



STATE OF TEXAS

# OFFICE OF CONSUMER CREDIT COMMISSIONER

SAM KELLEY, Commissioner

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November 30, 1981 No. 81-28

Mr. John H. Harris  
Associate Counsel  
Mortgage and Trust, Inc.  
P. O. Box 2885  
Houston, Texas 77001

Dear Mr. Harris:

This is to acknowledge receipt of your letter dated July 6, 1981, wherein you ask whether, in the opinion of this Office, two types of loan transactions common to the mortgage lending business would be considered "open-end accounts" as that term is used in Art. 1.01(f), Article 5069, V.T.C.S. I apologize for the delay in this response.

In our Letter Interpretation No. 81-24, dated October 9, 1981, a copy of which is attached hereto, we set out our basic approach in determining whether certain transactions would be considered "open-end accounts." Some of the types of transactions discussed in that letter are similar to those about which you inquire. Because others have inquired about transactions similar to those set out in your letter and because you give a very good description of such transactions, I have taken the liberty of quoting a portion of your letter and your questions as follows:

"In many permanent commercial loan transactions, the borrower's obligation will be evidenced by a loan commitment and by a note in a fixed principal amount repayable in fixed installments, but will contain a 'recasting' provision - a provision which contemplates and allows for less than the full loan amount to be disbursed at the initial loan closing, with the remainder being 'heldback' for tenant finish and/or rental achievement. The loan commitment between the parties provides all provisions regarding disbursement of the full loan amount and the conditions which must be met to qualify for fundings. The holdback will be disbursed at some specified date(s) upon completion of the tenant fit-up or upon attainment of the desired rental achievement. The initial loan payments will be less than those described in the note and will be 'recast' by computing the payments on the principal actually disbursed and outstanding, with interest on such amount at the rate specified in the note, and with the term, the number of payments and the amortization schedule remaining unchanged. The payments will remain constant until the holdback(s) is funded. Any funds remaining undisbursed at the expiration of the commitment are forfeited by the borrower and immediately applied to reduction of the principal of the note.

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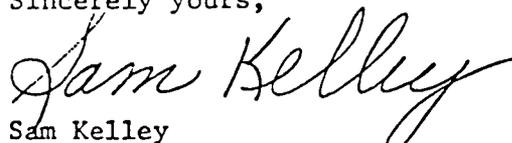
"In the typical residential construction loan, the borrower's obligation is evidenced by a loan commitment and by a note which is secured by a first lien upon real property and the improvements to be placed thereon. The note is in a fixed principal amount, but the principal will be disbursed in multiple advances corresponding to a draw schedule attached to the commitment. Interest will usually be 'prime plus' and will be computed on the amount actually advanced to date. Interest will be payable at fixed intervals (usually monthly) as it accrues and principal will usually be payable on demand or on a specified date.

"Since most permanent commercial loans which are secured by an office building, office warehouse, strip center and other type of improvement involving rental space will provide for a tenant finish and/or rental achievement holdback, and since most construction loans secured by real property will be advanced in multiple disbursements, it is important to the lending community to be certain as to the classification of the above described loans under H.B. 1228. As such, I would respectfully request your interpretation of Article 5069-1.01(f) as applicable to the above loan types and your response to the following questions:

- "1. Is a commercial construction loan arising from a loan commitment, evidenced by a note in a fixed principal amount, which provides for multiple principal advances, an open-end account as described in Article 5069-1.01(f)?"
- "2. Is a permanent commercial loan arising from a loan commitment, evidenced by a note in a fixed amount, which provides for a two or more stage funding (floor funding and rental achievement funding) an open-end account as described in Article 5069-1.01(f)?"

We would not consider the loan transactions about which you inquire to be "open-end accounts" within the definition of that term in Art. 1.01(f). I would liken both these types of transactions to the "advancing note" as described in Letter Interpretation No. 81-24. In our view, there are no new loans made from time to time as contemplated by Art. 1.01(f). Both transactions have fixed principal amounts and neither transaction "revolves." In our view, in each instance there is only one loan made although it may be advanced in increments over a period of time. Neither of your described transactions would, in our view, fall within the definition of "open-end accounts" as set out in Art. 1.01(f).

Sincerely yours,

  
Sam Kelley  
Consumer Credit Commissioner