Comptroller of the Currency
Administrator of National Banks

Other Consumer Protection Laws and Regulations

Comptroller's Handbook

October 1996

CCE

Consumer Compliance Examination

Other Consumer Protection Laws and Regulations

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Background and Summary

Twelve USC 85 regulates the maximum rate of interest that national banks may charge. Banks that charge a higher rate violate the law and may trigger the penalties for usury described in 12 USC 86.

General Rule

Section 85 authorizes national banks to charge interest on loans at the rates allowed by the states in which the bank is located, e.g., in which it was chartered or has branches. National banks can charge the maximum rates allowed any competing state-chartered lenders. Any rate may be charged for a particular type of loan when no maximum is specified in state law for that type of loan.

Additions to the General Rule

- One Percent over the Discount Rate — On all loans, national banks may charge 1 percent more than the discount rate on 90-day commercial paper in effect at the Federal Reserve bank in the district in which the bank is located. For example, if the discount rate is 7 percent, national banks may charge 8 percent, discounted in advance, without regard to state usury laws.

- Certain Federally Insured or Guaranteed Loans — No maximum interest rate is applied to loans secured by one-to-four family dwellings and insured under Titles I or II of the National Housing Act, or insured, guaranteed, or made by the Veterans Administration, until the state establishes one.

Most Favored Lender Status

A national bank may charge the maximum rate of interest permitted by state law to any competing state-chartered or licensed lending institution. A national bank that charges a higher interest rate on a specified class of loans, as allowed by state law, is only subject to the provisions relative to that class of loans. For example, when a state law allows finance companies to charge 20 percent on certain loans, but limits state banks to 16 percent, national banks may charge 20 percent. However, national banks would be limited to charging the higher rate only on the same size and type of loans that finance companies are allowed to make. If state law allowed 20 percent of the first $500 on open-end credit accounts and 18 percent thereafter, a national bank lending $800 could charge 20 percent for the first $500 and 18 percent on the remaining $300.

The most favored lender status also permits national banks to impose interest rates sanctioned by the laws of their states on loans to consumers who reside in other states. Frequently, out-of-state loans to consumers are made in the form of credit card accounts. Thus, a consumer living in a state that limits annual credit card account fees to 18 percent can be required, under 12 USC 85, to pay 24 percent annually if the bank is located in a state that permits such a rate. *Marquette National Bank of Minneapolis* v. *First of Omaha Service Corp.*; *Minnesota* v. *First of Omaha Service Corp.,* 439 U.S. 299 (1978).

Preemption of State Usury Laws

Twelve USC 1735f-7a and its implementing regulation, 12 CFR 590, "Preemption of State Usury Laws," permits the preemption of state laws expressly limiting the rate or amount of interest, discount points, finance charges, or other charges that may be levied on any federally-related loan (as defined in section 590.2) made after March 31, 1980, and secured by a first lien on one of the following:

- Residential real property.
- Stock in a residential cooperative housing corporation when the loan is used to finance the acquisition of such stock.
- A residential manufactured home. However, banks must comply with the consumer protection rules contained in section 590.4 to be granted the preemption on residential manufactured homes.

Jurisdiction

Twelve CFR 590 is a regulation of the Office of Thrift Supervision. Compliance by national banks and federal branches and agencies of foreign banks is enforced by the OCC.

1. To appraise the quality of the bank's compliance management system for Interest on Loans.

2. To determine the reliance that can be placed on the bank's compliance management system, including internal controls and procedures performed by the person(s) responsible for monitoring the bank's compliance review function for Interest on Loans.

3. To determine the bank's compliance with Interest on Loans.

4. To initiate corrective action when policies or internal controls are deficient or violations of law or regulation are identified.

1. From the examiner who completed the Compliance Management System program, obtain information pertinent to the area of examination (historical examination findings, complaint information, and significant findings from compliance review and audit).

