3C.

Along the same line, a credit sale or a loan in which the amount financed exceeds \$25,000 (and which, in the case of a loan, is not secured by an interest in land) is not covered by the U3C, even if all the other elements of a consumer credit transaction are present. See the definitions of "consumer credit sale" and "consumer loan" in K.S.A. 16a-1-301(14) and 16a-1-301(17) and the Kansas comments to those sections. This dollar limit excludes a growing number of traditional consumer credit transactions from the scope of the U3C as items such as automobiles, boats, and recreational vehicles continue to increase in price. Because they are not covered by the U3C, the general 15% interest rate ceiling in K.S.A. 16-207(a) would be applicable to those high-dollar transactions. Just as with first mortgage loans and margin loans, however, the creditor presumably can take advantage of the higher U3C rates by contracting into the U3C under this section.

## Part 2

### SCOPE AND JURISDICTION

#### **K.S.A. 16a-1-201. (UCCC) Territorial application.**

(1) Except as otherwise provided in this section, K.S.A. 16a-1-101 through 16a-9-102, and amendments thereto, apply to consumer credit transactions made in this state. For

purposes of such sections of this act, a consumer credit transaction is made in this state if:

- (a) A signed writing evidencing the obligation or offer of the consumer is received by the creditor in this state; or
- (b) the creditor induces the consumer who is a resident of this state to enter into the transaction by solicitation in this state by any means, including but not limited to: Mail, telephone, radio, television or any other electronic means.

(2) With respect to consumer credit transactions entered into pursuant to open end credit (subsection (31) of K.S.A. 16a-1-301, and amendments thereto), this act applies if the consumer's communication or indication of intention to establish the arrangement 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 arrangement is mailed or personally delivered in this state.

(3) The part on limitations on creditors' remedies (part 1) of the article on remedies and penalties (article 5) applies to actions or other proceedings brought in this state to enforce rights arising from consumer credit sales, consumer leases, or consumer loans, or extortionate extensions of credit, wherever made.

(4) A consumer credit transaction made in another state to a person who is a resident of this state at the time of the transaction is valid and enforceable in this state to the extent that it is valid and enforceable under the laws of the state applicable to the transaction, but the following provisions apply as though the transaction occurred in this state:

- (a) A creditor may not collect charges through actions or other proceedings in excess of those permitted by the article on finance charges and related provisions (article 2); and
- (b) a creditor 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 3) and limitations on consumer's liability (part 4) of the article on regulation of agreements and practices (article 3).

(5) Except as provided in subsection (3), a consumer credit transaction made in another state to a person who was not a resident of this state when the sale, lease, loan, 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.

(6) For the purposes of K.S.A. 16a-1-101 through 16a-9-102, and amendments thereto, the residence of a consumer is the address given by the consumer as the consumer's residence in any writing signed by the consumer in connection with a credit transaction. Until the consumer notifies the creditor of a new or different address, the given address is presumed to be unchanged.

(7) Notwithstanding other provisions of this section:

- (a) Except as provided in subsection (3), K.S.A. 16a-1-101 through 16a-9-102, and amendments thereto, do not apply if the consumer is not a resident of this state at the time of a credit transaction and the parties have agreed that the law of the consumer's residence applies; and
- (b) K.S.A. 16a-1-101 through 16a-9-102, and amendments thereto, apply if the consumer is a resident of this state at the time of a credit transaction and the parties have agreed that the law of the consumer's residence applies.

(8) Except as provided in subsection (7) the following agreements by a buyer, lessee, or debtor are invalid with respect to consumer credit transaction to which K.S.A. 16a-1-101 through 16a-9-102, and amendments thereto, apply:

- (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.

(9) The following provisions of this act specify the applicable law governing certain cases:

- (a) Applicability (K.S.A. 16a-6-102, and amendments thereto) of the part on powers and functions of administrator (part 1) of the article on administration (article 6); and
- (b) applicability (K.S.A. 16a-6-201, and amendments thereto) of the part on notification and fees (part 2) of the article on administration (article 6).

(10) With respect to a consumer credit sale or consumer loan to which K.S.A. 16a-1-101 through 16a-9-102, and amendments thereto, does not otherwise apply by reason of the foregoing provisions of this section, if, pursuant to a solicitation relating to a consumer credit sale or loan received in this state, a person who is a resident of this state sends a signed writing evidencing the obligation or offer of the person to a creditor in another state, and the person receives the goods or services purchased or the cash proceeds of the loan in this state:

- (a) The creditor may not contract for or receive charges exceeding those permitted by this code, and such charges as do exceed those permitted are excess charges for purposes of subsections (3) and (4) of K.S.A. 16a-5-201 and 16a-6-113, and amendments thereto, and such sections shall apply as though the consumer credit sale or consumer loan were made in this state; and
- (b) the part on powers and functions of administrator (part 1) of the article on administration (article 6) shall apply as though the consumer credit sale or consumer loan were made in this state.

**History:** L. 1973, ch. 85, § 9; L. 1977, ch. 70, § 1; L. 1981, ch. 93, § 4; L. 1993, ch. 200, § 3; L. 1999, ch. 107, § 7; July 1. **Attorney General's Opinions:** Finance charge for consumer loans; supervised lenders. 79-286. Scope and jurisdiction of UCCC; territorial application. 90-38.

#### **KANSAS COMMENT, 2010**

1. This section enables Kansas to apply the U3C for the protection of its own consumer residents in multi-state transactions.

2. Under the original version of subsections (1) and (2) of this section, the issue of whether a transaction was deemed to have been made in Kansas (thus triggering application of the entire U3C) was dependent on the place at which the executed contract was received by the creditor and whether any face-to-face solicitations occurred in Kansas.

Subsection (1)(b) was amended, however, in the 1999 legislative session to remove the "face-to-face" qualifier from the solicitation test. This amendment was driven primarily by a concern over the growing use of the internet as a means of soliciting Kansas consumers to enter into credit transactions with out-of-state creditors.

Under amended subsection (1)(b), the applicability of the U3C to a multi-state transaction turns on whether there is "solicitation in this state." The Court of Appeals for the 10th Circuit affirmed the constitutionality of subsection (1)(b) in the case *Quik Payday v. Stork, et al.*, 549 F.3d 1302, (2008), cert. denied 129 S.Ct. 2062. In that case, the court held that the administrator did not act unconstitutionally when the administrator applied the U3C to an internet payday lender located in Utah. In *Quik Payday*, an out-of-state payday lender made supervised loans to Kansas consumers via the internet. The lender had no agents or offices in Kansas. However, subsection (1)(b) brought these internet payday loan transactions under the U3C. Additional guidance regarding when a solicitation is deemed to have been made in Kansas may be found in *Watkins v. Roach Cadillac, Inc.*, 7 Kan. App. 2d 8, 637 P.2d 458 (1981), the court held that out-of-state radio and newspaper advertisements which reached a Kansas consumer were "solicitations"

sufficiently "within this state" to bring the transaction within the scope of the KCPA. Another example of a case construing a similar phrase is *Norton v. Local Loan*, 251 N.W.2d 520 (Iowa 1977), the court held that a long distance phone call from the creditor's out-of-state agent to the consumer was "conduct in this state" within the meaning of that phrase in the Iowa U3C.

It seems quite unlikely that a Kansas resident will locate an out-of-state creditor, travel to the creditor's state and consummate a consumer credit transaction with that creditor unless the creditor has "solicited" the consumer by the use of targeted telephone, mail or other direct marketing or general radio, television, or other non-individualized advertisements received or seen by the consumer in Kansas. Thus, as a practical matter, nearly all consumer credit extended by out-of-state creditors to Kansas residents would be deemed to have been made in Kansas. The entire U3C (including its licensing requirements, its disclosure requirements and its substantive limitations) would apply to those transactions.

3. Under subsections (7) and (8), choice of law agreements have been invalidated except where the law chosen is that of the state of the consumer's residence. This eliminates the danger that creditors could induce consumers to agree that the applicable law would be that of a creditor's haven that had no effective credit protection.

4. As noted in Kansas comment 2 to this section, virtually all supervised loans extended to Kansas residents would be deemed to have been made in Kansas and, as a result, out-of-state creditors extending those loans would need a Kansas supervised lender's license. Note, however, that (a) an out-of-state supervised financial organization does not need a supervised lender's license to make supervised loans in Kansas and (b) federally-insured financial institutions may "export" to Kansas the interest rates and related charges permitted by the law of their home states as a matter of federal law. See *Smiley v. Citibank (South Dakota)*, N.A., 116 S.Ct. 1730 (1996).

#### **K.S.A. 16a-1-202. (UCCC) Exclusions.**

K.S.A. 16a-1-101 through 16a-6-414 do not apply to

- (1) extensions of credit to government or governmental agencies or instrumentalities;
- (2) except as otherwise provided in the article on insurance (article 4), the sale of insurance by an insurer if the insured is not obligated to pay installments of the premium and the insurance may terminate or be cancelled after nonpayment of an installment of the premium;
- (3) transactions under public utility or common carrier tariffs if a subdivision or agency of this state or of the United States regulates the charges for the services involved, the charges for delayed payment, and any discount allowed for early payment;
- (4) except with respect to disclosure, pawnbrokers licensed and regulated pursuant to statutes of this state;
- (5) transactions covered by the Kansas insurance premium finance company act. (K.S.A. 40-2601 to 40-2613).

**History:** L. 1973, ch. 85, § 10; Jan. 1, 1974.

#### **KANSAS COMMENT, 2010**

Nonconsumer credit transactions are of course outside the scope of the U3C. In addition, several classes of transactions are expressly excluded in this section even though they might otherwise fall within the ambit of the U3C. Subsections (1) and (3) are derived from TILA 15 U.S.C.A. § 1603, which exempts government agencies and public utilities from truth in lending requirements. With respect to subsection (2), article 4 of the U3C covers the insurance aspects of consumer credit transactions, but the sale of insurance itself is excluded insofar as no installment obligation arises and cancellation may take place at any time. With respect to subsection (4), pawnbroker transactions are exempted from the U3C except for disclosure; they are regulated as to charges, licensing and other matters by K.S.A. 16-706 et seq. With respect to subsection (5),

insurance premium financing is excluded from the U3C because of its uniqueness and its unusual rate structure, which is comprehensively covered by K.S.A. 40-2601 et seq.

Other transactions are inferentially excluded for failure to qualify under the definitions of the three key transactions covered by the U3C, "consumer credit sale," "consumer lease," and "consumer loan," or by one of the specific exclusions listed in those definitions. See K.S.A. 16a-1-301(14), (16), and (17), and the corresponding Kansas comments. One of the major categories of consumer transactions excluded from coverage under the U3C for failure to so qualify is the lease-purchase agreement or rent-to-own contract. Those agreements are now comprehensively regulated by the Kansas consumer lease-purchase agreement act, K.S.A. 50-680 et seq.

### **Part 3**

## **DEFINITIONS**

### **K.S.A. 16a-1-301. General definitions.**

In addition to definitions appearing in subsequent articles, in K.S.A. 16a-1-101 through 16a-9-102, and amendments thereto:

(1) "Actuarial method" means the method of allocating payments made on a debt between the principal and the finance charge pursuant to which a payment is applied, assuming no delinquency charges or other additional charges are then due, first to the accumulated finance charge and then to the unpaid principal balance. When a finance charge is calculated in accordance with the actuarial method, the contract rate is applied to the unpaid principal balance for the number of days the principal balance is unpaid. At the end of each computational period, or fractional computational period, the unpaid principal balance is increased by the amount of the finance charge earned during that period and is decreased by the total payment, if any, made during the period after the deduction of any delinquency charges or other additional charges due during the period.

(2) "Administrator" means the deputy commissioner of the consumer and mortgage lending division appointed by the bank commissioner pursuant to K.S.A. 75-3135, and amendments thereto.

(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.

(4) "Amount financed" means the net amount of credit provided to the consumer or on the consumer's behalf. The amount financed shall be calculated as provided in rules and regulations adopted by the administrator pursuant to K.S.A. 16a-6-117, and amendments thereto.

(5) "Annual percentage rate" means the finance charge expressed as a yearly rate, as calculated in accordance with the actuarial method. The annual percentage rate shall be calculated as provided in rules and regulations adopted by the administrator pursuant to K.S.A. 16a-6-117, and amendments thereto.

(6) "Appraised value" means, with respect to any real estate at any time:

- (a) The total appraised value of the real estate, as reflected in the most recent records of the tax assessor of the county in which the real estate is located;
- (b) the fair market value of the real estate, as reflected in a written appraisal of the real estate performed by a Kansas licensed or certified appraiser within the past 12 months; or
- (c) in the case of a nonpurchase money real estate transaction, the estimated market value as determined through an automated valuation model acceptable to the administrator. As used in this paragraph (c), "automated

valuation model" means an automated system that is used to derive a property value through the use of publicly available property records and various analytic methodologies such as comparable sales prices, home characteristics and historical home price appreciations. Automated valuation models must be validated by an independent credit rating agency. An automated valuation model provider shall not accept a property valuation assignment when the assignment itself is contingent upon the automated valuation model provider reporting a predetermined property valuation, or when the fee to be paid to the automated valuation model provider is contingent upon the property valuation reached or upon the consequences resulting from the property valuation assignment.

(7) "Billing cycle" means the time interval between periodic billing statement dates.

(8) "Cash price" of goods, services, or an interest in land means the price at which they are offered for sale by the seller to cash buyers in the ordinary course of business and may include (a) the cash price of accessories or services related to the sale, such as delivery, installation, alterations, modifications, and improvements, and (b) taxes to the extent imposed on a cash sale of the goods, services, or interest in land. The cash price stated by the seller to the buyer in a disclosure statement is presumed to be the cash price.

(9) "Closed end credit" means a consumer loan or a consumer credit sale which is not incurred pursuant to open end credit.

(10) "Closing costs" with respect to a debt secured by an interest in land includes:

(a) The actual fees paid a public official or agency of the state or federal government, for filing, recording or releasing any instrument relating to the debt; and

(b) bona fide and reasonable expenses incurred by the lender in connection with the making, closing, disbursing, extending, readjusting or renewing the debt which are payable to third parties not related to the lender, except that reasonable fees for an appraisal made by the lender or related party are permissible.

(11) "Code mortgage rate" means the greater of:

(a) 12%; or

(b) the sum of:

(i) The yield on 30-year fixed rate conventional home mortgage loans committed for delivery within 61 to 90 days accepted under the federal home loan mortgage corporation's or any successor's daily offerings for sale on the last day on which commitments for such mortgages were received in the previous month; and

(ii) 5%.

If the reference rate referred to in subparagraph (i) of paragraph (b) is discontinued, becomes impractical to use, or is otherwise not readily ascertainable for any reason, the administrator may designate a comparable replacement reference rate and, upon publishing notice of the same, such replacement reference rate shall become the reference rate referred to in subparagraph (i) of paragraph (b). The secretary of state shall publish notice of the code mortgage rate not later than the second issue of the Kansas register published each month.

(12) "Conspicuous" means 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 trier of fact.

(13) "Consumer" means the buyer, lessee, or debtor to whom credit is granted in a consumer credit transaction.

(14) "Consumer credit sale":

(a) Except as provided in paragraph (b), a "consumer credit sale" is a sale of goods, services, or an interest in land in which:

(i) Credit is granted either by a seller who regularly engages as a seller in credit transactions of the same kind or pursuant to a credit card other than a lender credit card,

(ii) the buyer is a person other than an organization,

(iii) the goods, services, or interest in land are purchased primarily for a personal, family or household purpose,

(iv) either the debt is by written agreement payable in more than four installments or a finance charge is made, and

(v) with respect to a sale of goods or services, the amount financed does not exceed \$25,000.

(b) A "consumer credit sale" does not include:

(i) A sale in which the seller allows the buyer to purchase goods or services pursuant to a lender credit card; or

(ii) a sale of an interest in land, unless the parties agree in writing to make the transaction subject to the uniform consumer credit code.

(15) "Consumer credit transaction" means a consumer credit sale, consumer lease, or consumer loan or a modification thereof including a refinancing, consolidation, or deferral.

(16) "Consumer lease" means a lease of goods:

(a) Which a lessor regularly engaged in the business of leasing makes to a person, other than an organization, who takes under the lease primarily for a personal, family or household purpose;

(b) in which the amount payable under the lease does not exceed \$25,000;

(c) which is for a term exceeding four months; and

(d) which is not made pursuant to a lender credit card.

(17) "Consumer loan":

(a) Except as provided in paragraph (b), a "consumer loan" is a loan made by a person regularly engaged in the business of making loans in which:

(i) The debtor is a person other than an organization;

(ii) the debt is incurred primarily for a personal, family or household purpose;

(iii) either the debt is payable by written agreement in more than four installments or a finance charge is made; and

(iv) either the amount financed does not exceed \$25,000 or the debt is secured by an interest in land.

(b) Unless the loan is made subject to the uniform consumer credit code by written agreement, a "consumer loan" does not include:

(i) A loan secured by a first mortgage unless:

(A) The loan-to-value ratio of the loan at the time when made exceeds 100%; or

(B) in the case of subsection (1) of K.S.A. 16a-3-308a and amendments thereto, the annual percentage rate of the loan exceeds the code mortgage rate; or

(ii) a loan made by a qualified plan, as defined in section 401 of the internal revenue code, to an individual participant in such plan or to a member of the family of such individual participant.

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

(19) "Credit card" means any card, plate or other single credit device that may be used from time to time to obtain credit. Since this involves the possibility of repeated use of a single device, checks and similar instruments that can be used only once to obtain a single credit extension are not credit cards.

(20) "Creditor" means a person who regularly extends credit in a consumer credit transaction which is payable by a written agreement in more than four installments or for which the payment of a finance charge is or may be required and is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness or, if there is no such evidence of indebtedness, by written agreement. In the case of credit extended pursuant to a credit card, the creditor is the card issuer and not another person honoring the credit card.

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

(22) "Finance charge" means all charges payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or as a condition of the extension of credit. The finance charge shall be calculated as provided in rules and regulations adopted by the administrator pursuant to K.S.A. 16a-6-117, and amendments thereto.

(23) "First mortgage" means a first priority mortgage lien or similar real property security interest.

(24) "Goods" includes goods not in existence at the time the transaction is entered into and merchandise certificates, but excludes money, chattel paper, documents of title, and instruments.

(25) Except as otherwise provided, "lender" includes an assignee of the lender's right to payment but use of the term does not in itself impose on an assignee any obligation of the lender with respect to events occurring before the assignment.

(26) "Lender credit card" means a credit card issued by a supervised lender.

(27) "Loan":

(a) Except as provided in paragraph (b), a "loan" includes:

(i) The creation of debt by the lender's payment of or agreement to pay money to the debtor or to a third party for the account of the debtor;

(ii) the creation of debt either pursuant to a lender credit card or by a cash advance to a debtor pursuant to a credit card other than a lender credit card;

(iii) the creation of debt by a credit to an account with the lender upon which the debtor is entitled to draw immediately; and

(iv) the forbearance of debt arising from a loan.

(b) A "loan" does not include the payment or agreement to pay money to a third party for the account of a debtor if the debt of the debtor arises from a sale or lease and results from use of either a credit card issued by a person primarily in the business of selling or leasing goods or services or any other credit card which may be used for the purchase of goods or services and which is not a lender credit card.

(28) "Loan-to-value ratio", at any time for any loan secured by an interest in real estate, means a fraction expressed as a percentage:

- (a) The numerator of which is the aggregate unpaid principal balance of all loans secured by a first mortgage or a second mortgage encumbering the real estate at such time; and
  - (b) the denominator of which is the appraised value of the real estate.
- (29) "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.
- (30) "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, releasing, or satisfying a security interest related to a consumer credit sale, consumer lease, or consumer loan; or
  - (b) premiums payable for insurance in lieu of perfecting a security interest otherwise required by the creditor in connection with the sale, lease, or loan, if the premium does not exceed the fees and charges described in paragraph (a) which would otherwise be payable.
- (31) "Open end credit" means an arrangement pursuant to which:
- (a) A creditor may permit a consumer, from time to time, to purchase goods or services on credit from the creditor or pursuant to a credit card, or to obtain loans from the creditor or pursuant to a credit card;
  - (b) the unpaid balance of amounts financed and the finance and other appropriate charges are debited to an account;
  - (c) the finance charge, if made, is computed on the outstanding unpaid balances of the consumer's account from time to time; and
  - (d) the consumer has the privilege of paying the balances in installments.
- (32) "Organization" means a corporation, limited liability company, government or governmental subdivision or agency, trust, estate, partnership, cooperative or association.
- (33) "Person" includes a natural person or an individual, and an organization.
- (34) (a) "Person related to" with respect to an individual means
- (i) the spouse of the individual,
  - (ii) a brother, brother-in-law, sister, sister-in-law of the individual,
  - (iii) an ancestor or lineal descendant of the individual or the individual's spouse, and
  - (iv) any other relative, by blood, adoption or marriage, of the individual or such individual's spouse who shares the same home with the individual.
- (b) "Person related to" with respect to an organization means
- (i) a person directly or indirectly controlling, controlled by or under common control with the organization,
  - (ii) 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,
  - (iii) the spouse of a person related to the organization, and
  - (iv) a relative by blood, adoption or marriage of a person related to the organization who shares the same home with such person.
- (35) "Prepaid finance charge" means any finance charge paid separately in cash or by check before or at consummation of a transaction, or withheld from the proceeds of the credit at any time. Prepaid finance charges shall be calculated as provided in rules and regulations adopted by the administrator pursuant to K.S.A. 16a-6-117, and amendments thereto.

(36) "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 nonexistence.

(37) "Principal" means the total of the amount financed and the prepaid finance charges, except that prepaid finance charges are not added to the amount financed to the extent such prepaid finance charges are paid separately in cash or by check by the consumer. The administrator may adopt rules and regulations regarding the determination or calculation of the principal or the principal balance pursuant to K.S.A. 16a-6-117, and amendments thereto.

(38) "Sale of goods" includes any agreement in the form of a bailment or lease of goods 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 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 upon full compliance with such bailee's or lessee's obligations under the agreements.

(39) "Sale of an interest in land" includes a lease in which the lessee has an option to purchase the interest and all or a substantial part of the rental or other payments previously made by the lessee are applied to the purchase price.

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

(41) "Second mortgage" means a second or other subordinate priority mortgage lien or similar real property security interest.

(42) "Seller": Except as otherwise provided, "seller" includes an assignee of the seller's right to payment but use of the term does not in itself impose on an assignee any obligation of the seller with respect to events occurring before the assignment.

(43) "Services" includes (a) work, labor, and other personal services, (b) privileges with respect to transportation, hotel and restaurant accommodations, education, entertainment, recreation, physical culture, hospital accommodations, funerals, cemetery accommodations, and the like, and (c) insurance.

(44) "Supervised financial organization" means a person, other than an insurance company or other organization primarily engaged in an insurance business:

(a) Organized, chartered, or holding an authorization certificate under the laws of any 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 such state or of the United States.

(45) "Supervised lender" means a person authorized to make or take assignments of supervised loans, either under a license issued by the administrator (K.S.A. 16a-2-301 and amendments thereto) or as a supervised financial organization (subsection (44) of K.S.A. 16a-1-301 and amendments thereto).

(46) "Supervised loan" means a consumer loan, including a loan made pursuant to open end credit, with respect to which the annual percentage rate exceeds 12%.

(47) "Written agreement" means an agreement such as a promissory note, contract or lease that is evidence of or relates to the indebtedness. A letter that merely confirms an oral agreement does not constitute a written agreement for purposes of this subsection unless signed by the person against whom enforcement is sought.

(48) "Written administrative interpretation" means any written communication from the consumer credit commissioner which is the official interpretation as so stated in said written communication by the consumer credit commissioner of the Kansas uniform consumer credit code and rules and regulations pertaining thereto.

**History:** L. 1973, ch. 85, § 11; L. 1980, ch. 75, § 4; L. 1980, ch. 76, § 5; L. 1981, ch. 93, § 5; L. 1982, ch. 89, § 2; L. 1984, ch. 83, § 1; L. 1988, ch. 85, § 2; L. 1992, ch. 80, § 1; L. 1993, ch. 200, § 4; L. 1993, ch. 200, § 5; L. 1996, ch. 166, § 2; L. 1998, ch. 106, § 1; L. 1999, ch. 107, § 8; L. 1999, ch. 166, § 8; L. 2000, ch. 27, § 1; L. 2006, ch. 97, § 1; July 1. **Attorney General's Opinions:** Interest charges; usury. 79-252. Finance charge for consumer loans; supervised lenders. 79-286. "Supervised financial organization". 80-80. Supervised lender; examination of national banks. 80-94. Interest and charges; business and agricultural loans. 81-200. Finance charges; additional charges not included therein. 81-209. Kansas liquor control act; cereal malt beverages; retail sales involving electronic fund transfers. 81-266. Consumer loans; finance charge; exemption of adjustable rate loans from maximum finance charge limits. 82-128. Consumer credit transactions; prohibition on prepayment penalties; preemption as to national banks. 83-132. Consumer loans; maximum finance charges; loans secured by mortgage on real estate; charging of nonrefundable origination fee. 84-2. Definitions; supervised lender; supervised financial organization. 84-11. Attorney fees; national direct student loans. 86-113. Property and liability insurance. 87-47. Consumer credit insurance; amount of insurance. 88-13. Cable television company; late payment charges; "interest" and "finance charge". 88-30. Fair credit reporting act—permissible uses of credit reports. 88-89. Sale of intoxicating liquors on credit prohibited. 88-137. Investment certificates of investment companies' restrictions on investments. 88-166. Consumer credit transaction; blanket single interest insurance programs. 89-54. Interest rates applicable to certain real estate mortgages; loan agreements applying consumer credit code (UCCC) rates. 97-99.

#### **KANSAS COMMENT, 2010**

##### Subsection (1):

The definition of "actuarial method" is derived from TILA 15 U.S.C.A. § 1606(a)(1)(A). The assumption underlying the actuarial method is that a periodic payment is applied first to accumulated unpaid finance charges (assuming there are no delinquency charges or other additional charges that take priority over finance charges). If the payment exceeds the unpaid accumulated finance charges, the remainder of the payment is applied to reduce the unpaid principal balance. The application of the actuarial method is really quite simple. First, the annualized stated interest rate is multiplied by the actual outstanding principal balance of the obligation. Next, the product of that calculation is multiplied by the actual number of days in the period in question (or by the assumed number of days in the period in a "360/360" transaction). Finally, the product of that calculation is divided by 365 (or, if agreed to by the parties, by 360). The result is the finance charge for the period in question. The consumer's payment is first allocated to the payment of the calculated finance charge (after deducting any delinquency charges or other additional charges due during the period) and the remainder, if any, is applied to reduce the unpaid principal balance of the obligation.

##### Subsection (2):

The administrator of the U3C is the deputy commissioner of the consumer and mortgage lending division of the Office of the State Bank Commissioner. Note, however, that the Kansas commissioner of insurance also issues rules and may participate in enforcement of article 4 of the U3C relating to consumer credit insurance. See K.S.A. 16a-4-111 and 16a-4-112. As mentioned in the comments to K.S.A. 16a-1-101, on-line versions of the U3C, these comments and administrative regulations and interpretations can be found at the administrator's web page, <http://www.osbckansas.org>. Similarly, recent Kansas legislative bills and supplemental notes affecting Kansas consumer credit matters can be accessed at <http://www.kslegislature.org>.

##### Subsection (3):

The definition of "agreement" is derived from the UCC. K.S.A. 84-1-201(3). The terms "course of dealing," "usage of trade," and "course of performance" should be given the same meanings under the U3C as under the UCC. See K.S.A. 84-1-303. Allowance should be made for the different context, e.g., consumer compared to commercial, and "course of performance" should apply to lessors and lenders as well as to sellers.

##### Subsection (4):

The "amount financed" is a key concept with respect to both rate ceilings and disclosures, as it determines the amount on which the finance charge is imposed and serves as a baseline for computing other allowable charges. The "amount financed" focuses on the amount of credit extended to the consumer (or on the consumer's behalf) and includes not only the cash price in a sale or the amount advanced under a loan, but also other amounts (such as official fees, insurance charges, and other additional charges (K.S.A. 16a-2-501)) that are not part of the finance charge (subsection (22)) to the extent payment of those amounts is deferred. The calculation of the amount financed is governed by a regulation adopted by the administrator (K.A.R. 75-6-26) which, under K.S.A. 16a-6-117, tracks the requirements of Regulation Z. Thus, the amount financed for a particular transaction will generally be disclosed in the truth in lending disclosure statement that the creditor prepares for that transaction under Regulation Z (at least for those transactions that are subject to Regulation Z).

Subsection (5):

The definition of "annual percentage rate" is a key term and determines the applicability of several restrictions and requirements under the U3C, such as limits on negative amortization and the need for a supervised lender's license. The annual percentage rate is designed to reflect in one number the annual cost of credit expressed as a percentage. The calculation of the annual percentage rate is governed by a regulation adopted by the administrator (K.A.R. 75-6-26) which, under K.S.A. 16a-6-117, tracks the requirements of Regulation Z. Thus, the annual percentage rate for a particular transaction will generally be disclosed in the truth in lending disclosure statement that the creditor prepares for that transaction under Regulation Z (at least for those transactions that are subject to Regulation Z).

Subsection (6):

The definition of "appraised value" relates to mortgage loans and is critical for determining whether such loans are governed by the U3C generally (in the case of certain high loan-to-value first mortgage loans) or to certain of its substantive restrictions (in the case of certain high-rate first or second mortgage loans). The creditor may determine the appraised value by looking to (1) the appraised value of the real estate as reflected in the records of the tax assessor of the relevant county, (2) the fair market value of the real estate as reflected in a separate written appraisal that meets the statutory requirements, or, (3) in the case of a nonpurchase money real estate transaction, the estimated value as determined through use of an automated valuation model. The U3C does not require a creditor to obtain a separate written appraisal — the creditor may always choose to simply rely on the tax assessor's records. However, the creditor may want to obtain a separate written appraisal if, for example, it believes the value reflected in the tax assessor's records is below the fair market value that would be reflected in a separate written appraisal and that the fair market value would be great enough to avoid application of the U3C's restrictions on certain high loan-to-value mortgage loans. In such a case, the creditor may rely on the written appraisal even though the tax assessor's records reflect a lower value. In 2006, the U3C was amended to allow the use of an automated valuation model. Automated valuation models must be validated by an independent credit rating agency and acceptable to the administrator.

Subsection (7):

The concept of the "billing cycle" becomes important with respect to the provisions of the U3C regulating finance charges in open end credit transactions, including credit card transactions. See K.S.A. 16a-2-202 and 16a-2-402.

Subsection (8):

For either rate ceilings or disclosures to be meaningful in credit sales, the amount financed on which finance charges are imposed must include a true cash price. This definition essentially conforms to the definition in Regulation Z, 12 C.F.R. § 226.2(a)(9). The consumer or administrator can rebut the presumption that the cash price disclosed is the true cash price by showing that the cash price disclosed is not offered to cash buyers in the ordinary course of business. If a seller sells an item in ordinary course for \$97 for cash but sells the same item for \$100 to buyers wishing to pay installments, the \$3 difference is not part of a true cash price but is a disguised finance charge imposed by the seller. See subsection (22). If the cash price disclosed is not a true cash price (i.e., if in the example above the seller discloses \$100 as the cash price), the seller may be liable for a violation of the disclosure provisions (see K.S.A. 16a-5-203) and, if the

finance charge would have been excessive had the true cash price been used, for an excess charge (see K.S.A. 16a-5-201(3) and (4)).

Nothing in this definition prevents sellers from selling both for cash and on credit for the same price. For purposes of this definition it does not matter whether the charges enumerated in paragraphs (a) and (b) are included in the cash price or separately stated, since they will be included in the amount financed in either case. See subsection (4).

Subsection (9):

The definition of "closed end credit" is residual in that it works by exclusion. In other words, if a consumer loan or consumer credit sale does not qualify as open end credit (see subsection (31)), then by definition it must be closed end credit.

Subsection (10):

The definition of "closing costs" was originally derived from TILA U.S.C.A. § 1605(e). However, the U3C definition was amended in 1996 to move away from the "laundry list" approach of permissible closing costs used by the TILA. As amended, the U3C definition authorizes two broad categories of charges for transactions secured by an interest in land: (1) actual filing and recording fees, and (2) all other expenses incurred by the lender in connection with making the loan. Fees that typically qualify as closing costs include closing agent fees, appraisal fees, recording fees, title examination or insurance fees, document preparation fees, notary fees, pest inspection fees, application fees (if they are charged to all borrowers), courier fees, flood insurance determination fees (but only in connection with the initial decision to extend credit), credit report fees and tax service fees (but only in connection with the initial decision to extend credit). For additional guidance on the types of fees that are permitted, reference should be made to Regulation Z, 12 C.F.R. § 226.4(c)(7), K.A.R. 75-6-9 and to Administrative Interpretation No. 1009. Note that, except for appraisal fees, however, these expenses are considered closing costs only if paid to an unrelated third party. This is more restrictive than Regulation Z, which generally permits fees relating to services provided by a creditor's employees to be excluded from the finance charge. Moreover, all closing costs must be "bona fide and reasonable" and may not exceed the amount actually paid to the third party. This means that so-called "upcharges" of third-party fees are not permitted.

The significance of the definition is that closing costs are not included in the finance charge for purposes of rate ceilings and disclosure. See the Kansas comments to subsection (22) and K.S.A. 16a-2-501. Note that this definition is limited to transactions secured by an interest in land. Comparable costs charged to the consumer in non-real estate transactions would have to be included in the finance charge. This corresponds to the federal rule under truth in lending. Most first mortgage loans are excluded from the coverage of the U3C (see the Kansas comment to subsection (17)); as a result, this definition primarily applies to second mortgage loans.

Subsection (11):

The definition of "code mortgage rate" is used to determine whether certain high-rate first and second mortgage loans are subject to the U3C's restrictions on balloon payments and negative amortization. See subsection (17)(b)(i)(B). The definition uses a floating benchmark that is tied to the same index as the general usury rate for first mortgage loans (K.S.A. 16-207(b)), although the "margin" is 5% under the U3C instead of 1 1/2% under the general usury statute. Because the code mortgage rate uses a greater margin, it will always exceed the general usury limit for first mortgage loans. Thus, the parties would generally need to contract into the U3C to have a rate of finance charges on a first mortgage loan that exceeds the code mortgage rate. See K.S.A. 16a-1-109. That would make the transaction subject to the entire U3C and, at first blush, would seem to make this definition meaningless. There are at least two points to be made on this issue. First, adjustable mortgages subject to K.S.A. 16-207(h) are not subject to any rate ceiling. Thus, it would be possible to exceed the code mortgage rate on an adjustable mortgage without contracting into U3C. Second, even if a mortgage loan is otherwise subject to the entire U3C, its special restrictions on balloon payments and negative amortization only apply if the interest rate on the loan exceeds the code mortgage rate or if the loan-to-value ratio of the loan exceeds 100%. See K.S.A. 16a-3-308a.

Subsection (12):

The definition of "conspicuous" is derived from the UCC, K.S.A. 84-1-201(10), but the specific examples set out in the UCC provision are omitted. Here, as under the UCC, the issue is whether

attention can reasonably be expected to be called to a term. In the UCC, and in the official text of the uniform act, this issue was made a question of law. In this subsection, however, the Kansas legislature made the issue of conspicuousness a question of fact in consumer credit transactions. A similar variation was made in the section on unconscionability. See the Kansas comment to K.S.A. 16a-5-108.

Subsection (14):

Since most of the operative provisions of the U3C apply to consumer credit sales, consumer leases, or consumer loans, the definitions of these terms are the key scope definitions of the U3C. Under the definition of "consumer credit sale" in this subsection, the U3C applies to the same sales transactions as does the TILA. The requirement that a sale either be payable in more than four installments or subject to a finance charge excludes a great mass of transactions, e.g., the 30-day retail charge account and the short term credit furnished by professional people and artisans on a one-payment basis in connection with sales of their services for which no charge for credit is made. On the other hand, the U3C applies to merchants who sell on installments but make no identifiable charge for credit.

Sales or leases pursuant to a lender credit card give rise to loans as between the card issuer and cardholder, not to credit sales. See the Kansas comment to subsection (27). As originally adopted, the U3C covered consumer credit sales of land only if the rate of finance charge was above 12%. As a result of a non-uniform amendment in subparagraph (b)(ii), however, installment land sales are excluded from the U3C. Those transactions are instead regulated by K.S.A. 16-207(b) or (h) unless made subject to the U3C by agreement of the parties. See the Kansas comment to subsection (17) for a more complete discussion of the U3C's scope and policy with regard to land transactions.

Subsection (15):

Like the term "consumer," the term "consumer credit transaction" is all-embracing but takes meaning only from the more specific definitions of "consumer credit sale," "consumer loan," and "consumer lease." When the term "consumer credit transaction" is used, the intent is to make clear that the provision applies to all forms of consumer transactions. When a particular provision of the U3C is meant to apply only to consumer sales, or consumer lease, or consumer loans, those terms are used.

Subsection (16):

Leasing has become a popular alternative to credit sales as a means of distributing goods to consumers and merits inclusion in a comprehensive consumer credit code. The four month term requirement in paragraph (c) conforms to the federal Consumer Leasing Act, TILA 15 U.S.C.A. § 1667. It excludes from the U3C the innumerable hourly, daily, or weekly rental or hire agreements typically involving automobiles, trailers, home repair tools, sick room equipment, and the like. It also excludes the popular rent-to-own contracts for furniture, appliances, and electronic entertainment equipment, which typically obligate consumers only one week or month at a time. On the other hand, if the transaction, though in form a lease, is in substance a sale, it is treated as a sale for all purposes in the U3C and the provisions on consumer leases are inapplicable. See the definition of "sale of goods," subsection (38).

For those consumer leases which are covered, the U3C requires disclosure of the elements of the transaction (K.S.A. 16a-3-201 and K.A.R. 75-6-26); contains a number of contract limitations on agreements and practices (part 3 of article 3, notably K.S.A. 16a-3-301(2)) and on the lessee's liability (part 4 of article 3, notably K.S.A. 16a-3-401); regulates insurance provided in relation to consumer lease transactions (article 4); makes provisions for remedies and penalties in consumer lease transactions (article 5); and gives the administrator powers over consumer lease transactions (article 6). Since a finance charge is not made in the usual consumer lease transaction, the rate ceiling provisions of the U3C are inapplicable.

Subsection (17):

The primary definition of "consumer loan" in paragraph (a) generally parallels that of "consumer credit sale" in subsection (14)(a). It includes all loans under \$25,000 made by a person regularly engaged in the business of making loans to individuals for personal, family or household purposes, as long as they are repayable in more than four installments or a finance charge is imposed. See the Kansas comment to subsection (27).

Changes in the first mortgage market have resulted in the availability of certain types of high-

rate and high loan-to-value first mortgages that some view as raising the same consumer protection issues that historically existed only for second mortgage loans. As a result, the exclusion of first mortgages in subsection (b)(i) was narrowed in the 1999 legislative session so that certain first mortgage loans are subject to all or part of the U3C. Specifically, if the loan-to-value ratio (subsection (28)) of a first mortgage loan exceeds 100%, then the loan is subject to the entire U3C other than its rate ceilings — the permissible rate of interest on such a high loan-to-value first mortgage loan continues to be governed by K.S.A. 16-207(b), although the U3C's limits on prepaid finance charges apply to the transaction. See K.S.A. 16a-2-401(8). On the other hand, if the annual percentage rate on a first mortgage loan exceeds the code mortgage rate (subsection (11)), then the loan is subject to the U3C's restrictions on negative amortization and balloon payments. See K.S.A. 16a-3-308a. However, unless the transaction is otherwise subject to the U3C (because, for example, the parties contracted into the U3C or the transaction is a high loan-to-value loan), none of the other provisions of the U3C apply to the transaction. See also the Kansas comment to subsection (11). Another "scope" change made during the 1999 legislative session removed the long-standing exclusion from the U3C of a second mortgage held by the same creditor that holds the first mortgage. Second mortgage loans are now subject to the U3C, regardless of who holds the first mortgage.

Subparagraph (b)(ii), excluding certain pension plan loans, is not part of the uniform act. Pension plan loans are also exempt from the general usury laws. See K.S.A. 16-207(g). Discretionary overdrafts that are covered by a financial institution without a prearranged agreement to create or allow overdrafts are not "consumer loans" for purposes of the U3C. See Administrative Interpretation No. 1003.

Subsection (18):

The definition of "credit" emphasizes the fact that the U3C does not cover cash transactions. Credit is extended either when one who owes a debt is allowed to defer payment of the obligation or when one is given the right to incur an obligation in the future and to defer its payment. A commitment by a creditor to advance funds on request, as in the case of a letter of credit, is an example of the latter case.

Subsection (19):

The definition of "credit card" includes both seller and lender credit cards. The term encompasses the varied arrangements under which creditors equip consumers with a card or other form of access that enables them to obtain credit from the issuing creditor or others. The current definition has been brought in line with that under Regulation Z, 12 C.F.R. § 226.2(a)(15).

Subsection (20):

The U3C uses the term "creditor" as a short-hand way to refer inclusively to sellers, lenders and lessors. The current definition of "creditor" was taken from TILA 15 U.S.C.A. § 1602(f) and Regulation Z, 12 C.F.R. § 226.2(a)(17), which includes the "more than four installments" language found in this subsection. Many provisions of the U3C apply directly to assignees (e.g., K.S.A. 16a-2-301, 16a-2-304 and 16a-3-404). In the case of a lender credit card, the bank that issued the card, and not the merchant that honors it, is the "creditor."

Subsection (21):

The definition of "earnings" is derived in part from TILA 15 U.S.C.A. § 1672(a). The language is broad enough to include sums owed to independent contractors.

