

# WEIL, GOTSHAL & MANGES LLP

1300 I STREET, N.W.  
WASHINGTON, D.C. 20005  
(202) 682-7000  
FAX: (202) 857-0940

WALTER E. ZALENSKI  
DIRECT LINE (202) 682-7120  
walter.zalenski@weil.com

December 16, 2005

AUSTIN  
BOSTON  
BRUSSELS  
BUDAPEST  
DALLAS  
FRANKFURT  
HOUSTON  
LONDON  
MIAMI  
MUNICH  
NEW YORK  
PARIS  
PRAGUE  
RHODE ISLAND  
SHANGHAI  
SILICON VALLEY  
SINGAPORE  
WARSAW

## **BY E:MAIL**

Jennifer J. Johnson  
Secretary of the Board  
Board of Governors of the Federal Reserve System  
20th Street and Constitution Avenue, N.W.  
Washington, DC 20551

### **Re: Docket No. R-1217 - Regulation Z Advance Notice of Proposed Rulemaking**

Dear Ms. Johnson:

I appreciate the opportunity to comment on the Federal Reserve Board's second advance notice of proposed rulemaking ("ANPR") regarding the open-end credit rules of Regulation Z. The ANPR seeks comment regarding the implementation of amendments to the Truth in Lending Act ("TILA") included in the Bankruptcy Abuse Prevention Act of 2005 (the "Bankruptcy Act"). Weil, Gotshal & Manges LLP represents a variety of creditors interested in the ANPR. In particular, Weil, Gotshal & Manges LLP represents retailers that issue their own store credit cards. Unlike many credit card issuers, these are not depository institutions. As explained more fully below, section 1305, the amendment regarding late payment fee disclosure, will uniquely and unfairly burden non-depository issuers unless the Federal Reserve Board ("Board") implements it appropriately.

Part I of this letter discusses section 1305's requirements. Part II explains why broadly interpreting section 1305 uniquely burdens non-depository issuers. Part III analyzes why broadly interpreting section 1305 will unreasonably burden non-depository issuers without providing meaningful benefit to consumers. Part IV responds to some of

Jennifer J. Johnson  
December 16, 2005  
Page 2

the ANPR's specific questions. Part V analyzes how the Board should use its authority to implement section 1305 fairly.

### **I. Late Fee Disclosure Requirements of Section 1305 of the Bankruptcy Act**

Section 1305(a) of the Bankruptcy Act (to be codified at 15 U.S.C. § 1637(b)(12)) provides:

If a late payment fee is to be imposed due to the failure of the obligor to make payment on or before a required payment due date, the following shall be stated clearly and conspicuously on the billing statement:

(A) The date on which that payment is due or, if different, the earliest date on which a late payment fee may be charged.

(B) The amount of the late payment fee to be imposed if payment is made after such date.

Section 1305(b) directs the Board to implement these requirements by regulation.

Section 1305 is ambiguous in two respects. First, it is ambiguous regarding whether specific information about the date and amount of late fees must be disclosed or whether information may be disclosed more abstractly. For example, can an issuer disclose that cardholder must pay within 10 days of the payment due date suffice, or must the issuer disclose that if payment is not received by a specific date, then a late fee will be assessed? (*E.g.*, "If your minimum payment remains unpaid 10 days after your payment due date, we will assess the late fee specified in your agreement" versus "If your minimum payment remains unpaid as of December 16, 2005, we will assess a late fee of \$25.") Therefore, the Board must determine what information is appropriate to fulfill section 1305's requirements.

Additionally, it is unclear what circumstances the language "or, if different, the earliest date on which a late payment fee may be charged" is meant to regulate. This could be interpreted to mean the earliest date an issuer is contractually able to assess a late fee or it could mean the earliest date on which an issuer will assess a late fee in practice. The Board should interpret this language in a manner that gives it meaning, but does not create disclosure requirements that burden issuers and provide no meaningful benefit to consumers.

