STATE OF TEXAS

OFFICE OF CONSUMER CREDIT COMMISSIONER

AL ENDSLEY, Commissioner

2601 NORTH LAMAR
AUSTIN, TEXAS 78705-4207

(512)479-1280
(214)263-2016
(713)461-4074

Writer's Direct Number: (512) 479-129

January 18, 1988 88-1

Ms. Sharon Lock Davis
Attorney at Law
1431 Greenway Drive, Suite 700
Irving, Texas 75038

Dear Ms. Davis:

In your letter of December 7, 1987, you comment that Article 5069-Chapter 3, Chapter 4 and Chapter 5, V.T.C.S., expressly prohibit a creditor from directly or indirectly charging, contracting for or receiving brokerage fees whether received by the lender or any other person in connection with the loan. You further explain that your client, as do many other lenders throughout the state, uses "correspondents" who refer customers to the lending institution, which correspondents obtain the lender's approval for the loans and prepare the loan documents but do not actually fund the loans. Your lender client funds the loans and pays the correspondents a fee for referring the loans to the financial institution.

Before quoting the two scenarios identified as Examples 1 and 2 in your letter, I think it is necessary that I clarify the position of our Office with respect to the role of a "correspondent" and the inclusion of a prepaid interest charge in a loan made pursuant to Subtitle Two of Article 5069.

Chapters 3, 4 and 5 of Article 5069 contain similar but different language relative to the authority for a person to engage in business pursuant to each of the Chapters. Article 3.01 of Chapter 3 provides that only an authorized lender may engage in the business "...of making, transacting, or negotiating loans..." subject to the Chapter. "Authorized Lender" is defined in the Chapter as a person who has obtained a license from the Consumer Credit Commissioner or a bank or savings and loan association doing business under the laws of this state or of the United States. Article

4.01(1) provides that any bank or savings and loan association doing business under the laws of this state or of the United States and any person licensed to do business under the provisions of Chapter 3 may contract for and receive in connection with a loan made pursuant to the Chapter an interest charge amount not to exceed that stipulated in the Chapter. If the alternative interest rate provided under Article 5069-1.04 is used in connection with a Chapter 4 loan, the provisions of Article 1.04(n)(1) become applicable to the loan, which Article further requires that any person who makes or negotiates a Chapter 4 loan must be a bank or savings and loan association or a regulated loan licensee. Article 5.01(2) of Chapter 5 permits banks, savings and loan associations and credit unions doing business under the laws of Texas and the United States and a regulated loan licensee to make, negotiate and arrange secondary mortgage loans under the authority of the Chapter.

You will note from the preceding paragraph that only licensed and authorized persons (lenders) are recognized in the development of loans subject to the provisions of Subtitle Two. "Correspondents" are not identifiable under the statute. Therefore, for purposes of this response, any person who prepares loan documents subject to Subtitle Two as an arranger of a loan (broker, service company, correspondent) is required to be licensed by this agency or be a bank or savings and loan association.

We have previously written letters of interpretation relative to the propriety of the collection of prepaid interest in connection with loans secured by real property, including secondary mortgage loans made pursuant to Chapter 5 of Article 5069. Article 5069-1.07 provides a test for usury with respect to prepaid interest on loans secured by real property through the statutory process of spreading interest over the life of the loan. Article 5069 contains no similar language designed to be applicable to unsecured loans or loans secured by personal property. Consequently, this Office does not recognize the authority contained in Article 1.07 to extend to non-real property loans including all loans subject to Chapters 3 and 4 which prohibit the taking of liens upon real estate.

Your examples are quoted below followed by my response.

"Example 1

The customer is quoted a finance charge (for example 12% + 2% origination fee) when he makes his inquiry directly with the financial institution. Then, the same customer contacts a correspondent and the correspondent

quotes him 12.0% + 4% origination fee as the finance charge for the same loan with the same financial institution. In this transaction the correspondent was paid 2% for originating the loan.

"Question: Would the factual situation described in the first example result in an unlawful charge being made against the customer?"

Answer: The charge for the additional 2% origination fee is considered by us to be an unauthorized indirect charge in the form of a cost of procuring a loan which is specifically prohibited in Article 5.02(7).

"Example 2

The customer goes to the financial institution and obtains a quote on finance charge of 12% + 2% origination fee. Thereafter, he contacts a correspondent who quotes 12% + 2% origination fee with the same financial institution on the same loan. In this transaction the correspondent was paid 2% for originating the loan.

"Question: Would the scenario described in Example 2 result in an unlawful charge being made against the customer?"

Answer: The transaction would not be considered by this Office to be in violation of the provisions of Chapter 5. In this example the borrower is required to pay the same basic interest rate and the same amount of prepaid interest regardless of which authorized lender makes the loan. The funding lender absorbs the expense of the referral fee paid to the originating lender.

I trust this is an adequate response to your inquiry.

Very truly yours,

Al Endsley
Commissioner

AE:lwg