STATE OF TEXAS

OFFICE OF CONSUMER CREDIT COMMISSIONER

SAM KELLEY, Commissioner

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June 1, 1981 No. 81-2

Mr. Charles M. Pickett
Vice President
Preston State Bank
P. O. Box 12000
Dallas, Texas 75225

Dear Mr. Pickett:

This is in reply to your letter of May 22, 1981 concerning Sections 21 and 22 of House Bill 1228 by Messer, recently passed by both houses of the Texas Legislature and signed by Governor Clements on May 8, 1981.

In your letter you ask that we set out our interpretations of various portions of the language in the above-mentioned Sections which were added to the bill in the Senate by Senate Amendment No. 4. Senate Amendment No. 4 amended the existing Chapter 15, Article 5069, V.A.C.S., by (1) amending Art. 15.01(c), the definition of "average daily balance"; (2) adding a new Section 15.02(d); and (3) adding a new Section 15.02(e). (A copy (facsimile) of Senate Amendment No. 4 is attached hereto.) All statutory references contained in this letter are to various Sections or Chapters of Article 5069, V.A.C.S.

Before stating our interpretations of your specific questions concerning the effect of Senate Amendment No. 4, I would make a few general statements with regard to various considerations we have made in arriving at our interpretations. First, some of the language in Senate Amendment No. 4 may be construed to have different meanings or results. Additionally, some of the language in the amendment does not "mesh" with some of the "old" language of Chapter 15, which "old" language was not amended but rather left intact in the statute. We have also considered that the overall concept of H.B. 1228 was to enact "alternative rate ceilings" to the rate structure which was already in existence in various Chapters of Article 5069. (The alternative rates provided for in Section 5 of the bill are not applicable to Chapter 3.) For example, in Sections 14, 15, 16, 17, 19 and 20 of the bill, there were identical (except for technical differences in language) amendments to Chapters 4, 5, 6, 6A and 7 of Article 5069. These amendments were substantially as follows:

> As an alternative to the rates authorized by Section (a) of this Article, the parties may agree to any rate not exceeding a rate authorized by Article 1.04 of this Title.

All of these amendments were designed to provide, just as they are phrased, an alternative rate structure to the rates then in existence in those various Chapters. The old rates then in existence in those Chapters were left as they were and still remain in the statute. I would here point out that H.B. 1228 as passed by the House and sent to the Senate for consideration had the identical alternative rate provision for Chapter 15 as for the several other Chapters mentioned above. At that point in the legislative process (before Senate consideration), this alternative rate amendment would have added a new Section 15.02(d) providing the alternative rate provision for Chapter 15 but also leaving intact the existing rate structure in 15.02(a). Finally, in considering the effect of Senate Amendment No. 4, I have had several discussions with Senator Jack Ogg, its author, relative to his intent in offering the amendment. Senator Ogg has written a letter to me concerning these matters, a copy of which is attached hereto. I will now attempt to respond to your questions but not necessarily in the order in which you stated them.

It seems that the first question to be resolved is whether Articles 15.02(d) and (e) as added by Senate Amendment No. 4 are applicable only if the credit grantor decides to change from charging the old rates authorized by Article 15.02(a) to charging the new alternative rates authorized in the new Section 1.04. I believe that in order to properly answer this question, the Amendment must be considered in its entirety and in light of the concept of H.B. 1228 in general.

The first part of the Amendment changes the definition of "average daily balance" in 15.01(c). The last portion of that definition now reads: ".... Such sum [average daily balance] may include purchases and loans posted to the account during the previous billing cycle and such sum shall be reduced by all payments and credits during the previous billing cycle." (Emphasis added.) Taken by itself this language authorizes the inclusion in the average daily balance of all postings to the account (both debits and credits) in the cycle immediately prior to that during which the statement is sent for the account. Article 15.02(a), which was not amended by H.B. 1228, authorizes the assessment of the appropriate finance charge on the total or entire average daily balance, without any exclusions or "free period." Since Article 15.01(c) authorizes all debits and credits posted to a balance during the previous billing cycle to be included in the average daily balance, and since Article 15.02(a) authorizes the charges therein to be assessed on the average daily balance, these two sections clearly do not require a "free period" from finance charges on any postings during the billing cycle "previous" to the billing for such period.

In the credit card industry, so far as I know, a billing statement is always sent based on the average daily balance during the previous billing cycle. Obviously, an appropriate and accurate finance charge could not be computed until a billing cycle has ended. The first portion of Senate Amendment No. 4 deals with this and in effect states: The debits and credits during the last billing period will be considered before arriving at the final average daily balance on which the finance charge will be assessed. (Paraphrase, mine.) I am sure that all concerned would

agree that if the average daily balance method of computation is being used and if a billing cycle ended on May 15th and a billing statement for that cycle was sent on the following May 20th, the debtor should be given credit for a payment posted to the account on May 5th prior to the end of the cycle on the 15th. It seems clear that the portion of Senate Amendment No. 4 amending the definition of average daily balance in 15.01(c) treats debits (purchases and loans) in the same manner as credits (payments and credits) for the purpose of determining appropriate computation dates.