Jennifer J. Johnson  
December 16, 2005  
Page 3

## II. Broadly Interpreting Section 1305 Unduly Burdens Non-Depository Issuers

State law governs the late fee amount that an issuer may charge a consumer. Many states also regulate *when* a late fee may be assessed, generally requiring an issuer to wait until several days after the due date.<sup>1</sup> Non-depository institutions, unlike depository institutions, generally must comply with the laws of every state in which they have a customer. In contrast, depository institutions have the capacity to “export” the “interest” allowed in the state where they are located to other states.<sup>2</sup> This exportation capacity extends to late fees. *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996). Thus, a non-depository issuer, when required to make disclosures about rates and fees, must disclose the rates and fees applicable for each state in which the issuer has cardholders. This difference makes any disclosure requirement regarding rates or late fees more burdensome than it would be for the typical bank card issuer.

Non-depository issuers also operate pursuant to a different state regulatory regime than their depository counterparts. Whereas the terms offered by depository issuers are generally governed by state banking laws, the terms offered by non-depository issuers are governed by state retail installment sales acts (“RISAs”). The terms allowed by these regulatory regimes are often different and sometimes more permissive with respect to depository issuers.<sup>3</sup>

In the context of initial disclosures, the need to disclose the rates and fees of multiple states – while not ideal – is manageable. The periodic statement, however, is a more constrained environment. Space on both the front and the back of the statement is limited, and therefore not amendable to lengthy disclosures, as is often required to disclose the applicable law of multiple states. Furthermore, disclosure on the front of the statement is driven, in large part, by the systems that generate completed statements. Any requirement to disclose the specific date and amount of a late fee that might be

---

<sup>1</sup> *E.g.*, Cal. Civil Code § 1810.12 (allowing a late fee of \$10 if assessed not less than 10 days after payment is due or a late fee of \$15 if assessed not less than 15 days after payment is due).

<sup>2</sup> *See* 12 U.S.C. § 85; 12 U.S.C § 1463(g); 12 U.S.C. § 1831d.

<sup>3</sup> *Compare* Del. Code Ann. tit 5, § 950 (“If the agreement governing a revolving credit plan so provides, a bank may impose, as interest, a late or delinquency charge upon any outstanding unpaid installment payments or portions thereof under the plan which are in default . . . .”) *with* Del. Code Ann. tit 6, § 950 (“The service charge shall include all charges incident to investigating and making the retail installment account. No fee, expense, delinquency, collection or other charge whatsoever shall be taken, received, reserved or contracted by the seller or holder of a retail installment account except as provided in this section.”).

Jennifer J. Johnson  
December 16, 2005  
Page 4

imposed on a particular cardholder will require major systems changes, because the systems of non-depository issuers will need to determine, pursuant to various state-specific rules and formulas, such dates and amounts and insert those values into the statement. Only non-depository issuers would appear to be faced with such a burden.

### **III. Broadly Interpreting Section 1305 Creates Unreasonable Burdens Without Meaningful Benefit to Consumers**

Unfortunately, the legislative history to the Bankruptcy Act does not indicate the harm to consumers Congress sought to remedy.<sup>4</sup> The intent might have been that consumers could more conveniently access late fee information if it is on their statement, rather than having to refer back to their initial disclosures. In the absence of Congressional direction, the Board must determine the purpose of section 1305's disclosures and what information is necessary to meet that purpose.

#### A. Circumstances in Which the Payment Due Date and the Earliest Date on Which a Late Fee May Be Charged Might Differ

The ANPR asks:

*Q97: Under what circumstances, if any, would the "date on which the payment is due" be different from the "earliest date on which a late payment fee may be charged?"*

At least two routine circumstances come to mind with respect to non-depository issuers of revolving credit. First, many states require a grace period before a late fee may be imposed. Second, even if not required, some non-depository issuers grant a short grace period for customer service reasons. Disclosure is inappropriate in both instances.