Subsection (22):

The definition of "finance charge" is designed to pick up all charges "incident to or as a condition of the extension of credit" (whatever the parties call them), if they are imposed by the creditor on the consumer. Finance charges may be charges that are paid over the life of the transaction (such as the stated interest rate) or may be "prepaid" at or before the closing of the transaction (such as "points," which are charges to reduce the stated interest rate). The calculation of the finance charge is governed by a regulation adopted by the administrator (K.A.R. 75-6-26) which, under K.S.A. 16a-6-117, generally tracks the requirements of Regulation Z. Thus, the finance charge for a particular transaction under the U3C will generally be the same as that disclosed in the truth in lending disclosure statement that the creditor prepares for that transaction under Regulation Z (at least for those transactions that are subject to Regulation Z). One area of difference, however, is closing costs for real estate transactions that are not paid to an unrelated

third party. Generally speaking, if a fee qualifies as a closing cost, it is excluded from the finance charge; if it fails to so qualify, it is normally included in the finance charge. Other than appraisal fees, the U3C limits closing costs in real estate transactions to fees that are paid to an unrelated third party. Regulation Z, on the other hand, allows closing costs to be paid to the creditor or a related party. See the Kansas comment to subsection (10) and Administrative Interpretation No. 1009. Thus, in a real estate transaction, the finance charge will be smaller under Regulation Z than under the U3C if there are closing costs (other than appraisal fees) that are payable to the creditor or a related party.

The definition of finance charge used in Regulation Z was amended in 1996 to deal specifically with charges imposed on the consumer by a third party. Generally, those charges must be included in the finance charge if the creditor requires the use of a third party as a condition of or an incident to the extension of credit (even if the consumer can choose the third party) or if the creditor retains a portion of the charge (but only to the extent of the portion retained). 12 C.F.R. § 226.4(a)(1). There are special rules for fees charged by a closing agent and fees charged by a mortgage broker. Closing agent fees must be included in the finance charge only if the creditor requires the particular services for which the consumer is charged, requires the charge to be imposed, or retains a portion of the charge (but only to the extent of the portion retained). 12 C.F.R. § 226.4(a)(2). Mortgage broker fees (whether paid by the consumer directly to the broker or indirectly through the creditor) must be included in the finance charge, even if the creditor does not require the use of a mortgage broker and even if the creditor does not retain any portion of the charge. 12 C.F.R. § 226.4(a)(3).

Charges imposed by financial institutions for covering discretionary overdrafts in the absence of a prearranged agreement to create or allow overdrafts are not "finance charges" for purposes of the U3C. See Administrative Interpretation No. 1003. This is consistent with the treatment of such charges under Regulation Z. See 12 C.F.R. § 226.4(c)(3) and the Official Staff Commentary to that section.

Subsection (23):

The definition of "first mortgage" conforms to the common understanding of that term and includes a mortgage that has a higher priority than any other mortgage or similar consensual lien on the real estate in question. The existence of a UCC fixture filing on personal property which is or becomes attached to the real estate would not preclude a mortgage from otherwise being a first mortgage, even if the fixture filing has priority under the UCC as to the fixture.

Subsection (24):

The definition of "goods," substantially conforms to that found in the UCC. Intangible property and commercial instruments are distinguished from "goods" both in the U3C and in the UCC. See K.S.A. 84-2-105(l) and 84-9-102(44).

Subsection (25):

Assignees take all rights conferred by the U3C on lenders. Various provisions of the U3C apply specifically to assignees. See also the Kansas comment to subsection (20).

Subsection (26):

As used in the U3C, "lender credit card" is limited to a card issued by a supervised lender (subsection (45)). The lender credit card arrangement is one under which the card issuer agrees to pay to third parties for purchases of goods and services by the cardholder. A bank credit card such as VISA or MasterCard is the most common example; however, licensed lenders (K.S.A. 16a-2-301) and other supervised financial organizations can also issue lender credit cards. See also the Kansas comments to subsections (19) and (27). "Credit card banks" are popular with retailers. Rather than issuing a seller credit card itself, the retailer establishes a bank that issues credit cards that can only be used at the retailer's stores. The cards issued by such a limited purpose entity are lender credit cards, and it is the special purpose entity, not the retailer, that is the creditor.

Subsection (27):

The distinction between loans and sales is basic to the applicability of the rate ceiling provisions (parts 2 and 4 of article 2), the licensing provisions (part 3 of article 2), and other provisions of the U3C. The traditional concept of a loan as an advance of money or a commitment to advance money is continued in paragraph (a). Under the U3C, forbearance of debt is characterized on the

basis of the nature of the original debt. Thus, forbearance of debt arising from sales or leases is not a loan transaction for U3C purposes.

Seller credit cards, such as credit cards issued by retailers, are issued primarily for the purpose of enabling cardholders to purchase property or services from the card issuer or closely related persons such as franchisees. If seller credit card issuers allow their cardholders to obtain nominal cash advances pursuant to their credit cards, then such advances are loan transactions under paragraph (a)(ii), and if a finance charge exceeding 12% is imposed, the transaction becomes a supervised loan (see subsection (46)) and the licensing provisions of part 3 of article 2 apply.

There are companies which will contract to exchange cash to consumers for personal living expenses in exchange for a security interest in the consumer's potential settlement, judgment or verdict resulting from a personal injury claim. Such contracts may not require the consumer to repay the cash advance if the consumer does not receive a successful settlement, judgment or verdict in the civil case; however, if the consumer is successful then the consumer is obligated to repay the principal amount plus a finance charge. These contracts to advance plaintiffs funds are similar to the loan receipt transactions in the insurance industry which have been held to constitute loans even though the obligation to repay is contingent. See *Hiebert v. Millers' Mutual Insurance Association of Illinois*, 212 Kan. 249, 510 P.2d 1203 (1973). The Kansas Supreme Court has held agreements to advance realtors cash for living expenses pending repayment from future anticipated commissions are not the sale of a business receivable discounted for commercial purposes, but rather the agreements constitute consumer loans. See *Decision Point, Inc. v. Reece & Nichols Realtors, Inc.*, 282 Kan. 381, 144 P.3d 706 (2006).

Subsection (28):

The definition of "loan-to-value ratio" is critical in determining whether and to what extent the U3C regulates certain mortgage loans. The U3C was amended during the 1999 legislative session to extend many of the U3C's protections to these high loan-to-value loans. The key factor in determining whether the U3C applies is the loan-to-value ratio. If the unpaid principal balance of all loans secured by a first mortgage or a subordinate mortgage on the real estate in question exceeds the real estate's appraised value (subsection (6)), then the transaction is governed by the entire U3C (except for its interest rate ceilings in the case of a first mortgage loan). Of course, if a loan is made at a time when the loan-to-value ratio is less than 100% but that ratio later exceeds 100% because subsequent second mortgage loans are made or the value of the real estate declines, the existing loan is not viewed as a high loan-to-value loan. When dealing with an open end mortgage loan (such as a home equity line of credit), the loan-to-value ratio should be determined by reference to the total amount of the line of credit rather than the amount that has been advanced as of any particular date.

Subsection (29):

"Merchandise certificate" primarily means the kind of scrip used by merchants to facilitate the purchase on credit of a number of relatively small items so that a separate contract or agreement is not required for each item purchased; it does not include a trading stamp redeemable only at a stamp redemption center.

Subsection (30):

The definition of "official fees" is derived from TILA 15 U.S.C.A. §1605.

Subsection (31):

The definition of "open end credit" is intended to cover both revolving charge accounts offered by retailers and lines of credit under bank credit cards, overdraft protection plans and the like. The term should be contrasted with closed end installment contracts where the amount financed and the total finance charge can normally be calculated in advance.

The treatment of a transaction in which a seller credit card issuer allows a cardholder to make purchases and add them to an account payable at a fixed time after billing with no right to defer payment further and with a charge imposed for late payment will depend on the way in which the creditor deals with late payments. The ordinary 30-day "open account," for example, in which the consumer gets a bill at the end of the month and is expected to pay in full within 30 days, with no finance charge imposed, is not "open end credit" within the definition of this subsection. As long as any late charge is a "true" late charge, the transaction is not a "consumer credit sale" for purposes of the U3C because there is neither a finance charge nor the privilege of paying in installments. See subsection (14). On the other hand, if the late charge is in reality a disguised

finance charge, then the transaction is a consumer credit sale involving open end credit and the entire U3C applies to it. The test is whether the charge is made for actual unanticipated late payment or other delinquency. For example, assume an oil company extends 30-day credit with no right to defer payment further and imposes a charge for late payment, but does not require surrender of the credit card if full payment is not made when billed. Instead, the consumer is permitted to continue to have purchases or other debts charged to the account in the ordinary course of business after imposition of the charge. In this case the transaction is a consumer credit sale made under open end credit and the entire U3C applies to it. Each case must be decided on its own facts.

Subsection (32):

The term "organization" includes virtually any legal entity except a natural person.

Subsection (33):

The term "person" is all-inclusive. Compare the definition of "organization" in subsection (32).

Subsection (34):

The term "person related to" finds use where the question is the relationship between a lender and a seller, lessor or other creditor.

Subsection (35):

The definition of "prepaid finance charge" is based on Regulation Z, 12 C.F.R. §226.2(a)(23). Common examples of prepaid finance charges include buyer's points, service fees, loan fees, finder's fees, loan guarantee insurance premiums and credit investigation fees. Additional guidance can be found in Administrative Interpretation No. 1009. Classification of items as prepaid finance charges is significant because the U3C imposes separate caps on the amount of prepaid finance charges that may be imposed in connection with a consumer credit transaction. Generally, the cap for non-real estate transactions is 2% of the amount financed or \$100 (whichever is less), and the cap for real estate transactions (including those relating to certain manufactured homes) is 8% of the amount financed, although the amount payable to the lender or a related party may not exceed 5% of the amount financed. See K.S.A. 16a-2-201(3) and 16a-2-401(6). The amount of prepaid finance charges is calculated in accordance with TILA and Regulation Z. See K.A.R. 75-6-26. Thus, the prepaid finance charges for a particular transaction under the U3C will generally be the same as that disclosed in the truth in lending disclosure statement that the creditor prepares for that transaction under Regulation Z. See, however, the Kansas comments to subsections (10) and (22) as they relate to differences in closing costs and finance charges for real estate transactions under Regulation Z and the U3C.

Subsection (36):

The term "presumption" means a rebuttable presumption. See K.S.A. 60-414 on the effect of presumptions.

Subsection (37):

The definition of "principal" was added by legislation adopted in 1993 that prohibited use of the precomputed method of determining finance charges on transactions originated on or after January 1, 1994. However, legislation adopted in 1998 and 1999 reinstated the permissibility of precomputed finance charges for closed end consumer credit sales. K.S.A. 16a-2-201.

Subsection (38):

The term "sale of goods" is derived from TILA 16 U.S.C.A. § 103(g). It includes sales disguised as leases. See, e.g., *Gulf Homes, Inc. v. Gonzales*, 676 P.2d 635 (Ariz. App. 1983), holding that a lease/purchase option agreement for a mobile home was in reality a sales transaction subject to the state retail installment sales act. For a discussion of the special issues relating to so-called "rent-to-own" contracts, see the Kansas comment to subsection (16).

Subsection (39):

The term "sale of an interest in land" includes lease-option arrangements and is not limited to situations where the option price is nominal.

Subsection (40):

The term "sale of services" underscores the fact that the U3C applies to more than goods or real estate. For example, it covers installment contracts to provide dance lessons or "health salon" activities, or even the sale of legal services. See *Ault v. General Property Management Co.*, 683 P.2d 988 (Okla. App. 1984). See also subsection (43). The KCPA also applies to the sale of services.

Subsection (41):

The definition of "second mortgage" refers to any mortgage or similar consensual lien on real estate other than a first mortgage.

Subsection (42):

With respect to the definition of "seller," see the Kansas comment to the definition of "lender" in subsection (25).

Subsection (43):

The U3C makes no exclusion for services furnished by members of professions— physicians, dentists, attorneys and the like. See also subsection (40). On the other hand, the definition of "consumer credit sale" in subsection (14) excludes the usual arrangement that professional people use in selling their services, since they usually do not enter into installment contracts with their patients or clients and do not impose finance charges. However, the U3C does apply if the professional agrees with his or her client to accept payment for services on an installment basis (with or without provision for a finance charge).

Subsection (44):

This subsection defines the class of lenders that may engage in the business of making supervised loans or taking assignments of such loans for collection without first being licensed under the U3C by the administrator (K.S.A. 16a-2-301). If a lender of this class is subject to supervision by an official or agency other than the administrator, the powers of examination, investigation and enforcement under the U3C may be exercised by that official or agency (K.S.A. 16a-6-105). This class of lenders typically includes persons authorized to make loans and receive deposits or their equivalent, such as banks, savings and loan associations and credit unions.

Subsection (45):

The term "supervised lender" includes any lender authorized to make loans with annual percentage rates in excess of 12%, including supervised financial organizations (such as banks).

Subsection (46):

The term "supervised loan" is defined according to the annual percentage rate. Although all persons making consumer loans are regulated by the U3C, those making loans with an annual percentage rate in excess of 12% must either be specifically licensed by the administrator or be supervised financial organizations.

Subsection (47):

The definition of "written agreement" is not part of the official text of the U3C; it was added to the Kansas U3C in 1984. The term is used primarily in the definitions of "consumer credit sale" and "creditor," which require a written agreement for certain installment contracts which do not impose a finance charge. Under this definition, the writing merely must be sufficient to be "evidence of" the agreement, it need not contain all the terms of the contract. However, a mere confirmatory letter is not sufficient under this subsection unless it is signed by the person against whom the agreement contained in the letter is enforced.

Subsection (48):

The definition of "written administrative interpretation" was added by legislation adopted in 1992. That legislation, among other things, insulates creditors from liability for penalties where they have relied in good faith on the administrator's official interpretations of the U3C. See K.S.A. 16a-5-201(9) and 16a-6-104(4).

### **K.S.A. 16a-1-303. (UCCC) Other defined terms.**

Other definitions appearing in this act

(1) "Residential mortgage loan originator" means an individual:

- (a) Who engages in residential mortgage loan origination on behalf of a single supervised lender;
- (b) whose conduct of residential mortgage loan origination is the responsibility of the licensed supervised lender;
- (c) who takes a residential mortgage loan application or offers or negotiates terms of a residential mortgage loan for compensation or gain or in the expectation of compensation or gain; and

- (d) whose job responsibilities include contact with borrowers during the loan origination process, which can include soliciting, negotiating, acquiring, arranging or making mortgage loans for others, obtaining personal or financial information, assisting with the preparation of loan applications or other documents, quoting loan rates or terms or providing required disclosures. It does not include any individual engaged solely as a loan processor or underwriter.
- (2) “Loan processor or underwriter” means an individual who performs clerical or support duties as an employee at the direction and subject to the supervision and instruction of a person registered, or exempt from registration, under this act.
- (a) For purposes of this subsection, the term “clerical or support duties” may include subsequent to the receipt of an application:
- (i) The receipt, collection, distribution and analysis of information common for the processing or underwriting of a residential mortgage loan; and
  - (ii) communicating with a consumer to obtain the information necessary for the processing or underwriting of a loan, to the extent that such communication does not include offering or negotiating loan rates or terms or counseling consumers about residential mortgage loan rates or terms.
- (b) An individual engaging solely in loan processor or underwriter activities shall not represent to the public, through advertising or other means of communicating or providing information including the use of business cards, stationery, brochures, signs, rate lists, or other promotional items, that such individual can or will perform any of the activities of a residential mortgage loan originator.
- (3) “Nationwide mortgage licensing system and registry” means a mortgage licensing system developed and maintained by the conference of state bank supervisors and the American association of residential mortgage regulators for the licensing and registration of licensed mortgage loan originators.
- (4) “Residential mortgage loan” means any loan or contract for deed primarily for personal, family or household use that is secured by a mortgage, deed of trust or other equivalent consensual security interest on a dwelling, as defined in section 103(v) of the truth in lending act, 15 U.S.C. §1602(v), or residential real estate located in this state upon which a dwelling is constructed or intended to be constructed, including the renewal or refinancing of any such loan.
- (5) “Registrant” means any individual who holds a valid registration to engage in residential mortgage loan origination in this state.
- (6) “Unique identifier” means a number or other identifier assigned by protocols established by the nationwide mortgage licensing system and registry.

**History:** L. 1973, ch. 85, § 13; Jan. 1, 1974; L. 2009, ch. 29 §15; July 1.

#### **KANSAS COMMENT, 2010**

1. In 2009 the Kansas legislature amended this U3C section to adopt the definitions from the federal mandated Title V of P.L. 110-289, the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 ("SAFE Act").

2. The licensing exemption for mortgage loan processors and underwriters only applies to employees of a licensee. There is no licensing exemption for independent contractors who engage in mortgage loan processing or underwriting on behalf of a licensee.

## Article 2.--FINANCE CHARGES AND RELATED PROVISIONS

### Part 1

#### GENERAL PROVISIONS

##### **K.S.A. 16a-2-101. (UCCC) Short title.**

This article shall be known and may be cited as revised uniform consumer credit code-finance charges and related provisions.

**History:** L. 1973, ch. 85, § 14; Jan. 1, 1974.

##### **K.S.A. 16a-2-102. (UCCC) Scope.**

Part 2 of this article applies to consumer credit sales. Parts 3 and 4 apply to consumer loans, including loans made by supervised lenders. Part 5 applies to other charges and modifications with respect to consumer credit transactions. Part 6 applies to other credit transactions.

**History:** L. 1973, ch. 85, § 15; Jan. 1, 1974.

##### **KANSAS COMMENT, 2000**

The U3C continues the distinction between loans and credit sales in consumer transactions, and sets separate finance charge rate ceilings for each. Part 2 of this article sets ceilings for consumer credit sales, including sales pursuant to seller credit cards (see K.S.A. 16a-2-201 and 16a-2-202); part 4 sets ceilings for consumer loans, including loans pursuant to lender credit cards (see K.S.A. 16a-2-401 and 16a-2-402). Part 5 regulates charges other than "finance charges." While this section refers to "part 6," that part of the uniform act was omitted from the U3C.

##### **K.S.A. 16a-2-103. Computation of finance charges.**

(1) The provisions of this section shall apply to all consumer loans and all consumer credit sales.

(2) The finance charge on a consumer loan or consumer credit sale shall be computed in accordance with the actuarial method using either the 365/365 method or, if the consumer agrees in writing, the 360/360 method:

- (a) The 365/365 method means a method of calculating the finance charge whereby the contract rate is divided by 365 and the resulting daily rate is multiplied by the outstanding principal amount and the actual number of days in the computational period.
- (b) The 360/360 method means a method of calculating the finance charge whereby the contract rate is divided by 360 and the resulting daily rate is multiplied by the outstanding principal amount and the number of assumed days in the computational period. For the purposes of this subsection, a creditor may assume that a month has 30 days, regardless of the actual number of days in the month.
- (c) If the documentation evidencing a consumer credit contract is silent regarding whether the 365/365 method or the 360/360 method applies, then the 365/365 method shall apply.

(3) In addition to the methods listed under subsection 2, the computation of finance charges on a consumer loan secured by a first or second lien real estate mortgage may be computed using the following amortization method: The contract rate is divided by

360 and the resulting rate is multiplied by the outstanding principal amount and 30 assumed days between scheduled due dates. For the purposes of this subsection, a creditor shall assume there are 30 days in the computational period, regardless of the actual number of days between due dates.

(4) The finance charge on a consumer loan or consumer credit sale may not be computed in accordance with the 365/360 method, whereby the contract rate is divided by 360 and the resulting daily rate is multiplied by the outstanding principal amount and the actual number of days in the computational period.

(5) Creditors may ignore the effect of a leap year in computing the finance charge.

(6) (a) Except for any portion of a loan made pursuant to a lender credit card which does not represent a cash advance, interest or other periodic finance charges on a consumer loan may accrue only on that portion of the principal which has been disbursed to or for the benefit of the consumer.

(b) On a consumer credit sale, interest or other periodic finance charges may accrue only on that portion of the principal which relates to goods, services or an interest in land, as the case may be, which has been shipped, delivered, furnished or otherwise made available to or for the benefit of the consumer or has been disbursed to or for the benefit of the consumer.

(7) Subsection (2) does not apply to a consumer credit sale the finance charge for which is computed in accordance with subsection (5) of K.S.A. 16a-2-201, and amendments thereto.

(8) Notwithstanding any other provisions of this act, the finance charges on consumer loans or consumer credit sales originating prior to January 1, 1994, which computed such finance charges on a precomputed basis, shall be subject to the conditions, limitations and restrictions contained in the uniform consumer credit code as in effect on December 31, 1993, as such code relates to precomputed finance charges.

(9) This section shall be supplemental to and a part of the uniform consumer credit code.

**History:** L. 1993, ch. 200, § 1; L. 1999, ch. 107, § 9; L. 2005, ch. 144, § 8; July 1.

#### **KANSAS COMMENT, 2010**

1. This section was added to the U3C by legislation adopted in 1993 and was substantially rewritten by legislation adopted in 1999. Except for certain precomputed closed end consumers credit sales (K.S.A. 16a-2-201(4)), the finance charge on all consumer credit transactions must be computed in accordance with the actuarial method (K.S.A. 16a-1-301(1)). In making that computation, the creditor must generally use the so-called "365/365" method under which the contract rate of the finance charge is divided by 365 and then multiplied by the actual number of days in the relevant period. If the consumer agrees in writing, however, the creditor may use the so-called "360/360" method under which the contract rate of the finance charge is divided by 360 and then multiplied by the number of assumed days in the relevant period. In that regard, every month is assumed to have 30 days. Thus, for example, if payments are received on December 31 and January 31, the creditor would calculate the finance charge for the period between the payments by dividing the contract rate of finance charge by 360 and multiplying it by 30 (because January is assumed to have 30 days, the extra day is ignored). Similarly, if payments are received on January 31 and February 28, the creditor would still divide the contract rate of finance charge by 360 and multiply it by 30 (because February is assumed to have 30 days, two extra days are added). On the other hand, however, if payments are received on January 31 and February 27, the creditor would divide the contract rate of finance charge by 360 and multiply it by 27. Creditors may ignore the effect of a leap year in computing the finance charge.

2. Subsection (3) of this section states that when computing monthly interest on a consumer loan secured by a first or second lien real estate mortgage, computation is in a 30 day month and a 360 day year. The monthly interest is always to be computed based on scheduled due dates, regardless of the actual date the payment was received by the creditor.

3. Creditors may not under any circumstance compute the finance charge on any consumer credit transaction by using the so-called "365/360" method under which the contract rate of the finance charge is divided by 360 and multiplied by the actual number of days in the relevant period. That method results in a higher effective rate of finance charge and is often viewed as inappropriate in the consumer credit context.

4. Subsection (5) of this section prohibits the accrual of interest or other periodic finance charges except to the extent that the creditor has disbursed the proceeds of the transaction to or for the benefit of the consumer. An exception is made for loans (other than cash advances) under lender credit cards, on the theory that there may be a delay between the time the consumer uses the card (and receives the related goods or services) and the time the lender settles the transaction with the merchant.

#### **K.S.A. 16a-2-104. (UCCC) Payment credit date.**

(1) A creditor shall credit a payment to the consumer's account on the date of receipt, except when a delay in crediting does not result in a finance charge or other charge.

(2) Notwithstanding subsection (1), if a creditor specifies, in a writing delivered to the consumer, reasonable requirements for the consumer to follow in making payments, but accepts a payment that does not conform to those requirements, then the creditor shall credit the payment within five days after receipt.

(3) This section shall be supplemental to and a part of the uniform consumer credit code.

**History:** L. 1999, ch. 107, § 4; July 1.

#### **KANSAS COMMENT, 2010**

1. This section, which was added by legislation adopted in 1999, is based on Regulation Z, 12 C.F.R. § 226.10. That provision requires prompt crediting of payments for open end accounts, and this section extends that requirement for all consumer credit transactions.

2. Subsection (2) of this section also follows Regulation Z's model and allows a creditor to establish reasonable requirements for payments such as sending them to a specific address or establishing a reasonable "cut-off" hour for payments. For additional guidance, see Administrative Interpretation No. 1010.

## **Part 2**

### **CONSUMER CREDIT SALES; MAXIMUM FINANCE CHARGES**

#### **K.S.A. 16a-2-201. Finance charge for closed end consumer credit sales.**

(1) This section applies only to a closed end consumer credit sale.

(2) A seller may charge a finance charge at any rate agreed to by the parties, subject, however, to the limitations on prepaid finance charges set forth in subsection (3).

(3) A seller may charge a prepaid finance charge:

(a) For a consumer credit sale secured by a security interest in a manufactured home as defined by 42 U.S.C. 5402(6), in an amount not to exceed 5% of the amount financed for the sole purpose of reducing the interest rate of the consumer credit sale; or

(b) for any other consumer credit sale, an amount not to exceed the lesser of 2% of the amount financed or \$100.

(c) A prepaid finance charge permitted under this subsection is in addition to finance charges permitted under subsection (2). A prepaid finance charge

permitted under this subsection is fully earned when paid and is nonrefundable, unless the parties agree otherwise in writing.

- (4) If the sale is precomputed:
  - (a) The finance charge may be calculated on the assumption that all scheduled payments will be made when due, and the fact that payments are made either before or after the due date does not affect the amount of finance charge which the creditor may charge or receive; and
  - (b) the effect of prepayment is governed by subsection (5).
- (5) Rebate upon prepayment:
  - (a) Except as provided for in this section, upon prepayment in full of a precomputed consumer credit transaction, the creditor shall rebate to the consumer an amount not less than the amount of rebate provided in subsection (b), paragraph (1), or redetermine the earned finance charge as provided in subsection (b), paragraph (2), and rebate any other unearned charges including charges for insurance. The rebate for charges for insurance shall be as prescribed by statute, rules and regulations and administrative interpretations by the administrator. If the rebate otherwise required is less than \$1, no rebate need be made.
  - (b) The amount of rebate and redetermined earned finance charge shall be as follows:
    - (1) The amount of rebate shall be determined by applying, according to the actuarial method, the rate of finance charge which was required to be disclosed in the transaction:
      - (i) Where no deferral charges have been made in a transaction, to the unpaid balances for the actual time remaining as originally scheduled for the period following prepayment; and
      - (ii) where deferral charges have been made in a transaction, to the unpaid balances for the actual time remaining as extended by deferral for the period following prepayment.

The time remaining for the period following prepayment shall be either the full days following prepayment; or both the full days, counting the date of prepayment, between the prepayment date and the end of the computational period in which the prepayment occurs, and the full computational periods following the date of prepayment to the scheduled due date of the final installment of the transaction.
    - (2) The redetermined earned finance charge shall be determined by applying, according to the actuarial method, the rate of finance charge which was required to be disclosed in the transaction to the actual unpaid balances of the amount financed for the actual time the unpaid balances were outstanding as of the date of prepayment. Any delinquency or deferral charges collected before the date of prepayment do not become a part of the total finance charge for purposes of rebating unearned charges.
  - (c) Upon prepayment, but not otherwise, of a consumer credit transaction whether or not precomputed, other than a consumer lease, a consumer rental purchase agreement, or a transaction pursuant to open end credit:
    - (1) If the prepayment is in full, the creditor may collect or retain a minimum charge not exceeding \$5 in a transaction which had an amount financed of \$75 or less, or not exceeding \$7.50 and in a transaction which had an amount financed of more than \$75, if the

finance charge earned at the time of prepayment is less than the minimum allowed pursuant to this subsection.

- (2) If the prepayment is in part, the creditor may not collect or retain a minimum finance charge.
- (d) For the purposes of this section, the following defined terms apply:
  - (1) "Computational period" means the interval between scheduled due dates of installments under the transaction if the intervals are substantially equal or, if the intervals are not substantially equal, one month if the smallest interval between the scheduled due dates of installments under the transaction is one month or more, and otherwise one week.
  - (2) The "interval" between specified dates means the interval between them including one or the other but not both of them. If the interval between the date of the transaction and the due date of the first scheduled installment does not exceed one month by more than fifteen days when the computational period is one month, or eleven days when the computational period is one week, the interval may be considered by the creditor as one computational period.
- (e) This section does not preclude the collection or retention by the creditor of delinquency charges.
- (f) If the maturity is accelerated by any reason and judgment is obtained, the consumer is entitled to the same rebate as if payment had been made on the date maturity is accelerated.
- (g) Upon prepayment in full of a precomputed consumer credit transaction by the proceeds of consumer credit insurance, the consumer or the consumer's estate is entitled to the same rebate as though the consumer had prepaid the agreement on the date the proceeds of the insurance are paid to the creditor, but no later than ten business days after satisfactory proof of loss is furnished to the creditor.

(6) This section does not apply to a sale of an interest in land. Subsection (11) of K.S.A. 16a-2-401, and amendments thereto, governs the limitations on finance charges for a contract for deed to real estate where the parties agree in writing to make the transaction subject to the uniform consumer credit code.

**History:** L. 1973, ch. 85, § 16; L. 1980, ch. 77, § 1; L. 1981, ch. 94, § 1; L. 1982, ch. 93, § 1; L. 1983, ch. 79, § 1; L. 1985, ch. 82, § 1; L. 1988, ch. 85, § 3; L. 1988, ch. 86, § 1; L. 1988, ch. 87, § 1; L. 1993, ch. 200, § 6; L. 1995, ch. 54, § 1; L. 1997, ch. 90, § 1; L. 1998, ch. 107, § 1; L. 1999, ch. 107, § 10; L. 2000, ch. 28, § 1; July 1.

#### **KANSAS COMMENT, 2010**

1. Subsection (2) of this section allows a seller in a closed end consumer credit sale to charge a finance charge at any rate agreed to by the parties. Subsection (6) makes it clear that this section does not apply to a "sale of an interest in land," even if the parties contract into the U3C.

2. While subsection (2) of this section allows the parties to agree to any rate of finance charge, subsection (3) limits the amount of prepaid finance charges in closed end transactions. For all closed end consumer credit sales (other than those relating to certain manufactured homes), the maximum amount of prepaid finance charges is 2% of the amount financed or \$100, whichever is less. Legislation adopted in 2000 provides that, for manufactured homes described in subsection (3)(a), the maximum amount of prepaid finance charges is 5% of the amount financed. However, in order to charge the 5% fee, the fee must be used to "buy-down" the interest rate that would have applied had the fee not been charged. Subsection 3(b) does not apply to a consumer credit sale secured by a security interest in a "manufactured home" as described in subsection 3(a). Note that, in all cases, any prepaid finance charge must be included

in the annual percentage rate calculation for disclosure purposes under the TILA.

3. Subsections (4) and (5) were added by legislation adopted in 1998 and 1999 to address certain issues relating to precomputed contracts. The legislation adopted in 1998 and 1999 allows precomputed contracts for closed end consumer credit sales and addresses various issues (such as the rebate required upon prepayment) relating to the use of precomputed contracts. Note, however, that precomputed contracts may not be used for consumer loans.

**K.S.A. 16a-2-202. Finance charge for consumer credit sales pursuant to open end credit.**

(1) With respect to a consumer credit sale made pursuant to open end credit, a seller may charge a finance charge at any rate agreed to by the parties.

(2) A charge may be made in each billing cycle which is a percentage of an amount no greater than:

(a) The average daily balance of the account, which is the sum of the actual amounts outstanding each day during the billing cycle divided by the number of days in the cycle;

(b) the unpaid balance of the account on the last day of the billing cycle.

(3) If the billing cycle is monthly, the charges may not exceed 1/12 of the annual rate agreed to by the consumer. If the billing cycle is not monthly, the maximum charge is that percentage which bears the same relation to the applicable monthly percentage as the number of days in the billing cycle bears to 30. For purposes of this subsection, a variation of not more than four days from month to month is "the last day of the billing cycle."

(4) For any period in which a finance charge is due, the parties may agree on a minimum amount.

(5) This section does not apply to a sale of an interest in land. Subsection (11) of K.S.A. 16a-2-401, and amendments thereto, governs the limitations on finance charges for a contract for deed to real estate where the parties agree in writing to make the transaction subject to the uniform consumer credit code.

**History:** L. 1973, ch. 85, § 17; L. 1980, ch. 77, § 2; L. 1981, ch. 94, § 2; L. 1982, ch. 93, § 2; L. 1983, ch. 79, § 2; L. 1985, ch. 82, § 2; L. 1988, ch. 85, § 4; L. 1988, ch. 86, § 2; L. 1997, ch. 90, § 2; L. 1999, ch. 107, § 11; July 1.

**KANSAS COMMENT, 2010**

1. This section applies to all open end consumer credit sales, including sales pursuant to seller credit cards, and allows the parties to agree to any rate of finance charge. Subsection (5) makes it clear that this section does not apply to a "sale of an interest in land," even if the parties contract into the U3C.

2. Under subsection (2) a credit seller is given two options in determining the balance on which the finance charge will be imposed. The TILA requires the creditor to disclose and explain the method used. See Regulation Z, 12 C.F.R. §§ 226.6(a)(3) and 226.7(e). The average daily balance ("ADB") method authorized by subsection (2)(a) is a method by which the finance charge is computed on the sum of the amount of the actual daily balances each day during the billing cycle divided by the number of days in the billing cycle. In practice, there are several methods of computing the average daily balance, and each produces a different outstanding balance for the billing cycle. In most methods, payments are credited on the date of receipt; early payments or payments in excess of the minimum payment due result in smaller finance charges. The main variable is whether the creditor includes or excludes current transactions, that is, charges or purchases incurred during the current cycle. This section permits the use of any of the standard ADB methods currently in use. It also permits the creditor to offer a "free ride," or grace period during which current charges may be paid without incurring any additional finance charges.

There are also three common non-ADB methods of computing the outstanding balance, but not

all of them are permitted by this section. The "closing balance" method, also known as the "ending balance" method, is authorized by subsection (2)(b). Under this method, finance charges are characteristically computed on the balance in the account as of the end of the current billing cycle. Credit is given for all payments and other credits during the cycle, but the closing balance may also include all purchases made during the current cycle even though they were never billed before.

Subsection (2)(b) also permits the so-called "adjusted balance" method. Under this method, finance charges are based on the ending balance, including credit for payments and other credits during the current cycle, but without adding the current purchases. However, the so-called "previous balance method" is prohibited by this section. Under this method, the finance charge is computed on the outstanding balance at the beginning of the billing cycle, without adjustment for payments or other credits received during the cycle, and before adding charges incurred during the cycle.

3. Subsection (4) permits the parties to agree to a minimum finance charge for any period in which a finance charge would otherwise be due. Thus, for example, the parties could agree that a \$1.00 finance charge will be due if the normal finance charge calculation results in any finance charge (such as 5¢) for the period in question.

### **Part 3**

## **CONSUMER LOANS; SUPERVISED LENDERS**

### **K.S.A. 16a-2-301. (UCCC) Authority to make supervised loans.**

(1) Unless a person is a supervised financial organization; or has first obtained a license from the administrator authorizing such person to make supervised loans; or is the federal deposit insurance corporation acting in its corporate capacity or as receiver, such person shall not engage in the business of:

- (a) Making supervised loans;
- (b) taking assignments of and directly or indirectly, including through the use of servicing contracts or otherwise, undertaking collection of payments from debtors arising from supervised loans, but such person may collect for three months without a license if the person promptly applies for a license and such person's application has not been denied; or
- (c) taking assignments of and directly or indirectly, including through the use of servicing contracts or otherwise, enforcing rights against debtors arising from supervised loans, but such person may enforce for three months without a license if the person promptly applies for a license and such person's application has not been denied.

(2) Residential mortgage loan origination shall only be conducted in this state by an individual who has first been registered with the administrator as a residential mortgage loan originator and maintains a valid unique identifier issued by the nationwide mortgage licensing system and registry if operational at the time of registration.

- (a) Residential mortgage loan origination shall only be conducted at or from a supervised lender and a registrant shall only engage in residential mortgage loan origination on behalf of one supervised lender.
- (b) A supervised lender shall be responsible for all mortgage loan origination conducted on their behalf by residential mortgage loan originators or other employees.

(3) Nothing in this section shall be construed to require the licensing of an attorney who is forwarded contracts for collection.

**History:** L. 1973, ch. 85, § 18; L. 1980, ch. 76, § 6; L. 1985, ch. 83, § 1; L. 1988, ch. 85, § 5; L. 2009, ch. 29, § 16; July 1. **Attorney General's Opinions:** Finance charge for consumer loans; supervised lenders. 79-286. Supervised financial organization. 80-80. Supervised lenders; examination of national banks. 80-94. Supervised lender fees. 80-236. Definitions; supervised lender; supervised financial organization. 84-11. Debt collection. 2012-11.

#### **KANSAS COMMENT, 2010**

1. Supervised lenders include supervised financial organizations (see K.S.A. 16a-1-301(44)). Because supervised financial organizations are already subject to supervision by other agencies, the U3C does not require them to obtain a license in order to make supervised loans. Moreover, under the doctrine of federal preemption, federally-chartered supervised financial organizations cannot be required to obtain a license from the administrator for any purpose. For a general discussion of the preemption doctrine, see *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982). In *Tokarz v. Frontier Federal Savings & Loan Ass'n*, 656 P.2d 1089 (Wash. App. 1983), the court held that federal savings and loan associations were exempt from state consumer protection laws. The same rule has been applied to federal credit unions. See *Brown v. Austin Area Teachers Federal Credit Union*, 588 S.W.2d 629 (Tex. Civ. App. 1979).

In an effort to keep a level playing field for state-chartered financial institutions, Congress extended "most favored lender" protection to all federally-insured, state-chartered financial institutions as a part of the interest rate deregulation legislation it adopted in the early 1980s. See 12 U.S.C.A. § 1785(g) (for federally-insured credit unions) and 12 U.S.C.A. § 1831d (for other federally-insured depository institutions). Thus, state-chartered supervised financial organizations that are federally-insured may make supervised loans in Kansas without first obtaining a supervised lender's license. See May 4, 1987 letter from Rita M. D'Agostino to Jim Maag, distributed by the Kansas Banker's Association as Legislative Bulletin 14-87. See also Kan. A.G. Op. 81-158 and Kan. A.G. Op. 81-210.

2. Supervised financial organizations may generally "export" to Kansas the interest rates and related charges permitted by their home states as a matter of federal law and they do not need to obtain a supervised lender's license to make supervised loans in Kansas.

3. Legislation adopted in 2009 clarifies that a person taking assignment of supervised loans but using independent contractors to either collect on such loans or to enforce the assignees' rights arising from such loans is required to have a supervised lender license. See also *Independent Financial, Inc. v. Wanna*, 39 Kan.App.2d 733, 186 P.3d 196 (2008). If an unlicensed assignee not previously engaged in Kansas is in the business of making collections or enforcing rights under the paper as assigned undertakes collection or enforcement of rights, subsections (1)(b) and (c) give the assignee a three-month grace period in which to operate before obtaining a license.

#### **K.S.A. 16a-2-302. (UCCC) License to make supervised loans; fees.**

(1) (a) The administrator shall receive and act on all applications for licenses to make supervised loans and all applications for residential mortgage loan originator registrations under this act. Applications shall be filed in the manner prescribed by the administrator and shall contain the information the administrator may require by rule and regulation to make an evaluation of the financial responsibility, character and fitness of the applicant.

(b) Submitted with each application shall be a nonrefundable application fee. Application, license and registration fees shall be in such amounts as are established pursuant to subsection (5) of K.S.A. 16a-6-104, and amendments thereto. The license year shall be the calendar year. Each license shall be nonrefundable and nonassignable, and shall remain in force until surrendered, suspended or revoked.

- (c) The administrator shall remit all moneys received under K.S.A. 16a-1-101 to 16a-6-414, inclusive, and amendments thereto, to the state treasurer in accordance with the provisions of K.S.A. 75-4215, and amendments thereto. Upon receipt of each such remittance, the state treasurer shall deposit the entire amount in the state treasury. Of each deposit 10% shall be credited to the state general fund and the balance shall be credited to the bank commissioner fee fund. All expenditures from such fund shall be made in accordance with appropriation acts upon warrants of the director of accounts and reports issued pursuant to vouchers approved by the administrator or by a person or persons designated by the administrator.
  - (d) Every licensee and registrant shall, on or before the first day of January, pay to the administrator the license or registration fee prescribed under this subsection (1) for each license or registration held for the succeeding license year. Failure to pay the fee within the time prescribed shall automatically revoke the license or registration.
- (2) No license or registration shall be issued unless the administrator, upon investigation, finds that the financial responsibility, character and fitness of the applicant, and of the members thereof if the applicant is a copartnership or association and of the officers and directors thereof, if the applicant is a corporation, are such as to warrant belief that the business will be operated honestly and fairly within the purposes of this act. The administrator shall not base a registration denial solely on the applicant's credit score. An applicant meets the minimum standard of financial responsibility for engaging in the business of making supervised loans, under subsection (1) of K.S.A. 16a-2-301, and amendments thereto, only if:
- (a) The applicant has filed with the administrator a proper surety bond of at least \$100,000 which has been approved by the administrator. The bond must provide within its terms that the bond shall not expire for two years after the date of the surrender, revocation or expiration of the subject license, whichever shall first occur. The required surety bond may not be canceled by the licensee without providing the administrator at least 30 days' prior written notice, provided that such cancellation shall not affect the surety's liability for violations of the uniform consumer credit code occurring prior to the effective date of cancellation and principal and surety shall be and remain liable for a period of two years from the date of any action or inaction of the principal that gives rise to a claim under the bond; and
  - (b) the applicant provides evidence in a form and manner prescribed by the administrator that establishes the applicant will maintain a satisfactory minimum net worth, as determined by the administrator, to engage in credit transactions of the nature proposed by the applicant. Such net worth requirements shall be established by the administrator pursuant to rule and regulation and shall not exceed \$500,000 for each applicant or licensee.
- (3) The administrator may deny any application or renewal for a supervised loan license or a residential mortgage loan originator registration, if the administrator finds:
- (a) There is a refusal to furnish information required by the administrator within a reasonable time as fixed by the administrator; or

- (b) any of the factors stated as grounds for denial, revocation or suspension of a license in K.S.A. 16a-2-303 or section 2, and amendments thereto.
- (4) Upon written request the applicant is entitled to a hearing on the question of license qualifications if:
  - (a) The administrator has notified the applicant in writing that the application has been denied; or
  - (b) the administrator has not issued a license within 60 days after the application for the license was filed. A request for a hearing may not be made more than 15 days after the administrator has mailed a writing to the applicant notifying the applicant that the application has been denied and stating in substance the administrator's findings supporting denial of the application.
- (5) The administrator shall adopt rules and regulations regarding whether a licensee shall be required to obtain a single license for each place of business or whether a licensee may obtain a master license for all of its places of business, and in so doing the administrator may differentiate between licensees located in this state and licensees located elsewhere. Each license shall remain in full force and effect until surrendered, suspended or revoked.
- (6) No licensee shall change the location of any place of business without giving the administrator at least 15 days prior written notice.
- (7) A licensee may conduct the business of making loans for personal, family or household purposes only at or from any place of business for which the licensee holds a license and not under any other name than that in the license. Loans made pursuant to a lender credit card do not violate this subsection.

