STATE OF TEXAS

OFFICE OF CONSUMER CREDIT COMMISSIONER

SAM KELLEY, Commissioner

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February 24, 1982 No. 82-8

Mr. Jack Welch
Attorney at Law
Box 568
Marlin, Texas 76661

Dear Mr. Welch:

This is to acknowledge receipt of your letter dated February 11, 1982, wherein you request an opinion from this Office concerning a proposed method of implementation of the provisions of Article 5069-1.04, V.T.C.S., as to retail charge agreements subject to Chapter 6 of Article 5069.

In your letter you point out that Article 5069-1A.01 requires that a creditor who implements the provisions of Art. 1.04 as to existing open-end accounts must allow the obligors to pay off the balances then existing at the previously agreed to rates and terms. This can be achieved upon implementation of the Art. 1.04 provisions by the creditor's maintaining two balances on each of the open-end accounts -- the pre-implementation balance at the old rates and terms and the new balances incurred after the implementation date at the new rates and terms. As you mention, many relatively small retailers do not have data processing equipment which will maintain two different balances with different finance charges. You suggest the following hypothetical situation as a possible course of action for those creditors who cannot maintain two separate balances and ask for our opinion as to whether such a program would comply with the requirements of Arts. 1.04 and 1A.01.

The hypothetical situation to be assumed is as follows: A retailer has a revolving credit program subject to Chapter 6, Article 5069. The required percentage of repayment scheduled for all customers participating in the program is the same and is established in such a manner that all balances, no matter what their size, will be paid in full in not more than a certain number of months -- for example, six months -- if the customers pay as agreed. The creditor proposes that the provisions of Art. 1.04 be implemented as to customers participating in the program as of a monthly billing date, say April 1982; that the annualized ceiling be applicable to the agreements and that the rate to be implemented will be 21% per annum. However, the 21%, although implemented as of the April billing date, will not be charged on any account until after a six month period. The 21% would not be charged on any balances existing on the accounts as of the date of implementation nor would it be assessed on new purchases during the six month period. If the

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customers paid according to their agreements, the balances which were in existence as of the implementation date (April 1982) would be paid off during the six month period. The old rates would be charged on all old balances and new purchases during this period. The creditor would not charge the new, higher rate until after the initial six month period at which time the new rate of 21% would be charged on balances existing as of that time and on all future charges to the accounts. This type of program would not require the creditor to maintain two balances at two different rates of charge.

It is our opinion that such a proposed implementation of Art. 1.04 provisions, if done properly, would comply with the requirements of Arts. 1.04 and 1A.01. Article 1A.01, as previously mentioned, requires that upon implementation of Art. 1.04 provisions the creditor must allow the obligor to pay the existing balance at the rates previously agreed to and at the minimum payment terms previously agreed upon. This section also allows the creditor to apply all payments made on the account first to the "old" balances. In the proposed plan, all balances existing as of the implementation date (April 1982 billing date), if paid as agreed, would be paid off by the end of the six month period. This I think is what 1A.01 requires. There would of course be some customers who would not have paid enough to pay off those balances but they would not have paid as agreed. Article 1A.01 in my opinion does not require the creditor to extend the old repayment terms on the old balances beyond the old agreement provisions. In my view those customers who do not pay according to the old agreement terms lose the benefits of 1A.01 after the time at which the old balances would have been retired if proper payment had been made.

It could be argued (and has been considered) that in your hypothetical situation the creditor has not implemented the Art. 1.04 rates as of the April 1982 billing date, and that therefore the provisions of 1A.01 should be applicable not to the balances as of April 1982 but to those existing some six months later when the new rate of 21% starts being assessed. I do not agree with that view for several reasons. First, 1A.01 does not speak in terms of implementing the Art. 1.04 rates but rather the Art. 1.04 provisions. Although I believe in the hypothetical situation the creditor has implemented the Art. 1.04 rates as of April 1982 but is just not charging them, Art. 1A.01 would be applicable as of the date the provisions of Art. 1.04 were implemented even though the Art. 1.04 rates were not charged. Secondly, Art. 1.04(g) provides "...that when the parties have agreed to a rate, they are considered to have agreed to any lesser rate that the creditor may elect, or is required under Section (h) of this Article to implement." (Emphasis, mine.) Art. 1.04(g) thus contemplates two instances when lesser rates than those specifically agreed upon have by implication been agreed to: when the creditor of his own volition decides to charge less and when the creditor is required to charge less. It seems to me that the former situation is applicable here.

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In my opinion the creditor in the hypothetical situation will implement the provisions (including the rates) of Art. 1.04 as of the April 1982 billing date and that the proposed plan will comply with the requirements of Art. 1A.01. The customers will be allowed to retire the balances existing as of that time at the old rates and payment terms. (This opinion is of course predicated on the assumption that the old repayment terms are such that the old balances will all be retired during the six month period if payments are made as agreed.) The new rate of charge of 21% would not be assessed on any balances on any account until after the six month period. This feature can be more beneficial to the customers than some other plans since the new, higher rate will not be charged on new purchases during the initial six month period. Assuming proper notice is given to customers and the other requirements (such as limitations on charges) are complied with, we are of the opinion that the method of implementation of Art. 1.04 provisions you have proposed is in compliance with the provisions of Arts. 1.04 and 1A.01.

Sincerely yours,

Sam Kelley

Sam Kelley
Consumer Credit Commissioner