FDIC
Federal Deposit Insurance Corporation
550 17th Street NW, Washington, DC 20429
Division of Supervision

Truth in Lending Restitution

FIL-19-97
March 10, 1997

TO: CHIEF EXECUTIVE OFFICER

SUBJECT: *Requests for Relief from Reimbursement under the Truth in Lending Act*

Historically, the FDIC has treated a request made by non-member banks seeking relief from making reimbursement under the Truth in Lending Act, 15 U.S.C. 1601 et seq. (TILA), as an application under its regulations. The Board has delegated authority to the Director of the Division of Compliance and Consumer Affairs (DCA) to grant or deny these requests.

The Director has further delegated this authority to the Regional Directors (DCA) but only to deny requests where the amount of reimbursement totals less than $25,000.

The TILA grants the enforcement agencies very little discretion to grant relief from reimbursement for violations. Because of this limited discretion, the FDIC has not been able to grant relief in many instances. From 1991 through 1996, a total of 63 requests were reviewed at the Washington level and only one of these requests was granted. In that one instance, it was determined that the cited violation was, in fact, not a violation of Regulation Z.

Should a nonmember bank wish to pursue a request for relief, even though there is a strong likelihood that a request will not be granted, the request will be processed within established time frames (see FIL-26-96, "Regulatory Responsiveness," dated May 6, 1996, concerning application processing time lines):

> Requests that can be processed under delegated authority by the Regional Director and Regional Counsel must be completed within 60 days after receipt unless the institution has agreed in writing to an extension of time to make the determination.
>
> Requests requiring action by the Washington Office will be referred by the Regional Office to the Washington Office within 45 days of receipt. A decision will be made within 45 days of receipt in Washington.

Legal Background: Section 108(e) of the TILA, which governs enforcement of TILA, provides a very specific framework for requiring agency action on restitution. Once the FDIC determines that a disclosure error involving an inaccurate APR or finance charge has occurred, and that the error has resulted from "gross negligence," or a "clear and consistent pattern or practice of violations," the agency shall require an adjustment unless one of four stated exceptions applies, in which case the agency need not require an adjustment. If the exceptions apply, or in cases of similar disclosure errors, an agency may require an adjustment.

The use of the terms "shall require an adjustment," "need not require an adjustment" and "may require an adjustment" within the same section of the statute suggests that Congress intended the term "shall require" to be mandatory. The Congress used the word must, indicating the compulsory nature of its direction that an agency enforce the TILA with regard to the specific kinds of violations enumerated, as contrasted with the agency's discretion to order restitution in other situations:

> "Where the violation resulted from a pattern or practice of violations, gross negligence, or a willful violation intended to mislead, an agency must, subject to the restrictions discussed below, order restitution to the consumer designed to assure that the consumer pays no more than the lower of the finance charge or annual percentage rate actually disclosed.... In the case of violations not falling under any of the above criteria, each agency may in its discretion order restitution." Id. at 12; accord verbatim, S.Rep. No. 368, 96th Cong., 1st Sess. 26 (1979).

There are four instances where the FDIC has discretion to waive reimbursement. Three of these exceptions are straightforward and are fact specific. It would be unusual to find a bank which could successfully assert one of these exceptions as a defense, since it is unlikely that restitution would have been ordered in the first place as FDIC examiners carefully evaluate whether any of the exceptions exist before requesting that a bank make restitution.

The first three exceptions are where:

1. The error involves a fee or charge that would otherwise be excludable in computing the finance charge;

2. The error involved a disclosed amount which was 10 percent or less of the amount that should have been disclosed and either the annual percentage rate (APR) or finance charge was disclosed correctly; or

3. The error involved a total failure to disclose either the APR or finance charge.

The fourth exception is the one most frequently cited by an institution in requesting relief. It is the one that is most difficult to meet since it contains four elements, all four of which must be met for the exception to apply. The conditions are that:

> the error resulted from a unique circumstance,
> the disclosure violations are clearly technical and non- substantive,
>
> do not adversely affect information provided to the consumer, and
>
> have not misled or otherwise deceived the consumer.

The legislative history of TILA does not define the term "unique circumstance"; however, the FDIC considers the term "unique" to have the traditional meaning, including "unusual," "atypical," and "infrequent." Where violations involving the finance charge and APR are concerned, the requirement that the error be "clearly technical and nonsubstantive" generally cannot be met. Technical and nonsubstantive violations do not include those which could affect the outcome of a borrower's decision in credit shopping. See S. Rep. No. 368, 96th Cong., 1st Sess. 16-17 (1979). Congress intended the "technical and non-substantive" exception to be construed very narrowly for use in such situations as clerical or computer errors.

Similarly, where there is an understatement of the finance charge or APR, it is unlikely that there will be "no adverse effect on information provided to the consumer" and that the error would not have "misled or otherwise deceived the consumer." Thus, it is extremely rare that the conditions contained in the fourth exception are ever met. For example, some recent requests by institutions seeking relief from having to make reimbursement have included some of the following reasons as a defense that the FDIC determined to be unacceptable:

Consumers did not pay any additional amount because of inaccurate disclosures
Impact on the institution's reputation in its community

Size of the institution

Consumers signed the credit life insurance application but did not affirmatively indicate a desire to purchase the insurance

Provider of form/software purchased by institution gave erroneous advice

Consumers were given new disclosures but were not provided monetary reimbursement

Examiners did not cite violation at previous examination

Procedures for Making a Request: If an institution decides to make a request for relief from reimbursement, it should do so within 30 days of receipt of the report of examination containing the request to conduct a file search and make restitution to affected customers. The request should be directed to the attention of the Regional Director (DCA) and must address the statutory factors contained in Section 108(e) of the TILA. The Regional Director will notify the institution of the receipt of the request and that pending a final determination, the institution is not required to complete corrective action on the restitution request.

When restitution must be made, the FDIC expects the institution to carry out the reimbursement to the customer expeditiously according to the Joint Statement of Policy on Restitution adopted on July 11, 1980. (A copy of the Statement is attached.) When lump sum payments to consumers are required to be made, they must be provided to the consumer either by official check or a deposit into an existing unrestricted consumer asset account, such as an unrestricted savings, checking or NOW account. If, however, the loan is delinquent, in default, or has been charged off, the creditor may apply all or part of the reimbursement to the amount past due, if permissible under law.

There have been instances where institution personnel have inappropriately requested consumers to return reimbursement checks to the institution. This, and any like practice, is not permissible and the FDIC views any such attempts to prevent unrestricted access by the consumer to reimbursement proceeds as a serious breach of fiduciary duty as well as a violation of law and regulation. These violations will be subject to enforcement actions, including but not limited to, assessment of civil money penalties, orders to cease and desist, and possible removal/prohibition orders.

Questions about the procedures for requesting relief from reimbursement may be directed to any of the DCA Review Examiners in Washington or the Regional Offices listed in Attachment 2.

Carmen J. Sullivan
Director

Attachments (2)
  [Attachment 1]
  [Attachment 2]

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