**History:** L. 1973, ch. 85, § 19; L. 1976, ch. 98, § 1; L.1981, ch. 95, § 1; L. 1999, ch. 107, § 12; L. 1999, ch. 166, § 9; L. 2000, ch. 27, § 2; L. 2001, ch. 5, § 57; L. 2005, ch. 144, § 9; L. 2009, ch. 29, § 17; L. 2009, ch. 29, § 17; L. 2011, ch. 53 § 5. **Attorney General's Opinions:** Supervised financial organization. 80-80. Supervised lender fees. 80-236. Investment certificates of investment companies; standards of operation; permissible loans. 81-239. Authority of legislature to transfer money from special revenue funds into state general fund. 2002-45.

#### **KANSAS COMMENT, 2010**

1. This section adopts a test of "financial responsibility, character and fitness." Bonding and maintaining a minimum net worth are important parts of "financial responsibility." Additional guidance on these requirements can be found in K.A.R. 75-6-31.
2. If increased competition should cause the development of undesirable credit practices, those practices are subject to controls by the administrator's powers to revoke or suspend a license (K.S.A. 16a-2-303), and by the other powers of the administrator (article 6) as well as the provisions on remedies and penalties available to aggrieved consumers (article 5).
3. Under subsections (5), (6) and (7), licensees may be required to obtain a license for each place of business and may do business only at licensed locations. See K.A.R. 75-6-30. A "place of business" includes any location in Kansas where the licensee places an automated loan machine. K.A.R. 75-6-30(c). A lender credit card issuer does not conduct business within the meaning of this section at the place where a third person honors the card. This rule, however, does not apply to supervised financial organizations. Their authority to open new offices at which they may receive deposits and make loans is found not in the U3C but in the statutes otherwise governing those organizations.
4. Annual fees are required of all licensees and all persons required to file notification. See K.S.A. 16a-6-201 through K.S.A. 16a-6-203. This includes all persons making consumer credit sales, consumer leases or consumer loans and persons taking assignments of and undertaking collection of payments from or enforcement of rights against debtors arising from such sales, leases or loans. Supervised financial organizations are exempt from these requirements.

**K.S.A. 16a-2-303. (UCCC) Denial, revocation or suspension of license.**

(1) The administrator may deny, revoke or suspend the license of a supervised lender if the administrator finds that:

- (a) The applicant or licensee has repeatedly or willfully violated the provisions of K.S.A. 16a-1-101 through 16a-9-102 and amendments thereto or any rule and regulation, order or administrative interpretation lawfully made pursuant to such sections of this act;
- (b) the applicant or licensee has failed to file and maintain the surety bond or net worth required in K.S.A. 16a-2-302, and amendments thereto;
- (c) the applicant or licensee is insolvent;
- (d) the applicant or licensee has filed with the administrator any document or statement falsely representing or omitting a material fact;
- (e) the applicant, licensee, members thereof if a copartnership or association, or officers and directors thereof if a corporation have been convicted of a felony crime or any crime involving fraud, dishonesty or deceit or the applicant or licensee knowingly or repeatedly contracts with or employs persons to directly engage in lending activities who have been convicted of a felony crime or any crime involving fraud, dishonesty or deceit;
- (f) the applicant or licensee fails to keep and maintain sufficient records to permit an audit satisfactorily disclosing to the administrator the applicant or licensee's compliance with the provision of this act;
- (g) the applicant or licensee has been the subject of any disciplinary action by this or any other state or federal agency;
- (h) a final judgment has been entered against the applicant or licensee in a civil action and the administrator finds the conduct on which the judgment is based indicates that it would be contrary to the public interest to permit such person to be licensed;
- (i) the applicant or licensee has engaged in deceptive business practices; or
- (j) facts or conditions exist which would clearly have justified the administrator in refusing to grant a license had these facts or conditions been known to exist at the time the application for the license was made.

(2) Any person holding a license to make supervised loans may surrender the license by notifying the administrator in writing of its surrender, but this surrender shall not affect such person's liability for acts previously committed.

(3) No revocation, suspension, or relinquishment of a license shall impair or affect the obligation of any preexisting lawful contract between the licensee and any debtor.

(4) None of the following actions shall deprive the administrator of any jurisdiction or right to institute or proceed with any disciplinary proceeding against such licensee, to render a decision suspending, revoking or refusing to renew such license, or to establish and make a record of the facts of any violation of law for any lawful purpose:

- (a) The imposition of an administrative penalty under this section;
- (b) the lapse or suspension of any license issued under this act by operation of law;
- (c) the licensee's failure to renew any license issued under this act; or
- (d) the licensee's voluntary surrender of any license issued under this act.

(5) The administrator may reinstate a license, terminate a suspension, or grant a new license to a person whose license has been revoked or suspended if no fact or condition then exists which clearly would have justified the administrator in refusing to grant a license.

**History:** L. 1973, ch. 85, § 20; L. 1988, ch. 356, § 47; L. 1999, ch. 107, § 13; L. 2005, ch. 144, § 10; L. 2009, ch. 29, § 18; July 1.

## **KANSAS COMMENT, 2010**

This section provides the procedural framework under which a supervised lender license may be denied, revoked, suspended or reinstated. It should be read in conjunction with part 4 of Article 6 of the U3C, particularly K.S.A. 16a-6-410. If the administrator finds repeated or willful violations of the U3C or related regulatory requirements, the licensee's license may be denied, revoked or suspended.

### **K.S.A. 16a-2-303a. Denial, revocation or suspension of registration of residential mortgage loan originator.**

(1) The administrator may deny, revoke or suspend the registration of a residential mortgage loan originator if the administrator finds that:

- (a) The applicant or registrant has repeatedly or willfully violated the provisions of K.S.A. 16a-1-101 through 16a-9-102, and amendments thereto, or any rule and regulation, order or administrative interpretation lawfully made pursuant to such sections of this act;
- (b) the applicant or registrant has filed with the administrator any document or statement falsely representing or omitting a material fact;
- (c) the applicant or registrant has been convicted of any crime involving fraud, dishonesty or deceit, except that no registration shall be granted to any loan originator who:
  - (i) Has had a mortgage loan originator license or registration revoked in any governmental jurisdiction; or
  - (ii) has been convicted of, pled guilty or nolo contendere to, a felony in a domestic, foreign or military court:
    - (A) During the seven-year period preceding the date of the application for licensing and registration; or
    - (B) at any time preceding such date of application, if such felony involved an act of fraud, dishonesty, deceit, a breach of trust or money laundering;
- (d) the applicant or registrant has been the subject of any disciplinary action by this or any other state or federal agency;
- (e) a final judgment has been entered against the applicant or registrant in a civil action and the administrator finds the conduct on which the judgment is based indicates that it would be contrary to the public interest to permit such person to be registered;
- (f) the applicant or registrant has engaged in deceptive business practices;
- (g) facts or conditions exist which would clearly have justified the administrator in refusing to grant a registration had these facts or conditions been known to exist at the time the application for the registration was made;
- (h) the applicant or registrant has not completed all requirements for registration or renewal, including successfully passing a standardized examination and completing all pre-licensing or continuing education requirements;
  - (i) the administrator is unable to determine that the financial responsibility, character and fitness of the applicant or registrant are such as to warrant belief that the applicant's or registrant's residential mortgage loan origination activity will be operated honestly and fairly within the purposes of this act.

(2) None of the following actions shall deprive the administrator of any jurisdiction or right to institute or proceed with any disciplinary proceeding against such registration, to

render a decision suspending, revoking or refusing to renew such registration, or to establish and make a record of the facts of any violation of law for any lawful purpose:

- (a) The imposition of an administrative penalty under this section;
- (b) the lapse or suspension of any registration issued under this act by operation of law;
- (c) the registrant's failure to renew any registration issued under this act; or
- (d) the registrant's voluntary surrender of any registration issued under this act.

(3) This section shall be part of and supplemental to the uniform consumer credit code.

**History:** L. 2009, ch. 29, § 2 July 1.

#### **KANSAS COMMENT, 2010**

This section provides the procedural framework under which a mortgage loan originator license may be denied, revoked, suspended or reinstated. It should be read in conjunction with part 4 of Article 6 of the U3C, particularly K.S.A. 16a-6-410. If the administrator finds repeated or willful violations of the U3C or related regulatory requirements, the licensee's license may be denied, revoked or suspended.

#### **K.S.A. 16a-2-304. (UCCC) Records; annual reports; maintenance of records.**

(1) Every licensee and any assignee or servicer of a consumer credit transaction and every person required to file notification shall maintain records in conformity with generally accepted accounting principles and practices in a manner that will enable the administrator and, in the case of a supervised financial organization its supervisory official or agency, to determine whether the licensee, assignee, servicer or person required to file notification is complying with the provisions of K.S.A. 16a-1-101 through 16a-9-102, and amendments thereto. The record keeping system of a licensee, assignee, servicer or person required to file notification shall be sufficient if the licensee, assignee, servicer or any person required to file notification makes the required information reasonably available. The records need not be kept in the place of business where supervised loans are made, if the administrator or supervisory official or agency is given free access to the records wherever located. Every licensee and any assignee or servicer of a consumer credit transaction and every person required to file notification shall provide the administrator with the name, address, telephone number, contact person and any other reasonable information regarding the location and availability of current records of a consumer credit transaction. The records pertaining to any loan shall be kept for the minimum time frames established by the administrator pursuant to rules and regulations.

(2) Every licensee and any assignee or servicer of a consumer credit transaction, and every person required to file notification shall establish, maintain and enforce written policies and procedures regarding security of records which are reasonably designed to prevent the misuse of a consumer's personal or financial information.

(3) Before ceasing to conduct or discontinuing business, a licensee or person required to file notification shall arrange for and be responsible for the preservation of the books and records required to be maintained and preserved under this act and applicable rules and regulations for the remainder of each period specified.

(4) Any records required to be retained may be maintained and preserved by nonerasureable, nonalterable electronic imaging or by photograph on film. If the records are produced or reproduced by photographic film, electronic imaging or computer

storage medium, the licensee, assignee or person required to file notification shall meet the following criteria:

- (a) Arrange the records and index the films, electronic image or computer storage media to permit immediate location of any particular record;
- (b) be ready at all times to promptly provide a facsimile enlargement of film, a computer printout or a copy of the electronic images or computer storage medium that the administrator may request; and
- (c) with respect to electronic images and records stored on computer storage medium, maintain procedures for maintenance and preservation of, and access to, records in order to reasonably safeguard these records from loss, alteration or destruction.

(5) On or before April 15 of each year every licensee shall file with the administrator and, in the case of a supervised financial organization with its supervisory official or agency, a composite annual report in the form prescribed by the administrator relating to all loans made by such licensee. The administrator shall consult with comparable officials in other states for the purpose of making the kinds of information required in annual reports uniform among the states. Information contained in annual reports shall be confidential and may be published only in composite form.

(6) No person required to be licensed or file notification under this act shall:

- (a) Alter, destroy, shred, mutilate, conceal, cover up or falsify any record with the intent to impede, obstruct or influence any investigation by the administrator or the administrator's designee; or
- (b) alter, destroy, shred, mutilate or conceal a record with the intent to impair the object's integrity or availability for use in a proceeding before the administrator or a proceeding brought by the administrator.

**History:** L. 1973, ch. 85, § 21; L. 1980, ch. 76, § 7; L. 1998, ch. 106, § 2; L. 2005, ch. 144, § 11; L. 2009, ch. 29, § 19 July 1. **Attorney General's Opinions:** Supervised lenders; examination of national banks. 80-94.

#### **KANSAS COMMENT, 2010**

Licensees are required to file annual reports in a form prescribed by the administrator. This allows the administrator to compile statistics to aid in the discharge of the administrator's duties and to provide the legislature with information necessary for a proper evaluation of the effectiveness of the U3C.

#### **K.S.A. 16a-2-307. (UCCC) Restrictions on interest in land as security.**

With respect to a consumer loan in which the finance charge exceeds 12% and the amount financed is \$3,000 or less, a lender may not contract for an interest in land as security. A security interest taken in violation of this section is void.

**History:** L. 1973, ch. 85, § 24; L. 1999, ch. 107, § 14; July 1.

#### **KANSAS COMMENT, 2000**

Under this section, no supervised loan with respect to which the amount financed is \$3,000 or less may include a security interest in land. The purpose of this section is to deny the lender in a relatively small loan transaction the great leverage that results from a security interest in land. This section forbids transactions such as the second mortgage on a consumer's home taken as "back-up" collateral for a high-rate consolidation loan. This is the only limit on direct lender collateral under the U3C, except for the blanket prohibition against wage assignments in K.S.A. 16a-3-305. Much greater restrictions on taking security are imposed on consumer credit sellers and lessors. See the Kansas comment to K.S.A. 16a-3-301.

**K.S.A. 16a-2-308. (UCCC) Regular schedule of payments; maximum loan term.**

If consumer loans in which the finance charge exceeds twelve percent (12%), not made pursuant to open end credit or lender credit cards issued by a licensed lender, and in which the amount financed is one thousand dollars (\$1,000) or less are payable in installments, they shall be scheduled to be payable in substantially equal installments at substantially equal periodic intervals except to the extent that the schedule of payments is adjusted to the seasonal or irregular income of the debtor, and

- (a) over a period of not more than thirty-seven (37) calendar months if the amount financed is more than three hundred dollars (\$300), or
- (b) over a period of not more than twenty-five (25) calendar months if the amount financed is three hundred dollars (\$300) or less. The debtor's schedule of payments may be extended to a longer repayment period subsequent to the execution of the loan agreement pursuant to K.S.A. 16a-2-502 or 16a-2-503, and amendments thereto. The default of the borrower shall not be considered as having extended the loan beyond the prescribed time limits.

**History:** L. 1973, ch. 85, § 25; L. 1977, ch. 71, § 1; July 1.

**KANSAS COMMENT, 2010**

Under this section, all closed end supervised installment loans of \$1,000 or less must be repayable in substantially equal installments at equal periodic intervals (normally one month), except where irregularities are appropriate to meet the debtor's needs with respect to seasonal or irregular income. In addition, limits are imposed on the aggregate term of such loans depending upon the amount financed.

**K.S.A. 16a-2-309. Conduct of business; other than making loans.**

A licensee may conduct the business of making loans under K.S.A. 16a-1-101 through 16a-9-102 within any office, room or place of business in which any other business is solicited or engaged in, or in association or conjunction therewith, unless the commissioner shall find, after a hearing, that the other business is of such nature that such conduct tends to conceal evasion of such portion of this act or of the rules and regulations made thereunder and shall order such licensee in writing to desist from such conduct.

**History:** L. 1973, ch. 85, § 26; L. 1998, ch. 106, § 3; Apr. 23.

**KANSAS COMMENT, 2000**

This section allows a licensed lender to make supervised loans through a separate office located in a retail store unless the administrator finds that the arrangement would tend to conceal evasion of the U3C. An example of an operation which might be shut down by the administrator under this section is a loan office in a dealer's place of business to which credit buyers are referred in order to insulate the lender from defenses of the consumer. See K.S.A. 16a-3-405.

**K.S.A. 16a-2-310. Prohibited acts by persons licensed or registered under act.**

(1) No person required to be licensed or registered under this act shall directly or indirectly:

- (a) Delay closing of a loan for the purpose of increasing interest, costs, fees or charges payable by the borrower;
- (b) misrepresent the material facts or make false promises intended to influence, persuade or induce a consumer to enter into a loan;

- (c) misrepresent to or conceal from an applicant for a loan, a mortgagor or a lender, material facts, terms or conditions of a transaction to which the person required to be licensed or registered is a party;
  - (d) engage in any transaction, practice or business conduct that is not in good faith or that operates a fraud upon any person in connection with the making of or purchase or sale of any loan;
  - (e) receive compensation for making a residential mortgage loan where the licensee or registrant has otherwise acted as a real estate broker or agent in connection with the sale of the real estate which secures the mortgage transaction unless the person required to be licensed or registered has provided written disclosure to the person from whom compensation is collected that the person is receiving compensation both for making the loan and for real estate broker or agent services;
  - (f) engage in any fraudulent lending or underwriting practices;
  - (g) advertise, display, distribute, broadcast or televise, or cause or permit to be advertised, displayed, distributed, broadcast or televised, in any manner, any false, misleading or deceptive statement or representation with regard to rates, terms or conditions for a loan;
  - (h) record a mortgage if moneys are not available for immediate disbursement to the mortgagor unless, before that recording, the person required to be licensed or registered informs the mortgagor in writing of a definite date by which payment shall be made and obtains the mortgagor's written permission for the delay;
  - (i) transfer, assign or attempt to transfer or assign, a license or registration to any other person, or assist or aid and abet any person who does not hold a valid license or registration under this act in engaging in the conduct of mortgage business;
  - (j) solicit or enter into a contract with a borrower that provides in substance that the person required to be licensed or registered may earn a fee or commission through best efforts to obtain a loan even though no loan is actually obtained for the borrower;
  - (k) solicit, advertise or enter into a contract for specific interest rates, points or other financing terms unless the terms are actually available at the time of soliciting, advertising or contracting;
  - (l) make any payment, threat or promise to any person for the purposes of influencing the independent judgment of the person in connection with a residential mortgage loan, or make any payment, threat or promise to any appraiser of a property, for the purposes of influencing the independent judgment of the appraiser with respect to the value of the property or engage in any activity that would constitute a violation of K.S.A. 58-2344, and amendments thereto; or
  - (m) fail to comply with the uniform consumer credit code, or rules and regulations promulgated thereunder, or fail to comply with any other state or federal law, including the rules and regulations promulgated thereunder, applicable to any business authorized or conducted under the uniform consumer credit code.
- (2) This section shall be part of and supplemental to the uniform consumer credit code.

**History:** L. 2009, ch. 29, § 3; July 1.

## Part 4

### CONSUMER LOANS; MAXIMUM FINANCE CHARGES

#### **K.S.A. 16a-2-401. Finance charge for consumer loan; loan secured by mortgage or interest in manufactured home; prepaid finance charges.**

(1) For any consumer loan incurred pursuant to open end credit, including, without limitation, a loan pursuant to a lender credit card, a lender may charge a finance charge at any rate agreed to by the parties, subject, however, to the limitations on prepaid finance charges set forth in subsection (6). This subsection does not apply to a consumer loan secured by a first mortgage or a second mortgage.

(2) For any consumer loan incurred pursuant to closed end credit, a lender may charge a periodic finance charge, calculated accordingly to the actuarial method, not to exceed:

- (a) 36% per annum on the portion of the unpaid balance which is \$860 or less, and
- (b) 21% per annum on the portion of the unpaid balance which exceeds \$860, subject, however to the limitations on prepaid finance charges set forth in subsection (6).

This subsection does not apply to a consumer loan secured by a first mortgage or a second mortgage.

(3) For any consumer loan secured by a second mortgage or a consumer loan secured by an interest in a manufactured home as defined by 42 U.S.C. 5402(6), a lender may charge a periodic finance charge, calculated according to the actuarial method, not to exceed 18% per annum, subject, however to the limitations on prepaid finance charges set forth in subsection (6). This subsection does not apply if the lender and the consumer agree in writing that the finance charge for the loan is governed by K.S.A. 16-207(b), and amendments thereto.

(4) If the parties to a consumer loan secured by a first mortgage or a consumer loan secured by an interest in a manufactured home as defined by 42 U.S.C. 5402(6) agree in writing to make the transaction subject to the uniform consumer credit code, then the periodic finance charge for the loan, calculated according to the actuarial method, may not exceed 18% per annum, subject, however to the limitations on prepaid finance charges set forth in subsection (6).

(5) This section does not limit or restrict the manner of calculating the finance charge, whether by way of add-on, discount or otherwise, so long as the rate and the amount of the finance charge does not exceed that permitted by this section.

(6) Prepaid finance charges on consumer loans are limited as follows:

- (a) For a consumer loan secured by a first mortgage or a second mortgage, or a consumer loan secured by an interest in a manufactured home as defined by 42 U.S.C. 5402(6), prepaid finance charges in an amount not to exceed 8% of the amount financed may be charged, provided that the aggregate amount of prepaid finance charges payable to the lender or any person related to the lender do not exceed 5% of the amount financed; and
- (b) for any other consumer loan, prepaid finance charges in an amount not to exceed the lesser of 2% of the amount financed or \$100 may be charged. Prepaid finance charges permitted under this subsection are in addition to finance charges permitted under subsection (1), (2), (3) and (4), as applicable. Prepaid finance charges permitted under this subsection are fully earned when paid and are non-refundable, unless the parties agree otherwise in writing.

(7) The finance charge limitations in subsections (3) and (4) do not apply to a consumer loan the finance charge for which is governed by subsection (h) of K.S.A. 16-207, and amendments thereto.

(8) If a loan secured by a first mortgage constitutes a "consumer loan" under subsection (17) of K.S.A. 16a-1-301, and amendments thereto, by virtue of the loan-to-value ratio exceeding 100% at the time the loan is made, then the periodic finance charge for the loan shall not exceed that authorized by subsection (b) of K.S.A. 16-207, and amendments thereto, but the loan is subject to the limitations on prepaid finance charges set forth in paragraph (a) of subsection (6), which prepaid finance charges may be charged in addition to the finance charges permitted under subsection (b) of K.S.A. 16-207, and amendments thereto.

(9) If, within 12 months after the date of the original loan, a lender or a person related to the lender refinances a loan with respect to which a prepaid finance charge was payable to the same lender pursuant to subsection (6), then the following apply:

(a) If a prepaid finance charge with respect to the original loan was payable to the lender pursuant to paragraph (a) of subsection (6), then the aggregate amount of prepaid finance charges payable to the lender or any person related to the lender with respect to the new loan may not exceed 5% of the additional amount financed.

(b) If a prepaid finance charge with respect to the original loan was payable to the lender pursuant to paragraph (b) of subsection (6), then the aggregate amount of prepaid finance charges payable to the lender or any person related to the lender with respect to the new loan may not exceed the lesser of 2% of the additional amount financed or \$100.

(c) For purposes of this subsection, "additional amount financed" means the difference between: (i) The amount financed for the new loan, less the amount of all closing costs incurred in connection with the new loan which are not included in the prepaid finance charges for the new loan; and (ii) the unpaid principal balance of the original loan.

(10) For any period in which a finance charge is due on a consumer loan pursuant to open end credit, the parties may agree on a minimum amount.

(11) If the parties to a contract for deed to real estate agree in writing to make the transaction subject to the uniform consumer credit code, then the transaction is subject to the same limitations as set forth in subsections (4) and (6) for a consumer loan secured by a first mortgage.

(12) This section does not apply to a payday loan governed by K.S.A. 16a-2-404, and amendments thereto.

**History:** L. 1973, ch. 85, § 27; L. 1974, ch. 91, § 1; L. 1975, ch. 126, § 1; L. 1980, ch. 76, § 9; L. 1980, ch. 77, § 3; L. 1981, ch. 94, § 3; L. 1982, ch. 94, § 1; L. 1983, ch. 79, § 3; L. 1985, ch. 82, § 3; L. 1986, ch. 90, § 1; L. 1988, ch. 85, § 6; L. 1988, ch. 86, § 3; L. 1988, ch. 87, § 2; L. 1993, ch. 200, § 7; L. 1995, ch. 54, § 2; L. 1999, ch. 107, § 15; L. 2000, ch. 27, § 3; L. 2000, ch. 159, § 1; July 1. **Attorney General's Opinions:** Interest and charges; usury. 79-252. Finance charge for consumer loans; supervised lenders. 79-286. Supervised lenders; examination of national banks. 80-94. Interest and charges; extension of most favored lender doctrine to state banks. 81-158. Finance charges; additional charges not included therein. 81-209. Consumer loans; finance charge; exemption of adjustable rate loans from maximum finance charge limits. 82-128. Consumer loans; finance charge; effect of amendments passed in same legislative session. 82-153. Consumer loans; finance charge; exception of adjustable rate loans from maximum finance charge limits. 82-227. Consumer loans; maximum finance charges; loans secured by mortgage on real estate; charging of nonrefundable origination fee. 84-2. Definitions; supervised lender; supervised financial organization. 84-11.

Disclosure; discounts for cash purchases. 86-115. Interest rates applicable to certain real estate mortgages; loan agreements applying consumer credit code (UCCC) rates. 97-99.

### **KANSAS COMMENT, 2010**

1. Subsection (1) of this section allows the parties to agree to any periodic rate of finance charge on an open end consumer credit loan (other than one secured by a first or second mortgage). Subsection (10) of this section allows the parties to agree on a minimum finance charge for any period during which a finance charge would otherwise be due in an open end consumer loan.

2. Subsection (2) of this section establishes the following periodic rate ceilings for a closed end consumer loan (other than one secured by a first or second mortgage): (a) 36% per annum on the portion of the unpaid balance which is \$860 or less, and (b) 21% per annum on the portion of the unpaid balance which exceeds \$860. Legislation adopted in 2000 provides that these rate ceilings apply to the unpaid balance of the loan, and are not based on the original principal amount of the loan. Thus a promissory note for a loan subject to this subsection may have two different interest rates, with one rate applying to the portion of the unpaid principal balance of the loan which exceeds \$860 at any given time and the other rate applying to the portion of the unpaid principal balance which is equal to or less than \$860 at such time.

3. As mentioned above, mortgage loans are not governed by the provisions of subsections (1) or (2) of this section. The rate of finance charge for first mortgage loans (even if they are otherwise subject to all or part of the U3C because they are high-rate or high loan-to-value mortgages) is governed by K.S.A. 16-207. Of course, the parties to a first mortgage loan can always agree to make the transaction subject to the U3C. In that event, subsection (4) limits the maximum rate of periodic finance charge to 18% per annum.

Under subsection (3), the maximum rate of periodic finance charge on second mortgage loans is 18% per annum. However, the parties to a second mortgage loan can agree in writing to "opt out" of the U3C's rate ceilings and instead use the general usury limit authorized by K.S.A. 16-207(b). Note, however, that the parties to a second mortgage loan may only "opt out" of the U3C's rate ceilings. All other provisions of the U3C (including its limits on prepaid finance charges) would continue to apply to the transaction.

Subsections (3), (4) and (6)(a) were amended by legislation adopted in 2000 to address permissible finance charges on consumer loans secured by certain manufactured homes. Subsection (3), as amended in 2000, provides that a lender may charge a periodic finance charge not to exceed 18% on any consumer loan secured by a qualifying manufactured home. A specific rate authority (e.g., subsections (3) or (4) in the case of loans secured by manufactured homes) should control over a more general or non-explicit rate authority (e.g., subsections (1) or (2)). Subsection (6)(a), as amended in 2000, does not require that the prepaid finance charge in a loan secured by a manufactured home be used to "buy down" the interest rate. Compare this to K.S.A. 16a-2-201(3), also amended by legislation in 2000, which requires the maximum 5% prepaid finance charge in a credit sale of a manufactured home be used to buy down the interest rate that would otherwise apply.

Under subsection (4), the parties to a "consumer" loan secured by a qualifying manufactured home in which the amount financed exceeds \$25,000 may agree to "opt in" to the U3C and, in so doing, may agree on a periodic rate not to exceed 18% (as well as prepaid finance charges permitted under subsection (6))— rather than being limited to the 15% usury rate found in K.S.A. 16-207(a) for unsecured or personal property loans not governed by the U3C.

4. While federal law generally subjects national banks to the usury limitations of the states in which they are located, see 12 U.S.C.A. § 85, national banks may "export" the interest rates and related charges permitted in their home state and are not bound by the interest rate limitations of the state of the consumer's residence. For example, a national bank located in South Dakota is not bound by the limits imposed by this section in the rates it charges its Kansas credit cardholders. See *Marquette National Bank v. First of Omaha Corp.*, 439 U.S. 299, 99 S.Ct. 540, 58 L.Ed.2d 534 (1978). This same treatment has been expanded beyond the pure interest rate to include items such as late payment fees, returned check fees, over limit fees and the like. See *Smiley v. Citibank (South Dakota), N.A.*, 116 S.Ct. 1730 (1996).

5. Subsection (6) deals with prepaid finance charges. Any prepaid finance charge would

ordinarily need to be included in the calculation to determine whether the rate of finance charge on a transaction exceeds the limits prescribed by this section. Under the special rule of subsection (6), however, this result is changed. Note, however, that any prepaid finance charges still must be included in the annual percentage rate calculation for disclosure purposes under the TILA. As a result, it would be possible for a loan contract to disclose an annual percentage rate for purposes of the TILA that is greater than the stated rate allowed by this section, and yet not be in violation of this section. Moreover subsection (6) makes it clear that prepaid finance charges are earned at the time the loan is made. Thus, if a loan is prepaid no refund of any portion of the prepaid finance charges needs to be made, unless the parties have provided for a refund in a signed writing.

The maximum amount of prepaid finance charges depends on whether or not the transaction is a mortgage loan (including a loan secured by a qualifying manufactured home). Subsection (a) permits lenders who make loans secured by real estate or certain manufactured homes to impose prepaid finance charges of up to 8% of the amount financed. However, the total of all prepaid finance charges payable to the lender or any related person cannot exceed 5% of the amount financed. Two of the largest and most common prepaid finance charges in mortgage loans are "points" (or origination fees) and mortgage broker fees. As noted in the Kansas Comment to subsection (4), first mortgage loans that are subject to the U3C because their loan-to-value ratios exceed 100% remain subject to the interest rate limitations of K.S.A. 16-207. Under subsection (8) of this section, however, the U3C's limits on prepaid finance charges continue to apply to such loans. Similarly, if the parties to a second mortgage loan "opt out" of the U3C's rate ceilings under subsection (3), the U3C's limits on prepaid finance charges continue to apply to the transaction. Subsection (6)(b) permits lenders in loans not secured by real estate or certain manufactured homes to impose nonrefundable prepaid finance charges of up to 2% of the amount financed or \$100, whichever is less.

Prepaid finance charges permitted under subsection (6) are expressed as a percentage of the "amount financed" of the loan. "Amount financed" is defined in K.S.A. 16a-1-301(4) as "the net amount of credit provided to the consumer or on the consumer's behalf." This definition — and the accompanying Kansas regulation, K.A.R. 75-6-26 — tracks the Regulation Z treatment of "amount financed." See Regulation Z, 12 C.F.R. §226.18(b). This brings up a noteworthy point:

First, the "amount financed" is usually the principal amount of the loan minus the amount of any prepaid finance charges. (There are some minor exceptions to this general rule under Regulation Z.) This means that, when a prepaid finance charge is imposed, the "amount financed" will be less than the principal amount of the loan. Accordingly, a lender desiring to charge the maximum prepaid finance charge that can be paid to the lender itself under subsection (6)(a), that is 5%, would need to multiply that percentage (5%) by the amount financed, and not by the principal amount of the loan. To illustrate, if the principal amount of the loan is \$100 and the prepaid finance charge is \$4.76, then the amount financed would be \$95.24. ( $\$100 - \$4.76 = \$95.24$ .) This prepaid finance charge approximately equals the 5% limit under subsection (6)(a). ( $\$4.76 / \$95.24 = 5\%$ , rounding issues aside.) Accordingly, in most situations, the maximum prepaid finance charge under subsection (6)(a) payable to the lender itself, when expressed as a percentage of the principal amount of the loan, is 4.7619% ( $.05 / 1.05 = .047619$ ). This analysis assumes the entire prepaid finance charge is payable only to the lender, with no prepaid finance charge payable to a third party (e.g., a mortgage loan broker). If a prepaid finance charge is also payable to a third party (let's say \$2 on a \$100 principal amount loan), then the 4.7619% multiplier would need to be multiplied by the principal amount of the loan minus the third-party prepaid finance charge (in this example, \$98). Similarly, in most cases the maximum prepaid finance charge under subsection (6)(a) payable to the lender and any third parties, again when expressed as a percentage of the principal amount of the loan, would be approximately 7.4% ( $.08 / 1.08 = .074070$ ).

6. Subsection (9) of this section was added by legislation adopted in 1999 and is directed at the practice known as "loan flipping" — quick, repeated refinancings of a consumer loan that are often accompanied by significant prepaid finance charges. Under this provision, if a loan is refinanced within the first 12 months by the same lender or a related party, then the lender (or the related party) may not receive prepaid finance charges that exceed the specified limits based on the additional amount financed in the subsequent loan. In that regard, the additional amount

financed is determined by subtracting the unpaid principal balance of the old loan and the closing costs for the new loan that are not included in the prepaid finance charges for the new loan from the amount financed for the new loan.

7. Subsection (11) of this section applies if the parties to a contract for deed to real estate "opt in" to the U3C and subject the transaction to the 18% limit on periodic finance charges and the 8%/5% limit on prepaid finance charges that apply to first mortgage loans.

8. In a nutshell, the Kansas maximum interest rate or finance charge structure as of July 1, 2000, is as follows:

(a) Open end consumer loans not secured by a first or second mortgage (or a qualifying manufactured home) — the rate agreed to by the parties, plus prepaid finance charges of 2% of the amount financed or \$100, whichever is less (K.S.A. 16a-2-401(1) and (6)(b));

(b) closed end consumer loans not secured by a first or second mortgage (or a qualifying manufactured home)—36% on the unpaid principal balance which is \$860 or less, and 21% on the unpaid principal balance which exceeds \$860, plus prepaid finance charges of 2% of the amount financed or \$100, whichever is less (K.S.A. 16a-2-401(2) and (6)(b));

(c) "consumer" loans (not secured by an interest in land) in which the amount financed exceeds \$25,000 — 15%, with no specific limit on prepaid finance charges (K.S.A. 16-207(a); not covered by the U3C);

(d) open end consumer credit sales — the rate agreed to by the parties (K.S.A. 16a-2-202(1));

(e) closed end consumer credit sales — the rate agreed to by the parties, plus prepaid finance charges of 2% of the amount financed or \$100, whichever is less; however, in the case of a closed end credit sale of a qualifying manufactured home, the seller may charge prepaid finance charges of 5% of the amount financed provided that they are used to buy-down the interest rate (K.S.A. 16a-2-201(2) and (3));

(f) "consumer" credit sales (other than a contract for deed) in which the amount financed exceeds \$25,000 — 15%, with no specific limit on prepaid finance charges (K.S.A. 16-207(a); not covered by the U3C);

(g) consumer loans secured by a first mortgage and contracts for deed having a fixed rate, term and amortization schedule — 1 1/2% above current rate for federal home loan mortgage corporation conventional mortgages, with no specific limit on prepaid finance charges (K.S.A. 16-207(b); rate not covered by the U3C regardless of the rate or loan-to-value ratio, but prepaid finance charges are subject to the U3C's limits if the loan-to-value ratio exceeds 100%);

(h) consumer loans secured by a subordinate mortgage having a fixed rate, term and amortization schedule — 18% plus prepaid finance charges of 8% of the amount financed (with a 5% of the amount financed limit on prepaid finance charges paid to the lender or a related party) (K.S.A. 16a-2-401(3) and (6)(a));

(i) consumer loans secured by a first or second mortgage and contracts for deed that permit adjustment of the rate, term or amortization schedule — the rate agreed to by the parties, subject to the prepaid finance charge limitations (K.S.A. 16-207(h) and K.S.A. 16a-2-401(6));

(j) non-consumer first mortgage loans and contracts for deed that permit adjustment of the rate, term or amortization schedule — the rate agreed to by the parties, with no specific limit on prepaid finance charges (K.S.A. 16-207(h) and K.S.A. 16a-2-401(7));

(k) consumer loans secured by qualifying manufactured homes — 18% plus prepaid finance charges of 8% of the amount financed (with a 5% of the amount financed limit on prepaid finance charges paid to the lender or a related party) (K.S.A. 16a-2-401(3), (4) and (6)(a));

(l) insurance premium financing — \$12 per \$100 (approximately 21.50%) plus a flat \$10 (K.S.A. 40-2610; not covered by the U3C);

(m) pawnbroker transactions — 10% per month (120% per annum) on transactions of \$5,000 or less only (K.S.A. 16-719; not covered by the U3C);

(n) business and agricultural loans — the rate agreed to by the parties, with no specific limit on prepaid finance charges (K.S.A. 16-207(f); not covered by the U3C);

(o) pension plan loans to an individual participant or family member— the rate agreed to by the parties, with no specific limit on prepaid finance charges (K.S.A. 16-207(g) and K.S.A. 16a-1-301(17)(b)(ii); not covered by the U3C);

(p) broker-dealer advances to purchase or carry securities — 1 1/2% above the broker-dealer's most recent commercial loan or 10%, whichever is higher (K.S.A. 16-214; not covered by the

U3C);

(q) delinquent accounts which do not otherwise provide for interest and are not covered by the U3C — 10% (K.S.A. 16-201).

Note that whenever "no specific limit on prepaid finance charges" is used in the foregoing discussion, it is not meant to indicate that prepaid finance charges are prohibited. Rather, it is intended to indicate that there is no allowance for prepaid finance charges that are separate and apart from the general limit on finance charges, and that any prepaid finance charges must be included in determining if the applicable rate ceiling has been exceeded.

**K.S.A. 16a-2-402. (UCCC) Consumer loans pursuant to open end credit; allowable charges per billing cycle.**

(1) This section applies only to consumer loans pursuant to open end credit.

(2) A charge may be made in each billing cycle which is a percentage of an amount no greater than:

(a) The average daily balance of the account, which is the sum of the actual amounts outstanding each day during the billing cycle divided by the number of days in the cycle;

(b) the unpaid balance of the account on the last day of the billing cycle.

(3) If the billing cycle is monthly, the charge may not exceed 1/12 of the annual rate agreed to by the consumer. If the billing cycle is not monthly, the maximum charge is that percentage which bears the same relation to the applicable monthly percentage as the number of days in the billing cycle bears to 30. For the purposes of this section, a variation of not more than four days from month to month is "the last day of the billing cycle."

**History:** L. 1973, ch. 85, § 28; L. 1999, ch. 107, § 16; July 1.

**KANSAS COMMENT, 2000**

The actual rate ceilings for open end consumer loans are set forth in K.S.A. 16a-2-401. This section establishes rules for determining the amount of the unpaid balance against which the finance charge rates will be applied. The various methods of computing the unpaid balance, and the effect of these rules, are explained in Kansas comment 2 to K.S.A. 16a-2-202.

**K.S.A. 16a-2-403. Prohibiting surcharge on credit cards.**

No seller or lessor in any sales or lease transaction or any credit card issuer may impose a surcharge on a card holder who elects to use a credit card in lieu of payment by cash, check or similar means. A surcharge is any additional amount imposed at the time of the sales or lease transaction by the merchant, seller or lessor that increases the charge to the buyer or lessee for the privilege of using a credit card.

**History:** L. 1986, ch. 90, § 2; L. 1999, ch. 107, § 17; July 1; L. 2010 ch. 17, § 37; July 1.

**Attorney General's Opinions:** Disclosure; discounts for cash purchases. 86-115.

**KANSAS COMMENT, 2010**

1. This section, which is not part of the uniform act, prohibits surcharges for the use of credit cards in sales and lease transactions. The concept of a "surcharge" assumes the existence of a regular price, or norm against which the surcharge can be measured. Presumably, any extra charge which increases the regular price to a credit card customer would be a surcharge. This is the definition used in the TILA; the term "regular price" is defined in TILA, 15 U.S.C.A. § 1601(x) as the tag or posted price.

Under this section, as under the TILA, surcharges are distinguished from discounts and, discounts for using cash are permitted. See TILA, 15 U.S.C.A. § 1666f; Kan. A.G. Op. No. 86-115.

As a practical matter, there is no difference between posting a price for gasoline, for example, of \$1.00 per gallon and offering a discount of 4 cents to cash purchasers, and posting a price of 96 cents per gallon and imposing a surcharge of 4 cents to credit card purchasers. Either way, the cash purchaser pays 96 cents and the credit card purchaser pays a dollar. Yet under this section, one practice is legal and the other is not. Abuse or manipulation of this rule might be a deceptive trade practice under the KCPA.

2. Under 15 U.S.C.A. § 1666f, discounts offered for inducing payment by cash instead of credit card are not to be considered finance charges for purposes of state usury laws. This means that such discounts need not be figured into the calculations for purposes of determining whether a creditor exceeds the rate limits imposed by the U3C. TILA 15 U.S.C.A. § 1666f requires that discounts be offered to all prospective buyers and that their availability be disclosed clearly and conspicuously; compliance with this rule exempts such discounts from the finance charge disclosure provisions of the TILA.

### **K.S.A. 16a-2-404. Payday loans; finance charges; rights and duties.**

(1) On consumer loan transactions in which cash is advanced:

- (a) With a short term,
- (b) a single payment repayment is anticipated, and
- (c) such cash advance is equal to or less than \$500, a licensed or supervised lender may charge an amount not to exceed 15% of the amount of the cash advance.

(2) The minimum term of any loan under this section shall be 7 days and the maximum term of any loan made under this section shall be 30 days.

(3) A lender and related interest shall not have more than two loans made under this section outstanding to the same borrower at any one time and shall not make more than three loans to any one borrower within a 30 calendar day period. Each lender shall maintain a journal of loan transactions for each borrower which shall include at least the following information:

- (a) Name, address and telephone number of each borrower; and
- (b) date made and due date of each loan.

