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DEPARTMENT OF BUSINESS REGULATION
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ADVISORY RULING #58
AUGUST 17, 1981

(Revocation of ARs # 8,
10, 11 & 13)

August 17, 1981

Dear

You have requested a Ruling on behalf of your client, a fuel oil dealer. This dealer has registered with the Bureau in the past as an open-end creditor. You maintain that the dealer is not a creditor because the dealer assesses a "late fee" and not a "finance charge" within the meaning of the Consumer Credit Code and Truth in Lending Act.

The fuel dealer expects payment within 30 days of delivery. A series of personal contacts and late notices is initiated to request payment if the consumer is late. A late fee equivalent to 1½% a month is assessed for failure to pay within 30 days. According to the dealer's figures for the period March, 1980 - February, 1981, 5,008 delinquent customers out of a total of 432,300 customers were allowed to charge, the bulk of those transactions occurring during the winter heating season. Delinquent customers are not automatically put on a C.O.D. basis if the customer has a good reason for being late and establishes a repayment schedule (usually under 30 days). Total late fees collected by the dealer for consumer accounts average .3% of total sales.

The Consumer Credit Code defines "consumer credit sale" as one in which the debt is "payable in installments or a finance charge is made." §1-301(11). The term "payable in installments" was recently amended to adopt the TIL rule of more than four periodic payments. §1-301(28), P.L. 81, c. 243. The term "finance charge" is defined to exclude default charges and late fees. §1-301(19). The Federal Truth in Lending Act also defines "finance charge" to exclude actual unanticipated late payment charges. 12 CFR 226.4(c)(2). The proposed Commentary to Regulation Z (TIL-1) states that whether or not the person imposing the charge continues to extend credit to the delinquent consumer is not necessarily the only determinative factor. The Federal Reserve Board intends to look at a variety of factors, including (1) the terms of the account, and (2) the practices of the creditor in handling the account, i.e., the collection efforts. The Commentary has

incorporated the previous guidance set forth in Official Staff Interpretation FC-0060 and Official Board Interpretation 226.401. See also FRB Letter No. 1301 (May 23, 1978).

Viewed according to the Federal TIL criteria, your client's program does not seem to result in a finance charge because, while credit privileges are not automatically ended, the bill/contract requires payment within 30 days and collection efforts are pursued to bring the customer "current"

as soon as possible. Failure to resolve the delinquency results in a withdrawal of credit privileges and a C.O.D. requirement.

The Consumer Credit Code would not change this result. However, the Bureau takes this opportunity to clarify previous advice on this matter. AR #8, 10, 11 and 13 address the "late charge vs. finance charge" issue. Because of recent amendments to the Code and the desire to avoid (where possible) conflicts between the Code and TIL Act, these Advisory Rulings are hereby repealed. The Bureau intends to adopt the same criteria outlined by the Commentary to Regulation Z to determine this issue for the Code and TIL Act.

To summarize, a person is subject to the Code and TIL Act if a "finance charge" is imposed or a written agreement allows or requires payment in more than four installments. The term "finance charge" excludes late fees for actual, unanticipated delinquency and the Bureau will analyze both the written agreement and the creditor's collection conduct in distinguishing between the two.

Sincerely,

/s/ Barbara R. Alexander

Barbara R. Alexander
Superintendent

BA:as