



STATE OF TEXAS

OFFICE OF CONSUMER CREDIT COMMISSIONER

SAM KELLEY, Commissioner

POST OFFICE BOX 2107
AUSTIN, TEXAS 78768

1011 SAN JACINTO BOULEVARD
512/475-2111

January 7, 1982 No. 82-1

Mr. Owen L. Roberts
Graves, Dougherty, Hearon & Moody
Attorneys at Law
P. O. Box 98
Austin, Texas 78767

Dear Mr. Roberts:

This is to acknowledge receipt of your letter dated November 10, 1981, in which you ask us to express our views concerning a proposed open-end credit plan. I will attempt to briefly summarize the basic features of the proposal as I understand it and then offer our views concerning it.

Your client, a creditor, proposes to enter into individual signed written agreements with a substantial number of prospective borrowers. The creditor would agree to make a line of credit with a specified limit, which would vary among customers, available to each borrower who elects to participate in the plan. Each borrower would have the right to obtain extensions of credit up to the amount of his/her credit limit by direct cash advances from the creditor, or by making purchases at various locations from merchants who would obtain and forward to the creditor sales drafts evidencing purchases made pursuant to the plan. Upon receipt of the sales drafts, the creditor would pay the merchant and debit the account of the customer for the amount of the purchase(s) in the same manner as if a cash advance had been made to the customer. When making a purchase or obtaining a cash advance pursuant to the plan the customer would present a credit card to the merchant or the creditor. Thus, as can be seen, the plan would have several similarities with a typical bank credit card program.

However, your client's proposal would differ from the typical bank card program in that the proposal would have no provision for deferred payment of balances incurred prior to the monthly billing date. All credit extensions made during a monthly billing cycle would be posted to the borrower's account when made or when the sales drafts were received by the bank. At the close of each monthly billing cycle the creditor would send a bill to the borrower stating that the entire balance was due and payable by some specified date during the billing cycle following that in which the balance was incurred. The creditor would charge no

Mr. Owen L. Roberts
Page 2

January 7, 1982

interest on any current balance of the borrower's account which was paid on or before the due date of that balance but would wish to assess some interest charge on past due balances. The creditor would have the right to accelerate the full unpaid balance of an account, including portions of the account not previously billed, at any time the borrower became delinquent in the making of any payment. You further state that the extensions of credit would be primarily for personal, family or household use, but in view of our opinion concerning the program I do not think this feature to be determinative. However, another feature of the proposed program which is important is the fact that borrowers would be assessed a uniform annual membership fee for his/her right to participate in the program. Although there was an indication in your letter that the amount of the membership fee might vary among customers, it is now my understanding that the fee would be the same for all participants and our views expressed herein are based on that assumption.

You ask us to express our views generally on the legality of the proposed program under Texas law, whether the annual membership fee may be charged, and what rate of interest, if any, may lawfully be charged on past due balances if the plan may be implemented.

During years past bank card credit programs have been conducted pursuant to either Chapters 3, 4 or 15, Article 5069, V.T.C.S. As you know, we have always taken the position that any type of annual membership fee, or any other type of charge not specifically authorized, was prohibited on plans conducted pursuant to any of those Chapters. We are of the opinion that it is possible to conduct the type of program you suggest in a manner which does not subject it to the provisions of those Chapters.

In the credit program you outline in your letter, no interest is to be charged on credit extensions for the agreed upon terms of their extensions. If the customer pays the balance owed as contracted on or before the due date there is never an interest charge. The creditor proposes only to assess some interest charge on past due balances that are not paid by their due date.

Article 1.04(n)(5) provides that any person engaged in the business of extending open-end credit primarily for personal, family or household use and charging a rate or amount under the authority of Art. 1.04 shall be subject to the applicable Chapter of Subtitle 2 or Chapter 15 of Article 5069 (emphasis, mine). However, in my opinion, if in the proposed program outlined in your letter an interest charge of no more than 10% per annum were assessed on past due balances, it would not be utilizing the rates authorized by Art. 1.04. Based on that premise it is our opinion that Art. 1.04(n)(5) would not be applicable to the proposed program as long as the interest to be charged did not exceed 10% per annum on past due balances, and therefore the plan would not (as proposed) become subject to the provisions of Subtitle 2 nor Chapter 15 of Article 5069.

Mr. Owen L. Roberts
Page 3


January 7, 1982

Assuming this conclusion to be correct, the prohibitions applicable to programs subject to those Chapters which preclude the assessment of annual membership fees would not apply to the proposal being considered here.

It is our opinion that the proposed program, so long as interest charges of 10% per annum are assessed on past due accounts, does not assess interest under the authority of Art. 1.04 and therefore is not subject to the provisions of Art. 1.04(n)(5). That being the case, the program would not be subject to the provisions of Chapters 3, 4 or 15 of Article 5069 which prohibit annual membership fees on open-end credit plans. We are further of the opinion that so long as the proposed membership fee is a bona fide, uniform charge made for the right to participate in the program, there is no prohibition against its being assessed.

I would emphasize that our opinions expressed herein are limited to this fact situation. For example, if the membership fee were not uniform but rather graduated depending on the amount of credit limit or number of times the card may be used, such fee would take on the characteristics of a charge for credit, i.e. interest, and our opinion of the program would probably be different. Also, if interest in excess of 10% per annum were charged, the provisions of Art. 1.04, including Art. 1.04(n)(5), would be applicable, and we would consider any annual membership fee to be improper.

Sincerely yours,


Sam Kelley
Consumer Credit Commissioner