(4) Each loan agreement made under this section shall contain the following notice in at least 10 point bold face type: NOTICE TO BORROWER: KANSAS LAW PROHIBITS THIS LENDER AND THEIR RELATED INTEREST FROM HAVING MORE THAN TWO LOANS OUTSTANDING TO YOU AT ANY ONE TIME. A LENDER CANNOT DIVIDE THE AMOUNT YOU WANT TO BORROW INTO MULTIPLE LOANS IN ORDER TO INCREASE THE FEES YOU PAY.

Prior to consummation of the loan transaction, the lender must:

- (a) Provide the notice set forth in this subsection in both English and Spanish; and
- (b) obtain the borrower's signature or initials next to the English version of the notice or, if the borrower advises the lender that the borrower is more proficient in Spanish than in English, then next to the Spanish version of the notice.

(5) The contract rate of any loan made under this section shall not be more than 3% per month of the loan proceeds after the maturity date. No insurance charges or any other charges of any nature whatsoever shall be permitted, except as stated in subsection (7), including any charges for cashing the loan proceeds if they are given in check form.

(6) Any loan made under this section shall not be repaid by proceeds of another loan made under this section by the same lender or related interest. The proceeds from any

loan made under this section shall not be applied to any other loan from the same lender or related interest.

(7) On a consumer loan transaction in which cash is advanced in exchange for a personal check, one return check charge may be charged if the check is deemed insufficient as defined in paragraph (e) of subsection (1) of K.S.A. 16a-2-501, and amendments thereto. Upon receipt of the check from the consumer, the lender shall immediately stamp the back of the check with an endorsement that states: "Negotiated as part of a loan made under K.S.A. 16a-2-404. Holder takes subject to claims and defenses of maker. No criminal prosecution."

(8) In determining whether a consumer loan transaction made under the provisions of this section is unconscionable conduct under K.S.A. 16a-5-108, and amendments thereto, consideration shall be given, among other factors, to:

- (a) The ability of the borrower to repay within the terms of the loan made under this section; or
- (b) the original request of the borrower for amount and term of the loan are within the limitations under this section.

(9) A consumer may rescind any consumer loan transaction made under the provisions of this section without cost not later than the end of the business day immediately following the day on which the loan transaction was made. To rescind the loan transaction:

- (a) A consumer shall inform the lender that the consumer wants to rescind the loan transaction;
- (b) the consumer shall return the cash amount of the principal of the loan transaction to the lender; and
- (c) the lender shall return any fees that have been collected in association with the loan.

(10) A person shall not commit or cause to be committed any of the following acts or practices in connection with a consumer loan transaction subject to the provisions of this section:

- (a) Use any device or agreement that would have the effect of charging or collecting more fees, charges or interest, or which results in more fees, charges, or interest being paid by the consumer, than allowed by the provisions of this section, including but not limited to:
  - (i) Entering into a different type of transaction with the consumer;
  - (ii) entering into a sales/leaseback or rebate arrangement;
  - (iii) catalog sales; or
  - (iv) entering into any other transaction with the consumer or any other person that is designed to evade the applicability of this section;
- (b) use, or threaten to use the criminal process in any state to collect on the loan;
- (c) sell any other product of any kind in connection with the making or collecting of the loan;
- (d) include any of the following provisions in a loan document:
  - (i) A hold harmless clause;
  - (ii) a confession of judgment clause;
  - (iii) a provision in which the consumer agrees not to assert a claim or defense arising out of the contract.

(11) As used in this section, "related interest" shall have the same meaning as "person related to" in K.S.A. 16a-1-301, and amendments thereto.

(12) Any person who facilitates, enables or acts as a conduit or agent for any third party who enters into a consumer loan transaction with the characteristics set out in paragraphs (a) and (b) of subsection (1) shall be required to obtain a supervised loan

license pursuant to K.S.A. 16a-2-301, and amendments thereto, regardless of whether the third party may be exempt from licensure provisions of the Kansas uniform consumer credit code.

(13) Notwithstanding that a person may be exempted by virtue of federal law from the interest rate, finance charge and licensure provisions of the Kansas uniform consumer credit code, all other provisions of the code shall apply to both the person and the loan transaction.

(14) This section shall be supplemental to and a part of the uniform consumer credit code.

**History:** L. 1993, ch. 75, § 1; L. 1999, ch. 107, § 20; L. 2001, ch. 50, § 1; L. 2004, ch. 29, § 1; L. 2005, ch. 144, § 12; July 1.

### **KANSAS COMMENT, 2010**

1. This section is not part of the uniform act. These loans take many forms, with some involving the up-front exchange of the consumer's personal check (which may or may not be post-dated) for a discounted amount of cash. The administrator has also found certain arrangements for the purchase of discount coupons for merchandise from a particular catalog and certain internet service contracts to be disguised payday loans requiring supervised loan licensure.

2. Subsection (1) sets special high-limit rate ceilings for payday loans. Several requirements must be met to take advantage of the special rate ceilings. First, the creditor must be a supervised lender. Second, the loan must have a "short term" — which is defined as a minimum term of seven days and a maximum term of less than 30 days. See subsection (2). Third, the parties must anticipate that the loan will be repaid in a single payment. Fourth, the cash advance cannot exceed \$500. If all of these requirements are met, then the lender may charge the special rates authorized by this section. This statute must be read in conjunction with federal laws that impose additional restrictions with respect to rates, terms, and required disclosures on loans to military personnel and their dependents. The federal law and implementing regulations preempt state law. See, for example, Section 670 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Talent Amendment), 10 U.S.C.A. § 987, regulations that implement section 670 from the Department of Defense, found at 32 C.F.R. Part 232, and the Servicemembers Civil Relief Act, 50 U.S.C.A. § 501 et seq.

3. Creditors should remember that their ability to impose the special rates authorized by this section does not exempt them from the other provisions of the U3C or the disclosure requirements of the TILA. As a result, the special rates authorized by this section will need to be converted into rather high annual percentage rates for pre-transaction disclosure to the consumer.

4. Other than one return check charge for a personal check given by the consumer in exchange for cash, subsection (5) prohibits other charges of any type from being imposed in connection with a payday loan. This may include, but is not limited to, insurance charges, charges for cashing a check representing the loan proceeds, collection costs, court costs, service of process fees, and/or attorneys' fees.

5. Subsection (5) permits the creditor to contract for interest if the loan is not repaid at maturity.

6. Subsection (6) prohibits the practice of repaying one payday loan with the proceeds of another payday loan from the same lender or a related interest.

### **K.S.A. 16a-2-405. Payday loans to military borrowers; restrictions.**

(a) Any person who makes a loan under the provisions of K.S.A. 16a-2-404, and amendments thereto, shall:

(1) Not garnish any wages or salary paid to a military borrower for service in the armed forces.

- (2) Defer all collection activity against a military borrower who has been deployed to a combat or combat support posting for the duration of such posting.
  - (3) Not contact any person in the military chain of command of a military borrower in an attempt to collect such loan.
  - (4) Honor all terms of any repayment agreement between the person making such loan and:
    - (A) The military borrower; or
    - (B) any military counselor or third party credit counselor negotiating on behalf of the military borrower.
  - (5) Not make any loan to any military borrower whenever the military base commander has declared such person's place of business off limits to military personnel.
- (b) For the purposes of this section, "military borrower" means any of the following that have been called to active duty:
- (1) Any member of the armed forces of the United States;
  - (2) any member of the national guard; or
  - (3) any member of the armed forces reserves.
- (c) This section shall be supplemental to and a part of the uniform consumer credit code.

**History:** L. 2005, ch. 144, § 22; July 1.

#### **KANSAS COMMENT, 2010**

The military provisions added to the Code assist in providing extra safeguards under state law to military personnel. This section, as well as K.S.A. 16a-2-404 must be read in conjunction with federal laws that impose additional restrictions with respect to rates, terms, and required disclosures on loans to military personnel and their dependents. The federal law and implementing regulations preempt state law. See, for example, Section 670 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Talent Amendment), 10 U.S.C.A. § 987, regulations that implement section 670 from the Department of Defense, found at 32 C.F.R. Part 232, and the Servicemembers Civil Relief Act, 50 U.S.C.A. § 501 et seq.

## **Part 5**

### **CONSUMER CREDIT TRANSACTIONS; OTHER CHARGES AND MODIFICATIONS**

#### **K.S.A. 16a-2-501. (UCCC) Additional charges.**

(1) In addition to the finance charge permitted by the parts of this article on maximum finance charges for consumer credit sales and consumer loans (parts 2 and 4), a creditor may contract for and receive the following additional charges in connection with a consumer credit transaction:

- (a) Official fees and taxes;
- (b) charges for insurance as described in subsection (2);
- (c) delinquency charges permitted under K.S.A. 16a-2-502, and amendments thereto, and service charges for insufficient checks permitted under paragraph (e);
- (d) charges for other benefits, including insurance, conferred on the consumer, if the benefits are of value to the consumer and if the charges are reasonable in relation to the benefits, are of a type which is not for credit, and are excluded as permissible additional charges from the finance charge by rules and regulations adopted by the administrator;

- (e) a service charge for an insufficient check as defined and authorized by this subsection:
- (i) For the purposes of this subsection, "insufficient check" means any check, order or draft drawn on any bank, credit union, savings and loan association, or other financial institution for the payment of money and delivered in payment, in whole or in part, of preexisting indebtedness of the drawer or maker, which is refused payment by the drawee because the drawer or maker does not have sufficient funds in or credits with the drawee to pay the amount of the check, order or draft upon presentation, provided that any check, order or draft which is postdated or delivered to a payee who has knowledge at the time of delivery that the drawer or maker did not have sufficient funds in or credits with the drawee to pay the amount of the check, draft or order upon presentation shall not be deemed an insufficient check.
  - (ii) "Written notice" shall be presumed to have been given a drawer or maker of an insufficient check when notice is sent by first class mail addressed to the person to be given notice of such person's address as it appears on the insufficient check or to such person's last known address or notice provided on a regular monthly statement provides clear notice of the insufficient check charge being assessed.
  - (iii) When an insufficient check has been given to a payee, the payee may charge and collect a \$10 insufficient check service charge from the drawer or maker, subject to limitations contained in this subsection or, if a larger amount is provided within the contract, the larger amount, if the payee has given the drawer or maker oral or written notice of demand that the amount of the insufficient check plus the insufficient check service charge be paid to the payee within 14 days from the giving of notice. In no event shall the amount of such insufficient check service charge exceed \$30.
  - (iv) If the drawer or maker of an insufficient check does not pay the amount of the insufficient check plus the insufficient check service charge provided for in subsection (iii) to the payee within 14 days from the giving of notice as provided in subsection (iii), the payee may add the insufficient check service charge to the outstanding balance of the preexisting indebtedness of the drawer or maker to draw interest at the contract rate applicable to the preexisting indebtedness.
  - (v) Notwithstanding the provisions of subparagraph (iii), if an insufficient check has been given to a creditor under a lender credit card, the creditor may charge a service charge for the insufficient check in an amount not to exceed the amount agreed to by the drawer or maker.

(2) An additional charge may be made for insurance written in connection with the transaction, including vendor's single interest insurance with respect to which the insurer has no right of subrogation against the consumer but excluding other insurance protecting the creditor against the consumer's default or other credit loss:

- (a) With respect to insurance against loss of or damage to property, or against liability, if the creditor furnishes a clear and specific statement in writing to the consumer setting forth the cost of the insurance if obtained from or through the creditor and stating that the consumer may choose the person through whom the insurance is to be obtained; and

(b) with respect to consumer credit insurance providing life, accident and health, or loss of employment coverage, if the insurance coverage is not a factor in the approval by the creditor of the extension of credit, and this fact is clearly disclosed in writing to the consumer, and if, in order to obtain the insurance in connection with the extension of credit, the consumer gives specific affirmative written indication of the consumer's desire to do so after written disclosure to the consumer of the cost thereof.

(3) With respect to a consumer loan or a consumer credit sale in either case pursuant to open end credit, a creditor may charge the following fees in an amount not to exceed that agreed to by the consumer:

(a) Fees on a monthly or annual basis;

(b) over-limit fees; and

(c) cash advance fees. The fees permitted under this subsection are in addition to any finance charges, additional charges or other charges permitted by the uniform consumer credit code.

(4) A charge not exceeding \$5 per payment, if the borrower makes a single installment payment by authorizing a creditor, verbally or in writing, to write a check or process a payment through use of the automated clearing house procedures on the borrower's checking account, subject to the following limitations:

(A) No charge shall be assessed if the creditor also collects a delinquency fee on the same installment; and

(B) no charge shall be assessed where the consumer has agreed in writing with the creditor to make all scheduled payments through the use of the automated clearing house procedures.

**History:** L. 1973, ch. 85, § 29; L. 1987, ch. 80, § 1; L. 1988, ch. 88, § 1; L. 1988, ch. 89, § 1; L. 1988, ch. 87, § 3; L. 1990, ch. 209, § 2; L. 1991, ch. 72, § 1; L. 1996, ch. 174, § 1; L. 1999, ch. 107, § 18; L. 2004, ch. 32, § 1; July 1. **Attorney General's Opinions:** Finance charges; additional charges not included therein. 81-209. Property insurance; damage to property unrelated to credit transaction. 86-42. Consumer credit insurance; property and liability insurance. 87-3. Consumer credit transaction; blanket single interest insurance programs. 89-54. Worthless checks; statutory service charge; preexisting indebtedness; notice; refusal of payment. 90-93.

#### **KANSAS COMMENT, 2010**

1. There are two categories of charges a creditor is permitted to make at the beginning of a credit transaction: (1) finance charges (K.S.A. 16a-1-301(22)), within the limits established by parts 2 and 4 of this article, and (2) additional charges as enumerated in this section. The additional charges specified in this section may be imposed in a consumer credit transaction without having to be included in the finance charge for rate ceiling or disclosure purposes. In general, the charges designated as additional charges fall roughly into two categories: (1) those closely related to the extension of credit but providing valuable subsidiary benefits to the consumer (e.g., the annual fee for a credit card or line of credit, or the premium for credit life, health, or property insurance), and (2) those ultimately payable to third parties with no portion of the charge returnable to the creditor by commission or otherwise (e.g., taxes, or filing fees for perfecting security interests). Paragraph (d) of subsection (1) provides the administrator with the flexibility needed to deal with new kinds of charges as new credit transactions evolve.

"Closing costs" as additional charges are permitted. K.A.R. 75-6-9. See also the Kansas comment to K.S.A. 16a-1-301(10).

The administrator has issued an administrative interpretation under subsection (1)(d) concerning so-called guaranteed auto protection or "GAP" products. See Administrative Interpretation No. 1004. GAP products are designed to provide assurance that there will be no deficiency balance against a consumer in the event that the consumer's financed vehicle experiences a total loss and the consumer's physical damage insurance is not sufficient to pay

the debt in full. The administrative interpretation sets forth detailed limitations on the circumstances under which GAP products may be sold, detailed requirements concerning the substantive provisions of the GAP contract and detailed actuarial reporting requirements. GAP contracts and other debt cancellation products are also subject to Regulation Z. The treatment of these products is modeled on the familiar rules for excluding the cost of insurance from the finance charge. Thus, in order to be excluded from the finance charge, the product must not be required by the creditor (and that fact must be disclosed in writing), the fee for the initial term of the coverage must be disclosed, and the consumer must sign or initial a written request for the coverage after receiving these disclosures. See Regulation Z, 12 C.F.R. § 226.4(d)(3).

2. Subsection (1)(e) is not part of the uniform act. It permits a charge to be imposed on dishonored checks offered in payment of pre-existing indebtedness. This rule would apply primarily to checks offered in payment of installment or credit card obligations, and not to bad checks given to merchants for payment in full of goods or services. This charge is conceptually different from the other charges permitted by this section in that it is not a "front-end" charge, or a charge imposed at the beginning of a credit transaction, but instead is more in the nature of a delinquency charge or penalty. Like the other charges permitted in this and the immediately following section, the insufficient check fee may be imposed only if it is provided for in the consumer credit contract. If a charge greater than \$10 but not to exceed \$30 is imposed, the specific amount must be included in the contract.

K.S.A. 60-2610 creates treble damage civil liability for worthless checks under the circumstances and procedures spelled out in that section. However, because of the comprehensive nature of the U3C with respect to consumer credit transactions, and because of the rule of this section mandating that any charges other than finance charges be specifically authorized by this section (or elsewhere in the U3C), the liability created by K.S.A. 60-2610 would not apply to consumer credit transactions. The rule of K.S.A. 16a-1-104, providing against implicit repeal of any part of the U3C, supports this conclusion. See also Kan. A.G. Op. No. 90-93 construing the various bad check statutes in Kansas.

3. The TILA requires that charges or premiums for insurance be included in the "finance charge" for the purpose of disclosing the annual percentage rate unless certain strict requirements as to disclosure and voluntariness are met. See Regulation Z 12 C.F.R. § 226.4(d). The tests specified in subsection (2) of this section are not quite identical, but it seems clear that any creditor who meets the tests of Regulation Z will also satisfy the tests of subsection (2). See also Kan. A.G. Op. No. 89-54 comparing the provisions of the U3C and Regulation Z as they relate to single interest insurance programs. The effect of subsection (2) is to require that charges or premiums for insurance be included in the finance charge for ceiling purposes as well unless the stated conditions are satisfied. In that regard the Federal Reserve has interpreted Regulation Z as not requiring the creditor to obtain a specific written indication of the consumer's desire to purchase insurance in connection with post-loan sales of credit insurance. See Official Staff Commentary to Regulation Z, 12 C.F.R. § 226.4(b)(7) and (8). The administrator has construed subsection (2)(b) in a similar fashion. See Administrative Interpretation No. 1005.

### **K.S.A. 16a-2-502. (UCCC) Delinquency charges.**

(1) The parties to a consumer credit transaction may contract for a delinquency charge on any installment not paid in full within 10 days after its scheduled or deferred due date in an amount not exceeding 5% of the unpaid amount of the installment or \$25, whichever is less.

(2) As an alternative to the delinquency charge set forth in subsection (1), the parties to a consumer credit transaction may contract for a delinquency charge not to exceed \$10 on any installment not paid in full within 10 days after its scheduled or deferred due date, except that if the scheduled payment amount is \$25 or less, the maximum delinquency charge shall be \$5.

(3) A delinquency charge may be collected only once on an installment however long it remains in default. A delinquency charge may be collected at the time it accrues or at any time thereafter.

(4) No delinquency charge may be collected on an installment which is paid in full within 10 days after its scheduled or deferred installment due date even though an earlier maturing installment or a delinquency charge on an earlier installment may not have been paid in full.

(5) For delinquency charge purposes, a payment made prior to the due date of the next installment payment shall be applied to the previous installment. For all other purposes, payments are applied to installments in the order in which they fall due.

(6) Notwithstanding subsections (1), (2), (4) and (5), the parties to a lender credit card agreement may contract for a delinquency charge in an amount agreed to by the consumer and may impose such charge on any installment not paid in full on the next business day following the scheduled due date of the delinquent payment.

(7) Notwithstanding subsections (1), (2), (4), (5) and (6), no delinquency charge may be collected on a lender credit card installment which is paid in full on the next business day following the scheduled or deferred due date even though an earlier maturing installment or a delinquency charge on an earlier installment may not have been paid in full.

**History:** L. 1973, ch. 85, § 30; L. 1975, ch. 127, § 3; L. 1988, ch. 85, § 7; L. 1988, ch. 86, § 4; L. 1988, ch. 87, § 4; L. 1992, ch. 46, § 1; L. 1993, ch. 200, § 8; L. 1994, ch. 39, § 1; L. 1996, ch. 166, § 4; L. 1999, ch. 107, § 19; July 1.

#### **KANSAS COMMENT, 2010**

1. This section permits creditors to impose delinquency charges for late installments, as set forth therein. In order for a delinquency charge to be imposed, however, it must be provided for by the underlying consumer credit contract. Subsection (1) follows the model of the uniform act and sets the maximum delinquency charge by reference to a percentage of the unpaid amount of an installment with a specific dollar cap — 5% of the unpaid amount of the installment, but not more than \$25.00. Note that the 5% limit is only applied to the unpaid amount of the installment, not to the entire installment. Thus, if the consumer makes \$950 of a \$1,000 installment on time, the maximum delinquency charge under subsection (1) is \$2.50 ( $\$50 \times 5\% = \$2.50$ ). Thus, only if the unpaid amount of the installment is \$500 or more does the \$25 cap come into play. In the alternative, per subsection (2), the creditor may contract for a flat delinquency charge of up to \$5 for installments of \$25 and less and a delinquency charge of up to \$10 on installments in excess of \$25.

2. Subsections (3), (4) and (5) are aimed at the abusive practice known as "pyramiding," or the imposition of multiple delinquency charges stemming from a single delayed payment. If a consumer missed the installment due in January, for example, but then paid the installment due in February on time, the creditor might try to apply the February payment to the missed January installment. This would create a delinquency for February as well as for January, and indeed for all remaining installments under the contract if the debtor continued to make subsequent payments on time but did not make up the January payment. Subsection (3) is intended to limit the creditor to a single delinquency charge (for the missed January payment), and attempts to prevent the creditor from "pyramiding," or collecting delinquency charges for the later months. The F.T.C. Credit Practices Rule, 16 C.F.R. § 444.4, contains a similar rule.

Subsection (4) addresses a different sort of pyramiding. Under the law of some states, if the consumer's payments were due on the first of the month and the January payment of \$100 was not made until the 15th, the creditor could assess a late payment of \$5, and then allocate the \$100 payment received on February 1st as follows: \$5 to the delinquency charge for January, and \$95 to the February payment. This would cause the February payment to be delinquent as well, and the creditor could then impose another delinquency charge and allocate the March payment in a similar fashion. Following this pattern, if the consumer made each of the remaining \$100 payments on time for the balance of the contract, the consumer would incur a delinquency charge for each month because the creditor could allocate current payments to unpaid delinquency charges in past periods. Subsection (4) meets this problem by compelling the creditor to apply the full \$100 payment received on February 1 to the payment due that month, and so on for the

remaining payments. Hence, the creditor could collect the delinquency charge only for January if all other payments were made on time. Subsection (5) codifies the long-standing position of the administrator previously set forth in the administrative regulations.

3. Subsections (6) and (7) were added by legislation adopted in 1999 and provide special rules for lender credit cards. Under these special rules, the normal 10-day grace period and the normal limits on delinquency charges do not apply. Thus, a creditor under a lender credit card may contract for a delinquency charge of any amount and may impose it if an installment is not paid in full on the first business day following the scheduled due date. In 2009, TILA, 15 U.S.C. § 1601 et seq. was amended to include the "Credit Cardholders Bill of Rights Act of 2009." The Credit Cardholders Bill of Rights Act of 2009 states that a payment received by the creditor by 5 p.m. on the due date, shall be considered timely payment.

#### **K.S.A. 16a-2-504. (UCCC) Finance charge on refinancing.**

With respect to a consumer credit transaction, the creditor may by agreement with the consumer refinance the unpaid balance and may contract for and receive a finance charge based on the amount financed resulting from the refinancing at a rate not exceeding that permitted by the provisions on finance charge for consumer credit sales other than open end credit (section 16a-2-201) if a consumer credit sale is refinanced, or for consumer loans (subsections (1) or (2) of section 16a-2-401, whichever is appropriate) if a consumer loan is refinanced. For the purpose of determining the finance charge permitted, the amount financed resulting from the refinancing shall be comprised of the total of the unpaid balance and the accrued charges on the date of the refinancing.

**History:** L. 1973, ch. 85, § 32; L. 1993, ch. 200, § 9; Jan. 1, 1994.

#### **KANSAS COMMENT, 2010**

This section provides the method of determining the amount financed on which the finance charge is based when a consumer credit transaction is refinanced, and sets the ceiling for the charge. The amount financed for the new transaction is equal to the unpaid balance of the old transaction plus accrued charges at the date of refinancing. See K.S.A. 16a-2-401(9) limitations on prepaid finance charges if refinancing.

#### **K.S.A. 16a-2-505. (UCCC) 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. The parties may agree to add the unpaid amount of the amount financed and accrued charges on the date of consolidation to the amount financed with respect to the subsequent consumer credit transaction.

The creditor may contract for and receive a finance charge as provided in subsection (2) based on the aggregate amount financed resulting from the consolidation.

(2) If the debts consolidated arise exclusively from consumer credit sales the transaction is a consolidation with respect to a consumer credit sale and the amount of the finance charge is governed by the provisions on finance charge for consumer credit sales other than open end credit (section 16a-2-201). If the debts consolidated include a debt arising from a consumer loan the transaction is a consolidation with respect to a consumer loan and the amount of the finance charge is governed by the provisions on finance charge for consumer loans (subsection (1) or (2) of section 16a-2-401), as appropriate.

(3) If a consumer owes an unpaid balance to a creditor with respect to a consumer credit transaction arising out of a consumer credit sale, and becomes obligated on

another consumer credit transaction arising out of another consumer credit sale by the same seller, the parties may agree to a consolidation resulting in a single schedule of payments either pursuant to subsection (1) or by adding together the unpaid balances with respect to the two sales.

**History:** L. 1973, ch. 85, § 33; L. 1993, ch. 200, § 10; Jan. 1, 1994.

**KANSAS COMMENT, 2000**

1. This section permits the consolidation of balances arising from different transactions between the same consumer and creditor. The unpaid balance of the amount financed on the old transaction (together with any accrued charges) on the date of the consolidation is simply added to the amount financed with respect to the later transaction. The consolidated total is then payable on one schedule of payments. This usually means that the maturity of the first transaction will be extended.

2. If a series of secured credit sales by the same seller is consolidated, the seller must also comply with the rules for allocating payments in cross-collateral transactions. See K.S.A. 16a-3-302 and 16a-3-303.

**K.S.A. 16a-2-506. (UCCC) Advances to perform covenants of consumer.**

(1) If the agreement with respect to a consumer credit transaction contains covenants by the consumer to perform certain duties pertaining to insuring or preserving collateral and the creditor pursuant to the agreement pays for performance of the duties on behalf of the consumer, he may, after giving prior notification and giving the buyer reasonable opportunity to perform, add the amounts paid to the debt. Within a reasonable time after advancing any sums, he shall state to the buyer 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 by the creditor including the type and amount of coverages. No further information need be given.

(2) 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 law in a disclosure statement, except that with respect to open end credit the amount of the advance may be added to the unpaid balance of the debt and the creditor may make a finance charge not exceeding that permitted by the appropriate provisions on finance charge for consumer credit sales pursuant to open end credit (section 16a-2-202) or for consumer loans (subsection (1) or (2) of section 16a-2-401), whichever is appropriate.

**History:** L. 1973, ch. 85, § 34; Jan. 1, 1974.

**KANSAS COMMENT, 2010**

Under this section, and if the agreement so provides, in some instances the creditor may add to the debt sums paid or advanced for the performance of duties on behalf of the consumer. Before doing so, however, the creditor must give prior notice to the consumer and must also disclose the details of the transaction to the consumer after the amount has been added. If the original transaction was made pursuant to open end credit, the creditor may add the amount of the advance to the unpaid balance of the account. In other cases the creditor may impose a finance charge on the additional amounts paid or advanced at a rate not in excess of the rate disclosed to the consumer for the original transaction. Normally the creditor would compute this charge for the remaining period of the agreement, and increase the amount of the consumer's remaining payments accordingly.

**K.S.A. 16a-2-507. (UCCC) Recovery of collection costs and attorney fees.**

With respect to a consumer credit transaction, the agreement may provide for the payment by the debtor of reasonable costs of collection, including, but not limited to, court costs, attorney fees and collection agency fees, except that such costs of collection: (1) May not include costs that were incurred by a salaried employee of the creditor or its assignee; (2) may not include the recovery of both attorney fees and collection agency fees; and (3) shall not be in excess of 15% of the unpaid debt after default. A provision in violation of this section is unenforceable.

**History:** L. 1973, ch. 85, § 35; L. 1994, ch. 276, § 1; July 1. **Attorney General's Opinions:** Attorney fees; national direct student loans. 86-113.

#### **KANSAS COMMENT, 2010**

1. The U3C not only places limitations on the amount that a creditor may charge a consumer for credit at the time the agreement is entered into (parts 2 and 4 of article 2), but also on the amount that the creditor may charge a defaulting consumer for collecting the debt. See also K.S.A. 16a-3-402.

2. This section permits the payment by the debtor of the reasonable costs of collection, including attorneys' fees or collection agency fees. However, there are significant limits on the creditor's ability to recover such costs. First, fees paid to an in-house attorney or collection agent on a salary may not be recovered. Second, the creditor may not recover both attorneys' fees and collection agency fees. Finally, the costs of collection may not exceed 15% of the unpaid debt after default. Note that the 15% limit is based on the amount of the "debt" — not on the unpaid "principal" balance. Thus, the creditor should be allowed to include other items in the computation such as unpaid delinquency charges, unpaid insurance premiums and any amounts that the creditor has advanced under K.S.A. 16a-2-506.

3. It is important to note that K.S.A. 16a-2-507, like many of the other post- transaction provisions of the U3C providing for costs or fees, is not self-executing. The costs of collection (including court costs, attorneys' fees or collection agency fees) are recoverable from the consumer only if the underlying agreement so provides. In *Credit Union One of Kansas v. Stamm*, 254 Kan. 367, 867 P.2d 285 (1994), the court held that a contract provision in a consumer credit transaction authorizing the creditor to recover attorney fees to the extent authorized by law, did not violate the prohibition in K.S.A. 16a-2-507 (overruling *Halloran v. North Plaza State Bank*, 17 Kan.App.2d 840, 844 P.2d 764 (1993)). Compare the disclosure required after default under K.S.A. 16a-5-110.

#### **K.S.A. 16a-2-508. (UCCC) Conversion to open end credit.**

The parties may agree to add the unpaid balance of a consumer credit transaction not made pursuant to open end credit to the consumer's open end credit account with the creditor. The unpaid balance so added is an amount equal to the amount financed determined according to the provisions on finance charge on refinancing (section 16a-2-504).

**History:** L. 1973, ch. 85, § 36; Jan. 1, 1974.

#### **KANSAS COMMENT, 2000**

The parties may agree to add a closed end consumer loan or consumer credit sale to an open end account. This section provides that the old loan or sale is treated as being refinanced at the time of the conversion and the unpaid balance resulting from the refinancing (K.S.A. 16a-2-504) is added to the open end account.

#### **K.S.A. 16a-2-509. (UCCC) Right to prepay.**

The consumer may prepay in full the unpaid balance of a consumer credit transaction at any time without penalty.

**History:** L. 1973, ch. 85, § 37; L. 1993, ch. 200, § 11; Jan. 1, 1994. **Attorney General's Opinions:** Interest and charges; usury. 79-252. Consumer credit transactions; prohibition on prepayment penalties; preemption as to national banks. 83-132.

**KANSAS COMMENT, 2010**

This section does not apply to a first mortgage loan unless otherwise governed by the U3C. See K.S.A. 16a-1-301(17)(b). Nor does this section give the consumer a right to make a partial prepayment without the consent of the creditor.

**K.S.A. 16a-2-510. (UCCC) Prepayment; minimum charges; judgments; rebate.**

(1) Upon prepayment in full, but not upon a refinancing (K.S.A. 16a-2-504, and amendments thereto), of a consumer credit transaction other than one pursuant to open end credit, the creditor may collect or retain a minimum charge of \$5 in a transaction which had an amount financed of \$75 or less, or \$7.50 in a transaction which had an amount financed of more than \$75, if the minimum charge was contracted for and the finance charge earned at the time of prepayment is less than the minimum charge contracted for. In those instances where the amounts financed are under or over \$75 and the finance charge is less than the minimum provided therefor, then the finance charge so contracted may be retained as the minimum finance charge.

(2) If the maturity is accelerated for any reason and judgment is obtained, the judgment shall be taken in accordance with the provisions of K.S.A. 16-205, and amendments thereto.

(3) Upon prepayment in full of a consumer credit contract by proceeds of consumer credit insurance, K.S.A. 16a-4-103, and amendments thereto, the consumer or the consumer's estate is entitled to the same rebate as though the consumer had prepaid the agreement on the date the proceeds of the insurance are paid to the creditor, but no later than 10 business days after satisfactory proof of loss is furnished to the creditor.

**History:** L. 1973, ch. 85, § 38; L. 1974, ch. 90, § 2; L. 1982, ch. 93, § 4; L. 1988, ch. 85, § 8; L. 1988, ch. 86, § 5; L. 1993, ch. 200, § 12; L. 1999, ch. 107, § 21; July 1. **Attorney General's Opinions:** Interest and charges; usury. 79-252.

**KANSAS COMMENT, 2010**

1. Subsection (1) permits the creditor to collect or retain specified minimum charges upon prepayment of any closed end consumer credit transaction if the minimum charge is contracted for and if the finance charge earned at the time of prepayment is less than the minimum charge. The permitted minimum charges are those for which the TILA requires no annual percentage rate disclosure. See Regulation Z, 12 C.F.R. § 226.18, fn 42.

2. The actuarial method has been mandated in all consumer credit transactions (other than precomputed closed end credit sales under K.S.A. 16a-2-201(5), which itself requires rebates to be calculated under the actuarial method).

## Article 3.--REGULATION OF AGREEMENTS AND PRACTICES

### Part 1

#### GENERAL PROVISIONS

##### **K.S.A. 16a-3-101. (UCCC) Short title.**

This article shall be known and may be cited as revised uniform consumer credit code-regulation of agreements and practices.

**History:** L. 1973, ch. 85, § 39; Jan. 1, 1974.

##### **KANSAS COMMENT, 2000**

The U3C recognizes that a basic issue in the regulation of consumer credit is adequate protection of consumers from creditor practices and agreements that are abusive or have a potential for abuse. In addition to the notice and disclosure requirements found in part 2 of this article, many restrictions on creditor practices are also included in this article. Many provisions limit the actual, substantive terms creditors may include in their agreements. These include limitations on collateral in consumer sales and leases, prohibition of certain abusive practices such as balloon payments and referral sales, and abolition of the holder in due course doctrine in most consumer transactions. In addition, many limitations on creditor remedies are found in article 5 of the U3C.

##### **K.S.A. 16a-3-102. (UCCC) Scope.**

Parts 2, 3, and 4 of this article apply, respectively, to disclosure, limitations on agreements and practices, and limitations on consumer's liability with respect to consumer credit transactions.

**History:** L. 1973, ch. 85, § 40; Jan. 1, 1974.

##### **KANSAS COMMENT, 2000**

See the Kansas comment to the preceding section.

### Part 2

#### DISCLOSURES

##### **K.S.A. 16a-3-201. (UCCC) Consumer leases.**

A lessor shall disclose to the consumer the information required by rules and regulations adopted by the administrator pursuant to K.S.A. 16a-6-117, and amendments thereto.

**History:** L. 1973, ch. 85, § 41; L. 1992, ch. 46, § 2; July 1.

##### **KANSAS COMMENT, 2010**

1. The U3C covers only those leases which exceed four months in duration. See the Kansas comment to K.S.A. 16a-1-301(16). Note that potential liability at the end of the lease term is limited by K.S.A. 16a-3-401; see the Kansas comment to that section.

2. In 1976, Congress added the Consumer Leasing Act (CLA) to the TILA, 15 U.S.C.A. § 1667 et seq. The CLA contains its own requirements for disclosure in consumer leasing transactions, and inconsistent state law is preempted. See Federal Reserve Board Regulation M, 12 C.F.R. Part 213. As had earlier been done for consumer credit sales and loans, the

administrator has adopted a regulation that incorporates the federal disclosure requirements for leases by reference. See K.A.R. 75-6-26. See also the Kansas comment to K.S.A. 16a-3-401.

**K.S.A. 16a-3-202. (UCCC) Notice to consumer.**

A written agreement which requires or provides for the signature of the consumer and which evidences a consumer credit transaction other than one pursuant to open end credit shall contain a clear, conspicuous, and printed notice to the consumer that he should not sign the agreement before reading it, and that he is entitled to a copy of the agreement and to prepay the unpaid balance at any time without penalty. The following notice if clearly and conspicuously printed complies with this section:

NOTICE TO CONSUMER: 1. Do not sign this agreement before you read it. 2. You are entitled to a copy of this agreement. 3. You may prepay the unpaid balance at any time without penalty.

**History:** L. 1973, ch. 85, § 42; Jan. 1, 1974.

**KANSAS COMMENT, 2010**

The disclosures required in this section are intended to give the consumer some important information about closed end credit agreements or consumer leases. As to the definition of "conspicuous," see K.S.A. 16a-1-301(12).

**K.S.A. 16a-3-203. (UCCC) Notice of assignment.**

The consumer is authorized to pay the original creditor until he receives notification of assignment of 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.

**History:** L. 1973, ch. 85, § 43; Jan. 1, 1974.

**KANSAS COMMENT, 2010**

The consumer is protected in paying the original creditor until he or she receives notice of an assignment. This section is derived from the UCC, K.S.A. 84-9-406. The assignee should also be mindful of the potential for an affirmative duty to give certain notices with respect to refunds of premiums on consumer credit insurance. See the Kansas comment to K.S.A. 16a-4-108(3).

**K.S.A. 16a-3-203a. Receipt of payment by assignor.**

If payment is received by the assignor of a consumer credit contract for the benefit of the assignee, the date of payment shall be deemed to be the day payment is received by the assignor.

**History:** L. 1996, ch. 166, § 1; July 1.

**KANSAS COMMENT, 2010**

The Kansas Comment, 2000 in the K.S.A. bound volume is no longer valid.

**K.S.A. 16a-3-204. (UCCC) Change in terms of open end credit accounts.**

(1) If a creditor makes a change in the terms of an open end credit account without complying with this section any additional cost or charge to the consumer resulting from the change is an excess charge and subject to the remedies available to consumers (section 16a-5-201) and to the administrator (section 16a-6-113).

(2) A creditor may change the terms, including the finance charge, of an open end credit account whether or not the change is authorized by prior agreement. Except as provided in subsection (3), the lender shall give to the consumer written notice of any change at least 30 days before the effective date of the change.

(3) The notice specified in subsection (2) is not required if:

(a) The consumer elects to pay an amount designated on a billing statement as including a new charge for a benefit offered to the consumer when the benefit and charge constitute the change in terms and when the billing statement also states the amount payable if the new charge is excluded;

(b) the change involves no significant cost to the consumer; or

(c) the change applies only to debts incurred after a date specified in a notice of the change.

(4) The notice provided for in this section is given to the consumer when mailed to the consumer at the address used by the creditor for sending periodic billing statements.

**History:** L. 1973, ch. 85, § 44; L. 1980, ch. 77, § 4; L. 1981, ch. 94, § 4; L. 1982, ch. 93, § 5; L. 1983, ch. 79, § 4; L. 1985, ch. 82, § 4; L. 1987, ch. 81, § 1; L. 1993, ch. 49, § 1; July 1.

**KANSAS COMMENT, 2010**

In 2009, the Credit Cardholders Bill of Rights Act of 2009 was added to TILA 15 U.S.C. § 1601 et seq. Such Act preempts this provision to the extent it requires all creditors to provide at least 45 days notice to the consumer prior to the effective date of a rate increase. The notice must completely and conspicuously describe the changes in the APR and describe how the increase will apply to an existing balance. If the customer disapproves of the change he or she may avoid any liability predicated on it (a) with respect to future transactions, by refraining from making further purchases or loans under the revolving account, and (b) with respect to the balance in the account at the time of the notice of change, by paying it in full before the change takes effect.

**K.S.A. 16a-3-205. (UCCC) Receipts; statements of account; evidence of payment.**

(1) The creditor shall deliver or mail to the consumer, without request, a written receipt for each payment by coin or currency on an obligation pursuant to a consumer credit transaction. A periodic statement showing a payment received by mail complies with this subsection.

(2) Upon written request of the consumer, the person to whom an obligation is owed pursuant to a consumer credit transaction, other than one pursuant to open end credit, shall provide a written statement of the dates and amounts of payments made within the past 15 months and the amount required to pay the debt in full. The statement shall be provided without charge.

(3) After a consumer has fulfilled all obligations with respect to a consumer credit transaction, other than one pursuant to open end credit, the person to whom the obligation was owed shall upon request of the consumer, deliver or mail to the consumer written evidence acknowledging payment in full of all obligations with respect to the transaction.

**History:** L. 1973, ch. 85; § 45; L. 2005, ch. 144, § 13; July 1.

### **KANSAS COMMENT, 2000**

1. Subsection (1) assures consumers of receipts for payments made in currency but imposes no duty on creditors to give receipts for payments made by check, money order, or the like. Sending periodic statements for open end credit accounts (Regulation Z § 226.7) showing payments made relieves the creditor of any further duty to send receipts. A creditor may also comply with this section by sending periodic statements showing payments in closed end transactions.

2. Subsection (2) allows consumers to obtain a statement of account in closed end transactions. The consumer's receipt of periodic statements serves this need in open end credit accounts.

3. Subsection (3) allows the consumer to obtain evidence of satisfaction upon payment in full of closed end credit obligations. Again, this requirement is unnecessary in open end credit owing to the creditor's duty to reflect payments in periodic statements.

### **K.S.A. 16a-3-206. (UCCC) Compliance with rules and regulations; truth in lending.**

A creditor shall disclose to the consumer the information required by the rules and regulations adopted by the administrator pursuant to K.S.A. 16a-6-117, and amendments thereto.

**History:** L. 1973, ch. 85, § 46; L. 1981, ch. 93, § 6; L. 1987, ch. 80, § 2; July 1.

**Attorney General's Opinions:** Arrests; citations; procedures and penalties; appearance bonds; use of credit cards. 82-165

### **KANSAS COMMENT, 2010**

The disclosure requirements of the TILA (15 U.S.C.A. § 1601 et seq.) are incorporated by reference pursuant to rules and regulations adopted by the administrator under K.S.A. 16a-6-117 and this section. See K.A.R. 75-6-26. The purpose is to obtain dual administrative enforcement of the TILA. See K.S.A. 16a-5-203(6). The U3C does contain a few disclosure requirements that go beyond federal law. See K.S.A. 16a-3-202, 16a-2-404(4), and 16a-3-207.

### **K.S.A. 16a-3-207. Consumer loans secured by certain real estate mortgages; appraisals and notice.**

(1) The provisions of this section apply only to a consumer loan which is secured by a first mortgage or a second mortgage on the consumer's principal residence. The provisions of this section do not apply to a lender who is a supervised financial organization.