---

<sup>4</sup> The House Committee Report contains only cursory comments regarding section 1305. *See* H.R. Rep. No. 109-31 (2005):

Sec. 1305. Disclosures Related to Late Payment Deadlines and Penalties. Subsection (a) of section 1305 of the Act amends section 127(b) of the Truth in Lending Act to provide that if a late payment fee is to be imposed due to the obligor's failure to make payment on or before a required payment due date, the billing statement must specify the date on which that payment is due (or if different the earliest date on which a late payment fee may be charged) and the amount of the late payment fee to be imposed if payment is made after such date.

Jennifer J. Johnson  
December 16, 2005  
Page 5

The law of several states requires that a non-depository creditor provide a grace period between when payment is due and when the creditor may charge a late fee. This required grace period varies by state. As a result, for a non-depository issuer, disclosing the exact date on which it may charge a late fee will vary depending on the law governing its relationship with a particular cardholder.

Furthermore, even if a grace period is not required by the applicable state RISA, non-depository issuers sometimes provide for short “convenience” grace periods when payment is received within a short period after the payment due date. This often reflects a judgment that imposing a late fee in these circumstances is contrary to the issuer’s customer relationship goals.

#### B. Consumers Would Not Benefit From the Disclosure of Late Fee Grace Periods

To the extent that revolving credit issuers provide a grace period between when payment is due and when they assess a late fee, consumers will not benefit disclosure of this grace period on the periodic statement. As discussed above, state RISAs often require non-depository issuers to have a grace period between the cardholder’s payment due date and when a late fee is actual assessed. The purpose of these provisions is to provide a cushion in case consumers slightly miss-time a payment. Reminding consumers of that cushion, particularly in the form of a specific date, encourages consumers to pay after the payment due date and actively frustrates the purpose of these provisions. More to the point, consumers likely will incur late fees more often. Therefore, the Board should interpret or limit this language so that disclosure of state-mandated grace periods is not required.

Even where a state RISA does not require a late fee grace period and issuers merely provide a “convenience” grace period, it is not clear what benefit consumers would receive from disclosure. Disclosing a “convenience” grace period only overloads consumers with more disclosures and frustrates a consumer-friendly policy of protecting consumers when they slightly miss-time a payment. It also is possible that some issuers simply will limit or stop granting such grace periods if disclosure is required, which is contrary to consumer interests. Therefore, the Board should interpret this language so that disclosure of “convenience” grace periods is not required.

This is not to say that the Board should effectively interpret the relevant language out of section 1305. There are circumstances where this language is meaningful and

Jennifer J. Johnson  
December 16, 2005  
Page 6

useful. For example, many charge cards state that payment is due on receipt.<sup>5</sup> However, a late payment fee will not be assessed until some future date. The statements of such charge cards generally disclose this date, which serves the same purpose as the payment due date of a credit card, but is different because payment is due immediately. Disclosing the “earliest date on which a late payment fee may be charged” is appropriate in this instance. There may be other instances where there is a functional need to distinguish between when payment is due and when a late fee will be assessed. Accordingly, the Board should interpret this language as applying solely to situations where such functional needs exist.

#### B. The Burden of Disclosing Specific Late Fee Amounts Outweighs Any Benefit

Disclosing the amount of the late fee on the periodic statement may well provide some convenience to consumers. To the extent that issuers assess a single, flat late fee for all delinquent cardholders, complying with this requirement may be relatively straightforward. However, state RISAs sometimes require non-depository issuers to calculate late fees on a percentage of the payment due (or similar formulas). The applicable late fee also will vary according to state law. As a result, disclosing the specific amount of the late fee requires substantial changes to the periodic statement. More importantly, it will require expensive systems changes for non-depository issuers. Even if non-depository issuers were required or permitted to disclose a table of late fees that apply depending on the consumer’s state of residence, rather than an amount specific to each cardholder, the requirement still would be overly burdensome. Non-depository issuers would be required to find space to list the late fees of up to 50 states – a difficult task within the constraints of a periodic statement and likely to overshadow other mandated disclosures. As a result, this requirement unfairly (and probably unintentionally) burdens non-depository issuers – without providing clear benefits to consumers.