This being the case, it appears that the first part of Senate Amendment No. 4 authorizes a "no free period" method of assessment of finance charges, while the last part purports to do the opposite. Did the addition by Senate Amendment No. 4 to H.B. 1228 of the new Sections 15.02(d) and (e) affect that same amendment's treatment of the definition of average daily balance in 15.01(c) and affect the method of assessment of finance charges as authorized by 15.02(a)? The new Sections 15.02(d) and (e) are as follows:

> "(d) Interest may not accrue upon transactions except for the amount or portion thereof which remains unpaid at the time of the billing cycle immediately following the billing cycle in which the customer was given an initial opportunity to pay for the purchases.
>
> (e) As an alternative to the rates authorized by Section (a) of this Article, the parties may agree to any rate calculated pursuant to (d) of this Article not exceeding a rate authorized by Art. 1.04 of this Title."

As mentioned previously, when H.B. 1228 passed the House, Section (d) was the standard alternative rate section that was added in other Chapters. Senate Amendment No. 4 substituted the current (d) for the "House (d)" and moved the "House (d)" to the new (e) with one important change. The standard alternative rate provision was changed to read as follows in (e): "As an alternative to the rates authorized by Sec. (a) of this Article, the parties may agree to any rate calculated pursuant to Sec. (d) of this Article not exceeding a rate authorized by Art. 1.04 of this Title." (The underlined words were added by the Senate Amendment.)

Actually Sec. (d) does not contain a "rate" and therefore the use of the phrase in (e) "... rate calculated pursuant to Sec. (d)" is not precise. Sec. (d) provides for a method of applying a rate authorized elsewhere; namely, Art. 1.04. When viewed in this context and in conjunction with the first portion of the amendment, it seems to me that (d) and (e) fall into appropriate perspective. As mentioned, (d) does not have a rate provision but, rather, sets out a method of applying a rate found elsewhere. Sec. (e) provides an alternative rate (1.04) to Section 15.02(a) rates if the method of application of the rate in (d) is adhered to. If Sec. (d) had been meant to apply to Sec. (a), the words "calculated pursuant to Sec. (d) of this Article" need not have been added to the alternative rate section (e). This reasoning also is suggested by the fact that 15.02(a) was not amended

to prevent the assessment of the finance charges authorized therein on the total or entire average daily balance during the previous billing cycle. This reasoning also comports with the views expressed in his letter by Senator Ogg, the sponsor of the Amendment. It also resolves seemingly conflicting portions of the same amendment adopted at the same time.

It is therefore the opinion of this Office that Section 15.02(d) of H.B. 1228 is not applicable to a creditor who decides to charge only the interest rates authorized by Article 15.02(a). If a creditor who extends credit pursuant to Chapter 15 desires to charge the Art. 1.04 alternative rates authorized by Article 15.02(e), the creditor must comply with 15.02(d).

We have been asked for our opinion as to whether Article 15.02(d) is applicable to cash loans as well as credit purchases made pursuant to a Chapter 15 credit program when such program is subject to 15.02(d). As is apparent in the first part of (d), the word "transactions" is used, which would normally be broad enough to cover both cash loans and purchases. However, the last word in (d) is "purchases." I feel that the use of the word "purchases" in the amendment has a limiting effect on its application and in effect defines the word "transactions" used earlier in the Section. This reasoning is in conformity with Senator Ogg's intent as expressed in his letter. It is our position, therefore, that if 15.02(d) is applicable to a particular credit program because it is subject to Art. 1.04, it is applicable only to purchases and not to cash loans made pursuant to the program.

Finally, we have been asked to express our opinion as to what type of free period is required by 15.02(d) if it is applicable to a particular credit program. Section (d) may be read so as to reach several different results, all of which may have varying degrees of validity. Therefore, in formulating our position on this question, we have relied heavily on the expressions by Senator Ogg in his letter and in personal conversations and on the statements made on the Senate floor during the debate on this amendment as well as the language of the amendment.