(2) Before making a loan subject to this section, a lender shall obtain the appraised value of the real estate to be encumbered. The appraisal evidencing the appraised value shall be retained by the lender and preserved in accordance with the recordkeeping requirements set forth in K.S.A. 16a-2-304, and amendments thereto.

(3) If, based upon the appraisal, the loan to value ratio of the loan exceeds 100%, then the lender shall deliver to the consumer:

(a) A free copy of the appraisal; and

(b) a written notice regarding high loan-to-value mortgages and the availability of consumer credit counseling. The administrator may adopt rules and regulations regarding the form of the notice to be delivered to the consumer and the names, addresses and telephone numbers of selected consumer credit counseling providers.

(4) The notice referred to in subsection (3) shall be given to the consumer not less than three days before the loan is made. The notice must be retained by the lender and

preserved in accordance with the record-keeping requirements set forth in K.S.A. 16a-2-304, and amendments thereto.

(5) If, within three days after receiving the notice, the consumer elects not to enter into the loan transaction, then the lender must promptly refund to the consumer any application fees or other amounts paid by the consumer to the lender. However, the lender is not required to refund any bona fide out-of-pocket costs incurred by the lender before the consumer elected not to enter into the loan transaction, provided that such costs were paid or are payable to a person or persons not related to the lender. Notwithstanding the provisions of this subsection, a bona fide appraisal fee paid or payable to a person related to the lender need not be refunded to the consumer.

(6) This section shall be supplemental to and a part of the uniform consumer credit code.

**History:** L. 1999, ch. 107, § 1; L. 2000, ch. 64, § 2; July 1.

#### **KANSAS COMMENT, 2010**

1. This section requires a lender to obtain the appraised value of the real estate covered by a first or second mortgage loan on the consumer's principal residence. See also K.S.A. 16a-1-301(6) for additional guidance on acceptable appraisals.

2. If the loan-to-value ratio (K.S.A. 16a-1-301(28)) of a proposed loan exceeds 100%, then the lender must give the consumer a free copy of the appraisal and a notice regarding high loan-to-value mortgages. Guidance on the form of the notice can be found in Administrative Interpretation No. 1008. The notice must be given to the consumer at least 3 days before the loan is made. During the 3-day "cooling off" period, the consumer may decide not to close the loan and receive a full refund of all application fees and other charges (other than any actual out-of-pocket fees paid by the lender to an unrelated third party).

#### **K.S.A. 16a-3-208. Advertising; prohibited conduct.**

(1) A supervised lender shall not, directly or indirectly, make a false, misleading or deceptive advertisement regarding loans or the availability of loans.

(2) A supervised lender shall not advertise any size of loan, security required for a loan, rate of charge or other conditions of lending except with the full intent of making loans at those rates, or lower rates, and under those conditions or conditions more favorable to the consumer, to loan applicants who meet the standards or qualifications prescribed by the supervised lender.

(3) This section shall be supplemental to and a part of the uniform consumer credit code.

**History:** L. 1999, ch. 107, § 2; July 1.

#### **KANSAS COMMENT, 2010**

This type of deceptive advertisement prohibited by this section may violate the KCPA and expose the lender to penalties under both statutes.

#### **K.S.A. 16-3-209. Calendar days used for computing time.**

(a) Unless otherwise specifically stated, for the purposes of K.S.A. 16a-1-101 through 16a-9-102, and amendments thereto, in computing any period of time, calendar days shall be used. The day of the act, event or default from which the designated period of time begins to run shall not be included. Saturdays, Sundays and legal holidays are included, unless the last day of the period so computed is a Saturday, Sunday or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday or a legal holiday. "Legal holiday" includes any day designated as a holiday by the Federal Reserve Bank.

(b) This section shall be part of and supplemental to the uniform consumer credit code.

**History:** L. 2009, ch. 29, § 1; July 1.

### Part 3

## LIMITATIONS ON AGREEMENTS AND PRACTICES

### **K.S.A. 16a-3-301. (UCCC) Security in sales or leases.**

(1) With respect to a consumer credit sale, a seller may take a security interest in the property sold. In addition, a seller may take a security interest in goods upon which services are performed or in which goods sold are installed or to which they are annexed, or in land to which the goods are affixed or which is maintained, repaired or improved as a result of the sale of the goods or services, if in the case of a security interest in land the debt secured is \$3,000 or more, or, in the case of a security interest in goods the debt secured is \$900 or more. Except as provided with respect to cross-collateral (K.S.A. 16a-3-302, and amendments thereto) a seller may not otherwise take a security interest in property of the buyer to secure the debt arising from a consumer credit sale.

(2) With respect to a consumer lease, a lessor may not take a security interest in property of the lessee to secure the debt arising from the lease.

(3) A security interest taken in violation of this section is void.

**History:** L. 1973, ch. 85, § 47; L. 1981, ch. 93, § 7; L. 1999, ch. 107, § 22; July 1.

### **KANSAS COMMENT, 2010**

1. This section limits sellers and lessors with respect to the manner in which they may secure the obligation arising from a consumer credit sale (K.S.A. 16a-1-301(14)) or consumer lease (K.S.A. 16a-1-301(16)). Additional restrictions on collateral are found in the F.T.C. Credit Practices Rule, 16 C.F.R. Part 444, and Federal Reserve Board Regulation AA, 12 C.F.R. Part 227, which prohibit lenders and retail installment sellers of goods or services from receiving from any consumer an obligation which constitutes or contains a non-possessory, non-purchase money security interest in most household goods. See also K.S.A. 84-9-204, which limits security interests in after-acquired consumer goods.

2. Sales of goods. Under this section, a seller may take a security interest in the goods sold but not in other goods or land of the buyer unless the goods sold become closely connected with the other goods or land in which the security interest is taken. For example, an appliance dealer may retain a security interest in a washing machine sold but may not take a security interest in other appliances of the buyer to secure the sale obligation unless the dealer complies with K.S.A. 16a-3-302. Except as provided in K.S.A. 16a-3-302, a seller of goods may take additional security for the sale obligation in other goods or land of the buyer only if the debt secured is substantial — \$900 in the case of security interest in goods, \$3,000 in the case of a security interest in land — and then only if the other goods or land in which the additional security interest is taken are closely related to the goods sold, i.e., (a) goods in which the goods sold are installed or to which they are annexed (accessions), or (b) land to which the goods are annexed (fixtures) or which is maintained, repaired, or improved by the goods sold. The F.T.C. Credit Practices Rule does not affect the ability of sellers of goods to take security interests in land in these limited circumstances. For example, a mobile home dealer could take a mortgage on the consumer's lot in the mobile home park. However, the F.T.C. Rule may affect the seller of accessions. If the goods into which the goods sold are installed or annexed are household goods, the seller could not take the larger item as collateral. For example, a seller of a new engine or sound system could take a security interest in the car into which these items are installed, but a seller of a new motor for a washing machine could not take the washing machine as collateral because that would create a non-possessory, non-purchase money security interest in household goods in

violation of the F.T.C. Rule.

3. Sales of services. Under this section, the seller may not take a security interest in goods or land of the buyer to secure an obligation arising out of the sale of services unless the services are performed on the goods or are used to maintain, repair, or improve the land. Even then, as in cases involving sales of goods, the debt secured must be substantial — \$900 in the case of a security interest in goods and \$3,000 in the case of a security interest in land. Thus a seller of dancing lessons may not take a security interest in goods or land of the buyer, and a carpenter or painter may take a security interest in the buyer's residence only if the debt arising from these services is \$3,000 or more. Under the F.T.C. Rule, the seller of services may not take a security interest in household goods even if the services are performed on household goods. Thus an appliance repairman who repairs a consumer's washing machine may not take a security interest in that washing machine to secure the repair bill.

4. Sales of land. The seller can retain a security interest only in the land sold and not in other goods or land of the buyer. It should be noted, however, that this section applies only to consumer credit sales of land which are within the scope of the U3C. Most land sales are excluded from the coverage of the U3C. See the Kansas comment to K.S.A. 16a-1-301(14). See also K.S.A. 16a-2-307, which contains additional restrictions on taking land as security in certain supervised loans.

5. Consumer leases. A lessor may not secure the lease obligation by taking a security interest in property of the lessee. The lease itself, of course, serves as a form of security with respect to the leased property.

#### **K.S.A. 16a-3-302. (UCCC) Cross-collateral.**

(1) In addition to contracting for a security interest pursuant to the provisions on security in sales or leases (section 16a-3-301), a seller in a consumer credit sale may secure the debt arising from the sale by contracting for a security interest in other property if as a result of a prior sale the seller has an existing security interest in the other property. The seller may also contract for a security interest in the property sold in the subsequent sale as security for the previous debt.

(2) If the seller contracts for a security interest in other property pursuant to this section, the rate of credit service charge thereafter on the aggregate unpaid balances so secured may not exceed that permitted if the balances so secured were consolidated pursuant to the provisions on consolidation involving a refinancing (subsection (1) of section 16a-2-505). The seller has a reasonable time after so contracting to make any adjustments required by this section. "Seller" in this section does not include an assignee not related to the original seller.

**History:** L. 1973, ch. 85, § 48; Jan. 1, 1974.

#### **KANSAS COMMENT, 2010**

1. A seller who sells goods on credit to a buyer in more than one sale may secure the debts arising from each sale by a cross-collateral security interest in the other goods sold so long as the seller has an existing security interest in the other goods. K.S.A. 16a-3-303 specifies when a seller loses a security interest in goods in a cross-collateral situation.

2. Cross-collateral clauses are most commonly used by sellers of furniture and appliances, and their use of these clauses may be affected by the F.T.C. Credit Practices Rule, 16 C.F.R. Part 444, which prohibits the taking of non-possessory, non-purchase money security interests in most household goods. See the Kansas comment to K.S.A. 16a-3-301. Under the F.T.C. Rule, cross-collateral clauses that attempt to make household goods serve as security for all current and future loans are invalid. However, the F.T.C. Rule does not prohibit retention of a security interest in household goods upon refinancing or consolidation of an original purchase money transaction. Thus, cross-collateral clauses are permitted to the extent that they allow a creditor to retain a security interest in refinancing or consolidating a prior transaction in which the security interest arose. As a result, household goods which secure the prior loan may continue to secure a refinanced or consolidated loan, but clauses that go beyond refinancing or consolidation of

purchase money transactions violate the F.T.C. Rule if they include household goods.

3. In cases not involving household goods, subsection (1) allows cross-collateral to be taken either for separate debts or for consolidated debts, but subsection (2) limits the rate of the finance charge that a seller may charge in the separate debt case to that chargeable had the debts been consolidated pursuant to K.S.A. 16a-2-505(1).

### **K.S.A. 16a-3-303. (UCCC) Debt secured by cross-collateral.**

(1) If debts arising from two or more consumer credit sales, other than sales pursuant to open end credit, are secured by cross-collateral (section 16a-3-302) or consolidated into one debt payable on a single schedule of payments, and the debt is secured by security interests taken with respect to one or more of the sales, payments received by the seller after the taking of the cross-collateral or the consolidation are deemed, for the purpose of determining the amount of the debt secured by the various security interests, to have been first applied to the payment of the debts arising from the sales first made. To the extent debts are paid according to this section, security interests in items of property terminate as the debts originally incurred with respect to each item is paid.

(2) Payments received by the seller upon an open end credit account are deemed, for the purpose of determining the amount of the debt 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 debts in the order in which the entries to the account showing the debts were made.

(3) If the debts consolidated arose from two or more sales made on the same day, payments received by the seller are deemed, for the purpose of determining the amount of the debt secured by the various security interests, to have been applied first to the payment of the smallest debt.

**History:** L. 1973, ch. 85, § 49; L. 1981, ch. 93, § 8; July 1.

### **KANSAS COMMENT, 2010**

1. When a seller consolidates debts arising from multiple sales and secures the consolidated debt by security interests in the goods sold in those sales, or when a seller secures separate debts by cross-collateral (K.S.A. 16a-3-302), this section prevents the seller from retaining a security interest in all of the goods until the buyer's entire debt is paid. The basis of this section is that a security interest in goods terminates when the debt incurred in the purchase of those goods is paid. For the purpose of determining when this debt is paid, subsection (1) first allocates the buyer's payments to the debts first incurred. Thus, if the seller consolidates debts of \$100, \$200, and \$300 arising from sales made in that order, the security interest in the goods purchased pursuant to the \$100 sale terminates when \$100 of the consolidated debt is paid. If the seller does not consolidate these debts but secures them by cross-collateral, all of the buyer's payments must be allocated to the \$100 debt until it is paid off, and so forth. Subsection (2) applies this first-payments-against-first-debts rule to open end credit accounts.

2. Subsection (3) applies to the case in which the buyer purchases a \$750 TV in one department at 9:30 a.m. and a \$150 printer in another department at 10:00 a.m. Subsequently, the debts are consolidated. This subsection relieves the seller of having to keep records of the exact hour a sale is made.

3. This section applies only to credit sales; nothing in the U3C prohibits lenders from taking cross-collateral and applying the payments in any way they choose. However, *In re Gibson*, 16 B.R. 257 (Bankr. D. Kan. 1981), the court applied the first-payments-against-first-debts rule of this section by analogy to a cross-collateralized loan. Contrary to the rule of this section, however, the court also ruled that after the first item was paid off the lien was not extinguished; instead, it merely became non-purchase money and continued to secure debts attributable to other items. Under the F.T.C. Credit Practices Rule, if the item paid off was household goods, any continuing non-possessory, non-purchase money security interest would be invalid. See the discussion of the F.T.C. Rule in the Kansas comments to K.S.A. 16a-3-301 and 16a-3-302.

**K.S.A. 16a-3-304. (UCCC) Use of multiple agreements.**

(1) A creditor may not engage in a pattern or practice of using multiple agreements to obtain a higher finance charge than would otherwise be permitted by the provisions of the article on finance charges and related provisions (article 2).

(2) The excess amount of finance charge provided for in this section is an excess charge for the purposes of the provisions on rights of parties (K.S.A. 16a-5-201, and amendments thereto) and the provisions on civil actions by administrator (K.S.A. 16a-6-113, and amendments thereto).

**History:** L. 1973, ch. 85, § 50; L. 1977, ch. 71, § 2; L. 1999, ch. 107, § 23; L. 2005, ch. 144, § 14; July 1.

**KANSAS COMMENT, 2000**

*Editor's reminder:*

*Comments do not include analysis of any statutory amendments that occurred after the 2000 Legislative Session.*

Originally, the graduated rate ceiling structure of the U3C allowed a creditor to charge higher rates on smaller balances. However, given the general lifting of the U3C's rate ceilings, this concern now only applies to closed end, non-real estate secured consumer loans and payday loans. See K.S.A. 16a-2-401(2) and K.S.A. 16a-2-404. In order to achieve maximum rates on those transactions, a creditor might arbitrarily divide a transaction into two or more agreements so that the amount financed under each is within the range on which the highest rate can be charged. By doing so, the creditor violates this section and subsection (2) makes the excess amount of finance charge provided for an excess charge for purposes of the provisions on remedies by consumers and the administrator. For example, a licensed lender violates this section by manipulating the transaction by directing a consumer seeking a \$1,200 loan to sign one note for \$600 and the consumer's spouse to sign another note for \$600 in order to charge the highest rate permitted by K.S.A. 16a-2-401(2). On the other hand, the lender would not violate this section if one spouse borrowed \$600 at one time and the other spouse on a voluntary separate loan application borrowed \$600 at some other time.

**K.S.A. 16a-3-305. (UCCC) No assignment of earnings.**

(1) A creditor may not take an assignment of earnings of the consumer for payment or as security for payment of a debt arising out of a consumer credit transaction. An assignment of earnings in violation of this section is unenforceable by the assignee of the earnings and revocable by the consumer. This section does not prohibit an employee from authorizing deductions from his earnings if the authorization is revocable.

(2) A sale of unpaid earnings made in consideration of the payment of money to or for the account of the seller of the earnings is deemed to be a loan to him secured by an assignment of earnings.

**History:** L. 1973, ch. 85, § 51; Jan. 1, 1974.

**KANSAS COMMENT, 2010**

The U3C recognizes the potential for hardship to a consumer and his or her dependents that could result from a disruption of the steady flow of family income. Just as K.S.A. 60-730 prevents a creditor from attaching unpaid earnings of a debtor before obtaining a judgment, this provision precludes a creditor from reaching the debtor's earnings pursuant to an irrevocable wage assignment obtained from the debtor. The purpose of both limitations is to afford the debtor an opportunity to have the debt determined by a court before the debtor's unpaid earnings are taken by a creditor. This provision prohibits a creditor from taking either an assignment of earnings as payment or as security for payment for a debt or a sale of earnings in payment of the price or rental. Under K.S.A. 16a-1-301(21), the definition of "earnings" includes periodic payments under

pension, retirement, or disability programs; thus this section also prohibits assignments of these entitlements.

A revocable payroll deduction authorization in favor of a creditor, as frequently used by credit unions, is authorized by this section. The F.T.C. Credit Practices Rule, 16 C.F.R. Part 444, prohibits irrevocable assignments of earnings, but permits certain irrevocable payroll deduction plans. Under this section, however, payroll deduction plans are permitted only if they are revocable. See also K.A.R. 75-6-23 requiring a separate form for authorizing a revocable payroll deduction that contains a clear and conspicuous notice to the debtor that the deduction may be revoked at any time and that must be worded so that the form may be used for revoking the deduction.

**K.S.A. 16a-3-306. (UCCC) Authorization to confess judgment prohibited.**

A consumer may not authorize any person to confess judgment on a claim arising out of a consumer credit transaction. An authorization in violation of this section is void.

**History:** L. 1973, ch. 85, § 52; Jan. 1, 1974.

**KANSAS COMMENT, 2010**

This section does not prohibit the consumer from confessing judgment in connection with litigation. A similar prohibition is found in the F.T.C. Credit Practices Rule, 16 C.F.R. Part 444.

**K.S.A. 16a-3-307. (UCCC) Certain negotiable instruments prohibited.**

With respect to a consumer credit sale or consumer lease, the creditor may not take a negotiable instrument other than a currently dated check as evidence of the obligation of the buyer or lessee.

**History:** L. 1973, ch. 85, § 53; L. 1981, ch. 93, § 9; July 1. **Attorney General's Opinions:** Interest and charges; usury. 79-252. Limitations on consumers' liability; balloon payments; denial of right to refinance. 82-143.

**KANSAS COMMENT, 2000**

This section, together with K.S.A. 16a-3-403, 16a-3-404, and 16a-3-405, states a major tenet of the U3C, that the holder in due course doctrine should be abrogated in consumer cases and that the assignee of any note or installment contract arising from a consumer credit sale or lease should be subject to any defenses and claims that the buyer had against the original seller or lessor arising out of the sale or lease. Whatever beneficial effects holder in due course doctrine may have in promoting the currency of paper is greatly outweighed by the harshness of its consequences in denying consumers the right to raise valid defenses arising out of consumer credit transactions. The first step in abolition of the doctrine is the prohibition found in this section against the use of negotiable instruments in consumer credit sales and consumer leases. The F.T.C. Holder in Due Course Regulations, 16 C.F.R. Part 433, also effectively abolishes the holder in due course doctrine in consumer credit sales and leases by requiring a printed legend on consumer contracts which renders the paper non-negotiable. See the Kansas comments to K.S.A. 16a-3-404 and 16a-3-405.

**K.S.A. 16a-3-308. (UCCC) Balloon payments; exception.**

With respect to a consumer credit transaction, other than one pursuant to open end credit if any scheduled payment is more than twice as large as the average of earlier scheduled payments, the consumer has the right to refinance the amount of that payment at the time it is due without penalty. The terms of the refinancing shall be no less favorable to the consumer than the terms of the original transaction. These provisions do not apply to the extent that the payment schedule is adjusted to the

seasonal or irregular income of the consumer or to a note secured by a real estate mortgage.

**History:** L. 1973, ch. 85, § 54; L. 1981, ch. 93, § 10; L. 1991, ch. 73, § 1; L. 2002, ch. 125, § 1; L.2009, ch. 29, § 20, July 1.

#### **KANSAS COMMENT, 2010**

Balloon payments can be used to induce a buyer or borrower to enter into a burdensome contract by offering invitingly small installment payments until the end of the contract when the buyer or borrower is confronted with a balloon payment too large to pay. See also K.S.A. 16a-2-308, prohibiting balloon payments in certain small supervised loans. This section meets the threat of misuse of balloon payments by giving the consumer the right to compel refinancing of the amount of the balloon payment at the time it is due without penalty and under terms no less favorable than those of the original transaction. Under the refinancing, the size of the installment payments may not exceed the average scheduled payments (excluding the balloon payment) and the rate of finance charge may not exceed that under the original agreement. If the balloon payment was agreed to by the parties to accommodate the consumer because of his seasonal or irregular income expectations, the abuse at which this section is aimed is not present and the section does not apply.

#### **K.S.A. 16a-3-308a. Loans secured by mortgages on consumer's principal residence; negative amortization and balloon payments prohibited.**

(1) A loan subject to this section may not provide for the negative amortization of principal or a balloon payment. A loan payment is not a balloon payment if the amount of the payment is less than twice the amount of any other payment.

(2) Subsection (1) applies to a consumer loan which is secured by a first mortgage or a second mortgage on the consumer's principal residence and with respect to which (a) the loan-to-value ratio exceeds 100% at the time the loan is made or (b) the annual percentage rate exceeds the code mortgage rate. Notwithstanding the foregoing, subsection (1) does not apply to a loan pursuant to open end credit; a purchase-money loan incurred to acquire or construct the consumer's principal residence; or a reverse mortgage transaction.

(3) The creditor must disburse the proceeds of a consumer loan secured by a first mortgage or a second mortgage upon the satisfaction of all conditions to the disbursement and the expiration of all applicable rescission, cooling-off or other waiting periods required by law, unless the parties otherwise agree in writing.

(4) No person shall record a mortgage if moneys are not available for disbursal to the mortgagor upon the expiration of all applicable rescission, cooling-off or other waiting periods required by law unless, before that recording, the person informs the mortgagor in writing of a definite date by which payment shall be made and obtains the mortgagor's written permission for the delay.

(5) This section shall be supplemental to and a part of the uniform consumer credit code.

**History:** L. 1999, ch. 107, § 3; L. 2005, ch. 144, § 15; L. 2006, ch. 67, § 1; July 1.

#### **KANSAS COMMENT, 2010**

1. Subsections (1) and (2) prohibit negative amortization or balloon payments on loans secured by a first or second mortgage on the consumer's principal residence if the loan-to-value ratio (K.S.A. 16a-1-301(28)) of the loan exceeds 100% or the annual percentage rate on the loan exceeds the code mortgage rate (K.S.A. 16a-1-301(11)). These restrictions do not apply to open end consumer loans (such as a home equity line of credit), purchase money loans used to acquire or build the residence, or to reverse mortgages. This provision is based on Regulation Z, 12 C.F.R. § 226.32(d), but expands the limitations of that provision.

2. Subsection (3) of this section requires the lender to disburse the proceeds of a first or second mortgage loan as soon as all conditions are satisfied. There is an exception for situations (such as a line of credit or a construction loan) where the parties agree to a different disbursement schedule.

#### **K.S.A. 16a-3-309. (UCCC) Referral sales.**

With respect to a consumer credit sale or consumer lease the seller or lessor may not give or offer to give a rebate or discount or otherwise pay or offer to pay value to the buyer or lessee as an inducement for a sale or lease in consideration of his giving to the seller or lessor the names of prospective purchasers or lessees, or otherwise aiding the seller or lessor in making a sale or lease to another person, if the earning of the rebate, discount or other value is contingent upon the occurrence of an event subsequent to the time the buyer or lessee agrees to buy or lease. If a buyer or lessee is induced by a violation of this section to enter into a consumer credit sale or consumer lease, the agreement is unenforceable by the seller or lessor and the buyer or lessee, at his option, may rescind the agreement or retain the goods delivered and the benefit of any services performed, without any obligation to pay for them.

**History:** L. 1974, ch. 85, § 55; Jan. 1, 1974.

#### **KANSAS COMMENT, 2000**

1. The typical sale scheme which would be barred by this section is one in which the seller, before closing the sale, offers to reduce the price by \$25 for every name of a person the buyer supplies who will agree to buy from the seller. The seller may be able to make an inflated price much more palatable to a buyer by convincing the buyer that the referral plan will greatly reduce the amount the buyer will actually have to pay. The buyer may not realize until later that the friends whose names were provided are not as gullible and that the buyer will be required to pay the original balance of the contract price.

2. The evil this section is aimed at is the raising of expectations in a buyer of benefits to accrue from events which are to occur in the future. This provision has no effect on a seller's agreement to reduce at the time of the sale the price of an item in exchange for the buyer's giving the seller a list of prospective purchasers or assisting in other ways if the price reduction is not contingent on whether the purchasers do in fact buy or on whether other events occur in the future.

3. The misuse of the referral sale scheme has been so pervasive in some segments of seller credit that this provision, in an effort to halt these practices, not only makes agreements in violation of this section unenforceable but also allows the buyer to retain the goods sold or the benefit of services rendered with no obligation to pay for them. Alternatively, the buyer may rescind the agreement, return the goods, and recover any payment.

4. The KCPA contains a similar prohibition. K.S.A. 50-626(b)(1)(E). As a result, a seller who engages in an unlawful referral scheme may be subject to liability or penalties under both the U3C and the KCPA.

### **Part 4**

#### **LIMITATIONS ON CONSUMER'S LIABILITY**

#### **K.S.A. 16a-3-401. (UCCC) Restriction on liability in consumer lease.**

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

**History:** L. 1973, ch. 85, § 56; L. 1981, ch. 93, § 11; July 1.

## **KANSAS COMMENT, 2010**

1. This section is designed to protect consumer lessees against abuses associated with what are sometimes described as "open end" or "net" leases. Under "open end" or "net" leases, the parties contract that at the expiration of the lease the article leased, usually an automobile, will have a certain depreciated value and will be sold. If it brings less than the agreed depreciated value, the lessee is liable for the difference; if it brings more, the lessee is entitled to the surplus. Under such an agreement, the lessee will have no understanding of how much the lease might cost unless the lessee can accurately predict what the second hand market will be at the expiration of the lease. Moreover, if the lessor sets an unrealistically high depreciated value the contingent liability of the lessee will increase accordingly, and the seller can offer deceptively low rental payments to a gullible customer.

2. Under this section the liability, contingent or otherwise, of the lessee at the end of the term of the lease is limited to twice the average monthly rental payment. This limitation not only avoids the possibility of a large contingent liability on the part of the lessee at the end of the term but also gives the lessee a basis for comprehending how much the lease will actually cost. The CLA creates a set of rebuttable presumptions concerning the residual value of the leased property which in most cases will protect the consumer from having a residual liability greater than three times the average monthly payment under the lease. In this regard, this section offers greater protection since it absolutely prohibits residual charges greater than twice the average monthly payment. The CLA also permits the lessee to obtain (at his or her own expense) a neutral appraisal by an independent third party agreed to by both parties, and provides that any such appraisal is final and binding on the parties. Kansas lessees could, of course, make use of this provision if they wished.

3. This section does not limit the charges the lessor may impose for damage to the leased property or for default. The CLA, however, limits default and other similar charges to amounts which are reasonable in light of the anticipated or actual harm caused by the default or delinquency. See TILA 15 U.S.C.A. § 1667b. This federal limitation prohibits lessors from imposing unreasonably large default or other similar charges.

4. Because of the special problems associated with the open end lease, the CLA requires that the disclosures given to the consumer lessee at the beginning of the lease include disclosure of the fact that the consumer will be liable for the fair market differential on termination, if the consumer will in fact be so liable, as well as a statement of the fair market value of the property at the inception of the lease.

### **K.S.A. 16a-3-402. (UCCC) Limitation on default charges.**

Except for reasonable expenses incurred in realizing on a security interest, the agreement with respect to a consumer credit transaction may not provide for any charges as a result of default by the consumer other than those authorized by K.S.A. 16a-1-101 through 16a-9-102. A provision in violation of this section is unenforceable.

**History:** L. 1973, ch. 85, § 57; Jan. 1, 1974. **Attorney General's Opinions:** Savings and loan association code; examinations; acceptance of examinations made by the Federal Savings and Loan Insurance Corporation. 83-113. Consumer credit transactions; prohibition on prepayment penalties; preemption as to national banks. 83-132. Attorney fees; national direct student loans. 86-113.

## **KANSAS COMMENT, 2010**

The U3C limits the credit-related charges a creditor may impose on a consumer not only at the outset of the contract but also at the default stage. Except for delinquency charges (K.S.A. 16a-2-502), collection costs and attorneys' fees (K.S.A. 16a-2-507), and expenses arising from realizing on collateral authorized by the UCC (K.S.A. 84-9-615), the creditor may impose no collection or default charges on a consumer.

### **K.S. A. 16a-3-403. (UCCC) Credit card issuer subject to defenses.**

(1) If the issuer of a credit card, other than a lender credit card, is the seller or lessor or a person related to the seller or lessor, or if the seller or lessor is licensed, franchised, or permitted by the issuer to do business under the business name or trade name or designation of the issuer, the issuer is subject to all claims and defenses of a buyer or lessee against the seller or lessor arising out of a sale or lease of goods or services pursuant to the credit card.

(2) The issuer of a lender credit card is not subject to the claims and defenses of a buyer or lessee arising out of a sale or lease of goods or services pursuant to a lender credit card except where a home solicitation sale is involved. For purposes of this section, a "home solicitation sale" means a sale to a consumer of goods (other than equipment used in a business) or services, in which the seller or a person acting for the seller engages in a personal solicitation (other than by telephone or mail) of the sale at a residence of the buyer. It does not include a sale made pursuant to prior negotiations between the parties at a business establishment at a fixed location where goods or services are offered or exhibited for sale.

(3) Claims or defenses of a buyer or lessee against a seller or lessor in connection with a home solicitation sale may be asserted against the issuer of the lender credit card only:

- (a) If the buyer or lessee has attempted in good faith to obtain reasonable satisfaction from the seller or lessor with respect to claims or defenses, and
- (b) to the extent of the amount owing to the issuer with respect to the sale or lease at the time the issuer has notice of the claims or defenses. Notice of the claims or defenses may be given prior to the attempt specified in paragraph (a). The notice, which may generally state the claims or defenses, must be in writing but may be sent to either the seller (or lessor), or to the issuer.

(4) For the purpose of determining the amount owing to the issuer with respect to a sale or lease under a credit card, payments received upon the account are deemed to have been first applied to the payment of finance charges in the order of their entry to the account and then to the payment of debts in the order in which the entries of the debts are made to the account.

(5) An agreement may not provide for greater rights for an issuer of a credit card than this section permits.

**History:** L. 1973, ch. 85, § 58; L. 1981, ch. 93, § 12; July 1.

#### **KANSAS COMMENT, 2010**

1. Subsection (1) makes it clear that the issuer of a seller credit card is subject to all claims and defenses of the buyer against the seller arising out of the sale, even where the seller of goods or services is not the issuer of the card but a franchisee who honors the card. Some credit card issuers (e.g., the major retail chains) are themselves the sellers or lessors of products or services, and their liability as sellers or lessors is in no way affected by their status as credit card issuers. When the card issuer allows others to sell products while operating under the issuer's name (e.g., oil distributors), the card issuer should be liable to the full amount of the credit extended in the sale as the financier of the transaction. In addition, the card issuer in these cases may also be the manufacturer or processor of a defective product sold pursuant to its credit card by the franchised dealer. In such cases, their liability under other law as manufacturer or processor is not affected by this section.

2. The provisions of subsections (2) and (3), insulating lender credit card issuers from underlying claims and defenses except in home solicitation sales, vary from the uniform act and have been overridden by the TILA. Under TILA 15 U.S.C.A. § 1666i, the liability of issuers of seller credit cards is basically the same as in this section. With respect to lender credit cards, however, the TILA makes the issuer subject to all claims (other than tort claims) and defenses arising out of any transaction in which the card was used as a method of payment. There are three limitations on this liability: First, the cardholder must make a good faith attempt to resolve

the dispute with the person who honored the card; second, the amount of the transaction must exceed \$50; and third, the transaction must have occurred within the debtor's state or within 100 miles of the debtor's residence. The rationale of these limitations is to make card issuers subject to claims and defenses in those transactions in which the credit card is more likely to be used as a true credit device (transactions over \$50) and in which the great volume of credit card use takes place (within the consumer's state or within 100 miles of his residence). Liability is also limited to the amount of credit outstanding at the time the cardholder first notifies the issuer or person honoring the card of the claim or defense. This parallels the liability of assignees and "all in the family" lenders under K.S.A. 16a-3-404 and 16a-3-405. Under Regulation Z, 12 C.F.R. § 226.12(c), the cardholder may withhold payment for the property or services in dispute, and the card issuer is prohibited from making an adverse credit report until the dispute is settled.

**K.S.A. 16a-3-404. (UCCC) Assignee subject to defenses; application of payments received by assignee; limitation of actions; assignee may require seller or lessor to repurchase obligation; joinder of parties; procedure.**

(1) An assignee of the rights of the seller or lessor under a consumer credit sale or consumer lease is subject to all claims and defenses of the buyer or lessee against the seller or lessor arising out of the sale or lease, notwithstanding that:

- (a) There is an agreement to the contrary, or
- (b) the assignee is a holder in due course of a negotiable instrument issued in violation of the provisions prohibiting certain negotiable instruments (section 16a-3-307).

(2) Claims or defenses of a buyer or lessee specified in subsection (1) may be asserted against the assignee only:

- (a) If the buyer or lessee has attempted in good faith to obtain reasonable satisfaction from the seller or lessor with respect to claims or defenses,
- (b) if the buyer or lessee, when requested in writing to do so by the seller, lessor or the assignee, has given notice in writing to the seller or lessee and the assignee stating the claims or defenses,
- (c) to the extent of the amount owing to the assignee with respect to the sale or lease at the time the assignee has notice of such claims or defenses. Such notice, generally stating the claims or defenses, must be in writing and shall be sent to the seller (or lessor), and to the assignee if the buyer or lessee has received written notice of the name and address of the assignee, and
- (d) as a matter of defense to or setoff against claims by the assignee except that the buyer or lessee shall not be prohibited from bringing an action to rescind an obligation against which it has a defense or setoff.

(3) For the purpose of determining the amount owing to the assignee with respect to the sale or lease:

- (a) Payments received by the assignee after the consolidation of two or more consumer credit sales, other than pursuant to open end credit, are deemed to have been first applied to the payment of the sales first made; if the sales consolidated arose from sales made on the same day, payments are deemed to have been first applied to the smaller or smallest sale or sales;
- (b) payments received upon an open end credit account are deemed to have been first applied to the payment of finance charges in the order of their entry to the account and then to the payment of debts in the order in which the entries of the debts are made to the account.

(4) Any action by an assignee or the original seller or lessor who has repurchased an obligation under subsection (5) to enforce an obligation, or any action by a buyer or lessee to rescind, or any request to repurchase the obligation, shall be brought within

one year from the date of receipt of the notice of the claim or defense, or default in payment, whichever is later.

(5) If a claim or defense of a buyer or lessee against a seller or lessor is asserted against an assignee, the assignee may, regardless of any existing agreement to the contrary, require the seller or lessor to repurchase the obligation for an amount equal to the price for which the obligation was assigned, plus that portion of the finance charge earned by the assignee, minus payments previously made to the assignee by the buyer or lessee. In any action by the buyer or lessee to rescind an obligation held by the assignee, the seller or lessor shall have the right to intervene and any party may join as a defendant any manufacturer or other person who is or may be liable to another party. If the action to rescind is brought against the seller or lessor, such seller or lessor shall have the right to join as a defendant any manufacturer or other person who is or may be liable to such seller or lessor.

(6) An agreement may not provide greater rights for an assignee than this section permits.

**History:** L. 1973, ch. 85, § 59; L. 1975, ch. 127, § 1; L. 1976, ch. 145, § 40; L. 1981, ch. 93, § 13; July 1.

#### **KANSAS COMMENT, 2010**

1. This section does away with the holder in due course doctrine under which the assignee of consumer paper could enforce the obligation irrespective of legitimate claims or defenses which the consumer may have had against the dealer. The doctrine is codified in the UCC (K.S.A. 84-3-305 and 84-9-403) so that the U3C will supersede the UCC rule, at least with respect to consumer credit transactions (see K.S.A. 84-9-201). The third party financier will be subject to claims and defenses whether the holder in due course of a negotiable instrument issued in violation of K.S.A. 16a-3-307, or an assignee claiming under a "cut-off clause" or "waiver of defenses clause" which in the past had been used as a contractual substitute for negotiability. The policy justifications for this section are to protect the consumer from the harshness of the holder in due course doctrine as well as to encourage financial institutions taking assignments of consumer paper to use discretion in dealing with sellers and lessors whose transactions give rise to an unusual percentage of consumer complaints. See also the Kansas comment to K.S.A. 16a-3-307.

2. Except for the consumer's right to rescind a contract held by a third party subject to a defense, the rights of the consumer under this section are basically defensive. That is, the consumer-buyer is prohibited from suing the third party financier for return of any down payment of installments already paid before the assignee receives notice of the defense. The consumer-buyer may assert a claim or defense only as a defense to or set-off against claims by the third party financier. In addition, the consumer can assert a claim or defense against the assignee only to the extent of the amount still owing to the assignee at the time the assignee gets written notice of the claim or defense. For example, if a consumer purchases a used car from a dealer and signs a \$700 installment contract which is then assigned to a bank or finance company, and if the consumer has already made four monthly installments of \$30 each before discovering that the car is a lemon, the consumer can defend against a claim for the balance due by the bank or finance company but the consumer can neither obtain a refund from the financier of \$120 nor subject the financier to any open ended claim for personal injury arising from defects in the car. (See, however, the Eachen case discussed in note 4, *infra*.) The third party financier is subject only to claims and defenses against the seller arising out of the sale, e.g., a claim for breach of warranty. For example, in *Perry v. Goff Motors, Inc.*, 12 Kan. App. 2d 139, 736 P.2d 949 (1987), the court held that the assignee was subject to the buyer's claim that the sale of a car was fraudulent and void because it violated the Kansas motor vehicle laws. In addition, the buyer must make a good faith effort to obtain reasonable satisfaction from the seller before asserting the claim or defense against the assignee. The terms "good faith effort" and "reasonable satisfaction" are deliberately not defined; their meaning will depend upon the facts of a given case.

In *Rosemond v. Campbell*, 343 S.E.2d 641 (S.C. App. 1986), the court held that the U3C

permitted the consumer to assert any claim available against the seller, including a fraud claim, offensively in a suit against the assignee. The South Carolina legislature, however, had amended the U3C to remove the language "as a matter of defense to or setoff against" found in subsection (2)(d) of this section. In Kansas, the consumer would have to wait until the assignee sued and then raise the claim as a defense.

3. Subsection (3) provides FIFO ground rules for determining what amount is owing to the assignee at the time notice of the defense is given. Subsection (5) provides for mandatory recourse by the financier against the dealer after assertion of a defense by the consumer, although non-recourse paper is still effective if the consumer has no excuse for the default. The theory of this subsection is that the ultimate risk should be shifted to the merchant in cases where the merchant's misconduct (breach of warranty, fraud, etc.) gave rise to the consumer defense. Third party practice — intervention, joinder or impleader — is also expressly authorized by this subsection wherever appropriate. Subsection (4) sets forth a short one-year statute of limitation for suits brought under this section.

4. This section should be read together with the F.T.C. Holder in Due Course Regulations, 16 C.F.R. Part 433, which require that all consumer paper contain a legend in ten point, bold face type expressly stating that the holder of the paper is subject to all claims and defenses which the consumer debtor could assert against the seller or lessor of the goods or services in the underlying transaction. The F.T.C. Regulations do not create any substantive rights in the consumer; they merely preserve against the assignee all state law rights the consumer already had against the seller or lessor. The purpose of the F.T.C. Regulations, like the purpose of this section, is to abolish the holder in due course doctrine in consumer transactions. Under the F.T.C. Regulations, the debtor's recovery is limited to a refund of amounts already paid, although the F.T.C. Regulations do not prohibit a greater recovery if state law allows it. In *Eachen v. Scott Housing Systems, Inc.*, 630 F.Supp. 162 (M.D. Ala. 1986), the court ruled that the F.T.C. Regulations permitted the consumer to sue the assignee for breach of warranty, notwithstanding that state law limited liability to cases of defense or setoff. Liability was limited to a refund of amounts paid.

5. This section deals only with the assignee's derivative liability for claims and defenses arising out of the underlying contract. Neither this section nor the F.T.C. Regulations limit rights the consumer may have directly against the third party financier for the financier's own actions, either under the KCPA or similar statute or under developing concepts of lender liability.

#### **K.S.A. 16a-3-405. (UCCC) Lender subject to defenses arising from sales and leases.**

(1) A lender, other than the issuer of a lender credit card, who, with respect to a particular transaction, makes a consumer loan for the purpose of enabling a consumer to buy or lease from a particular seller or lessee goods or services is subject to all claims and defenses of the consumer against the seller or lessor arising from that sale or lease of the goods and services if:

- (a) The lender knows that the seller or lessor arranged, for a commission, brokerage, or referral fee, for the extension of credit by the lender;
- (b) the lender is a person related to the seller or lessor unless the relationship is remote or is not a factor in the transaction;
- (c) the seller or lessor guarantees the loan or otherwise assumes the risk or loss by the lender upon the loan;
- (d) the lender directly supplies the seller or lessor with the contract document used by the consumer to evidence the loan, and the seller or lessor significantly participates in the preparation of the document; or
- (e) the loan is conditioned upon the consumer's purchase or lease of the goods or services from the particular seller or lessor, but the lender's payment of proceeds of the loan to the seller or lessor does not in itself establish that the loan was so conditioned.