Furthermore, requiring disclosure of a specific late fee amount effectively will circumscribe the manner in which some late fees are assessed. For example, a non-depository issuer might assess a “tiered” late fee amount, *i.e.*, an amount that varies based on the cardholder’s outstanding balance when the late fee is assessed. Typically, consumers with smaller balances are assessed smaller late fees under “tiered” late fee structure. Consequently, preventing issuers from using this type of structure is contrary to consumer interests.

---

<sup>5</sup> For example, the model Schumer box for charge cards has the following disclosure: “All charges made on this charge card are due and payable when you receive your periodic statement.” 12 C.F.R. pt. 226, App. G-10(C).

Jennifer J. Johnson  
December 16, 2005  
Page 7

#### IV. Responses to Specific ANPR Questions

In addition to the issues above, two other ANPR questions warrant comment. First, the ANPR asks:

*Q98: Is additional guidance needed on how these disclosures may be made in a clear and conspicuous manner on periodic statements? Should the Board consider particular format requirements such as requiring the late payment fee to be disclosed in close proximity to the payment due date (or the earliest date on which a late payment fee may be charged, if different)? What model disclosures, if any, should the Board provide with respect to these disclosures?*

Specific format requirements – especially proximity requirements – would make disclosure more difficult without clearly benefiting consumers. Issuers often place similar information – the grace period to avoid additional finance charges – on the back of the statement. Disclosing late fees on the front of the statement, but the grace period on the back, is both confusing and obfuscates the fact that consumers can avoid additional finance charges. Nor is it reasonable to assume that consumers will be less likely to pay late if the late fee amount is near the payment due date. There is no evidence – and, intuitively, it seems unlikely – that consumers are unaware that a late fee will be imposed if they do not pay on time. Therefore, the Board should not adopt a proximity requirement.

Additionally, the clear and conspicuous standard generally does not impose any specific formatting or proximity requirements.<sup>6</sup> This is appropriate, as a general rule, because it allows creditors flexibility to disclose terms in the manner that is adapted to the particular nature of their products. Nothing indicates that late fee information is more important than any of the other information required to be disclosed on the periodic statement. Accordingly, there is no basis to deviate from the general clear and conspicuous standard.

---

<sup>6</sup> See Comment 5(a)(1)-1 (“Except where otherwise provided, the [clear and conspicuous] standard does not require that disclosures be segregated from other material or located in any particular place on the disclosure statement, or that numerical amounts or percentages be in any particular type size.”).

Jennifer J. Johnson  
December 16, 2005  
Page 8

Second, the ANPR asks:

*Q100: Failure to make a payment on or before the required due date commonly triggers an increased APR in addition to a late payment fee. As a part of the Regulation Z review, should the Board consider requiring that any increased rate that would apply to outstanding balances accompany the late payment fee disclosure?*

Such a requirement would further complicate the disclosures of non-depository issuers. As with late fees, the interest rates that non-depository issuers may charge also varies with applicable state law. Consequently, whether a penalty rate applies and the amount of that rate depends on the law applicable to a particular cardholder. Furthermore, the event triggering a penalty rate is often something other than one late payment. For example, charging a penalty rate when a cardholder has failed to make two timely minimum payments is a common term. This means that disclosure of any penalty rate cannot be combined easily with a late fee disclosure – adding yet another complicated disclosure to the statement.

Additionally, disclosing the penalty rate that might apply in a future billing cycle is at odds with the Board's general rule that, "[w]ith regard to the periodic rate disclosure (and its corresponding annual percentage rate), only rates that *could have* been imposed during the billing cycle reflected on the periodic statement need to be disclosed." Comment 7(d)-2 (emphasis in original). Disclosing both current periodic rates (relative to the billing cycle for that periodic statement) and potential future periodic rates may confuse consumers. At the very least, this potential for confusion will require disclosure of when the penalty rate might be triggered, so that consumer can differentiate between the penalty rate disclosure and the disclosures required by section 226.7(d). This adds to the complexity and burden of the proposed disclosure, which ultimately overwhelms any marginal benefit the disclosure might create.

