STATE OF TEXAS

OFFICE OF CONSUMER CREDIT COMMISSIONER

SAM KELLEY, Commissioner

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January 15, 1982 No. 82-2

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

Dear Mr. Welch:

This is to acknowledge receipt of your letter dated November 30, 1981 wherein you pose several questions concerning retail charge agreements made pursuant to Chapter 6, Article 5069 V.T.C.S., and ask for an expression of opinion by this Office as to our position with regard to your questions. All the statutory references herein are to various provisions of Article 5069.

For the purpose of our response to your questions we are assuming a hypothetical situation of a retail creditor who has previously and correctly implemented the provisions of Art. 1.04. The creditor has complied with the provisions of Art. 1.04(h)(1), Art. 1.04(i) and Art. 1A.01. The creditor has implemented a rate of charge on the revolving charge agreement program for all customers participating in the plan for a yearly period pursuant to Art. 1.04(h)(1), with the rate not to exceed the annualized ceiling. We will further assume that the first year agreed to rate is 21% (not in excess of the annualized ceiling). At the time for the first annual adjustment of the rate (end of first year) the annualized ceiling drops to 20%. At the time for the second annual rate adjustment (end of second year) the annualized ceiling goes back up so as to be at or above the 21% originally agreed upon by the parties. As you of course know, when the annualized ceiling drops to 20% for the second year the creditor will have to adjust the rate charged on the plan to 20% or below if the creditor continues to utilize the annualized ceiling.

I will set out your questions (not necessarily verbatim) in the order you presented them with our responses directly following each question.

Question No. 1. Is it necessary for the retailer to disclose to the obligor the reduction in rate which occurs during the second annualized period?

Response to Question No. 1. No, assuming the retailer has at the time of original implementation advised the charge agreement customers that the election of the annualized period may be renewed, the creditor is not required to again comply with Art. 1.04(i). The new rate should of course be shown on the regular periodic statements sent to the customers. Also, Art. 1.04(g) provides that unless otherwise agreed, when the parties have agreed to a rate, they are considered also to have agreed to any lesser rate that the creditor may elect, or is required to implement. Art. 1.04(h)(1), again assuming proper initial notice, provides that no further notice of a renewal of an election is required if the rate does not exceed that previously agreed to. In the example, since the second period ceiling (20%) goes down, forcing down the rate for the second period (20% or lower), the rate will necessarily be lower than the rate (21%) previously agreed to by the obligor, and thus the creditor does not have to give notice of the lower rate for the second annualized period.

Question No. 2. Is it necessary for the retailer to give the Art. 1.04(i)(1) notice to the charge agreement customers of an increase in the rate of charge back to 21% for the third year when the ceiling has gone back up to 21% (the rate originally agreed upon) or above?

Response to Question No. 2. No, again assuming proper initial notice that elections of period could be renewed. The obligor originally agreed to a rate of charge of 21% which would be the rate for the third annualized period It seems to me that just this situation is contemplated by the next to last sentence in Art. 1.04(h)(1), which is as follows:

> "No further notice of the renewal of an election, or of any successive renewals of elections, is required if the creditor has previously disclosed to the obligor that the election may be renewed in accordance with this section and the rate does not exceed the rate previously agreed to by the obligor."

Therefore, it is our opinion that if the rate for the third year is raised to 21% and no higher, the Art. 1.04(i)(1) notice would not have to be given. However, I would offer a few cautionary comments. Although in the above situation, in our opinion. the Art 1.04(i)(1) notice would not be required, it appears that Regulation Z, Sec. 226.9(c) would require a notice of the rate increase be given to each obligor. In the event the creditor wished to increase the third year rate higher than 21% (the rate originally agreed upon) the Art. 1.04(i)(1) notice would have to be given. (Please refer to the last sentence in Art. 1.04(h)(1).) Also, if the contract were subject to Art. 1.04(h)(2) rather than 1.04(h)(1), the creditor would have to comply with the second paragraph of the former provision.

For your third and fourth questions, in addition to the original hypothetical facts, we assume that during the second annualized period when the annualized ceiling was at 20% (we also assume the rate for that period was 20%) that the retailer signed up a number of completely new customers to charge agreements subject to the plan. (To review the rates during the pertinent three years of the program, it was 21% the first year, 20% the second year and back to 21% the third year.) The new customers in question were signed up during the second year when the annualized ceiling as well as the rate of charge on the plan were at 20%.

Question No. 3. Assuming all of the above, would it be necessary for the new customers who signed agreements during the second yearly period when the ceiling and rate were 20% to be given the Art. 1.04(i)(1) notice in order to increase their (new customer) rate to 21% the following year?

Response to Question No. 3. Yes. First, the new customers have never agreed to a 21% rate of charge on the program. Secondly, although Art. 1.04(j) provides a method of signing up "in between" new customers to a previously implemented plan, they must enter the program under the terms in effect during the period that the particular election is in effect. The new customers can only agree to the 20% rate since that is the ceiling and the rate in effect at the time they enter the plan.

Question No. 4. Would it be possible for the retailer to have the above-mentioned new customers who enter into charge agreements during the second year period when the annualized ceiling and the contract rate are at 20% sign agreements which provide for the original rate of 21% even though the rate to be charged to their accounts at that time would be 20%?

Response to Question No. 4. No. It is our opinion that since the ceiling and the rate were both 20% at the time the new customers entered into the agreements, Art. 1.04(j) requires that the ceiling in effect for the majority of the accounts under the program would be the ceiling for the new accounts opened under the plan during the period the ceiling election is in effect. Additionally, if the annualized ceiling during the relevant period were 20%, any contractual agreement providing for a rate of charge in excess of that figure would not be authorized.

Sincerely yours,

Sam Kelley

Sam Kelley
Consumer Credit Commissioner