



STATE OF TEXAS

OFFICE OF CONSUMER CREDIT COMMISSIONER

SAM KELLEY, Commissioner

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July 13, 1983 83-9

Ms. Barbara N. Perkins
Liddell, Sapp, Zivley, Brown & LaBoon
Texas Commerce Tower
Houston, Texas 77002-3095

Dear Ms. Perkins:

This is to acknowledge receipt of your letter dated June 27, 1983 concerning the applicability of recently enacted Senate Bill 405, codified as various sections of Article 5069, V.T.C.S., to certain electronic transfer services offered by a bank(s). I will first describe the programs outlined in your letter.

The Bank, in compliance with applicable law, issues to customers who apply for electronic funds transfer service a personal identification number ("PIN") and a plastic card (such PIN and plastic card are collectively referred to as the "Access Device"), which Access Device may be used at an appropriate unmanned teller machine ("ATM"). The Access Device may be used at an ATM to obtain cash from the customer's asset accounts (savings, demand deposit, or NOW accounts); to make inquiries as to the balance of the customer's asset accounts; transfer funds between the customer's savings, demand deposit and NOW accounts; and make deposits to the customer's asset accounts. The Access Device allows a customer to access his/her asset account electronically; such customer can accomplish no more with respect to the asset accounts (other than to make balance inquiries via an ATM) than a customer with a checkbook and savings withdrawal slips. Neither the card itself nor the Access Device may be used to purchase goods or services on credit, nor can a customer present the Access Device at a teller window to obtain access to the customer's asset accounts. The sole purpose of the Access Device is to allow a customer to electronically access his/her accounts, alleviating his/her visiting the bank during normal banking hours.



Separate and apart from the electronic funds transfer service, the Bank offers two types of overdraft protection services (collectively referred to herein as "Overdraft Protection") to qualified customers for particular asset accounts such as checking and NOW accounts ("checking accounts"). Both Overdraft Protection services operate in the same fashion, except that the preapproved line of credit connected with the one service ("AMEX Overdraft Protection") may be used not only to cover any insufficiencies in a checking account but also to pay American Express Gold Card bills if the customer authorizes American Express to draft directly on such customer's line of credit. An American Express Gold Card holder does not borrow any money from the Bank when he purchases goods and services by using his Gold Card. A draw is made on the customer's line of credit only in the event the customer does not wish to pay his American Express bill and the customer instructs American Express to draft on his AMEX Overdraft Protection line of credit at the Bank.

Each such Overdraft Protection agreement is subject to Articles 5069-1.01 and 5069-15.01 et seq. of the Texas Revised Civil Statutes. The Bank elected the indicated ceiling as the ceiling for usury purposes for the Overdraft Protection lines of credit; however, the Bank has limited this rate to a fixed rate of 18% per annum pursuant to the written agreements establishing the Overdraft Protection services.

The amount of the Overdraft Protection line of credit is considered part of the available balance in a customer's asset account, available at all times for withdrawal by the customer. Both Overdraft Protection lines of credit are as a general rule activated by writing a check for more than exists in a customer's checking account. The balance in the checking account is used first, and then funds are automatically advanced from the Overdraft Protection line of credit in increments of \$100 to the checking account to cover the check. The Overdraft Protection line of credit may also be activated by a customer's calling, writing, telexing or visiting the Bank in advance of an expected deficiency and requesting the Bank to transfer funds in an estimated amount from the Overdraft Protection line of credit to the customer's checking account (thus triggering finance charges from the time the instruction is received as opposed to the time of the deficiency).

The Bank views the electronic funds transfer service and the Overdraft Protection service as separate entities. The former is designed to provide electronic access to asset accounts so that a customer may obtain cash at convenient locations at convenient times, without going to the Bank during normal banking hours to write a check and presenting the check to a teller; the latter is designed for the credit convenience of a customer who desires a pre-approved line of credit in various

amounts (typically in the \$2,000 range) and does not want to pay interest on the funds until he actually uses the funds. Not all holders of Access Devices have Overdraft Protection and there is no requirement that a Bank customer have either or both.