## **V. Implementing Section 1305**

Given the foregoing, the Board should minimize the undue burden section 1305 places on non-depository issuers – a class of open-end credit issuers that generally are less equipped to absorb extensive compliance costs. The Board can accomplish this by exercising its implementing authority as described in the proposals below.

When considering how the Board should implement section 1305, it is important to remember its broad authority to implement TILA. The Board may "provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board

Jennifer J. Johnson  
December 16, 2005  
Page 9

are necessary or proper to effectuate the purposes of this subchapter . . . or to facilitate compliance therewith.” 15 U.S.C. § 1604(a). TILA also allows the Board to exempt any class of transactions where coverage “does not provide a meaningful benefit to consumers in the form of useful information or protection.” § 1604(f)(1). In exercising that authority, the Board must weigh, *inter alia*, the benefit to consumers, § 1604(f)(2)(A), against “[t]he extent to which the requirements of this subchapter complicate, hinder, or make more expensive the credit process . . . ,” § 1604(f)(2)(B). With this in mind, the Board should adopt one or more of the four proposals below.

First, to the extent that the Board determines that the disclosure of specific late fee dates and amounts is generally appropriate for issuers, the Board should exempt non-depository issuers from those requirements. Such disclosure provide little benefit to consumers because these items are disclosed elsewhere. Nor is there evidence that re-disclosure on the periodic statement will have a substantial impact on consumer behavior. Furthermore, specific disclosure places a disproportionate compliance burden on non-depository issuers due to varying state law. Consequently, the Board should exercise its authority and exempt non-depository issuers from section 1305.

Second, even if the Board does not exempt non-depository issuers, the Board should interpret the language “or, if different, the earliest date on which a late payment fee may be charged” in section 1305(a) narrowly. More precisely, the Board should clarify that this language applies to products – such as charge cards – where there is a functional need to distinguish between when payment is due and when a late fee will be assessed. The Board should further clarify that this language is not meant to require the disclosure of grace periods before a late fee is assessed, whether mandated by state RISAs or granted as a customer service matter.

Third, even if the Board does not exempt non-depository issuers, it should limit the disclosures they must make pursuant to section 1305. Rather than disclosing the cardholder-specific amount of the late fee (which will differ), disclosure of the maximum late fee or a range of late fees should be allowed.<sup>7</sup> The Board’s Schumer box requirements, among others, adopt a similar solution for the disclosure of varying late fees.<sup>8</sup> Non-depository issuers should not be required to disclose cardholder-specific late fee amounts, which will require expensive systems changes. Nor should they be required

---

<sup>7</sup> If, notwithstanding the arguments above, the Board determines that disclosure of late fee grace periods also is appropriate, it should similarly allow non-depository issuers to disclose a range of grace periods and refer consumers to their agreements.

<sup>8</sup> See 12 C.F.R. § 226.5a(a)(5); Comment 5a(a)(5)-1

Jennifer J. Johnson  
December 16, 2005  
Page 10

to re-disclose the applicable late fee in every state. Such a disclosure would be impractical, if not impossible, on the front of the statement, and would only overwhelm consumers if placed on the back of the statement. Therefore, if not exempted completely, the Board should allow a streamlined disclosure such as: "We may impose a late fee of \$0 to \$25 if you fail to pay your minimum payment by its payment due date. Please see your agreement for details."

Fourth, the Board should interpret "clearly and conspicuously" in this context to allow any disclosures to be made on the back of the statement, as discussed above. The Board should not impose specific proximity requirements with respect to section 1305.

\* \* \*

Thank you for this opportunity to comment on the Board's proposal. If you have any questions, please feel free to call me at (202) 682-7120.

Sincerely,

Walter E. Zalenski