STATE OF TEXAS

# OFFICE OF CONSUMER CREDIT COMMISSIONER

SAM KELLEY, Commissioner

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December 4, 1985 85-16

Ms. Cheree Tull Kinzie
Sawtelle, Goode, Davidson
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Two Sasa Center
613 N.W. Loop 410, Suite 1000
San Antonio, Texas 78216

Dear Ms. Kinzie:

This is to acknowledge receipt of your letter dated November 18, 1985 wherein you request an interpretation by this office of various provisions of Article 5069, V.T.C.S. as they relate to a proposed open-end line of credit. The question posed by your letter is as follows:

> "Is a Texas lender entitled to extend credit to consumers under an open-end plan accessed by drafts secured by first lien real estate (and second liens which do not qualify under Chapter 5) under the authority of Chapter 1 of the Texas Credit Code?"

For several years within our office we have discussed the issue you present and it is probably fair to say that our only conclusion has been that the relevant statutory provisions are not clear. In a recent Letter Interpretation No. 85-10 dated August 9, 1985, I made the statement that with one exception (in Chapter 5 of Article 5069) there is no statutory authorization for an open-end loan agreement made primarily for personal, family or household use secured with real estate.

Chapters 3, 4 and 15 of Article 5069 (all of which have open-end credit provisions) prohibit the taking of real estate as collateral on a transaction subject to their provisions. Chapter 5 allows second liens in connection with an open-end credit plan but only on dwellings designed for occupancy by four families or less, and makes no allowance for the taking of first liens. We therefore have the situation where none of the open-end loan chapters allow for the taking of first liens on real estate as collateral and only Chapter 5 authorizes the taking of second liens and then only in limited circumstances.

When House Bill 1228 was enacted by the Texas Legislature in 1981 one of the many new provisions added to Article 5069 was Article 1.04(5) which provides as follows:

> "Any person (except a person subject to Chapter 24 of the Insurance Code) engaged in the business of extending open-end credit primarily for personal, family or household use and charging a rate or amount under authority of this Article 1.04 shall be subject to either the applicable Chapter in Subtitle 2 of this Title or Chapter 15 of this Title, as applicable, except to the extent inconsistent with this Article; the parties to such open-end accounts and their assignees shall comply with and have all other rights, duties and obligations under the applicable Chapter, except to the extent inconsistent with this Article."

The basic intent of this provision (as well as other similar provisions) was to ensure that if a type of transaction had been subject to one of the Subtitle Two Chapters or to Chapter 15 prior to the enactment of H.B. 1228 then that type transaction would still be subject to that Chapter after the passage of House Bill 1228. It will be noted that Article 1.04(5) refers to the applicable chapter in Subtitle Two, or Chapter 15 as applicable. So it seems to me that the answer to your question depends on what happens if none of the Chapters of Subtitle Two nor Chapter 15 is applicable to the transaction.

It is my view that even though there is no specific authorization in Chapter 1 of Article 5069 for an open-end loan plan for personal, family or household use accessed by drafts and secured by a first lien on real estate or by a second lien which is not of the type defined in Chapter 5 that such a plan may be implemented pursuant to Chapter 1. Prior to the enactment of H.B. 1228 the interest rate authorized by Article 1.04 was 10% per annum. This office would have taken the position at that time that an open-end loan plan as discussed in this letter could have been made pursuant to that article as it then existed and either a first lien or a second lien on real estate be taken as collateral provided the interest charged was not in excess of 10% per annum. House Bill 1228 of course changed the interest rate ceilings in Article 1.04 and Article 1.04(5) mandates that transactions subject to Subtitle Two or Chapter 15 be made pursuant to those chapters, but in our opinion if one of the chapters is not applicable to a type of transaction then that transaction may be made pursuant to Chapter 1.

Therefore it is the position of this office that a lender may extend credit for personal, family or household use to consumers under an open-end credit plan accessed by drafts secured by first lien real estate (and second liens which do not qualify under Chapter 5) under the authority of Chapter 1 of Article 5069. Nothing herein should be construed as being applicable to lender credit card agreements which are subject to Article 5069 - 15.02(d).

Sincerely,

Sam Kelley

Sam Kelley
Consumer Credit Commissioner