



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: 479-1292

August 31, 1989

89-3

Mr. William H. Daniel
McGinnis, Lochridge and
Kilgore
1300 Capitol Center
919 Congress Avenue
Austin, Texas 78701

Dear Mr. Daniel:

You represent a retailer who offers retail credit card arrangements under Chapter 6 of Article 5069, and who is registered pursuant to Article 6.11 thereof. Currently, your client offers a credit card program (the "regular program"). Under the regular program, a customer can purchase goods and services, as defined in Chapter 6, from your client, or others licensed or franchised to do business under its business or trade name or designation, or other persons authorized to honor the card. The rate of finance charge is provided under Article 5069-1.04 as modified by Article 5069-1.11. Revolving credit terms are available.

You have asked whether your client may now offer to customers and prospective customers a second type of credit card program - providing additional services not related to the extension of credit. Under the "enhanced services program" the customer could purchase on credit the same goods and services which he can purchase under the regular program. The enhanced services program would feature identical credit terms as the regular program. Customers and potential customers could choose between a regular and an enhanced services accounts.

Under the enhanced services program, however, the customer would receive certain special services, such as a toll-free message service, travel reservation and discounting service, and collision damage waiver on rental cars. In some cases, the customer would be entitled to a rebate based upon the volume of certain purchases made with the enhanced services credit card. The customer would pay a periodic charge, which would be charged to the credit card account to purchase the services, on an annual basis. Such charge would represent the "cash price" for such services (Article 5069-6.01(i)) and would be so identified in advertising and on or with the periodic statement in which the charge is posted.

Customers would have the option of declining to pay the charge when billed and if they did so, a basic service account would be offered to them if they continue to meet the retailer's regular credit standards. A visually unique credit card would be issued to persons purchasing the enhanced services to identify them as persons entitled to such services.

You have asked whether the proposed enhanced services program would comply with Article 5069, and in particular with Chapter 6 and Articles 5069-1.04 and 1.11 thereof.

The regular program, as you have described it, would be covered by Chapter 6 of Article 5069 and Articles 5069-1.04 and 1.11. The only features of the enhanced services program which suggest any cause to question Chapter 6 compliance are the presence of the enhanced services feature and the periodic charge. In this regard, I note that the definitions of "goods" and "services" in Chapter 6 of Article 5069 are extremely broad. For example, the definition of "services" includes "services of any kind when purchased primarily for personal, family or household use and not for commercial or business use and includes a maintenance or service contract or agreement. . . ." The "enhanced services" described in this letter would fall within this very broad definition. The fact that the charge for the services is made on a periodic basis (i.e., for a period of a month, a year, or other period of time that the enhanced services will be available to the customer), rather than at the time the services are delivered, does not remove them from the broad definition of "services" in Chapter 6. It is clear that a charge may be made under a retail charge agreement or a retail credit card arrangement for the cash price of any goods or services, as defined in Chapter 6, and for the finance charge thereon in accordance with Articles 5069-1.04 and 1.11 or Chapter 6 of Article 5069. Any modification of this program or any similar program should be designed to only include enhanced services which constitute goods or services as defined in Chapter 6 and insurance or service contracts permitted by Chapter 6.

As you have described the two programs, the only substantive differences between them are the enhanced services and the periodic charge for those services. Since the customer can obtain a credit card with the same rate of finance charge and the identical credit terms, without purchasing the services in question, it is clear that the customer does not pay the periodic charge for the credit privileges, but rather that the periodic charge is for the enhanced services. Since the enhanced services are "services" within the definition in Chapter 6, a charge for them is the cash price and can be charged under Chapter 6. Thus, as you have described it, the enhanced services program, and the periodic charge for the enhancements, would comply with Article 5069 and, in particular, with Chapter 6 and Articles 5069-1.04 and 1.11 thereof, and the periodic charge would be considered a charge for services. The rate of finance charge on the periodic

charge and on the other charges to the account could be determined under either Article 5069-1.04 (as modified by Article 5069-1.11) or under Chapter 6. As you know, this Office traditionally has taken the position that a fee (other than permissible finance charges) may not be charged under Chapter 6 for the privilege of obtaining credit. In my view, however, the periodic fee you describe is permissible because it is for the enhanced services rather than for the credit privileges available from the retailer.

It is recognized that your client believes that the charge for the enhanced services must be disclosed as an "annual fee" pursuant to Regulation Z, Section 226.5a(b)(2). I do not find that this changes the character of the charge under state law. You have stated that your client will formulate its advertising and periodic statements to indicate that the charge is the cash price for the enhanced services pursuant to Texas law and I agree that this should be done. I further believe that customers and potential customers should be informed in any advertising or periodic statement to which the charge is posted, that credit is available without payment of the "annual fee" or "cash price" to creditworthy persons. Failure to do so would tend to cause affected persons to believe or assume that payment of the fee is necessary to obtain credit.

Sincerely,



Al Endsley
Commissioner