STATE OF TEXAS

OFFICE OF CONSUMER CREDIT COMMISSIONER

SAM KELLEY, Commissioner

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March 14, 1985 85-4

Mr. George E. Henderson
Fulbright and Jaworski
American Bank Tower, Suite 1740
221 West Sixth Street
Austin, Texas 78701

Dear Mr. Henderson:

This is to acknowledge receipt of your letter of January 21, 1985 in which you request an interpretation by this office concerning the applicability, if any, of the provisions of Article 5069 - V.T.C.S. to out of state, federally insured state-chartered banks which propose to extend credit by mail to Texas residents. The fact situation as described in your letter is as follows:

> "A bank, chartered by a state other than Texas ('the Bank'), has its banking quarters outside this state. Accounts at the Bank are insured by the Federal Deposit Insurance Corporation. The Bank is a member of the Federal Reserve System.
>
> "The Bank desires to solicit credit card and open-end credit arrangements with Texas customers. The initial solicitation will be by mail, with the Bank having screened the addressees for creditworthiness. A recipient, if he elects to accept the program offered, will sign and return an approval form. (If the customer does not respond, an inter-state telephone follow-up will be made.) Applications from accepting persons will be returned to the Bank's headquarters, where the account will be opened and credit cards issued. The agreements select the law of the Bank's domicile as the governing law. The agreements (including rates, fees and disclosures) comply with federal law and the applicable law of the state of the Bank's domicile, both as to disclosure and substantive matters.
>
> "The Bank will advance loans or extend credit under the programs offered through customary credit card channels, so that payment of credit card sales slips or check-credit items will occur at its headquarters location.

> "The Bank will not, as a general matter, receive or impose a merchant discount, as defined in Article 1.01(h). Some merchants may, however, have both a sales location in Texas and agreements under which the Bank would receive a "merchant discount". (Consequently, we ask that your response identify any difference in result that the presence or absence of a merchant discount would produce.)"

You then request an interpretation by this office as stated by each of the below quoted questions:

> "1. Is the Bank, by reason of its credit programs extending credit 'under the authority of' Article 1.04 or other provisions of Article 5069 and, therefore, subject to regulation under and compliance with Article 5069?
>
> "2. If a merchant discount were received or imposed by the Bank as a creditor under a 'lender credit card agreement', would the Bank be subject to Chapter 15, as incorporated by Article 1.04(b)(5)?"

For at least the past several years it has been the position of this office that out-of-state national banks are not subject to Texas interest rate ceilings but rather have the ability to impose the highest rate permitted by the state in which they are located on credit transactions made by mail with Texas residents. Refer to 12 U.S.C.A. Sec. 85 (West. Supp. 1984) and Marquette National Bank of Minnesota v First of Omaha, 439 U.S. 299 (1978). The federal statutory law and court decisions make available to national banks the highest rate of the state in which they are located without reference to procedural requirements such as licensing. It is common practice since the Marquette decision for national banks to lend throughout the United States at the rate permitted by the state in which they are located without being licensed by other states. This office has not prior to your inquiry been required to take a formal position as to whether the above described legal principles are applicable to out-of-state, federally insured state chartered banks. It is our opinion that federally insured state banks for this purpose should be treated the same as national banks.

In 1980 the United States Congress enacted Public Law 96-221, The Depository Institutions Deregulation and Monetary Control Act of 1980. Section 521 of that act, codified as 12 U.S.C. Sec. 1831d, states as follows:

> "In order to prevent discrimination against State-chartered insured banks . . . with respect to interest rates, if the applicable rate prescribed in this subsection exceeds the rates such State bank . . . would be permitted to charge in the absence of this subsection, such State bank . . . may, notwithstanding any State constitution

> or statute which is hereby preempted for the purposes of this section, take, receive, reserve and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at a rate of not more than one per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where such State bank . . . is located or at the rate allowed by the laws of the State, territory or district where the bank is located, whichever may be greater."

Thus, this law states that state-chartered insured banks should be permitted to look solely to the laws of its state of domicile to establish the charges and rates of interest on its loans. Section 521 provides authority for the state-chartered insured bank to impose finance charges on its loans at the highest rates permitted by the laws of its state of domicile without reference to interest rate restrictions imposed by other states. This authority removed the discrimination against state-chartered insured banks that existed previously because of the earlier existing ability of national banks to "export" the interest rates of their state of domicile to other states. It is the view of this office that Section 521, by using language indentical to Section 85, exempts state-chartered insured banks from any procedural requirements of other states related to interest rate restrictions, including licensing, otherwise applicable to lenders imposing such interest rates.

It should be noted that the Federal Deposit Insurance Corporation has taken the above described position with regard to state-chartered insured banks. (Letter of February 2, 1981 from Mr. Frank L. Skillern, Jr., General Counsel to Edward N. Lange; letter of March 17, 1981 from Ms. Kathy Johnson, Attorney, Office of the General Counsel, to Harvey Bock.)

Similarily, the Federal Home Loan Bank Board has taken the position that Sec. 522 of the Depository Institutions Deregulation and Monetary Control Act of 1980 allows a state-chartered, federally insured savings and loan institution to "export" the interest rate ceilings of its home state into other states when extending credit to residents of those states. (Letter of Federal Home Loan Bank Board General Counsel, August 6, 1982).

In view of the foregoing, it is the position of this office that an out-of-state, federally insured state bank or state savings and loans institution may extend credit to residents of Texas and not be subject to Texas law. Such institutions would not need to obtain a license from this office and would not be doing business under the authority of any of the provisions of Article 5069, V.T.C.S. under the circumstances outlined in your letter. Our answer to each of your quoted questions is "No".

Sincerely,

Sam Kelley

Sam Kelley
Consumer Credit Commissioner