(2) Claims or defenses of a buyer or lessee specified in subsection (1) may be asserted against the lender only:

- (a) If the buyer or lessee has attempted in good faith to obtain reasonable satisfaction from the seller or lessor with respect to the claims or defenses;
- (b) if the buyer or lessee, when requested in writing to do so by the seller, lessor or the lender, has given notice in writing to the seller or lessee and the lender stating the claims or defenses,
- (c) to the extent of the amount owing to the lender with respect to the sale or lease at the time the lender has notice of the claims or defenses. Such notice, generally stating the claims or defenses, must be in writing and shall be sent to the seller (or lessor), and to the lender if the buyer or lessee has received written notice of the name and address of the lender; and
- (d) as a matter of defense to or setoff against claims by the lender except that the buyer or lessee shall not be prohibited from bringing an action to rescind an obligation against which it has a defense or setoff.

(3) For the purpose of determining the amount owing to the lender with respect to the sale or lease:

- (a) Payments received by the lender after the consolidation of two or more consumer loans, other than pursuant to open end credit, are deemed to have been first applied to the payment of the loans first made; if the loans consolidated arose from loans made on the same day, payments are deemed to have been first applied to the smaller or smallest loan or loans; and
- (b) payments received upon an open end credit account are deemed to have been first applied to the payment of finance charges in the order of their entry to the account and then to the payment of debts in the order in which the entries of the debts are made to the account.

(4) An agreement may not provide greater rights for a lender than this section permits. (5)

Notwithstanding any of the foregoing, the participation of the lender or lessor in any of the arrangements between seller and buyer to insure the perfection of the lender or lessor's security interest shall not in itself establish a relationship described and controlled by subsection (1).

**History:** L. 1973, ch. 85, § 60; L. 1975, ch. 127, § 2; L. 1981, ch. 93, § 14; July 1.

#### **KANSAS COMMENT, 2000**

1. This section extends the U3C's policy of preserving consumer claims and defenses to direct loan cases in those situations in which the relationship between the seller or lessor and the lender justifies allowing the consumer to raise claims or defenses against the lender. In order to preclude financiers from circumventing K.S.A. 16a-3-404 by shaping the transaction as a "direct loan" where it is really more like a purchase of dealer paper, this section sets forth five guidelines to test whether a true direct loan is involved. If it is, the consumer has no right to raise against the lender any claims or defenses against the seller whose product or service the consumer bought with the proceeds of the loan. Disguised dealer paper -- sometimes called an "all in the family" loan -- remains subject to the consumer's claims and defenses as if the transaction involved the assignment of an installment sales contract.

2. As indicated under subsection (1), any one of the following elements will subject the "direct lender" to claims and defenses of the consumer against the seller arising from the sale: (a) knowledge by the lender that the seller arranged for the extension of credit for a fee; (b) a close personal or corporate relationship between seller and lender (see the definition of "person related to" in K.S.A. 16a-1-301(34)); (c) dealer guarantee of the loan; (d) use of the lender's "direct loan" forms by a dealer who has significantly participated in their preparation; and (e) the lender's conditioning of the loan upon the consumer's use of the proceeds to purchase from a particular seller. With respect to this last element, the lender's making the proceeds check payable to a particular dealer does not in itself make the transaction an "all in the family" loan. Similarly, under

subsection (5) any participation by the lender in the sales transaction solely to insure perfection of a security interest, such as notation of the lender's lien on a certificate of title, does not in itself make a "direct loan" subject to the buyer's claims and defenses against the seller.

3. Subsections (2) and (3) of this section parallel those found in K.S.A. 16a-3-404. See the Kansas comments to that section. Nothing in this section limits the rights of an "all in the family" lender to recover from the seller after being subjected to a consumer's claims or defenses under this section.

4. As with liability of assignees for claims and defenses under K.S.A. 16a-3-404, the liability of direct lenders may be affected by the F.T.C. Holder in Due Course Regulations, 16 C.F.R. Part 433. The F.T.C. Regulations require all consumer contracts which arise out of certain direct loans to contain a legend in ten point, bold face type expressly stating that the lender or other holder of the paper is subject to claims and defenses which the consumer debtor could assert against the seller or lessor of the goods or services obtained with the proceeds of the loan. The direct loans which are subject to the F.T.C. Regulations arise in two circumstances: (a) those in which the seller or lessor refers consumers to the lender, and (b) those in which the seller or lessor is affiliated with the lender by common control, contract or business arrangement. As in the case of assignees, liability is limited to refund of the amounts already paid by the consumer. See Kansas comment 5 to K.S.A. 16a-3-404. Because of the differences in definitions, the U3C and the F.T.C. Regulations will each reach some direct loans not covered by the other, but many "all in the family" lenders will be subject to both provisions.

5. As in the case of the assignee's liability under K.S.A. 16a-3-404, this section deals only with the "all in the family" lender's derivative liability for claims and defenses arising out of the underlying sale or lease contract. Neither this section nor the F.T.C. Regulations limit rights the consumer may have directly against the lender for the lender's own actions, either under the KCPA or similar statute or under developing concepts of lender liability.

## Article 4.—INSURANCE

### Part 1

#### INSURANCE IN GENERAL

##### **K.S.A. 16a-4-101. (UCCC) Short title.**

This article shall be known and may be cited as revised uniform consumer credit code-insurance.

**History:** L. 1973, ch. 85, § 61; Jan. 1, 1974.

##### **KANSAS COMMENT, 2010**

A number of provisions of this article are derived from the NAIC model act, prepared by the national association of insurance commissioners "to provide for the regulation of credit life insurance and credit accident and health insurance."

##### **K.S.A. 16a-4-102. (UCCC) Scope.**

(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 16a-4-304) applies to loans the primary purpose of which is the financing of insurance. No other provision of this article applies to insurance so financed.

**History:** L. 1973, ch. 85, § 62; Jan. 1, 1974. **Attorney General's Opinions:** Consumer credit insurance; property and liability insurance. 87-3.

##### **KANSAS COMMENT, 2000**

In general, this article applies to nearly all forms of insurance provided in connection with a consumer credit transaction. See the Kansas comment to the next section. Lenders engaged in premium financing are exempted from the U3C by K.S.A. 16a-1-202(5); premium financing is controlled by the Kansas insurance premium financing act (K.S.A. 40-2601 et seq). For example, rate ceilings on insurance premium finance transactions will continue to be governed by K.S.A. 40-2610 rather than by the ceilings established for other consumer credit transactions covered by the U3C. By subsection (2), however, a single provision of this article is made applicable to lenders engaged in insurance premiums financing; the borrower must be forewarned of cancellation of the financed insurance by the lender (see K.S.A. 16a-4-304). Nothing else in this article affects the practices of a lender in that business.

##### **K.S.A. 16a-4-103. (UCCC) Definition: "Consumer credit insurance."**

In this act "consumer credit insurance" means insurance, other than insurance on property, by which the satisfaction of debt in whole or in part is a benefit provided, but does not include:

- (a) Insurance provided in relation to a credit transaction in which a payment is scheduled more than 15 years after the extension of credit;
- (b) insurance issued as an isolated transaction on the part of the insurer not related to an agreement or plan for insuring consumers of the creditor; or
- (c) insurance indemnifying the creditor against loss due to the consumer's default.

**History:** L. 1973, ch. 85, § 63; L. 1982, ch. 95, § 1; July 1.

##### **KANSAS COMMENT, 2010**

1. The usual forms of consumer credit insurance provide benefits conditioned on the death or disability of the consumer, the contracts being described as credit life insurance and credit accident and health insurance. The insured event might also be loss of earnings in other ways, as by the loss of employment. A type of insurance not embraced in the term "consumer credit insurance" is that procured by a creditor to guard against the uncollectibility of an account. Insurance of this type, although historically and properly called "credit insurance," is conditioned on the nonpayment of debt, and does not serve any interest of consumers of the insured person. This is true also of insurance indemnifying the creditor against loss due to nonfiling of instruments. By contrast, the benefit of consumer credit insurance runs to consumers as well as creditors; any payment made to the creditor by the insurer under the policy satisfies the consumer's obligation to the extent of the payment.

2. The definition of "consumer credit insurance" excludes insurance related to long-term credit, following a similar but broader exclusion from the scope of the NAIC model act.

**K.S.A. 16a-4-104. (UCCC) Creditor's provision 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 16a-2-501) and maximum finance charges (parts 2 and 4 of article 2), a creditor may agree to provide insurance, and may contract for and receive a charge for insurance separate from and in addition to other charges. A creditor need not make a separate charge for insurance provided or required by him. This act does not authorize the issuance of any insurance prohibited under any statute, or rule thereunder, governing the business of insurance.

(2) The excess amount of a charge for insurance provided for in agreements in violation of this article is an excess charge for the purposes of the provisions of the article on remedies and penalties (article 5) as to effect of violations on rights of parties (section 16a-5-201) and of the provisions of the article on administration (article 6) as to civil actions by the administrator (section 16a-6-113).

**History:** L. 1973, ch. 85, § 64; Jan. 1, 1974. **Attorney General's Opinions:** Consumer credit insurance; property and liability insurance. 87-3.

**KANSAS COMMENT, 2010**

1. Subsection (1) broadly authorizes creditors to contract for and receive payments for providing insurance covering the whole range of transactions within the scope of this article. See K.S.A. 16a-4-102. A creditor may provide insurance without making a charge in addition to the finance charge and, in that event, is not required to disclose any amount as a charge for insurance. If, however, the creditor requires insurance in connection with a consumer credit sale, consumer lease, or consumer loan, the fact that the cost of providing it is buried in an increased finance charge, giving the insurance for "free," will not necessarily exclude the creditor from restrictions under any other law.

2. Limitations are placed on the making of an additional or separate charge for insurance in K.S.A. 16a-2-501, and the authorization of this section is subject to that provision. In addition, such a charge must be limited as provided in K.S.A. 16a-4-107.

**K.S.A. 16a-4-105. (UCCC) Conditions applying to insurance to be provided by creditor.**

If a creditor agrees with a consumer to provide insurance

- (1) the insurance shall be evidenced by an individual policy or certificate of insurance delivered to the consumer, or sent to him at his address as stated by him, within thirty (30) days after the term of the insurance commences under the agreement between the creditor and consumer; or

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

**History:** L. 1973, ch. 85, § 65; Jan. 1, 1974. **Attorney General's Opinions:** Consumer credit insurance; property and liability insurance. 87-3.

#### **KANSAS COMMENT, 2010**

Unlike the NAIC model act, the U3C does not require that any specific information about the insurance coverage be disclosed to the consumer. This section requires only that the creditor deliver to the consumer at an early date the credit insurance policy, or a certificate if a group policy is involved. The TILA, however, does require special credit insurance disclosures that the creditor must give in order to exclude the insurance costs from the finance charge. See Regulation Z, 12 C.F.R. § 226.4(d). A similar approach is followed by the U3C. See K.S.A. 16a-2-501(2). In addition, more detailed disclosures concerning insurance are required by administrative regulation. See K.A.R. 40-5-103(c).

#### **K.S.A. 16a-4-106. (UCCC) Unconscionability.**

(1) In applying the provisions of this act on unconscionability (sections 16a-5-108 and 16a-6-111) to a separate charge for insurance, consideration shall be given, among other factors, to

- (a) potential benefits to the consumer including the satisfaction of his obligations;
- (b) the creditor's need for the protection provided by the insurance; and
- (c) the relation between the amount and terms of credit granted and the insurance benefits provided.

(2) If consumer credit insurance otherwise complies with this article and other applicable law, neither the amount nor the term of the insurance nor the amount of a charge therefor is unconscionable.

**History:** L. 1973, ch. 85, § 66; Jan. 1, 1974. **Attorney General's Opinions:** Consumer credit insurance; property and liability insurance. 87-3. Consumer credit transactions; blanket single interest insurance programs. 89-54.

#### **KANSAS COMMENT, 2010**

1. It may be shown that an agreement about insurance, like any other term of a consumer credit contract, is unconscionable, and the effects of such a showing are those specified in K.S.A. 16a-5-108 and 16a-6-111. This section lists only some of the factors to be considered for unconscionability, and indicates that a balancing of benefits, needs, and costs is required. In general, the creditor's need for insurance protection and the debtor's potential benefit are more patent in connection with extensions of credit that are substantial as to amount and time; the expense of providing exceptional coverage is suspect in relation to relatively small extensions of credit. The relation between the credit terms and the insurance terms must be taken into account in applying this section.

2. One aspect of credit insurance that has produced widespread complaints is the phenomenon of "reverse competition." In most credit insurance, the creditor keeps a portion of the premium as a commission. The effect of this practice is to encourage creditors to seek out insurers who charge the highest rates for the same coverage. This reverses the normal market forces, and prices are driven to their highest, rather than lowest, levels. Creditors seldom advise consumers who buy credit insurance that the same coverage is often available at a lower price. In *Browder v. Hanley Dawson Cadillac Co.*, 379 N.E.2d 1206 (Ill. App. 1978), the court held that failure to disclose the availability of cheaper, but comparable, credit insurance constituted an unfair or deceptive practice trade under the Illinois consumer deceptive practices act by concealing, suppressing, or omitting a material fact. To the same effect is *Matter of Dickson*, 432 F.Supp. 752 (W.D.N.Car. 1977). Failing to disclose the availability of cheaper insurance may be a violation of K.S.A. 40-2403 et seq. It could also be a factor in making a determination of unconscionability under this act.

**K.S.A. 16a-4-107. (UCCC) Maximum charge by creditor for insurance.**

(1) Except as provided in subsection (2), if a creditor contracts for or receives a separate charge for insurance, the amount charged to the consumer for the insurance may not exceed the premium to be charged by the insurer, as computed at the time the charge to the consumer is determined, conforming to any rate filings required by law and made by the insurer with the commissioner of insurance.

(2) A creditor who provides consumer credit insurance in relation to open end credit may calculate the charge to the consumer in each billing cycle by applying the current premium rate to the unpaid balance of debt in the same manner as is permitted with respect to finance charges by the provisions on finance charges for consumer credit sales pursuant to open end credit (section 16a-2-202).

**History:** L. 1973, ch. 85, § 67; Jan. 1, 1974. **Attorney General's Opinions:** Consumer credit insurance; amount of insurance. 88-13.

**KANSAS COMMENT, 2000**

1. Subsection (1) generally limits the creditor's charge to the debtor for insurance to the premiums to be charged by the insurer. Subsection (2) authorizes convenient methods of calculating charges in open end credit transactions that might not be permitted if subsection (1) were applied inflexibly. See the Kansas comment to K.S.A. 16a-2-202 for an explanation of the various methods of determining the unpaid balance in open end credit accounts.

2. As noted in the Kansas comment to the previous section, creditors often keep a portion of the premiums as a commission. It has been argued that this practice violates the rule of this section because the amount charged to the consumer, which includes the commission, exceeds the premium actually received by the insurer. The cases to date have not accepted this argument. See *Tew v. Dixieland Finance, Inc.*, 527 So.2d 665 (Miss. 1988); *Spears v. Colonial Bank of Alabama*, 514 So.2d 814 (Ala. 1987).

**K.S.A. 16a-4-108. (UCCC) Refund or credit required; amount.**

(1) Upon prepayment in full of a consumer credit sale or consumer loan 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 or prepayment is retained by the creditor or returned to him by the insurer unless the charge was computed from time to time on the basis of the balances of the consumer's account.

(2) This article does not require a creditor to grant a refund or credit to the consumer if all refunds and credits due to him under this article amount to less than one dollar (\$1), and except as provided in subsection (1) does not require the creditor to account to the consumer for any portion of a separate charge for insurance because

- (a) the insurance is terminated by performance of the insurer's obligation;
- (b) the creditor pays or accounts for premiums to the insurer in amounts and at times determined by the agreement between them; or
- (c) the creditor receives directly or indirectly under any policy of insurance a gain or advantage not prohibited by law.

(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 consumer 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 or a formula filed by the insurer with the commissioner of insurance at least thirty (30) days before the consumer's right to a refund or credit becomes determinable, unless the method or formula is employed after the commissioner of insurance notifies the insurer that he disapproves it.

**History:** L. 1973, ch. 85, § 68; Jan. 1, 1974.

#### **KANSAS COMMENT, 2000**

1. Subsection (1) concerns a premium for consumer credit insurance, or any part of it, that is not treated by the insurer as earned, even though the insurer has paid benefits for which the premium charge was made. If the premium was the subject of a separate charge to the debtor, a refund must be made. Making the refund is not practicable, however, and is not required, if the charge has been computed on the debtor's outstanding balances. Subsection (2)(a) recognizes that the insurer may, upon performance of its obligation, properly treat the premium as earned.

2. Subsection (2)(c) permits a creditor to derive from consumer credit insurance gains and advantages such as dividends and refunds resulting from favorable mortality or morbidity experience with respect to insured debtors, and is predicated on the following conclusions: (1) Although the gains and advantages may be large to the creditor, they are relatively insignificant to each insured debtor and the calculating, clerical, and mailing costs of returning them to insured debtors would be unreasonably disproportionate to the amounts involved, and (2) the requirement of this article that premiums for consumer credit insurance be reasonable in relation to benefits (K.S.A. 16a-4-203), if properly enforced by the insurance commissioner, will preclude the possibility of the use of consumer credit insurance as a device by creditors for concealing hidden charges from debtors.

3. Subsection (3) requires the creditor (subject to the exceptions provided by subsection (2)) to make a refund, or cause a refund to be made, if the insurance is not provided as contemplated or if it terminates prior to its expected term because of prepayment or other reasons. As a result of apparent deficiencies in the efforts of creditors (particularly assignees), the administrator has issued an administrative interpretation to facilitate the refunds required by subsection (3). See Administrative Interpretation No. 1002.

4. Subsection (4) commits to the insurance commissioner the responsibility for approval of methods and formulas for computing refunds or credits that are required by the circumstances stated in subsection (3).

#### **K.S.A. 16a-4-109. (UCCC) Existing insurance; choice of insurer; notice of option.**

If a creditor requires insurance, the consumer shall have the option of providing the required 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, but the creditor may for reasonable cause decline the insurance provided by the consumer. The creditor shall provide the consumer with a written notice on the loan agreement or other instrument fully informing the consumer of the option authorized by this section.

**History:** L. 1973, ch. 85, § 69; L. 1988, ch. 153, § 2; July 1. **Attorney General's Opinions:** Consumer credit insurance; property and liability insurance. 87-3.

#### **KANSAS COMMENT, 2000**

This section is directed against the practice of "tying" the grant of credit to the purchase of insurance from a particular insurer, through a particular agent, or the like. This practice is also prohibited by the NAIC model act. This section also requires the creditor to provide the consumer with written notice of his or her option under this section.

**K.S.A. 16a-4-110. (UCCC) Charge for insurance in connection with a refinancing or consolidation; duplicate charges.**

(1) A creditor may not contract for or receive a separate charge for insurance in connection with a refinancing (section 16a-2-504) or a consolidation (section 16a-2-505), unless:

- (a) The consumer agrees at or before the time of refinancing or consolidation that the charge may be made;
- (b) the consumer is or 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 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 16a-4-108); and
- (d) the charge does not exceed the amount permitted by this article (section 16a-4-107).

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

**History:** L. 1973, ch. 85, § 70; L. 1993, ch. 200, § 13; Jan. 1, 1994.

**KANSAS COMMENT, 2000**

A separate charge for insurance written in connection with a refinancing or a consolidation is permitted only if it has been agreed to by the debtor and bears an appropriate relation to the premium (K.S.A. 16a-4-107). No new charge may be made for coverage to which the debtor is already entitled. Actual termination of existing insurance is not required. Subsection (1)(b) recognizes that augmenting existing insurance coverage for a new separate charge is appropriate, but that "pyramiding" charges is not. Subsection (2) explicitly prohibits pyramiding.

**K.S.A. 16a-4-111. (UCCC) Cooperation between administrator and 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 jointly pursue investigations, prosecute suits, and take other official action, as may seem to them appropriate, if either of them is otherwise empowered to take the action. 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.

**History:** L. 1973, ch. 85, § 71; Jan. 1, 1974.

**KANSAS COMMENT, 2000**

Coordination of activities of creditors and insurers is essential to the provision of insurance related to consumer credit transactions. Accordingly, the public interest requires that officials charged with supervising credit practices and those concerned with related insurance practices coordinate their efforts. This section directs them to consult and work together in promoting compliance with this article with efficiency and economy. Compare the administrator's obligation to consult with and assist the authorities charged with supervision of supervised financial organizations under K.S.A. 16a-6-105.

**K.S.A. 16a-4-112. (UCCC) Administrative action of commissioner of insurance.**

(1) To the extent that the commissioner's responsibility under this article requires, the commissioner of insurance shall issue rules with respect to insurers, and with respect to

refunds (K.S.A. 16a-4-108, and amendments thereto), forms, schedules of premium rates and charges (K.S.A. 16a-4-203, and amendments thereto), and the commissioner's approval or disapproval thereof and, in case of violation, may make an order for compliance.

(2) Each provision on administrative procedures and judicial review of the article on administration (article 6) which applies to and governs administrative action taken by the administrator also applies to and governs all administrative action taken by the commissioner of insurance pursuant to this section.

**History:** L. 1973, ch. 85, § 72; L. 1999, ch. 107, § 25; July 1. **Attorney General's Opinions:** Consumer credit insurance; property and liability insurance. 87-3.

#### **KANSAS COMMENT, 2000**

Since Kansas never enacted the NAIC model act, subsection (1) is necessary to give the insurance commissioner the powers and duties needed to carry out the provisions of article 4. In addition, part 4 of article 6 sets forth administrative procedures to govern actions taken by the insurance commissioner under this section. See the Kansas comment to K.S.A. 16a-6-401.

## **Part 2**

### **CONSUMER CREDIT INSURANCE**

#### **K.S.A. 16a-4-201. (UCCC) 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 thirty (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) The originally scheduled term of the insurance shall extend at least until the due date of the last scheduled payment of the debt except as follows:

- (a) if the insurance relates to an open end credit account, the term need extend only until the payment of the debt under the account and may be sooner terminated after at least thirty (30) days' notice to the consumer; or
- (b) if the consumer is advised in writing that the insurance will be written for a specified shorter time, the term need extend only until the end of the specified time.

(3) The term of the insurance shall not extend more than fifteen (15) 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.

**History:** L. 1973, ch. 85, § 73; Jan. 1, 1974.

#### **KANSAS COMMENT, 2000**

1. The term of consumer credit insurance provided by a creditor should normally be the same as the term of the debt.

2. Subsection (1) permits postponement of the effective date of consumer credit insurance coverage until after the debt is incurred:

- (a) Under the preamble to subsection (1), when the debtor delays the application for the insurance -- coverage does not then become effective at least until the debtor applies for the insurance;
- (b) under subsection (1)(a), when the insurer requires the debtor to furnish evidence of insurability satisfactory to the insurer and the debtor does not furnish the evidence "until more than 30 days after the term would otherwise commence" -- coverage does not then become effective until the insurer determines the evidence of insurability to be satisfactory;
- (c) under subsection (1)(b), when the creditor newly provides insurance with respect to debt previously created -- coverage does not then become effective at least until the effective date of the policy.

3. However, under subsection (1), if evidence of insurability satisfactory to the insurer is required, and is furnished within "30 days after the term would otherwise commence," coverage becomes effective when the term of insurance would otherwise commence, e.g., the life of a debtor who, less than 30 days after becoming obligated to a creditor, furnishes evidence of insurability satisfactory to the insurer under a group policy insuring the lives of the creditor's debtors furnishing such evidence and who then dies is insured under the policy.

4. Subsection (2) specifies the circumstances when the term of consumer credit insurance need not extend to the due date of the last scheduled installment of the debt.

5. Subsection (3) limits, subject to the stated exceptions, the term of consumer credit insurance to 15 days after the scheduled due date of the last installment of the debt.

#### **K.S.A. 16a-4-202. (UCCC) Amount of insurance.**

(1) Except as provided in subsection (2),

- (a) in the case of consumer credit insurance providing life coverage, the amount of insurance may not initially exceed the debt and, if the debt is payable in installments, may not at any time exceed the greater of the scheduled or actual amount of the debt; or
- (b) in the case of any other consumer credit insurance, the total amount of periodic benefits payable may not exceed the total of scheduled unpaid installments of the debt, and the amount of any periodic benefit may not exceed the original amount of debt divided by the number of periodic installments in which it is payable.

(2) If consumer credit insurance is provided in connection with an open end credit account, the amounts payable as insurance benefits may be reasonably commensurate with the amount of debt as it exists from time to time. If consumer credit insurance is provided in connection with a commitment to grant credit in the future, the amounts payable as insurance benefits may be reasonably commensurate with the total from time to time of the amount of debt and the amount of the commitment.

**History:** L. 1973, ch. 85, § 74; L. 1988, ch. 85, § 9; July 1. **Attorney General's Opinions:** Consumer credit insurance; property and liability insurance. 87-3. Property and liability insurance. 87-47. Consumer credit insurance; amount of insurance. 88-13.

#### **KANSAS COMMENT, 2010**

1. Subsection (1) provides generally applicable limitations on the amounts of consumer credit insurance and benefits.

2. Subsection (2) provides more flexible limitations on the amounts of consumer credit insurance benefits necessary in connection with open end credit accounts and credit commitments.

3. Limitations of this kind are essential to the effectiveness of the requirement of K.S.A. 16a-4-203(2) that premium rates be reasonable in relation to the benefits provided by consumer credit insurance.

**K.S.A. 16a-4-203. (UCCC) 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 thirty (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 with the commissioner of insurance. Within thirty (30) days after the filing of any form or 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 provision 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.

**History:** L. 1973, ch. 85, § 75; Jan. 1, 1974. **Attorney General's Opinions:** Consumer credit insurance; amount of insurance. 88-13.

**KANSAS COMMENT, 2010**

1. This section gives the Kansas insurance commissioner the power to regulate credit life, accident and health insurance premium rates. See K.A.R. 40-5-107.

2. Subsection (3) facilitates insuring, as a group, the debtors of a creditor operating across state lines.

**Part 3**

**PROPERTY AND LIABILITY INSURANCE**

**K.S.A. 16a-4-301. (UCCC) Property insurance.**

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

(a) the insurance covers a substantial risk of loss of or damage to property related to the credit transaction;

(b) the amount, terms, and conditions of the insurance are reasonable in relation to the character and value of the property insured or to be insured; and

(c) the term of the insurance is reasonable in relation to the terms of credit.

(2) The term of the insurance is reasonable if it is customary and does not extend substantially beyond a scheduled maturity.

(3) A creditor may not contract for or receive a separate charge for insurance against loss of or damage to property unless property is purchased pursuant to a credit card or in a transaction pursuant to open end credit, or unless the amount financed exclusive of charges for the insurance is \$900 or more, and the value of the property is \$900 or more.

**History:** L. 1973, ch. 85, § 76; L. 1999, ch. 107, § 24; July 1. **Attorney General's Opinions:** Property insurance; damage to property unrelated to credit transaction. 86-42. Consumer credit insurance; property and liability insurance. 87-3. Property and liability insurance. 87-47

#### **KANSAS COMMENT, 2000**

1. The restrictions on property insurance imposed by subsection (1) are similar to those provided by retail installment sales acts in a number of states and basically track with the old Kansas sales finance act.

2. Subsection (2) permits reasonable flexibility so that the expiration of the term of property insurance need not coincide exactly with the scheduled maturity of the debt.

3. Subsection (3) prohibits a separate charge for property insurance when either the amount of debt or the value of the property to be insured is relatively small. Open end credit is exempted from this limitation.

#### **K.S.A. 16a-4-302. (UCCC) Insurance on creditor's interest only.**

If a creditor contracts for or 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 to the extent of any deficiency in the effective coverage of the insurance, even though the insurance covers only the interest of the creditor.

**History:** L. 1973, ch. 85, § 77; Jan. 1, 1974. **Attorney General's Opinions:** Consumer credit transaction; blanket single interest insurance programs. 89-54.

#### **KANSAS COMMENT, 2000**

This section prohibits a separate charge to the consumer for property insurance covering the creditor's interest in property unless the consumer also receives the benefit of the insurance to the extent he does not willfully cause the loss or damage, risk of which is insured. "Single interest" property insurance for which the creditor makes a separate charge to the consumer may not provide for subrogation of the insurer to the rights of the creditor as to any loss or damage not willfully caused by the consumer. See also K.S.A. 16a-2-501(2).

#### **K.S.A. 16a-4-303. (UCCC) Liability insurance.**

A creditor may not contract for or receive a separate charge for insurance against liability unless the insurance covers a substantial risk of liability arising out of the ownership or use of property related to the credit transaction.

**History:** L. 1973, ch. 85, § 78; Jan. 1, 1974.

#### **KANSAS COMMENT, 2000**

This section imposes restrictions with respect to liability insurance comparable to those imposed with respect to property insurance by subsection (1) of K.S.A. 16a-4-301.

#### **K.S.A. 16a-4-304. (UCCC) Cancellation by creditor.**

A creditor shall not request cancellation of a policy of property or liability insurance except after the consumer's default or in accordance with a written authorization by the consumer, and in either case the cancellation does not take effect until written notice is delivered to the consumer or mailed to him at his address as stated by him. The notice shall state that the policy may be cancelled on a date not less than ten (10) days after the notice is delivered, or, if the notice is mailed, not less than thirteen (13) days after it is mailed.

**History:** L. 1973, ch. 85, § 79; Jan. 1, 1974.

**KANSAS COMMENT, 2000**

This section requires advance written notice, by either the creditor or the insurer, of the prospective cancellation of property or liability insurance provided in connection with a consumer credit transaction. This section also applies to premium finance loans. See K.S.A. 16a-4-102(2).

## Article 5.--REMEDIES AND PENALTIES

### Part 1

#### LIMITATIONS ON CREDITORS' REMEDIES

##### **K.S.A. 16a-5-101. (UCCC) Short title.**

This article shall be known and may be cited as revised uniform consumer credit code-remedies and penalties.

**History:** L. 1973, ch. 85, § 80; Jan. 1, 1974.

##### **K.S.A. 16a-5-102. (UCCC) Scope.**

This part applies to actions or other proceedings to enforce rights arising from consumer credit transactions and, in addition, to extortionate extensions of credit (section 16a-5-107).

**History:** L. 1973, ch. 85, § 81; Jan. 1, 1974.

##### **KANSAS COMMENT, 2000**

K.S.A. 16a-1-201 states the territorial applicability of the U3C, and K.S.A. 16a-1-109 provides for the applicability of the U3C by written agreement. These sections should be consulted in determining the applicability of remedies and penalties in this article.

##### **K.S.A. 16a-5-103. (UCCC) Restrictions on deficiency judgments.**

(1) This section applies to a deficiency on a consumer credit sale of goods or services and on a consumer loan in which the lender is subject to defenses arising from sales (K.S.A. 16a-3-405, and amendments thereto); a consumer is not liable for a deficiency unless the creditor has disposed of the goods in good faith and in a commercially reasonable manner.

(2) If the seller repossesses or voluntarily accepts surrender of goods which were the subject of the sale and in which he has a security interest, the buyer is not personally liable to the seller for the unpaid balance of the debt arising from the sale of a commercial unit of goods of which the cash sale price was \$1,000 or less, and the seller is not obligated to resell the collateral unless the buyer has paid 60% or more of the cash price and has not signed after default a statement renouncing his rights in the collateral.

(3) If the seller repossesses or voluntarily accepts surrender of goods which were not the subject of the sale but in which the seller has a security interest to secure a debt arising from a sale of goods or services or a combined sale of goods and services and the cash price of the sale was \$1,000 or less, the buyer is not personally liable to the seller for the unpaid balance of the debt arising from the sale, and the seller's duty to dispose of the collateral is governed by the provisions on disposition of collateral (K.S.A. 84-9-610, and amendments thereto) of the uniform commercial code.

(4) If the lender takes possession or voluntarily accepts surrender of goods in which he has a security interest to secure a debt arising from a consumer loan in which the lender is subject to defenses arising from sales (K.S.A. 16a-3-405, and amendments thereto) and the net proceeds of the loan paid to or for the benefit of the debtor were \$1,000 or less, the debtor is not personally liable to the lender for the unpaid balance of the debt arising from the loan and the lender's duty to dispose of the collateral is governed by the

provisions on disposition of collateral (K.S.A. 84-9-610, and amendments thereto) of the uniform commercial code.

(5) For the purpose of determining the unpaid balance of consolidated debts or debts pursuant to open end credit, the allocation of payments to a debt shall be determined in the same manner as provided for determining the amount of debt secured by various security interests (K.S.A. 16a-3-303, and amendments thereto).

(6) The consumer may be liable in damages to the creditor if the consumer has wrongfully damaged the collateral or if, after default and demand, the consumer has wrongfully failed to make the collateral available to the creditor.

(7) If the creditor elects to bring an action against the consumer for a debt arising from a consumer credit sale of goods or services or from a consumer loan in which the lender is subject to defenses arising from sales (K.S.A. 16a-3-405, and amendments thereto), when under this section the creditor would not be entitled to a deficiency judgment if the creditor took possession of the collateral, and obtains judgment:

(a) The creditor may not take possession of the collateral, and

(b) the collateral is not subject to levy or sale on execution or similar proceedings pursuant to the judgment.

**History:** L. 1973, ch. 85, § 82; L. 2005, ch. 144, § 16; July 1.

#### **KANSAS COMMENT, 2010**

1. Where there has been a default with respect to a secured consumer credit transaction, the rights of the creditor and consumer are controlled by part 6 (Default) of UCC article 9 (K.S.A. 84-9-601, et seq.), except to the extent that such rights are changed by the U3C (see K.S.A. 84-9-201). Under the UCC, the creditor has the right to take possession of the collateral on default and may proceed without judicial process. K.S.A. 84-9-609. The creditor may then sell, lease or otherwise dispose of the collateral in public or private proceedings, and may buy at the foreclosure sale. The consumer is entitled to reasonable notification of the time and place of any public sale and reasonable notification of the time after which the collateral will be disposed of privately. K.S.A. 84-9-611. Proceeds are applied first to the expenses of repossession and disposition and then to satisfaction of the indebtedness. Any excess is paid to the consumer and the consumer is liable for any deficiency. K.S.A. 84-9-615. If the consumer has paid 60% of the cash price in the case of a sale or 60% of the principal in the case of a loan and, after default, has not signed a statement renouncing his or her rights, the creditor must dispose of the collateral. If the creditor fails to dispose of the collateral within 90 days after repossession the consumer may recover under K.S.A. 84-9-625. In all other cases the creditor may retain the collateral in satisfaction of the debt, if the consumer does not object after receipt of notification of the creditor's intention to do so. K.S.A. 84-9-620 and K.S.A. 84-9-622. The consumer has a right to redeem the collateral at anytime before disposition of the collateral or satisfaction of the obligation, by tendering fulfillment of all obligations secured by the collateral as well as expenses of the creditor. K.S.A. 84-9-623.

2. The provisions of the UCC outlined above are modified to some extent by this section with respect to proceedings to enforce rights arising from consumer credit sales and consumer loans in which the lender is subject to claims and defenses arising from sales and leases, or so-called "all in the family" loans. See K.S.A. 16a-3-405. For both types of transactions, subsection (1) adopts the position of the line of cases under the UCC that directly or indirectly deny the creditor a deficiency if the creditor has not disposed of the collateral in good faith and in a commercially reasonable manner. See, e.g., *Beneficial Finance Co. v. Reed*, 212 N.W.2d 454 (Iowa 1973).

Several Kansas cases have cited and discussed the rule of subsection (1); most, however, have found that the particular creditor disposed of the goods in a commercially reasonable manner and, therefore, was entitled to recover a deficiency. See, e.g., *Kelley v. Commercial National Bank*, 235 Kan. 45, 678 P.2d 620 (1984); *Medling v. Wecoe Credit Union*, 234 Kan. 852, 678 P.2d 1115 (1984). In *Topeka Datsun Motor Co. v. Stratton*, 12 Kan. App. 2d 95, 736 P.2d 82 (1987), the court held that failure to provide proper notice to the consumer under the UCC rules constituted failure to dispose of the collateral in a commercially reasonable manner and, as a

result, the creditor was barred from recovering a deficiency under the rule of this subsection.

3. Under subsection (2), with respect to a consumer credit sale in which the cash price is \$1,000 or less, a seller who repossesses or voluntarily accepts surrender of goods sold in which the creditor has a security interest may not obtain a deficiency judgment against the buyer if the proceeds on disposition of the goods are insufficient to pay the indebtedness and the expenses of the seller. The seller need not resell the goods unless the buyer has paid 60% of the cash price and, after default, has not signed a statement renouncing his or her rights in the collateral. In cases of sales of \$1,000 or less, this section gives to the seller the option of either suing for the unpaid balance or repossessing, but the creditor may not do both. The UCC concept of "commercial unit" is borrowed, see K.S.A. 84-2-105(6), and is intended to preclude the argument that subsection (2) is inapplicable to a consumer credit sale of a stove, a refrigerator, a washer, a dryer, and a TV set for a total cash price of more than \$1,000 when each of these "commercial units" does not separately cost more than \$1,000.

4. The seller may have a security interest in collateral other than goods sold in the consumer credit sale. The U3C allows the seller to take a security interest in collateral other than goods sold in certain limited circumstances. See K.S.A. 16a-3-301 and 16a-3-302, and the Kansas comments to those sections. In those cases, if the cash price of the sale is \$1,000 or less, the seller who repossesses or voluntarily accepts surrender of collateral may not obtain a deficiency judgment against the buyer. Subsection (3). The rights of the buyer with respect to compulsory disposition of collateral which was not the subject of the sale and recovery of any surplus on disposition are defined in the UCC. See K.S.A. 84-9-610 and 84-9-620.

5. Under subsection (4), if a lender makes a consumer loan in which the net proceeds paid to or for the benefit of the consumer are \$1,000 or less to enable the consumer to purchase goods under circumstances where the lender is subject to claims and defenses arising from the sale of goods (K.S.A. 16a-3-405) and, pursuant to a security interest acquired in the goods, repossesses or voluntarily accepts surrender of the goods, the lender may not obtain a deficiency judgment against the consumer if the proceeds on disposition of the goods are insufficient to pay the indebtedness and the expenses of the lender with respect to that loan. Whether the lender is subject to this restriction depends on whether the criteria for "all in the family" loans in K.S.A. 16a-3-405 are satisfied. The importance of these criteria is illustrated by *Central Finance Co., Inc. v. Stevens*, 221 Kan. 1, 558 P.2d 122 (1976), where a direct loan under \$1,000 was used by the consumer to buy a car. The loan was not an "all in the family" loan and, as a result, the lender was not precluded by this section from recovering a deficiency. However, if, for example, a consumer borrowed \$700 in a "direct loan" from a lender in corporate control of a dealer from whom the consumer purchased an item with the proceeds of the loan, the lender would be precluded from obtaining a deficiency against the consumer. See the definition of "person related to" in K.S.A. 16a-1-301(31).

6. Subsection (6) is designed to protect creditors against consumers who wrongfully damage collateral or who wrongfully refuse to surrender collateral. In addition to the right of the creditor to repossess the collateral, this subsection gives the creditor a right of action for damages for the loss of value of the collateral resulting from wrongful injury to the goods or, in the case of wrongful refusal to surrender the collateral, for any loss suffered by the creditor because of an inability to repossess.

7. Subsection (7) prohibits a creditor not entitled to a deficiency judgment under this section from achieving substantially the same result by first obtaining judgment for the debt and then levying on the collateral on execution.

8. It has been held that elimination of a deficiency judgment under this section is not an unconstitutional impairment of contract rights. See *Sanco Enterprises, Inc. v. Christian*, 495 P.2d 404 (Okla. Sup. Ct. 1972).

### **K.S.A. 16a-5-107. (UCCC) Extortionate extensions of credit.**

(1) If it is the understanding of the creditor and the consumer at the time an extension of credit is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person,

reputation, or property of any person, the repayment of the extension of credit is unenforceable through civil judicial processes against the consumer.

(2) If it is shown that an extension of credit was made at an annual rate exceeding thirty-six percent (36%) calculated according to the actuarial method and that the creditor then had a reputation for the use or threat of use of violence or other criminal means to cause harm to the person, reputation, or property of any person to collect extensions of credit or to punish the nonrepayment thereof, there is prima facie evidence that the extension of credit was unenforceable under subsection (1).

**History:** L. 1973, ch. 85, § 83; Jan. 1, 1974.

#### **KANSAS COMMENT, 2010**

1. This section is derived from 18 U.S.C. § 892, as added by title II of the TILA. It is intended to facilitate federal prosecutions with respect to making extortionate extensions of credit by providing one of the elements required for a prima facie case under the TILA provision referred to above, namely, that the repayment of the extension of credit would be unenforceable through civil judicial processes against the debtor. The federal rule sets the presumption of extortion at 45%, not at the 36% level used in this section. The uniform text of the U3C also uses 45%. Kansas' choice of 36% should have no effect on federal prosecutions, however, since the prima facie rule of this section would obviously apply to any federal prosecution of a lender who charged over 45%.

2. The effect of this section on Kansas law is to render unenforceable consumer loans above 36% when the specified elements of violence or other criminal means are present. Nothing in this section makes an extortionate extension of credit, in and of itself, a criminal offense under Kansas law. On the other hand, threats or other acts of violence directed toward consumer borrowers may themselves constitute crimes independent of this section. See also K.S.A. 16a-5-301(1), which imposes criminal liability on supervised lenders who make loans above the rates permitted by the U3C.

#### **K.S.A. 16a-5-108. (UCCC) Unconscionability; inducement by unconscionable conduct.**

(1) With respect to a consumer credit transaction, if the trier of fact finds

- (a) the agreement to have been unconscionable at the time it was made, or to have been induced by unconscionable conduct, the court may refuse to enforce the agreement, or
- (b) any clause of the agreement to have been unconscionable at the time it was made, the court may refuse to enforce the agreement, or may enforce the remainder of the agreement without the unconscionable clause, or may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) If it is claimed or appears to the trier of fact that the agreement or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its setting, purpose, and effect to aid the court in making the determination.

(3) For the purpose of this section, a charge or practice expressly permitted by this act is not unconscionable.

