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

December 30, 1982 No. 82-29

Mr. Larry E. Temple
1510 United Bank Tower
Austin, Texas 78701

Dear Mr. Temple:

On August 17, 1982 this office caused to be published in the Texas Register, Volume 7, Number 61, certain interpretations of this office made pursuant to Article 5069 - 1.04(p), V.T.C.S. Number 33 of that group of interpretations set out the position this office would take relative to buydown funds paid in connection with secondary mortgage loans made pursuant to Chapter 5, Article 5069, V.T.C.S. At the time of the above mentioned publication of interpretations we invited comment by interested parties and, as you know, as a result of such comments received relating to buydown funds have been reconsidering our earlier views as were set out in the Texas Register on August 17, 1982.

The question of buydown funds has been one of the most troublesome with which we have had to deal. Not only was Chapter 5 not designed to cover their treatment but they are a fairly recent phenomenon and there is very little legal authority upon which we can rely for assistance. Paragraphs 226.17(c)(3)(4) and (5) of the Regulation Z Official Staff Commentary describe how they should be treated for federal disclosure purposes. The federal position is of course not controlling as to how they should be considered for state usury tests. Sometime ago I concluded that any position we take with respect to buydown funds will in some respects be inadequate and/or unsatisfactory.

We have decided to partially change our earlier stated position on buydown funds in Chapter 5 transactions.

Our previously published position with regard to buyer buydown funds remains the same (please see Volume 7, Number 61, page 3043, Texas Register, August 17, 1982). As previously stated, these funds must be treated as interest if they are received by a lender in a Chapter 5 transaction. If a buyer/borrower

must pay them in advance in order to get the loan in question they have the basic characteristics of prepaid interest. If a parent or other person closely related to the borrower pays them on behalf of the borrower, such act has the appearances of a gift to or on behalf of the borrower and has the same basic characteristics of a payment by the borrower. Therefore, in the just described borrower buydown situations our earlier position remains the same and such buydown funds should be treated as prepaid interest even if placed in an escrow account.

In the case of seller buydown funds in connection with Chapter 5 transactions we have decided to change our earlier position. Our position will be that seller buydown funds will not be considered prepaid interest if they are placed in an escrow account and a portion thereof disbursed monthly in order to reduce the borrower's monthly payments over a period of time (typically 3 years). However, such funds will be considered interest as they are disbursed. They are just not considered prepaid interest when placed in an escrow account and disbursed monthly.

This position should not be considered applicable to "seller's points" which are not placed in an escrow account. Such payments should still be treated as prepaid interest in a Chapter 5 transaction.

Sincerely,

Sam Kelley

Sam Kelley
Consumer Credit Commissioner

SK:aw