First, in (d) the phrase "the customer was given an initial opportunity to pay for the purchases" is susceptible to more than one meaning. Actually, a plan can allow the customer an opportunity to pay for the purchases at any time subsequent to making them, and the customer would not have to wait until a billing statement is sent. However, we feel that this phrase was meant to designate the first time the purchases appear on the billing statement received by the debtor. The phrase "at the time of the billing cycle immediately following" is somewhat ambiguous, but it is our opinion that "at the time" means the date on which the billing cycle during which a debtor has received a billing statement for a purchase is closed out, and the next day is the first day of the next billing cycle. For example, a hypothetical billing cycle begins on the 5th day of each month and ends on the 4th day of the following month. A $50 purchase has been posted to this account on May 25th. This is the only activity on this account during this billing cycle and the account is closed out on June 4, and the billing statement sent a few days subsequent to that date. It is our opinion that Section (d) provides that the debtor

has through July 4 to pay the $50 charge before being assessed a finance charge on the purchase. If, however, the $50 is not paid on or before July 4, or is only partially paid, the creditor is entitled to earn interest on the amount or unpaid portion thereof beginning from the original date of posting (May 25). In the example given, if the customer had paid $25 on or before July 4, the creditor could charge interest only on the remaining $25 balance.

I hope this response is satisfactory for your purposes.

Sincerely yours,

Sam Kelley

Sam Kelley
Consumer Credit Commissioner

Senate Amendment Number 4

SECTION 21. Article 15.01(c), Title 79, Revised Civil Statutes of Texas, 1925, as amended (Article 5069-15.01, Vernon's Texas Civil Statutes), is amended to read as follows:

(c) "Average daily balance" means the sum of each day's ending balance in an account during the previous (a)billing cycle (less any interest included in such balance), divided by the number of days in the previous (such) billing cycle. Such sum may include purchases and loans posted to the account during the previous (such) billing cycle and such sum shall be reduced by all payments and credits during the previous (such) billing cycle.

SECTION 22. Article 15.02, Title 79, Revised Civil Statutes of Texas, 1925, as amended (Article 5069-15.02, Vernon's Texas Civil Statutes), is amended by adding Sections (d) and (e) to read as follows:

(d) Interest may not accrue upon transactions except for the amount or portion thereof which remains unpaid at the time of the billing cycle immediately following the billing cycle in which the customer was given an initial opportunity to pay for the purchases.

(e) As an alternative to the rates authorized by Section (a) of this Article, the parties may agree to any rate calculated pursuant to Section (d) of this Article not exceeding a rate authorized by Article 1.04 of this Title.

The Senate of The State of Texas Austin

JACK OGG
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Gentlemen:

I understand that you expect to be asked to construe H.B. 1228, recently passed by the Texas legislature and now in effect by virtue of Governor Clements' approval on May 8, 1981. I appreciate your concern as you view this task, and I write this letter to be of such help as I can in order that a uniform interpretation of the points in question might be achieved. In particular, I have set out below my views regarding amendments adopted on the floor of the Senate affecting Chapter 15 of the Texas Credit Code.

First, I frankly do not see that insertion of the words "the previous" instead of the word "a" before the term "billing cycle" in Article 5069-15.01(c) alters the meaning of that article in view of the practices of credit card issuers of billing interest in arrears. It would not alter the meaning of the Act.

Second, new Section (d) of 5069-15.02 is intended to apply only to credit card purchases, not cash loans. Further, Section (d) is not intended to interfere with the creditor's right to charge interest for the entire period from date of posting for purchases for which payment is not made in full during the period in which the customer is first billed for the purchases.

With regard to the relationship and construction of new subsections (d) and (e) to the remainder of Article 5069-15.02, it seems to me that the analysis most consistent with both actual language of Art. 15.02, as amended, and with the overall purpose of H.B. 1228 is that only those credit purchases that are to bear interest at the higher rates authorized by new Art. 1.04 would be subject to the "free period" requirements of new section (d).

In this connection, I would mention the following: (i) The overall purpose of H.B. 1228 was to provide an alternative to the present rigid interest rate ceilings. New Section 15.02(e) says as much: "As an alternative to the rates..." Thus, H.B. 1228, as amended, should be construed to preserve, rather than repeal, existing provisions affecting the rates and calculation of interest. (ii) Present Art. 15.02(a) permits certain rates to be charged on the "average daily balance" in an account. New Art. 15.02(e) permits rates authorized by Art. 1.04 and calculated pursuant to Art. 15.02(d) to be charged as an alternative to the present rates. There would have been no reason to refer in subsection (e) to the particular method of calculation set out in (d) if that method were to be of general application. (iii) Thus, the language of 15.02(e)--which provides for interest at alternative rates to be calculated under new 15.02(d)--and the overall intent of H.B. 1228 of providing alternative methods and rates of interest come together in support of what I had always believed was the proper analysis of my Senate Floor amendment: If a creditor wishes to utilize the rates allowed by Art. 1.04, then the creditor must provide the "free period" of Art. 15.02(d) on credit purchases; if, however, the creditor does not utilize the "new" rates but remains at rates available under 15.02(a), then new sections 15.02(d) and (e) would have no bearing on that creditor's calculation of interest.

Sincerely,

Jack Ogg