**History:** L. 1973, ch. 85, § 84; Jan. 1, 1974.

#### **KANSAS COMMENT, 2010**

1. Subsections (1) and (2) are derived in large part from the UCC. See K.S.A. 84-2-302. Contrary to the UCC, however, it is the trier of fact who determines whether a particular bargaining context or contract clause is unconscionable under the U3C. The trier of fact may be a judge or a jury. Under the KCPA, the determination of unconscionability is, as under the UCC, a

matter of law for the court. See K.S.A. 50-627(b). The model act also followed the UCC and made the issue of unconscionability one of law; as a result, the Kansas provision is nonuniform in this respect. Pursuant to subsection (2), the consumer has a right to choose a judge or jury as the trier of fact with respect to unconscionability claims in a consumer credit contract case. Pursuant to K.S.A. 16a-1-107, a consumer may not waive or agree to forego rights granted pursuant to the U3C. Additionally, K.S.A. 60-238 and Section 5 of the Bill of Rights in the Kansas Constitution provides that a right to a jury trial may not be waived. Since the right to a jury trial may not be waived pursuant to the U3C, K.S.A. 60-238 and the Kansas Constitution, a waiver of jury trial provision should not be included in a contract subject to the U3C.

2. Subsection (1) provides, as does the UCC (see K.S.A. 84-2-302), that a court can refuse to enforce or can adjust an agreement or part of an agreement that was unconscionable on its face at the time it was made. However, many agreements are not in and of themselves unconscionable according to their terms, but they would never have been entered into by a consumer if unconscionable means had not been employed to induce the consumer to agree to the contract. It would be a frustration of the policy against unconscionable contracts for a creditor to be able to utilize unconscionable acts or practices to obtain such an agreement. Consequently, subsection (1) also gives the court the power to refuse to enforce an agreement if the trier of fact finds that it was induced by unconscionable conduct. Finally, subsection (1) includes provisions for a determination of unconscionability in a transaction that a consumer is led to believe will give rise to a consumer credit transaction so that, for example, a seller cannot bind the consumer to a short term sale contract payable in a lump sum on the assurance that the seller will secure financing for the consumer, and then inform the consumer that financing is unavailable and keep the down payment or goods traded in as a penalty for nonpayment.

3. In subsection (2), the omission of the adjective "commercial" found in the UCC (see K.S.A. 84-2-302) from the provision concerning the presentation of evidence as to the contract's "setting, purpose, and effect" is deliberate. Unlike the UCC, this section is concerned only with transactions involving consumers, and the relevant standard of conduct for purposes of this section is not that which might be acceptable as between knowledgeable merchants but rather that which measures acceptable conduct on the part of a business person toward a consumer.

4. This section is intended to make it possible for the courts to police contracts or clauses which are found to be unconscionable or induced by unconscionable conduct. The basic test is whether, in the light of the background and setting of the market, the needs of the particular trade or case, and the condition of the particular parties to the conduct or contract, the conduct involved is, or the contract or clauses involved are so one-sided, or the bargaining power of the parties so unbalanced, as to be unconscionable under the circumstances existing at the time of the making of the contract. The particular facts involved in each case are of utmost importance since certain contracts or contractual provisions may be unconscionable in some situations but not in others. Inequality of bargaining power might be termed "procedural unconscionability" while unfair clauses in the fine print of a contract might be called "substantive unconscionability."

While this section does not contain a "laundry list" of factors to be considered in making the determination of unconscionability, the lists of factors provided in the KCPA, K.S.A. 50-627(b), and in the U3C in K.S.A. 16a-6-111, concerning the administrator's power to halt unconscionable conduct, may be looked to for guidance. Another useful and widely cited discussion can be found in *Wille v. Southwestern Bell Tel. Co.*, 219 Kan. 755, 549 P.2d 903 (1976). See also the discussion in *Paglia v. Elliott*, 373 N.W.2d 121 (Iowa 1985), discussing the unconscionability provision of the Iowa U3C; and *Besta v. Beneficial Loan Co. of Iowa*, 855 F.2d 532 (8th Cir. 1988), holding that it was unconscionable under the Iowa U3C for a finance company to arrange to finance a loan over a six-year period without informing the debtor that a three-year loan would have been cheaper. The following pre-U3C cases may also provide useful guidance. *Williams v. Walker-Thomas Furn. Co.*, 350 F.2d 445 (D.C. Cir. 1965); *American Home Improvement, Inc. v. MacIver*, 105 N.H. 435, 201 A.2d 886 (1964); *Unico v. Owen*, 50 N.J. 101, 232 A.2d 405 (1967); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); *Frostifresh Corp. v. Reynoso*, 54 Misc.2d 119, 281 N.Y.S.2d 964 (Supp. Ct. App. Term. 2d Dept. 1967), rev'g in part 52 Misc.2d 26, 274 N.Y.S.2d 757 (Nassau Co., 1966); *Steele v. J.I. Case Co.*, 197 Kan. 554, 419 P.2d 902 (1966).

5. Subsection (3) prohibits a finding that a charge or practice expressly permitted by the U3C

is in itself unconscionable. However, even though a practice or charge is authorized by the U3C, the totality of a particular creditor's conduct may show that the practice or charge is part of unconscionable conduct. Therefore, in determining unconscionability, the creditor's total conduct, including that part of the creditor's conduct which is in accordance with the provisions of the U3C, may be considered.

#### **K.S.A. 16a-5-109. (UCCC) Default.**

An agreement of the parties to a consumer credit transaction with respect to default on the part of the consumer is enforceable only to the extent that

- (1) the consumer fails to make a payment as required by agreement; or
- (2) the prospect of payment, performance, or realization of collateral is significantly impaired; the burden of establishing the prospect of significant impairment is on the creditor.

**History:** L. 1973, ch. 85, § 85; Jan. 1, 1974. **Attorney General's Opinions:** Definitions; supervised lender; supervised financial organization. 84-11.

#### **KANSAS COMMENT, 2010**

1. One of the vital terms of every consumer credit agreement is that which sets forth the criteria which will constitute default. By its nature "default" is not a term that is negotiated by the parties — it is generally controlled by the creditor. It is appropriate, therefore, that its content and implications be confined by the law so as to prevent abuse. This section is intended to accomplish that.

2. This section recognizes that there are two entirely distinct sets of circumstances which might constitute default on an installment obligation. The first and most common is the failure to pay an installment as required. A default of this type is susceptible of being cured by the consumer without impairing the continuing contractual relationship between the consumer and the creditor. See K.S.A. 16a-5-110. The second type of default relates to behavior of the consumer which endangers the prospect of a continuing relationship. It may be insolvency, illegal activity, or an impending removal of assets from the jurisdiction. There must, however, be circumstances present which significantly impair the relationship. Useful discussions of the types of factors and circumstances which constitute "significant impairment" can be found in *Johnson County Auto Credit, Inc. v. Green*, 277 Kan. 148, 83 P.2d 152 (2004); *Prairie State Bank v. Hoefgen*, 245 Kan. 236, 777 P.2d 811 (1989); and *Medling v. Wecoe Credit Union*, 234 Kan. 852, 678 P.2d 1115 (1984). The burden of proof is on the creditor to justify action on a claim of default of this type. This differs from the rule of UCC. See K.S.A. 84-1-208.

3. The "significant impairment" rule of subsection (2) prohibits so-called "insecurity clauses" under which default and acceleration can be called whenever the creditor in good faith feels "insecure." This also differs from the rule of UCC. See K.S.A. 84-1-208.

4. Under an administrative interpretation issued by the administrator, a demand or "call" feature may be included in non-real estate consumer loan agreements that are "interest only" — those in which the regularly scheduled payments are only of interest. See Administrative Interpretation No. 1001. This interpretation points out that calling for full payment in the middle of the regularly scheduled term (e.g., in the 30th month of a 48 month contract) would trigger the consumer's right to refinance the balloon payment under K.S.A. 16a-3-308.

#### **K.S.A. 16a-5-110. (UCCC) Notice of consumer's right to cure.**

(1) After a consumer has been in default for 10 days for failure to make a required payment in a consumer credit transaction payable in installments, a creditor may give the consumer the notice described in this section. A creditor gives notice to the consumer under this section when the creditor delivers the notice to the consumer or delivers or mails the notice to the address of the consumer's residence as provided in subsection (6) of K.S.A. 16a-1-201 and amendments thereto.

(2) The notice shall be in writing and shall conspicuously state: The name, address, and telephone number of the creditor to which payment is to be made, a brief description of the credit transaction, the consumer's right to cure the default, the amount of payment and date by which payment must be made to cure the default and the consumer's possible liability for the reasonable costs of collection, including, but not limited to, court costs, attorney fees and collection agency fees, as provided in K.S.A. 16a-2-507 and amendments thereto. A notice in substantially the following form complies with this section:

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(Name, address, and telephone number of creditor)

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(Account number, if any)

---

(Brief description of credit transaction)

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(Date) is the LAST DAY FOR PAYMENT

---

(Amount) is the AMOUNT NOW DUE

You are late in making your payment(s). If you pay the AMOUNT NOW DUE (above) by the LAST DAY FOR PAYMENT (above), you may continue with the contract as though you were not late. If you do not pay by this date, we may exercise our rights under the law. You may be obligated to pay reasonable costs of collection, including, but not limited to, court costs, attorney fees and collection agency fees, except that such costs of collection: (1) May not include costs that were incurred by a salaried employee of the creditor or its assignee; (2) may not include the recovery of both attorney fees and collection agency fees; and (3) shall not be in excess of 15% of the unpaid debt after default.

If you are late again in making your payments, we may exercise our rights without sending you another notice like this one. If you have questions, write or telephone the creditor promptly.

**History:** L. 1973, ch. 85, § 86; L. 1974, ch. 91, § 2; L. 1994, ch. 276, § 2; July 1.

**KANSAS COMMENT, 2010**

1. This section must be read in conjunction with the preceding section (K.S.A. 16a-5-109 — default) and the following section (K.S.A. 16a-5-111— cure of default). K.S.A. 16a-5-109 delineates the legal criteria for default and recognizes that a default consisting of the failure to make a payment as required by the agreement is susceptible of being cured by the consumer without impairing the continuing contractual relationship between the consumer and the creditor. This section then provides for a notice which may be sent to the consumer in the case of a failure in payment. The notice may be given at any time after the payment is more than ten days late. This is the same point at which the creditor may be entitled to assess a delinquency charge under K.S.A. 16a-2-502. The notice is calculated to give the consumer enough information to understand the predicament and to encourage the consumer to take appropriate steps to alleviate it. For example, if a consumer misses an installment payment due on April 10, the creditor must wait until April 20, at which point the creditor may send the consumer a written notice indicating the default and the amount due. The "last day for payment" would be shown as May 10, the end

of the cure period as provided in K.S.A. 16a-5-111. The notice must also mention the potential liability of the consumer for the collection agency fee or attorneys' fees of the creditor.

2. The notice must be correct. In *Farmers State Bank v. Haflich*, 10 Kan. App. 2d 333, 699 P.2d 533 (1985), the creditor violated this section by giving notice for the entire amount of the indebtedness rather than merely for past due installments. Note that K.S.A. 16a-5-111 provides that a default consisting of a failure to make a required payment may be cured by the consumer by making that payment before the expiration of the minimum period prescribed after written notice of the default, and that prior to that time the creditor may not proceed against goods that are collateral or accelerate the maturity of the unpaid debt. Repossession in the face of an improper notice, or before the cure period expires, entitles the consumer to damages for wrongful repossession and possibly for conversion. See *Farmers State Bank v. Haflich*, supra. This provision prevents the practice of some unscrupulous creditors who repossess collateral when a payment is only a day or two late. It also gives the average consumer the opportunity to rehabilitate an account, bring a billing error to the attention of, or present a breach of warranty claim to, the creditor, or negotiate a refinancing arrangement that may be required by a change in the consumer's financial circumstances.

3. The notice and right to cure provisions of this and the following sections apply only if the default is in the failure to make a required installment payment, and not to a default arising from significant impairment of the relationship under the previous section. This is because, unlike a late payment, a breakdown in the relationship between the consumer and the creditor which constitutes "significant impairment" cannot be cured. See *Johnson County Auto Credit, Inc. v. Green*, 277 Kan. 148, 83 P.2d 152 (2004); *Prairie State Bank v. Hoefgen*, 245 Kan. 236, 777 P.2d 811 (1989); *Medling v. Wecoe Credit Union*, 234 Kan. 852, 678 P.2d 1115 (1984). In addition, the cure provisions do not apply to a lump sum loan, i.e., a loan not "payable in installments." See *First National Bank of Shawnee Mission v. Hundley*, 12 Kan. App. 2d 487, 748 P.2d 903 (1988). In addition, it has been held that the debtor waives the right to cure default by filing a voluntary petition in bankruptcy. See *In re Schwarting*, 671 F.2d 1192 (8th Cir. 1982), construing the Iowa version of the uniform act.

### **K.S.A. 16a-5-111. (UCCC) Cure of default.**

(1) This section applies to consumer credit transactions.

(2) Except as provided in subsection (3), after a default consisting only of the consumer's failure to make a required payment in a consumer credit transaction payable in installments, a creditor may neither accelerate maturity of the unpaid balance of the obligation nor take possession of collateral because of that default until 20 days after a notice of the consumer's right to cure (K.S.A. 16a-5-110, and amendments thereto) is given. Until 20 days after the notice is given, the consumer may cure all defaults consisting of a failure to make the required payment by tendering the amount of all unpaid sums due at the time of the tender, without acceleration, plus any unpaid delinquency charges. Cure restores the consumer to the consumer's rights under the agreement as though the defaults had not occurred.

(3) With respect to defaults on the same obligation after a creditor has once given a notice of consumer's right to cure (K.S.A. 16a-5-110, and amendments thereto), this section gives the consumer no right to cure and imposes no limitation on the creditor's right to proceed against the consumer or the collateral.

**History:** L. 1973, ch. 85, § 87; L. 1974, ch. 91, § 3; L. 2005, ch. 144, § 17; July 1.

### **KANSAS COMMENT, 2000**

*Editor's reminder:*

*Comments do not include analysis of any statutory amendments that occurred after the 2000 Legislative Session.*

1. As noted in the Kansas comment to the preceding section, the creditor must wait 20 days after sending the notice provided for in K.S.A. 16a-5-110; no acceleration of the unpaid balance

or repossession of the collateral may take place until the 20-day grace period expires. If, before that time, the consumer pays the missing installment, plus any unpaid delinquency or other charges, the default has been "cured" and the consumer's prior status is restored.

2. This section imposes no limitation on the creditor's right to proceed against a consumer or goods that are collateral with respect to successive defaults on the same obligation. If the consumer misses another installment after once curing a default, subsection (3) makes it clear that the creditor can accelerate and repossess as permitted by the UCC. In addition, as noted in the Kansas comment to K.S.A. 16a-5-110, the right to cure applies only to defaults consisting of missed installment payments; there is no right to cure a default arising from an act constituting a significant impairment of the relationship.

### **K.S.A. 16a-5-112. (UCCC) Creditor's right to take possession after default.**

Upon default by a consumer, unless the consumer voluntarily surrenders possession of the collateral to the creditor, the creditor may take possession of the collateral without judicial process only if possession can be taken without entry into a dwelling and without the use of force or other breach of the peace.

**History:** L. 1973, ch. 85, § 88; Jan. 1, 1974.

### **KANSAS COMMENT, 2010**

1. Under the UCC, a secured creditor has the right to take possession of collateral without resorting to legal process if it can be done without a "breach of the peace." K.S.A. 84-9-609. This term is generally left to case law definition, but it raises delicate problems when it comes to repossessing furniture or other property that is within a home or apartment. The disputes that result from such a situation are rarely the type that get to the appellate courts for resolution. It is necessary, therefore, to make it clear that dwellings cannot be entered absent the consent of the occupants except under the supervision of the court. This section is subject to the limitations imposed by the preceding sections. That is, the creditor may not take possession of the collateral until after there has been a default (K.S.A. 16a-5-109) and the consumer has been given the notice and right to cure provided by K.S.A. 16a-5-110 and 16a-5-111.

2. If, instead of exercising self-help, the creditor opts to bring a replevin action under K.S.A. 60-1005 and 60-1006, the notice and hearing safeguards now found in those provisions will of course come into play. Here, too, however, the creditor may proceed in replevin only after default under K.S.A. 16a-5-109 and only after the notice and right to cure requirements to K.S.A. 16a-5-110 and 16a-5-111 have been satisfied.

## **Part 2**

### **CONSUMERS' REMEDIES**

### **K.S.A. 16a-5-201. (UCCC) Effect of violations on rights of parties.**

(1) If a creditor has violated the provisions of this act applying to collection of excess charges or enforcement of rights (subsection (4) of section 16a-1-201), restrictions on interests in land as security (section 16a-2-307), limitations on the schedule of payments or loan terms for supervised loans (section 16a-2-308), attorney's fees (section 16a-2-507), security in sales and leases (section 16a-3-301), assignments of earnings (section 16a-3-305), authorizations to confess judgment (section 16a-3-306), certain negotiable instruments prohibited (section 16a-3-307), assignees subject to defenses (section 16a-3-404), credit card issuer subject to defenses (section 16a-3-403), or limitations on default charges (section 16a-3-402), the consumer has a cause of action to recover actual damages and in addition a right in an action other than a class action to recover

from the person violating such provisions of this act a penalty in an amount determined by the court not less than \$100 nor more than \$1,000. With respect to violations arising from sales or loans made pursuant to open end credit, no action pursuant to this subsection may be brought more than two years after the violations occurred. With respect to violations arising from other consumer transactions, no action pursuant to this subsection may be brought more than one year after the due date of the last scheduled payment of the agreement.

(2) If a creditor has violated the provisions of this act applying to authority to make supervised loans (section 16a-2-301), the loan is void and the consumer is not obligated to pay either the amount financed or finance charge. If the consumer has paid any part of the amount financed or of the finance charge, the consumer has a right to recover the payment from the person violating this act or from an assignee of that person's rights who undertakes direct collection of payments or enforcement of rights arising from the debt. With respect to violations arising from loans made pursuant to open end credit, no action pursuant to this subsection may be brought more than two years after the violation occurred. With respect to violations arising from other loans, no action pursuant to this subsection may be brought more than one year after the due date of the last scheduled payment of the agreement pursuant to which the charge was paid. Persons subject to the penalties in this subsection shall not include attorneys or collection agencies who do not purchase a consumer obligation.

(3) A consumer is not obligated to pay a charge in excess of that allowed by this act, and if the consumer has paid an excess charge the consumer has a right to a refund of twice the excess charge. A refund may be made by reducing the consumer's obligation by twice the amount of the excess charge. If the consumer has paid an amount in excess of the lawful obligation under the agreement, the consumer may recover twice the excess amount from the person who made the excess charge or from an assignee of that person's rights who undertakes direct collection of payments from or enforcement of rights against debtors arising from the debt. Persons subject to the penalties in this subsection shall not include attorneys or collection agencies who do not purchase a consumer obligation.

(4) If a creditor has contracted for or received a charge in excess of that allowed by this act, or if a consumer is entitled to a refund and a person liable to the consumer refuses to make a refund within a reasonable time after demand, the consumer may recover from the creditor or the person liable in an action other than a class action a penalty in an amount determined by the court not less than \$100 or more than \$1,000. With respect to excess charges arising from sales or loans made pursuant to open end credit, no action pursuant to this subsection may be brought more than two years after the time the excess charge was made. With respect to excess charges arising from other consumer credit transactions no action pursuant to this subsection may be brought more than one year after the due date of the last scheduled payment of the agreement pursuant to which the charge was made. Persons subject to the penalties in this subsection shall not include attorneys or collection agencies who do not purchase a consumer obligation.

(5) Except as otherwise provided, no violation of the provisions of K.S.A. 16a-1-101 through 16a-9-102, and amendments thereto, impairs rights on a debt.

(6) A creditor has no liability for a penalty under subsection (1) or subsection (4) if within 15 days after discovering an error, and prior to the institution of an action under this section or the receipt of written notice of the error, the creditor notifies the person concerned of the error and corrects the error. If the violation consists of a prohibited agreement, giving the consumer a corrected copy of the writing containing the error is

sufficient notification and correction. If the violation consists of an excess charge, correction shall be made by an adjustment or refund.

(7) If the creditor establishes by a preponderance of evidence that a violation is unintentional or the result of a bona fide error of law or fact notwithstanding the maintenance of procedures reasonably adapted to avoid any such violation or error, no liability is imposed under subsections (1), (2), and (3), the validity of the transaction is not affected, and no liability is imposed under subsection (4) except for refusal to make a refund.

(8) In an action in which it is found that a creditor has violated any provision of K.S.A. 16a-1-101 through 16a-9-102, and amendments thereto, the court shall award to the consumer the costs of the action and to the consumer's attorneys their reasonable fees. Reasonable attorney's fees shall be determined by the value of the time reasonably expended by the attorney and not by the amount of the recovery on behalf of the consumer.

(9) A creditor who in good faith complies with a written administrative interpretation shall not be subject to any penalties under this section for any act done or omitted in conformity with such written administrative interpretation.

**History:** L. 1973, ch. 85, § 89; L. 1992, ch. 80, § 2; July 1. **Attorney General's Opinions:** Recovery by the administrator. 80-122.

#### **KANSAS COMMENT, 2010**

1. Rights that are accompanied by inadequate remedies or no remedy at all and limitations on agreements and practices that do not provide for sufficient penalties or for any penalty at all are generally ineffective to accomplish the desired result. They become little more than exhortatory, easily ignored, and meaningless proclamations. In order to protect rights created and to deter provisions of agreements and practices proscribed by legislation, suitable remedies and penalties must exist. Since an aggrieved party is one of the persons best able to enforce violations of rights and limitations, this section sets forth a right of action in the consumer in the event of violation by the creditor of each section of the U3C that does not include its own provision for infraction and, better to deter such practices, even of some that do, as in the case of restrictions on land as security (K.S.A. 16a-2-307).

2. Subsection (1) lists eleven provisions of the U3C for the contravention of which actual damages and a penalty may be recovered. The formula used for the penalty is derived from TILA 15 U.S.C.A. § 1640, with a minimum and a maximum recovery. Within this range, a court may apportion penalties according to the seriousness of the offense and the overall circumstances of each violation. These civil penalties attach irrespective of the fact that the consumer has suffered no monetary damage. They are designed to encourage individual consumers to serve as their own "private attorneys general" in order that the U3C may be vigorously enforced. Thus, the penalties are designed not only to provide a deterrent to potential violators but also an incentive to consumers to bring an action when a violation has occurred. In *Credit Union One of Kansas v. Stamm*, 254 Kan. 367, 867 P.2d 285 (1994), the court held that a contract provision in a consumer credit transaction authorizing the creditor to recover attorney fees to the extent authorized by law, did not violate the prohibition in K.S.A. 16a-2-507 (overruling *Halloran v. North Plaza State Bank*, 17 Kan.App.2d 840, 844 P.2d 764 (1993)). Given its strong minimum civil penalty approach, subsection (1) also provides for a relatively short statute of limitations: one year after the last installment is due under a closed end contract and two years after the violation occurs under open end credit.

3. Subsection (2) describes the remedy available to the consumer when a loan with an annual percentage rate exceeding 12% is made by a person not authorized to make such a loan. The remedy is to void the transaction and allow the consumer to retain the proceeds.

4. Subsections (3) and (4) set forth the rights of the consumer with respect to excess charges by a creditor. The penalty is recovery of twice the amount of the excess charge (subsection (3)) as well as the \$100 minimum civil penalty (subsection (4)) provided for in subsection (1). As in subsection (1), a short statute of limitations is provided and attorneys or collection agencies are

insulated from liability so long as they did not purchase the usurious obligation. An excess charge might arise when the consumer credit transaction expressly provides for a finance charge in excess of what is allowable under the U3C. It might also arise indirectly, as when the creditor improperly uses multiple agreements in violation of K.S.A. 16a-3-304.

5. Under subsection (5), except in cases where the obligation is expressly voided by the U3C (as, for example, in cases involving unlicensed loans under K.S.A. 16a-2-301, referral sales under K.S.A. 16a-3-309, or extortionate loans under K.S.A. 16a-5-107), the creditor may enforce an otherwise valid obligation even though the creditor has violated one of the provisions of the U3C. For example, a creditor suing to enforce an installment contract would, if the installment contract form included a negotiable note, simply face a counterclaim based on the civil penalties in subsection (1). See K.S.A. 16a-5-202.

6. Subsection (6) provides that if the creditor voluntarily notifies the consumer of the error and corrects the error within 15 days after discovering it, the creditor is not subject to a penalty. Such a provision encourages the autonomous correction of errors and violations. Voluntariness is considered to cease, however, either upon the commencement of an action against the creditor or upon the creditor's receipt of written notification from the consumer of the violation.

Acts done or omitted in conformity with a written administrative interpretation of the administrator result in no liability under the U3C except for refund of an excess charge. See subsection (9) and K.S.A. 16a-6-104(4).

7. Subsection (8) directs the court to award to the consumer the costs of the action and to the consumer's attorneys their reasonable fees in any action where it is found that a creditor has violated the U3C. The direction to award attorney's fees should enable consumers to find attorneys to prosecute their cases, an essential element if the consumers' rights provided by the U3C are to be enforced, as an attorney is assured of adequate compensation. This subsection applies whether or not the particular violation is one of those enumerated in subsection (1). For example, in *Topeka Datsun Motor Co. v. Stratton*, 12 Kan. App. 2d 95, 736 P.2d 82 (1987), the court awarded attorney's fees in a case involving a failure to conduct a commercially reasonable resale in violation of K.S.A. 16a-5-103; and in *Farmers State Bank v. Haflich*, 10 Kan. App. 2d 333, 699 P.2d 553 (1985), an award was made in a case involving a violation of the notice and right to cure rules of K.S.A. 16a-5-110 and 16a-5-111. The court in both cases also held that an award of attorney's fees under this subsection is mandatory. Thus, the trial court has no discretion to refuse to consider the consumer's motion for attorney's fees.

8. The U3C provides for other remedies in addition to those set forth in this section. For example, the consumer has a defense to the enforcement of a transaction which violates K.S.A. 16a-5-107 on extortionate extensions of credit. K.S.A. 16a-5-108 gives a consumer a remedy in certain cases of unconscionability.

In addition to the foregoing individual consumers' remedies, the U3C provides for actions by the administrator for the benefit of consumers. The administrator may issue cease and desist orders with respect to violations of the U3C or may bring civil actions to restrain violations of it. See K.S.A. 16a-6-108 and 16a-6-110. The administrator may also bring a civil action against a creditor to recover actual damages sustained and excess charges paid by one or more consumers who have a right to recover explicitly granted by the U3C, but not for penalties, and amounts recovered shall be paid to each consumer or set off against such consumer's obligation. K.S.A. 16a-6-113. K.S.A. 16a-6-111 provides for civil actions by the administrator for injunctions against a course of making unconscionable agreements or of fraudulent or unconscionable conduct.

Finally, in addition to the individual consumers' remedies and remedies of the administrator described above, the consumer may have other remedies based on general principles of law or equity, or based on the provisions of other applicable law such as the KCPA. See K.S.A. 16a-1-103 and 16a-6-115. Also, damages or penalties to which a consumer is entitled may be set off against the consumer's obligation, and may be raised as a defense to an action on the obligation without regard to the time limitations prescribed by this section. See K.S.A. 16a-5-202.

### **K.S.A. 16a-5-202. (UCCC) Refunds and penalties as setoff to obligation.**

Refunds or penalties to which the consumer is entitled pursuant to this part may be set off against the consumer's obligation, and may be raised as a defense to a suit on the obligation without regard to the time limitations prescribed by this part.

**History:** L. 1973, ch. 85, § 90; Jan. 1, 1974.

#### **KANSAS COMMENT, 2000**

As noted in the Kansas comment to the preceding section, this section permits a consumer to set off damages or penalties to which the consumer may be entitled against the consumer's obligation, without regard to the time limitations prescribed by other sections in this part. The policy of this section was stated in *Valley View State Bank v. Caulfield*, 11 Kan. App. 2d 601, 731 P.2d 316 (1987), as follows: "Without 16a-5-202, a creditor who had committed a violation could wait one year under the closed end contract, and two years under open end credit, and commence an action and not be concerned with any violations." 631 P.2d at 318. In *Caulfield*, the court also held that the term "obligation," as used in this section, refers only to the note or contract on which suit is brought, and not to prior notes which were consolidated or renewed into the current note. As a result, violations which had occurred in the prior notes and which were now time-barred could not be raised.

#### **K.S.A. 16a-5-203. (UCCC) Civil liability for violation of disclosure provisions.**

(1) Except as otherwise provided in this section, a creditor who, in violation of the provisions of the rules and regulations adopted by the administrator pursuant to K.S.A. 16a-6-117, and amendments thereto, fails to disclose information to a person entitled to the information under the provisions of K.S.A. 16a-1-101 through 16a-9-102, and amendments thereto, is liable to that person in an amount equal to the sum of:

- (a) Twice the amount of the finance charge in connection with the transaction, but the liability pursuant to this paragraph shall be not less than \$200 or more than \$2,000; and
- (b) in the case of a successful action to enforce the liability under paragraph (a), the costs of the action together with reasonable attorney's fees as determined by the court.

(2) A creditor has no liability under this section if within 15 days after discovering an error, and prior to the institution of an action under this section or the receipt of written notice of the error, the creditor notifies the person concerned of the error and makes whatever adjustments in the appropriate account are necessary to assure that the person will not be required to pay a credit service charge or loan finance charge in excess of the amount or percentage rate actually disclosed.

(3) A creditor may not be held liable in any action brought under this section for a violation of the provisions of K.S.A. 16a-1-101 through 16a-9-102, and amendments thereto, if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error.

(4) Any action which may be brought under this section against the original creditor in any credit transaction involving a security interest in land may be maintained against any subsequent assignee of the original creditor where the assignee, its subsidiaries, or affiliates were in a continuing business relationship with the original creditor either at the time the credit was extended or at the time of the assignment, unless the assignment was involuntary, or the assignee shows by a preponderance of evidence that it did not have reasonable grounds to believe that the original creditor was engaged in violations of this act and that it maintained procedures reasonably adapted to apprise it of the existence of the violations.

(5) No action pursuant to this section may be brought more than one year after the date of the occurrence of the violation.

(6) The liability of the creditor under this section is in lieu of and not in addition to the creditor's liability under the federal truth in lending act; no action with respect to the same violation may be maintained pursuant to both this section and the federal truth in lending act.

**History:** L. 1973, ch. 85, § 91; L. 1981, ch. 93, § 15; L. 1988, ch. 85, § 10; L. 1999, ch. 107, § 26; July 1.

#### **KANSAS COMMENT, 2010**

1. This section is derived from TILA 15 U.S.C.A. § 1640. It is intended to allow fulfillment of the demand of that statute that under state law classes of credit transactions be subject to requirements substantially similar to those imposed by the TILA and that adequate provision for enforcement exist if the state wishes to apply for an exemption from the TILA with respect to federal truth in lending. Subsections (1) through (5), consequently, are modeled on the federal provisions. Subsection (6) precludes double liability if a creditor is sued both under this section and under the TILA.

2. The disclosure requirements of the TILA are incorporated into the U3C pursuant to K.S.A. 16a-3-206 and 16a-6-117 and K.A.R. 75-6-26.

### **Part 3**

#### **CRIMINAL PENALTIES**

##### **K.S.A. 16a-5-301. (UCCC) Intentional violations; penalties.**

(1) It is unlawful for any person to violate any of the provisions of this act, any rule and regulation adopted or order issued under this act. A conviction for an intentional violation is a class A nonperson misdemeanor. A second or subsequent conviction of this subsection is severity level 7 nonperson felony. No person may be imprisoned for the violation of this section if such person proves that such person had no knowledge of the rule and regulation or order.

(2) The criminal liability of a person under this section is in lieu of and not in addition to the creditor's criminal liability under the federal truth in lending act. No prosecution of a person with respect to the same violation may be maintained pursuant to both this section and the federal truth in lending act.

(3) A person, other than a supervised financial organization or an attorney or collection agency who does not purchase the credit obligation, who willfully engages in the business of entering into consumer credit transactions, or of taking assignments of rights against consumers arising therefrom and undertakes direct collection of payments or enforcement of these rights, without complying with the provisions of this act concerning notification (K.S.A. 16a-6-202, and amendments thereto) or payment of fees (K.S.A. 16a-6-203, and amendments thereto), is guilty of a class A misdemeanor and upon conviction thereof shall be punished in the manner provided by law.

**History:** L. 1973, ch. 85, § 92; L. 1999, ch. 107, § 27; July 1.

#### **KANSAS COMMENT, 2010**

Any intentional violation of any provision of the U3C or any rule, regulation or order issued under it is a criminal offense.

## Article 6.--ADMINISTRATION

### Part 1

#### POWERS AND FUNCTIONS OF ADMINISTRATOR

##### **K.S.A. 16a-6-101. (UCCC) Short title.**

This article shall be known and may be cited as revised uniform consumer credit code-administration.

**History:** L. 1973, ch. 85, § 94; Jan. 1, 1974.

##### **KANSAS COMMENT, 2000**

In order to obtain the administration essential to the effectiveness of the U3C, all powers of administration are centralized in a single office, that of the deputy commissioner of the consumer and mortgage lending division of the Office of the State Bank Commissioner. See K.S.A. 16a-1-301(2). The deputy commissioner is appointed by the bank commissioner under K.S.A. 75-3135. The powers, duties, and other functions of the deputy commissioner, as administrator of the U3C, are spelled out by this part. See especially K.S.A. 16a-6-104. Note, however, that the Kansas commissioner of insurance also participates in the administration of article 4 of the U3C relating to credit insurance. See K.S.A. 16a-4-111 and K.S.A. 16a-4-112.

##### **K.S.A. 16a-6-102. (UCCC) Applicability.**

This part applies to persons who in this state

- (1) make or solicit consumer credit transactions; or
- (2) directly collect payments from or enforce rights against consumers arising from consumer credit transactions, wherever they are made.

**History:** L. 1973, ch. 85, § 95; Jan. 1, 1974.

##### **KANSAS COMMENT, 2010**

The Kansas Comment, 2000 in the K.S.A. bound volume is no longer valid.

##### **K.S.A. 16a-6-104. (UCCC) Powers of administrator; reliance on rules and regulations; written administrative interpretations.**

This act shall be administered by the consumer credit commissioner of Kansas who is also referred to as the administrator.

(1) In addition to other powers granted by this act, the administrator within the limitations provided by law may:

- (a) Receive and act on complaints, take action designed to obtain voluntary compliance with the provisions of K.S.A. 16a-1-101 to 16a-9-102, inclusive, and amendments thereto, or commence proceedings on the administrator's own initiative;
- (b) counsel persons and groups on their rights and duties under K.S.A. 16a-1-101 to 16a-9-102, inclusive, and amendments thereto;
- (c) establish programs for the education of consumers with respect to credit practices and problems and as a condition in settlements of investigations or examinations, the administrator may receive a payment designated for

- consumer education to be expended as directed by the administrator for such purpose;
- (d) make studies appropriate to effectuate the purposes and policies of K.S.A. 16a-1-101 to 16a-9-102, inclusive, and amendments thereto;
  - (e) adopt, amend and revoke rules and regulations to carry out the specific provisions of K.S.A. 16a-1-101 to 16a-9-102, inclusive, and amendments thereto, and to implement the requirements of the secure and fair enforcement for mortgage licensing act of 2008 (P.L. 110-289);
  - (f) issue, amend and revoke written administrative interpretations. Such written administrative interpretations shall be approved by the attorney general and published in the Kansas register within 15 days of issuance. The administrator shall annually publish all written administrative interpretations in effect;
  - (g) maintain offices within this state; and
  - (h) appoint any necessary attorneys, hearing examiners, clerks, and other employees and agents and fix their compensation, and authorize attorneys appointed under this section to appear for and represent the administrator in court;
  - (i) examine periodically at intervals the administrator deems appropriate the loans, business and records of every licensee, registrant or person filing notification pursuant to K.S.A. 16a-6-201 through 16a-6-203, and amendments thereto, except licensees which are supervised financial organizations. The official or agency responsible for the supervision of each supervised financial organization shall examine the loans, business and records of each such organization in the manner and periodically at intervals prescribed by the administrator. In addition, for the purpose of discovering violations of K.S.A. 16a-1-101 through 16a-9-102, and amendments thereto, or securing information lawfully required, the administrator or the official or agency to whose supervision the organization is subject to K.S.A. 16a-6-105, and amendments thereto, may at any time investigate the loans, business and records of any supervised lender. For examination purposes the administrator shall have free and reasonable access to the offices, places of business and records of the lender, registrant or person filing notification and the administrator may control access to any documents and records of a licensee, registrant or person filing notification under examination;
  - (j) refer such evidence as may be available concerning violations of this act or of any rule and regulation or order to the attorney general or the proper county or district attorney, who may in the prosecutor's discretion, with or without such a reference, institute the appropriate criminal proceedings under this act. Upon receipt of such reference, the attorney general or the county attorney or district attorney may request that a duly employed attorney of the administrator prosecute or assist in the prosecution of such violation on behalf of the state. Upon approval of the administrator, such employee shall be appointed special prosecutor for the attorney general or the county attorney or district attorney to serve without compensation from the attorney general or the county attorney or district attorney. Such special prosecutor shall have all the powers and duties prescribed by law for assistant attorneys general or assistant county or district attorneys, and such other powers and duties as are lawfully delegated to such special prosecutors by the attorney general or the county attorney or district attorney;

- (k) if deemed necessary by the administrator, require fingerprinting of any applicant, licensee, members thereof if a copartnership or association, or officers and directors thereof if a corporation, or any agent or other person acting on their behalf. The administrator, or the administrator's designee, may submit such fingerprints to the Kansas bureau of investigation, federal bureau of investigation, or other law enforcement agency for the purposes of verifying the identity of such persons and obtaining records of their criminal arrests and convictions. For purposes of this section and in order to reduce the points of contact which the federal bureau of investigation may have to maintain with the individual states, the administrator may use the nationwide mortgage licensing system and registry as a channeling agent for requesting information from and distributing information to the department of justice or any governmental agency;
- (l) exchange information regarding the administration of this act with any agency of the United States or any state which regulates the licensee, registrant or person required to file notification, or who administers statutes, rules and regulations or other programs related to consumer credit and to enter into information sharing arrangements with other governmental agencies or associations representing governmental agencies which are deemed necessary or beneficial to the administration of this act;
- (m) require that any applicant, licensee, registrant or other person complete a minimum number of prelicensing education hours and complete continuing education hours on an annual basis. Prelicensing and continuing education courses shall be approved by the administrator or the administrator's designee and may be made a condition of the application approval and renewal;
- (n) require that any applicant, licensee, registrant or other person successfully pass a standardized examination designed to establish such person's knowledge of residential mortgage loan origination transactions and all applicable state and federal law. Such examinations shall be created and administered by the administrator or the administrator's designee and may be made a condition of application approval;
- (o) use the nationwide mortgage licensing system and registry as a channeling agent for requesting and distributing any information regarding residential mortgage loan originator registration or supervised lender licensing to and from any source so directed by the administrator;
- (p) establish relationships or contracts with the nationwide mortgage licensing system and registry or other entities to collect and maintain records and process transaction fees or other fees related to applicants, licensees, registrants or other persons subject to the act and to take such other actions as may be reasonably necessary to participate in the nationwide mortgage licensing system and registry. The administrator shall regularly report violations of law, as well as enforcement actions and other relevant information, to the nationwide mortgage licensing system and registry, and make publicly available the proposed budget, fees, and audited financial statements of the nationwide mortgage licensing system and registry as may be prepared by the nationwide mortgage licensing system and registry and provided to the administrator;
- (q) require that any residential mortgage loan originator applicant, registrant or other person successfully pass a standardized examination designed to establish such person's knowledge of mortgage transactions and all

applicable state and federal law. Such examinations shall be created and administered by the administrator or the administrator's designee, and may be made a condition of application approval or application renewal;

- (r) require that any mortgage loan originator applicant, registrant or other person complete a minimum number of prelicensing education hours and complete continuing education hours on an annual or biannual basis. Prelicensing and continuing education courses shall be approved by the administrator or the administrator's designee and may be made a condition of application approval and renewal; and
- (s) require any licensee or registrant to file reports with the nationwide mortgage licensing system and registry in the form prescribed by the administrator or the administrator's designee.

(2) The administrator shall enforce the provisions of this act and the rules and regulations and interpretations adopted thereunder with respect to a creditor, unless the creditor's compliance is regulated exclusively or primarily by another state or federal agency.

(3) To keep the administrator's rules and regulations in harmony with the rules of administrators in other jurisdictions which enact the revised uniform consumer credit code, the administrator, so far as is consistent with the purposes, policies and provisions of K.S.A. 16a-1-101 to 16a-9-102, inclusive, and amendments thereto, may:

- (a) Before adopting, amending and revoking rules and regulations, advise and consult with administrators in other jurisdictions which enact the uniform consumer credit code; and
- (b) in adopting, amending and revoking rules and regulations, take into consideration the rules of administrators in other jurisdictions which enact the revised uniform consumer credit code.

(4) Except for refund of an excess charge, no liability is imposed under K.S.A. 16a-1-101 to 16a-9-102, inclusive, and amendments thereto, for an act done or omitted in conformity with a rule and regulation or written administrative interpretation of the administrator in effect at the time of the act or omission notwithstanding that after the act or omission the rule and regulation or written administrative interpretation may be determined by judicial or other authority to be invalid for any reason.

(5) The administrator prior to December 1 of each year shall establish such fees as are authorized under the provisions of K.S.A. 16a-1-101 to 16a-9-102, inclusive, and amendments thereto, for the ensuing calendar year in such amounts as the administrator may determine to be sufficient to meet the budget requirements of the administrator for each fiscal year.

**History:** L. 1973, ch. 85, § 97; L. 1976, ch. 98, § 2; L. 1981, ch. 93, § 17; L. 1992, ch. 80, § 3; L. 1999, ch. 107, § 28; L. 2005, ch. 144, § 18; L.2009, ch. 29, §21; July 1. **Attorney General's Opinions:** Supervised lender fees. 80-236. Authority of legislature to transfer money from special revenue funds into state general fund. 2002-45.