The Bank's existing data processing system and the Bank treat withdrawals at an ATM in exactly the same manner as withdrawals at the teller windows where the customer has used a check or savings withdrawal, except that the Bank furnishes the customer using the ATM services the required Regulation E periodic statement and receipt descriptions. When a customer uses the ATM to make an inquiry as to his current balance in his checking account, the ATM response is the customer's available balance, which includes the money in the customer's checking account (which may include actual previous advances under the Overdraft Protection line of credit) plus any amounts available for withdrawal from the customer's Overdraft Protection unused line of credit. The customer would receive the same response to a balance inquiry from a teller in person, by phone or letter. Advances of funds under an Overdraft Protection line of credit are generally automatically initiated by a deficiency in the customer's checking account balance or by the specific instruction, whether oral or written. Any withdrawal of funds from an ATM with the customer's Access Device which results in a deficiency in his asset account automatically triggers an advance under the Overdraft Protection line of credit, just as an asset deficiency caused by the writing of a check would automatically trigger the Overdraft Protection line. For example, if a customer has a checking account with a balance of \$100 and an unused Overdraft Protection line of credit of \$2,000 and he goes to the teller to cash a check for \$250, he obtains \$250. He then has a balance of \$200 under the Overdraft Protection Agreement (upon which finance charges are assessed), a balance of \$50 in his checking account and \$250 in cash. Rather than wait in line at the teller window, the customer could have taken his Access Device to the ATM in the Bank's lobby to obtain \$250 in cash and the result would have been the same. Without manually examining the customer's statement, the Bank cannot determine whether or not an ATM transfer or a check indirectly resulted in actual usage in the line of credit; if an ATM transaction and a check are posted on the same day, there may be no conclusive method of establishing which activated the credit line.

Response

In Letter Interpretation Number 83-6 dated June 27, 1983 we expressed our view that the Sections 29-37 of Senate Bill 405 were enacted to apply to the typical bank and retail credit card extensions of credit. I think it is clear that the Legislature did not intend that the relevant provisions of Senate Bill 405 apply to all open-end credit plans but only to typical credit card programs. In Letter Interpretation Number 83-6 we expressed our opinion that the debit card plan in connection

with an overdraft protection plan and the American Express Gold Card Plan described therein were not plans pursuant to which "credit card transactions" as defined in Article 5069-1.01(g) were made. Although there are some differences in the plans described in your letter and those discussed in Letter Interpretation Number 83-6, it is also our view that the plans outlined in your letter are not ones pursuant to which a "credit card transaction" is or may be made.

The debit card issue has been a difficult one with which to deal. I was to some extent involved in the Senate Bill 405 legislative process and have knowledge of the fact that no one ever expressed any intent that debit cards should be affected by the legislative changes intended for typical credit cards. On the other hand, it is fair to state that no one directly involved with Senate Bill 405 knew and was ever apprised of the various ways which debit cards might be used to debit an asset account in connection with which account there might be a separate overdraft protection plan. As far as I know, the issue was just never fully considered other than to assume that the new legislation in Senate Bill 405 would not affect debit cards.

I believe as a general rule that an administrative agency should not "legislate" by using its interpretive authority to expand the scope of legislative enactments. Arguments can be made that the Access Device plan in connection with the Overdraft Protection Plan described in your letter could be considered a plan pursuant to which "credit card transaction(s)" may be made. However, use of the described Access Device always debits an asset account; it does not debit an open-end account as required by Article 1.01(g). It is true that the debit to the asset account may result in funds being advanced to that account, but this is brought about by another agreement separate from the debit card agreement, and such advance may also be the result of a debit to the asset account caused by the writing of a check, which was clearly not intended to be subject to the definition of "credit card transaction."

It is the position of this office that transactions made pursuant to the described Access Device program and American Express Gold Card Plan in conjunction with the Overdraft Protection Plan do not constitute "credit card transaction(s)" as that term is defined in Article 5069-1.01(g), V.T.C.S.

It should be noted that the plans here discussed had been in existence sometime prior to the enactment of Senate Bill 405, and involve transactions on "bona fide" asset accounts. The programs were not established with any intent of circumventing the new provisions of Senate

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Bill 405. If programs were established in the future with more or less "dummy" asset accounts so as to offer some sort of open-end account credit program with the purpose of evading the restrictive provisions of Senate Bill 405 as they relate to credit card transactions our views of the program would probably not be those expressed herein.

Sincerely,

A handwritten signature in cursive script that reads "Sam Kelley". The signature is written in dark ink and is positioned above the printed name and title.

Sam Kelley
Consumer Credit Commissioner