#### **KANSAS COMMENT, 2010**

1. The administrator is given broad power to make studies relative to the proper working of the U3C, to provide educational services for consumers, and to advise persons and groups as to their rights and obligations under the U3C. The various disclosure rules, rate limitations and other provisions of the U3C designed to protect the consumer cannot be fully effective unless consumers are aware of and understand their rights. Therefore, an essential part of the administrator's total responsibility is providing consumer education.

2. The administrator also is given the power to receive and act on consumer complaints. Those complaints can be expected to be an important basis for the invocation of the administrator's investigatory powers (K.S.A. 16a-6-106). The ability to file a complaint in addition

may be a significant adjunct to the consumer's private right of action for violations (K.S.A. 16a-5-201) or for unconscionability (K.S.A. 16a-5-108) and, in appropriate cases, even an alternative to it. Appropriate cases might involve situations where, in the context of a single case, a violation will be difficult to establish, where the complaint involves an untested provision of the U3C, or where the amount at stake individually is not sufficient under the circumstances to prompt private action to cure a violation. Since the administrator is not under a duty to act in any particular instance, the administrator retains the discretion to act only in those cases where it is believed desirable to do so pursuant to policy considerations established from time to time by the administrator. In acting, the administrator may seek voluntary compliance or invoke the remedies provided in this part.

3. A number of provisions in the U3C specifically direct the administrator to adopt rules and regulations as a more reasonable approach than providing long and complex statutory provisions that are likely to prove too inflexible in practice. In addition, the need may well arise for rules and regulations to carry out many other specific provisions of the U3C. Indeed, almost any provision may need to be the subject of an interpretive rule, and procedural rules will be required in many instances to satisfy the requirements of administrative procedure statutes. Subsections (1)(e) and (f) grant the administrator authority to adopt, amend, and repeal rules and regulations and to issue and revoke written administrative interpretations in these circumstances.

4. Under subsection (2), enforcement of the U3C is delegated in part to those governmental agencies which are already supervising various classes of creditors covered by the U3C.

5. Under subsection (4), a person who acts in accordance with rules and regulations or the written administrative interpretation of the administrator incurs no liability with respect to such conduct even if the rules and regulations, or interpretations are later declared to be invalid, except that if a rule relating to charges is declared invalid, any excess charge made under the supposed authority of the invalid rule and regulation or interpretation may be recovered by the administrator for the consumers. See also K.S.A. 16a-5-201(9).

6. Subsection (5) directs the administrator to establish the various fees required under the U3C. See e.g., K.S.A. 16a-2-302 and 16a-6-203 and the Kansas comments to those sections.

#### **K.S.A. 16a-6-105. (UCCC) Administrative powers with respect to supervised financial organizations.**

(1) With respect to supervised financial organizations, the powers of examination and investigation (K.S.A. 16a-2-305 and K.S.A. 16a-6-106, and amendments thereto) and administrative enforcement (K.S.A. 16a-6-108, and amendments thereto) shall be exercised by the official or agency to whose supervision the organization is subject. Should a supervised financial organization become licensed hereunder, a report of that portion of each examination made by the supervisory official or agency of such organization relating to compliance with the provisions of chapter 16a of the Kansas Statutes Annotated shall be filed with the administrator. All other powers of the administrator under this act may be exercised by the administrator with respect to a supervised financial organization except that compliance with truth in lending shall be governed as set forth in subsection (2) of K.S.A. 16a-6-104, and amendments thereto.

(2) If the administrator receives a complaint or other information concerning noncompliance with this act by a supervised financial organization, the administrator 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. If such officials or agencies have cause to believe the licensee of any supervised financial organization subject to their supervision is subject to suspension or revocation for any reason stated in K.S.A. 16a-2-303, and amendments thereto, such official or agency shall notify the administrator and assist the administrator in the enforcement of this act.

(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 the provisions of K.S.A. 16a-1-101 through 16a-9-102, and amendments thereto. 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.

**History:** L. 1973, ch. 85, § 98; L. 1980, ch. 76, § 10; L. 1992, ch. 46, § 3; L. 1999, ch. 107, § 29; July 1.

#### **KANSAS COMMENT, 2000**

1. Supervised financial organizations are, by definition, subject to supervision by an official or agency of the United States or by an agency of Kansas or another state. See K.S.A. 16a-1-301(44). The powers of examination and investigation and administrative enforcement under the U3C are delegated to that official or agency rather than to the administrator, unless the administrator is also the supervising official or agency. All other powers of the administrator, including rule making and initiation of judicial action, may be exercised by the administrator with respect to supervised financial organizations.

2. Subsections (2) and (3) provide for exchange of information and for cooperation between the administrator under the U3C and the supervisory authorities of supervised financial institutions. Subsection (3) goes further and requires the administrator and the state agency having supervision over supervised financial organizations to consult with and assist each other in carrying out their duties under the U3C. Compare the administrator's obligation to consult with and assist the insurance commissioner under K.S.A. 16a-4-111.

#### **K.S.A. 16a-6-106. (UCCC) Examination and investigatory powers; costs.**

(1) The administrator may:

- (a) Conduct public or private examinations or investigations within or outside of this state as necessary to determine whether any license should be granted, denied or revoked or whether any person has violated or is about to violate any provision of this act or any rule and regulation, administrative interpretation, or order hereunder, or to aid in the enforcement of this act or in the prescribing of forms or adoption of rules and regulations;
- (b) require or permit any person to file a statement in writing, under oath or otherwise as the administrator determines, of all the facts and circumstances concerning any violation of this act or any rule and regulation, administrative interpretation or order hereunder.

(2) For the purpose of any examination, investigation or proceeding under this act, the administrator or any officer designated by the administrator may administer oaths and affirmations, subpoena witnesses, compel such witnesses' attendance, adduce evidence and require the production of any matter which is relevant to the examination or 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 relevant information or items.

(3) In case of contumacy by, or refusal to obey a subpoena issued to any person, any court of competent jurisdiction, upon application by the administrator, may issue to that person an order requiring the person to appear before the administrator, or the officer designated by the administrator, there, to produce documentary evidence if so ordered or to give evidence touching the matter under investigation or in question. Any failure to obey the order of the court may be punished by the court as a contempt of court.

(4) No person is excused from attending and testifying or from producing any document or record before the administrator or in obedience to the subpoena of the administrator or any officer designated by the the administrator or in any proceeding

instituted by the administrator, on the ground that the testimony or evidence (documentary or otherwise) required of the person may tend to incriminate the person or subject the person to a penalty or forfeiture. No individual may be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which such person is compelled, after claiming privilege against self-incrimination, to testify or produce evidence (documentary or otherwise), except that the individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

(5) The administrator may issue and apply to enforce subpoenas in this state at the request of a consumer code administrator of another state if the activities constituting an alleged violation for which the information is sought would be a violation of the Kansas consumer credit code if the activities had occurred in this state.

(6) If the person's records are located outside this state, the person shall either make them available to the administrator at a convenient location within this state or, at the administrator's discretion, pay the reasonable and necessary expenses for the administrator or such administrator's 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 the records on the administrator's behalf.

(7) The administrator may charge as costs of investigation or examination all reasonable expenses, including a per diem and actual travel and lodging expenses to be paid by the party or parties under investigation or examination. The administrator may maintain an action in any court to recover such costs.

**History:** L. 1973, ch. 85, § 99; L. 1999, ch. 107, § 30; July 1. **Attorney General's Opinions:** Finance charges; additional charges not included therein. 81-209.

#### **KANSAS COMMENT, 2000**

1. This section was substantially rewritten by legislation adopted in 1999 and now gives the administrator very extensive investigative powers. The administrator is given authority to issue and enforce subpoenas in Kansas at the request of the consumer credit administrator of another state and is given the authority to examine out-of-state records.

2. Subsection (7) provides for recovery by the administrator of investigatory costs.

#### **K.S.A. 16a-6-108. Enforcement of act; cease and desist orders; penalties; appeals.**

(1) If the administrator determines after notice and opportunity for a hearing that any person has engaged, is engaging or is about to engage in any act or practice constituting a violation of any provision of this act or any rule and regulation, order or administrative interpretation hereunder, the administrator by order may require that such person cease and desist from the unlawful act or practice and take such affirmative action as in the judgment of the administrator will carry out the purposes of this act.

(2) If the administrator makes written findings of fact that the public interest will be irreparably harmed by delay in issuing an order under subsection (1), the administrator may issue an emergency cease and desist order. Such order shall be subject to the same procedures as an emergency order issued under K.S.A. 77-536, and amendments thereto. Upon the entry of such an order the administrator shall promptly notify the person subject to the order that it has been entered, of the reasons and that upon written request the matter will be set for a hearing which shall be conducted in accordance with the provisions of the Kansas administrative procedure act. If no hearing is requested and none is ordered by the administrator, the order will remain in effect until it is modified or vacated by the administrator. If a hearing is requested or ordered, the administrator, after notice of and opportunity for hearing to the person subject to the order, shall by

written findings of fact and conclusion of law vacate, modify or make permanent the order.

(3) If the administrator reasonably believes that a person has violated this act or a rule and regulation, order or administrative interpretation of the administrator under this act, the administrator, in addition to any specific power granted under this act, after notice and hearing in an administrative proceeding, unless the right to notice and hearing is waived by the person against whom the sanction is imposed, may require any or all of the following:

- (a) Censure the person if the person is licensed under this act;
- (b) issue an order against an applicant, licensed person, residential mortgage loan originator registrant or other person who knowingly violates this act or a rule and regulation, order or administrative interpretation of the administrator under this act, imposing a civil penalty up to a maximum of \$5,000 for each violation. If any person is found to have knowingly or willfully violated any provision of this act, and such violation is committed against elder or disabled persons, as defined in K.S.A. 50-676, and amendments thereto, in addition to any civil penalty otherwise provided by law, the administrator may impose an additional penalty not to exceed \$5,000 for each such violation;
- (c) revoke or suspend the person's license or registration or bar the person from subsequently applying for a license or registration under this act; or
- (d) issue an order requiring the person to pay restitution for any loss arising from the violation or requiring the person to disgorge any profits arising from the violation. Such order may include the assessment of interest not to exceed 8% per annum from the date of the violation.

(4) Any person aggrieved by a final order of the administrator may obtain a review of the order in accordance with the provisions of the Kansas judicial review act.

**History:** L. 1973, ch. 85, § 101; L. 1986, ch. 318, § 21; L. 1999, ch. 107, § 31; L. 2005, ch. 144, § 19; L. 2009, ch. 29, § 22; L. 2010, ch. 17 § 36; July 1. **Attorney General's Opinions:** Finance charges; additional charges not included therein. 81-209.

#### **KANSAS COMMENT, 2010**

The Kansas Comment, 2000 in the K.S.A. bound volume is no longer valid.

#### **K.S.A. 16a-6-109. (UCCC) Assurance of discontinuance.**

If it is claimed that a person has engaged in conduct subject to an order by the administrator (section 16a-6-108) or by a court (sections 16a-6-110 through 16a-6-112), the administrator may accept an assurance in writing that the person will not engage in the conduct in the future. If a person giving an assurance of discontinuance fails to comply with its terms, the assurance is evidence that prior to the assurance he engaged in the conduct described in the assurance.

**History:** L. 1973, ch. 85, § 102; Jan. 1, 1974.

**KANSAS COMMENT, 2010**

This section provides a method for resolving controversies without formal proceedings that involve conduct which is alleged to contravene the provisions of the U3C. Considerable flexibility is granted to the administrator in formulating the terms of any assurance entered into. If the person giving an assurance fails to comply with its terms, the assurance is admissible as evidence, either in a proceeding before the administrator or in the courts, that the person giving the assurance actually engaged in the conduct specified therein.

**K.S.A. 16a-6-110. (UCCC) Injunctions against violations of act.**

The administrator may bring a civil action to restrain a person from violating the provisions of K.S.A. 16a-1-101 through 16a-9-102 and for other appropriate relief.

**History:** L. 1973, ch. 85, § 103; Jan. 1, 1974. **Attorney General's Opinions:** Finance charges; additional charges not included therein. 81-209.

**KANSAS COMMENT, 2010**

In an action under this section the administrator, in addition to relief appropriate under other law of this state, may seek relief under K.S.A. 16a-6-112 and 16a-6-113.

**K.S.A. 16a-6-111. (UCCC) Injunctions against unconscionable agreements and fraudulent or unconscionable conduct.**

(1) The administrator may bring a civil action to restrain a creditor or a person acting in his behalf from engaging in a course of

- (a) making or enforcing unconscionable terms or provisions of consumer credit transactions;
- (b) fraudulent or unconscionable conduct in inducing consumers to enter into consumer credit transactions.

(2) In an action brought pursuant to this section the court may grant relief only if the trier of the fact finds

- (a) that the respondent has made unconscionable agreements or has engaged or is likely to engage in a course of fraudulent or unconscionable conduct;
- (b) that the agreements or conduct of the respondent has caused or is likely to cause injury to consumers; and
- (c) that the respondent has been able to cause or will be able to cause the injury primarily because the transactions involved are credit transactions.

(3) In applying this section, consideration shall be given to each of the following factors, among others:

- (a) Belief by the creditor at the time consumer credit transactions are entered into that there was no reasonable probability of payment in full of the obligation by the consumer;
- (b) in the case of consumer credit sales or consumer leases, knowledge by the seller or lessor at the time of the sale or lease of the inability of the buyer or lessee to receive substantial benefits from the property or services sold or leased;
- (c) in the case of consumer credit sales or consumer leases, gross disparity between the price of the property or services sold or leased and the value of the property or services measured by the price at which similar property or services are readily obtainable in credit transactions by like buyers or lessees;

- (d) the fact that the creditor contracted for or received separate charges for insurance with respect to consumer credit sales or consumer loans with the effect of making the sales or loans, considered as a whole, unconscionable; and
- (e) the fact that the respondent has knowingly taken advantage of the inability of the consumer reasonably to protect his interests by reason of physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement, or similar factors.

(4) In an action brought pursuant to this section, a charge or practice expressly permitted by this act is not in itself unconscionable.

**History:** L. 1973, ch. 85, § 104; Jan. 1, 1974. **Attorney General's Opinions:** Limitations on consumer's liability; balloon payments; denial of right to refinance. 82-143.

### **KANSAS COMMENT, 2010**

1. This section permits the administrator to bring suit to enjoin a person to whom this part applies from engaging in a course of conduct specified in subsections (1)(a) or (b). Those subsections cover two different areas of unconscionable conduct: (1) unconscionable contract terms, and (2) fraudulent or unconscionable conduct in inducing consumers to enter into consumer credit transactions. The former might be called "substantive unconscionability" and the latter "procedural unconscionability."

2. The purpose of this section is to afford the administrator a means of dealing with new patterns of fraudulent or unconscionable conduct unforeseen and, perhaps, unforeseeable at the writing of the U3C.

3. Subsection (3) lists a number of specific factors to be considered on the issue of unconscionability. The following are illustrative of individual transactions which, if engaged in by or on behalf of a creditor, would entitle the administrator to injunctive relief under this section:

Under subsection (3)(a), a sale of goods to a low income consumer without expectation of payment but with the expectation of repossessing the goods sold and reselling them at a profit;

Under subsection (3)(b), a sale of an English language encyclopedia set to a person who speaks only Spanish, or a sale of two expensive vacuum cleaners to two poor families sharing the same apartment and one carpet;

Under subsection (3)(c), a home solicitation sale of a set of cookware or flatware for \$375 in an area where a set of comparable quality is readily available on credit in stores for \$125 or less;

Under subsection (3)(e), a sale of goods on terms known by the seller to be disadvantageous to the consumer where the written agreement is in English, the consumer is literate only in Spanish, the transaction was negotiated orally in Spanish by the seller's salesman, and the written agreement was neither translated nor explained to the consumer.

The criteria listed in subsection (3) to a large extent parallel those found in the KCPA (K.S.A. 50-627). Reference should be made to the comment under that provision for additional examples of conduct which could also violate this section. See also the Kansas comment to K.S.A. 16a-5-108.

4. Subsection (4) prohibits a finding that a charge or practice expressly permitted by the U3C is in itself unconscionable. However, even though a practice or charge is authorized by the U3C, the totality of a particular creditor's conduct may show that the practice or charge is part of an unconscionable course of conduct. Therefore, in determining unconscionability, the creditor's total conduct, including that part of the creditor's conduct which is in accordance with the provisions of the U3C, may be considered.

5. For cases illustrating the prior application of the doctrine of unconscionability in private actions, see the Kansas comment to K.S.A. 16a-5-108. The doctrine of unconscionability was applied in an action by a public official in *State by Lefkowitz v. ITM, Inc.*, 52 Misc.2d 39, 275 N.Y.S.2d 303 (Sup. Ct. 1966). See also *State v. Avco Financial Service*, 70 A.D.2d 859, 418 N.Y.S.2d 52 (1979), rev'd 50 N.Y.S.2d 383, 429 N.Y.S.2d 181, 406 N.E.2d 1075 (1980).

### **K.S.A. 16a-6-112. (UCCC) Temporary relief.**

With respect to an action brought to enjoin violations of K.S.A. 16a-1-101 through 16a-9-102 (section 16a-6-110) or unconscionable agreements or fraudulent or unconscionable conduct (section 16a-6-111), the administrator may apply to the court for appropriate temporary relief against a respondent, pending final determination of proceedings. If the court finds after a hearing held upon notice to the respondent that there is reasonable cause to believe that the respondent 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.

**History:** L. 1973, ch. 85, § 105; Jan. 1, 1974.

#### **KANSAS COMMENT, 2000**

This section permits the administrator to seek appropriate temporary relief in connection with actions brought pursuant to K.S.A. 16a-6-110 and 16a-6-111, and defines the circumstances under which such relief may be granted.

#### **K.S.A. 16a-6-113. (UCCC) Civil actions by administrator.**

(1) After demand, the administrator may bring a civil action against a creditor for all amounts of money, other than penalties, which a consumer or class of consumers has a right explicitly granted by the provisions of K.S.A. 16a-1-101 through 16a-9-102 to recover. The court shall order amounts recovered or recoverable under this subsection paid to each consumer or set off against his obligation. A consumer's action, other than a class action, takes precedence over a prior or subsequent action by the administrator with respect to the claim of that consumer. A consumer's class action takes precedence over a subsequent action by the administrator with respect to claims common to both actions but intervention by the administrator is authorized. An administrator's action on behalf of a class of consumers takes precedence over a consumer's subsequent class action with respect to claims common to both actions. When an action takes precedence over another action under this subsection, to the extent appropriate the other action may be stayed while the precedent action is pending and dismissed if the precedent action is dismissed with prejudice or results in a final judgment granting or denying the claim asserted in the precedent action.

(2) The administrator may bring a civil action against a creditor or a person acting in his behalf to recover a civil penalty for willfully violating this act, and if the court finds that the defendant has engaged in a course of repeated and willful violations of this act, it may assess a civil penalty of no more than five thousand dollars (\$5,000). Any civil action under this subsection shall be brought within two (2) years following the violation.

**History:** L. 1973, ch. 85, § 106; Jan. 1, 1974. **Attorney General's Opinions:** Recovery by the administrator. 80-122. Finance charges; additional charges not included therein. 81-209.

#### **KANSAS COMMENT, 2010**

1. The U3C explicitly grants a right of action to a consumer to recover actual damages and penalties for the violation of a number of its provisions. See K.S.A. 16a-5-201. In addition, subsection (1) of this section allows the administrator, after demand, to bring a civil action on behalf of one or more individual consumers in such cases, except for the recovery of penalties, in contemplation that in some number of these cases the administrator may be the only person with the necessary informational or monetary resources to prosecute an action properly, may be the only person who can adequately represent a group of consumers or, for other reasons, may be an appropriate person to litigate the question involved. If a consumer brings an action on behalf of himself or herself, that action takes precedence, whether initiated before or after the administrator's action. If the consumer brings a class action, it takes precedence if it is brought before an action by the administrator with respect to claims common to both actions, but the

administrator is given the authority to intervene. If the administrator's action on behalf of a class of consumers is brought prior to that of the consumer, the administrator's action takes precedence with respect to claims common to both actions.

2. An action for a civil penalty under subsection (2) may be in lieu of or in addition to an action under subsection (1). The civil penalty under subsection (2) may be recovered for any violation of the U3C, including unconscionable or fraudulent conduct under K.S.A. 16a-6-111. The amount of the penalty to be imposed under subsection (2) is in the discretion of the court, but may not exceed \$5,000; a penalty may be imposed only if it is found that the defendant has engaged in a course of repeated and willful violations of the U3C. Since this subsection confers a right of recovery on the administrator in that capacity, it prescribes its own statute of limitations. An unintentional and bona fide error defense is inapplicable since recovery can only be had for repeated and intentional violations. Contrast the standards for recovering civil penalties in private actions under K.S.A. 16a-5-201 and 16a-5-203 and in administrative proceedings under K.S.A. 16a-6-108(3)(b).

#### **K.S.A. 16a-6-115. (UCCC) Consumer's remedies not affected.**

The grant of powers to the administrator in this article does not affect remedies available to consumers under K.S.A. 16a-1-101 through 16a-9-102 or under other principles of law or equity.

**History:** L. 1973, ch. 85, § 107; Jan. 1, 1974.

#### **KANSAS COMMENT, 2010**

1. It is not the intention of the grant of powers to the administrator or of any of the other provisions of the U3C dealing with consumers' remedies to diminish in any way the availability of consumers' remedies under other principles of law or equity. For example, the individual consumer has a cause of action under K.S.A. 16a-5-201(3) and (4) to recover any charges in excess of those permitted in the U3C and to recover a penalty in certain cases, and the administrator may also bring an action under K.S.A. 16a-6-113 to recover excess charges on behalf of consumers. Whether a similar action by private parties exists depends upon Kansas law with respect to class actions (K.S.A. 60-223). The U3C does not specifically authorize such class actions for excess charges nor does it preclude them.

2. Various other consumers' remedies provided by other applicable law are not affected by the U3C. Examples include the UCC provisions concerning the buyer's remedies such as revocation of acceptance of goods delivered (K.S.A. 84-2-608), the right to cancel the contract and to take a security interest in the goods delivered (K.S.A. 84-2-711), the right to incidental and consequential damages (K.S.A. 84-2-715), and remedies for fraud (K.S.A. 84-2-721). So, too, the limitations on contract provided for in the UCC in regard to penalties, liquidated damages, and limitations of remedies (K.S.A. 84-2-718 and 84-2-719) continue to apply to transactions governed by the U3C. Finally, remedies provided under such laws as the KCPA and the Kansas Lemon Law, K.S.A. 50-645 and 50-646, are not affected.

#### **K.S.A. 16a-6-116. (UCCC) Venue.**

The administrator 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 county in which respondent resides or transacts business.

**History:** L. 1973, ch. 85, § 108; Jan. 1, 1974.

#### **KANSAS COMMENT, 2010**

Venue for administrative actions under the U3C is made broad in order to encourage public enforcement of it.

#### **K.S.A. 16a-6-117. Rules and regulations; truth in lending.**

The administrator shall adopt rules and regulations necessary to carry out the provisions and terms of the uniform consumer credit code which are consistent with or no less restrictive than the truth-in-lending act, which is contained in title I of the consumer credit protection act, 15 U.S.C. § 1601 et seq. and regulation Z, 12 C.F.R. § 226 et seq., as amended, the equal credit opportunity act, 15 U.S.C. § 1691-1691f and regulation B, 12 C.F.R. § 202 et seq., as amended, the real estate settlement procedures act of 1974, 12 U.S.C. § 2601 et seq., and regulation X, 24 C.F.R. §§ 3500 et seq., as amended and section 670 of the John Warner national defense authorization act for fiscal year 2007, 10 U.S.C. § 987 et seq. and 32 C.F.R. § 232 et seq.

**History:** L. 1981, ch. 93, § 1; L. 1992, ch. 46, § 4; L. 1999, ch. 107, § 32; L. 2000, ch. 27, § 4; Mar. 30. L. 2009, ch. 29, § 23; L. 2009, ch. 143; § 6; July 1.

#### **KANSAS COMMENT, 2010**

This section directs the administrator to adopt rules and regulations to carry out various provisions of the U3C by incorporating certain definitions and disclosure requirements of TILA and to obtain dual administrative and civil enforcement of TILA. Current regulations are found in K.A.R. 75-6-26. See the Kansas comments to K.S.A. 16a-3-206 and 16a-5-203.

## **Part 2**

### **NOTIFICATION AND FEES**

#### **K.S.A. 16a-6-201. (UCCC) Applicability.**

This part applies to a creditor engaged in this state in entering into consumer credit transactions and to any person who takes assignments of and undertakes collection of payments from or takes assignments of and enforces rights against debtors arising from these transactions. This part shall not apply to supervised financial organizations (K.S.A. 16a-1-301, and amendments thereto). Nothing in this section shall be construed to require the payment of any fees required by this article by attorneys or collection agencies who receive the same for collection purposes.

**History:** L. 1973, ch. 85, § 109; L. 1981, ch. 93, § 18; L. 1993, ch. 200, § 14; L. 2005, ch. 144, § 20; L. 2009, ch. 29, § 24; July 1.

#### **KANSAS COMMENT, 2010**

1. All creditors engaged in entering into consumer credit transactions in Kansas must file a notification under K.S.A. 16a-6-202, except supervised financial organizations such as banks and savings and loan associations. As to when a creditor enters into a consumer credit transaction in Kansas, see K.S.A. 16a-1-201 and its broad extra-territorial application.

2. Assignees of consumer obligations must file notification under K.S.A. 16a-6-202.

#### **K.S.A. 16a-6-202. (UCCC) Notification.**

(1) Persons subject to this part shall file notification with the administrator within 30 days after commencing business in this state, and, thereafter, in accordance with rules and regulations adopted by the administrator.

(2) If information in a notification becomes inaccurate after filing, the person filing the notification shall file a corrected or amended notification in such form and at such time as prescribed by rules and regulations adopted by the administrator.

**History:** L. 1973, ch. 85, § 110; L. 1988, ch. 85, § 12; L. 1999, ch. 107, § 33; July 1.

## **KANSAS COMMENT, 2010**

The Kansas Comment, 2000 in the K.S.A. bound volume is no longer valid.

### **K.S.A. 16a-6-203. Fees.**

(1) A person required to file notification shall on or before April 30 of each year pay to the administrator an annual fee in an amount established pursuant to subsection (5) of K.S.A. 16a-6-104, and amendments thereto, for each business location for that year.

(2) Persons required to file notification who are sellers, lessors or lenders shall pay an additional fee at the time and in the manner stated in subsection (1), in an amount established pursuant to subsection (5) of K.S.A. 16a-6-104, and amendments thereto, each \$100,000, or part thereof, of the average unpaid balances, including unpaid scheduled periodic payments under consumer leases, arising from consumer credit transactions entered into in this state and held on the last day of each calendar month during the preceding calendar year and held either by the seller, lessor or lender, or by the immediate or a remote assignee who has not filed notification. The unpaid balances of assigned obligations held by an assignee who has not filed notification are presumed to be the unpaid balances of the assigned obligations at the time of their assignment by the seller, lessor or lender.

(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), in an amount established pursuant to subsection (5) of K.S.A. 16a-6-104, and amendments thereto, for each \$100,000, or part thereof, of the average unpaid balances, including unpaid scheduled periodic payments payable by lessees, arising from consumer credit transactions entered into in this state taken by assignment and held on the last day of each calendar month during the preceding calendar year.

**History:** L. 1973, ch. 85, § 111; L. 1976, ch. 98, § 3; L. 1978, ch. 73, § 1; L. 2000, ch. 27, § 5; L. 2005, ch. 144, § 21; L. 2009, ch. 29, § 25; July 1. **Attorney General's**

**Opinions:** Authority of legislature to transfer money from special revenue funds into state general fund. 2002-45.

## **KANSAS COMMENT, 2010**

1. Any person required to file a notification under this part must pay an annual fee, as established by the administrator, for each business location. The fee must be paid on or before April 30 each year. The purpose of the fee structure is to make the U3C self-supporting, and the fees are left to the administrator to provide more flexibility. All creditors extending consumer credit in Kansas are governed by the U3C and should share in financing the cost of its administration. The fees will normally be set at an amount which will produce funds sufficient for the adequate administration of the U3C.

2. In addition to the annual fee for each business location, subsection (2) provides that persons who are sellers, lessors, or lenders must pay an additional fee for each \$100,000, or part thereof, of the average unpaid balances, including unpaid scheduled periodic payments under consumer leases, of obligations arising from consumer credit transactions entered into by such creditor in Kansas and held on the last day of each calendar month during the preceding calendar year. The average of the unpaid balances on the last day of each month during the year has been chosen as a convenient basis for calculating additional fees since creditors normally maintain records of these figures and they are easily audited by the administrator.

3. An assignee required to file notification must, under subsection (3), pay an additional fee

for each \$100,000, or part thereof, of the average unpaid balances of the obligations arising from consumer credit transactions entered into in Kansas taken by such assignee through assignment and held on the last day of each calendar month during the preceding calendar year.

4. A seller, lessor or lender entering into consumer credit transactions in Kansas cannot escape liability for the fees imposed by subsection (2) by assigning the resulting obligations to an assignee who has not filed notification. Subsection (2) imposes a liability for the fees on the seller, lessor or lender, if an immediate or remote assignee has not filed notification, and a presumption is created on the basis of which the fees can be computed.

## Part 4

### ADMINISTRATIVE PROCEDURE AND JUDICIAL REVIEW

#### **K.S.A. 16a-6-401. (UCCC) Applicability and scope.**

This part applies to the administrator, prescribes the procedures to be observed by him in exercising his powers under K.S.A. 16a-1-101 through 16a-9-102, and supplements the provisions of the part on powers and functions of administrator (part 1) of this article and of the part on supervised lenders (part 3) of the article on finance charges and related provisions (article 2).

**History:** L. 1973, ch. 85, § 116; Jan. 1, 1974.

#### **KANSAS COMMENT, 2000**

1. This part was patterned after the uniform law commissioners' 1961 revised model state administrative procedure act. It was intended for adoption only in those states which had not enacted an adequate administrative procedure act which would apply to the actions of the administrator under the U3C. In 1973, when the U3C was originally adopted in Kansas, Kansas had no administrative procedure act, and so the provisions of this part were adopted. In 1984, Kansas enacted a comprehensive administrative procedure act, K.S.A. 77-501 et seq. (KAPA), which was not based on the 1961 revised model act, but instead on the more modern 1981 revised state model administrative procedure act. As a result, the KAPA does not much resemble this part of the U3C. While this might have created problems of statutory interpretation, the KAPA, at K.S.A. 77-503, states that its provisions apply only to the extent that other statutes expressly so provide. Only one section of the U3C, K.S.A. 16a-6-410, has been amended to refer to the KAPA. As a result, the procedures spelled out in this part, rather than the KAPA, will apply generally to the actions of the administrator.

2. Many of the sections in this part pertain primarily to rule-making, and these sections often refer to article 4 of chapter 77 of K.S.A. Those provisions do not, of themselves, constitute a comprehensive administrative procedure act, but they do contain a number of guidelines for adoption of rules and regulations by Kansas administrative agencies.

3. This part also applies to action taken by the Kansas commissioner of insurance under article 4 of the U3C. See K.S.A. 16a-4-112(2).

#### **K.S.A. 16a-6-402. (UCCC) Definitions in part.**

In this part:

(1) "Contested case" means a proceeding, including but not restricted to one pursuant to the provisions on administrative enforcement orders (subsection (a) of K.S.A. 16a-6-108 and amendments thereto) and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by the administrator after an opportunity for hearing.

(2) "License" means a license authorizing a person to make supervised loans pursuant to the provisions on authority to make supervised loans ( K.S.A. 16a-2-301 and amendments thereto).

(3) "Licensing" includes the administrator's process respecting the grant, denial, revocation, suspension, annulment, withdrawal, or amendment of a license.

(4) "Rule" means each rule specifically 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 the administrator's 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) declaratory rulings issued pursuant to the provisions on declaratory rulings by administrator (K.S.A. 16a-6-409 and amendments thereto); or
- (c) intra-office memoranda.

**History:** L. 1973, ch. 85, § 117; L. 1988, ch. 356, § 48; July 1, 1989.

#### **KANSAS COMMENT, 2000**

These definitions are derived from the 1961 revised model administrative procedures act. They differ in language, and often in substance, from the definitions of the same terms in the KAPA. Compare K.S.A. 77-415 and 77-502.

#### **K.S.A. 16a-6-403. (UCCC) Public information; adoption of rules; availability of rules and orders.**

(1) In addition to other rule-making requirements imposed by law, the administrator may:

- (a) Adopt as a rule a description of the organization of the administrator's office, stating the general course and method of the operations of the 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 by the 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;
- (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 public inspection as herein required. This provision is not applicable in favor of any person or party who has actual knowledge thereof.

**History:** L. 1973, ch. 85, § 118; L. 1981, ch. 95, § 2; July 1.

#### **KANSAS COMMENT, 2010**

The Kansas Comment, 2000 in the K.S.A. bound volume is no longer valid.

#### **K.S.A. 16a-6-404. Procedure for adoption of rules.**

(1) Prior to the adoption, amendment, or repeal of any rule, the administrator shall submit such proposed rule, amendment or revocation to the attorney general for his examination and approval and shall give notice and hold a hearing thereon in the manner required by article 4 of chapter 77 of the Kansas Statutes Annotated and amendments thereto.

**History:** L. 1973, ch. 85, § 119; Jan. 1, 1974.

**KANSAS COMMENT, 2010**

The Kansas Comment, 2000 in the K.S.A. bound volume is no longer valid.

**K.S.A. 16a-6-405. Filing and taking effect of rules.**

(1) Every rule and regulation or amendment or revocation thereof shall be filed by the administrator in the office of the secretary of state in the manner provided by article 4 of chapter 77 of the Kansas Statutes Annotated and amendments thereto.

(2) Each rule and regulation or amendment or revocation thereof shall take effect at times prescribed under the provisions of article 4 of chapter 77 of the Kansas Statutes Annotated and amendments thereto.

**History:** L. 1973, ch. 85, § 120; L. 1988, ch. 366, § 4; June 1.

**KANSAS COMMENT, 2010**

The Kansas Comment, 2000 in the K.S.A. bound volume is no longer valid.

**K.S.A. 16a-6-406. Publication of rules.**

The secretary of state shall publish all rules and regulations filed under the provisions of this act subject to and in the manner provided for the publication of rules and regulations under the provisions of article 4 of chapter 77 of the Kansas Statutes Annotated and amendments thereto.

**History:** L. 1973, ch. 85, § 121; L. 1988, ch. 366, § 5; June 1.

**KANSAS COMMENT, 2010**

The Kansas Comment, 2000 in the K.S.A. bound volume is no longer valid.

**K.S.A. 16a-6-407. (UCCC) Petition for adoption, amendment or repeal of rules.**

An interested person may petition the administrator requesting the promulgation, amendment or repeal of a rule. The administrator may 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 the reasons for the denials) or shall initiate rule-making proceedings in accordance with the provisions on procedure for adoption of rules set forth in K.S.A 16a-6-404.

**History:** L. 1973, ch. 85, § 122; L. 1981, ch. 95, § 3; July 1.

**KANSAS COMMENT, 2010**

The Kansas Comment, 2000 in the K.S.A. bound volume is no longer valid.

**K.S.A. 16a-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 manner prescribed by K.S.A. 77-434 and amendments thereto.

**History:** L. 1973, ch. 85, § 123; Jan. 1, 1974.

**KANSAS COMMENT, 2010**

The cited section, K.S.A. 77-434, was repealed in 1984, but no corresponding amendment was made to this section.

**K.S.A. 16a-6-409. (UCCC) 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 as decisions or orders in contested cases.

**History:** L. 1973, ch. 85, § 124; Jan. 1, 1974.

**KANSAS COMMENT, 2010**

The Kansas Comment, 2000 in the K.S.A. bound volume is no longer valid.

**K.S.A. 16a-6-410. (UCCC) Contested cases; orders subject to provisions of Kansas administrative procedure act; informal disposition.**

(1) In a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice. Orders in contested cases, and proceedings thereon, shall be subject to the provisions of the Kansas administrative procedure act.

(2) Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, or consent order.

**History:** L. 1973, ch. 85, § 125; L. 1988, ch. 356, § 49; July 1, 1989.

**KANSAS COMMENT, 2010**

"Contested case" is defined in K.S.A. 16a-6-402. As for subsection (2), the KAPA also recognizes the validity of informal settlements. See K.S.A. 77-505.

**K.S.A. 16a-6-414. Judicial review of administrator's actions.**

Any action of the administrator pursuant to the uniform consumer credit code is subject to review in accordance with the Kansas judicial review act. This section does not limit utilization of or the scope of judicial review available under other means 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.

**History:** L. 1973, ch. 85, § 129; L. 1986, ch. 318, § 22; July 1; L. 2010, ch. 17 § 37; July 1.

**KANSAS COMMENT, 2010**

The administrator's actions are subject to judicial review under the Kansas judicial review act, K.S.A. 77-601 et seq. That act provides the exclusive means of judicial review of agency action. See K.S.A. 77-606.

## Article 9.

### EFFECTIVE DATE AND REPEALER

#### **K.S.A. 16a-9-101. (UCCC) Time of taking effect; provisions for transition.**

(1) Sections 1 through 135 of this act [\*] take effect at 12:01 a.m. on January 1, 1974.

(2) To the extent appropriate to permit the administrator to prepare for operation of sections 1 through 135 of this act [\*] when it takes effect and to act on applications for licenses to make supervised loans under this act (subsection (1) of section 16a-2-302), the part on supervised lenders (part 3) of the article on finance charges and related provisions (article 2), and the article on administration (article 6) take effect January 1, 1974.

(3) Transactions entered into before sections 1 through 135 of this act [\*] take effect and the rights, duties, and interests flowing from them thereafter may be terminated, completed, consummated, or enforced as required or permitted by any statute, rule of law, or other law amended, repealed, or modified by this act as though the repeal, amendment, or modification had not occurred, but sections 1 through 135 of this act [\*] apply to

- (a) refinancings, consolidations, and deferrals made after this act takes effect of sales, leases, and loans whenever made;
- (b) sales or loans made after this act takes effect pursuant to open end credit entered into, arranged, or contracted for before this act takes effect; and
- (c) all credit transactions made before this act takes effect insofar as the article on remedies and penalties (article 5) limits the remedies of creditors.

**History:** L. 1973, ch. 85, § 130; Jan. 1, 1974.

**[\*]This act includes 16a-1-101 through 16a-9-102, 16-207,16-403, 17-2214 and 84-9-203.**

#### **KANSAS COMMENT, 2010**

1. The transitional provisions set forth in this section were extremely important for ongoing customer transactions entered into before the effective date of the U3C, January 1, 1974, because certain transactions entered into before that date may well have fallen within the ambit of the U3C. For example, a note executed in 1973 containing a balloon payment scheduled to be due after January 1, 1974 would have been covered as a "refinancing" under subsection (3)(a) and the refinancing would have been required to take place under the limitations imposed by K.S.A. 16a-3-308. Similarly, under subsection (3)(c), a \$750 installment sales contract entered into during 1973 would have been subject to the U3C's restrictions on deficiency judgments (K.S.A. 16a-5-103) if judgment was sought after January 1, 1974. On the other hand, a clause in a 1973 installment sales contract giving the seller a security interest in property unrelated to the sale would have been valid, even though such a security interest in a contract executed after January 1, 1974 would be invalid under K.S.A. 16a-3-301. Today, these considerations are largely academic, since it is unlikely that any consumer credit contracts executed before 1974 are still around.

2. Upon the effective date of the U3C, January 1, 1974, the following Kansas statutes were repealed: (a) the 1955 consumer loan act (former K.S.A. 16-401 to 16-426); (b) the 1958 sales finance act (former K.S.A. 16-501 to 16-514); (c) the 1969 truth in lending act (former K.S.A. 16-801 to 16-830); (d) the 1969 provisions regarding revolving credit (former K.S.A. 16-901 to 16-911); and (e) the 1969 installment loan rate provisions (former K.S.A. 16-203 and 16-206 to 16-213), although a technical amendment to K.S.A. 16-207 was made. The only part of the consumer loan act retained was a portion of K.S.A. 16-403, dealing with the office of the consumer credit commissioner. As the comment to K.S.A. 16a-1-202 indicates, the former

statutes relating to pawnbrokers and insurance premium financing remain effective since these transactions are excluded from the U3C. The Kansas credit union law (K.S.A. 17-2201 to 17-2268) remains effective. Finally, it should be emphasized that the U3C does not repeal several important provisions relating to interest rates, such as K.S.A. 16-201 (stating the legal rate on unpaid accounts), K.S.A. 16-204 (judgment rate), 16-205 (relationship between contract rate and judgment rate), K.S.A. 16-207 (general usury limits), and K.S.A. 17-7105 (no usury limit when debtor is a corporation).

**K.S.A. 16a-9-102. (UCCC) Continuation of licensing.**

All persons licensed or otherwise authorized under the provisions of article 4 of chapter 16 of the Kansas Statutes Annotated, and amendments thereto, on the effective date of this act are licensed to make supervised loans under sections 1 through 135 of this act [\*], pursuant to the part on supervised lenders (part 3) of the article on finance charges and related provisions (article 2), and all provisions of that part apply to the persons so previously licensed or authorized. The administrator may, but is not required to, deliver evidence of licensing to the persons so previously licensed or authorized.

**History:** L. 1973, ch. 85, § 131; Jan. 1, 1974.

**[\*]This act includes 16a-1-101 through 16a-9-102, 16-207,16-403, 17-2214 and 84-9-203.**

**KANSAS COMMENT, 2000**

This section provides automatic licensing under article 2, part 3 (K.S.A. 16a-2-301 et seq.) for all lenders previously licensed under the old Kansas consumer loan act. No application or administrative action is required and the formal license under the prior statute, now repealed, will be a license under the U3C. The administrator, at such time as the duties under the U3C permit, may substitute new licenses for those in the lender's possession, but this is entirely a ministerial act.