2. Through discussions with management and review of the following documents, determine whether the bank's internal controls are adequate to ensure compliance in the area under review. Identify procedures used daily to detect errors and violations promptly. Also review the procedures used to ensure compliance when changes occur (e.g., changes in interest rates, computation methods, and software programs).

   - ☐ Organizational charts.
   - ☐ Process flowcharts.
   - ☐ Policies and procedures.
   - ☐ Loan documentation and disclosures.
   - ☐ Checklists, worksheets, and review documents.
   - ☐ Computer programs.

3. Review compliance review and audit work papers, and determine whether:

   a. The procedures used address all regulatory provisions (see Transactional Testing section).

   b. Steps are taken to follow up on previously identified deficiencies.

   c. The procedures used include samples that cover all product types and decision centers.

   d. The work performed is accurate (by reviewing some transactions).

   e. Significant deficiencies and their root causes are included in reports to management and board.

f. Corrective actions are timely and appropriate.

g. The area is reviewed at an appropriate interval.

Transactional Testing

4. Determine (from the bank if necessary) the applicable state usury rate for the various types of loans offered and review loan reports or a sample of loans (originated since the preceding examination) to determine that the rates charged comply with 12 USC 85.

5. Determine if the bank has extended mobile home loans subject to 12 CFR 590.4.

6. If 12 CFR 590.4 applies, review the contracts and disclosures for those mobile home loans to determine whether:

   a. The rebate is calculated on the actuarial method or one at least as favorable as that method (12 CFR 590.4(c)).

   b. No prepayment penalty is imposed (12 CFR 590.4(d)).

   c. Late charges are disclosed and assessed accurately (12 CFR 590.4(f)).

   d. Deferral fees are disclosed and assessed accurately (12 CFR 590.4(g)).

   e. The notice before repossession, foreclosure, or acceleration is delivered to the debtor 30 days before action is taken (12 CFR 590.4(h)(1)).

   f. The form contains a repossession notice (12 CFR 590.4(h)(2).

Conclusions

7. Summarize here *all* violations of law, regulation, or ruling and use when making SMS entries. (Refer to EC 263, "SMS Documentation Policy.")

Citation	Department	Violation	Recommendation	Policy Guide	Reference
a. ____	__________	________	_______________	___________	________
b. ____	__________	________	_______________	___________	________
c. ____	__________	________	_______________	___________	________
d. ____	__________	________	_______________	___________	________
e. ____	__________	________	_______________	___________	________

8. If the violation(s) noted above represent(s) a pattern or practice, determine the root cause by identifying weaknesses in internal controls, compliance review, training, management oversight, or other factors. Consider whether civil money penalties (CMP) or an enforcement action should be recommended (see CMP matrix).

9. Identify action needed to correct violations and weaknesses in the bank's compliance system, as appropriate. Form a conclusion about the reliability of the compliance system for the area under review and provide conclusions to the examiner performing the Compliance Management System program.

10. Determine, in consultation with the examiner-in-charge (EIC), whether violations or deficiencies in the compliance system are significant enough to merit bringing them to the board's attention in the report of examination. If so, prepare items for inclusion under the heading, Matters Requiring Board Attention, and under a Type 75 Follow-up Analysis.

11. Determine whether any items identified during this examination could materialize into a supervisory concern before the next on-site examination (consideration should be given to any planned: increase in activity in this area; personnel changes; policy changes; changes to outside auditors or consultants; changes in business strategy, etc.). If so, summarize your concerns and assess the potential risk to the institution and discuss it with the EIC and/or appropriate bank personnel.

12. Discuss findings with bank management and obtain commitments(s) for corrective action.

Questions and Answers

1. The scope of 12 CFR 590 applies to loans, mortgages, credit sales, and advances secured by first liens on residential real property. Does section 590.4 also include all of these types of loans or only mobile home loans?

   Section 590.4 applies only to loans secured by a first lien on a residential mobile home. The rules in this section pertain only if the bank exceeds the state usury limits for loans secured by first liens on residential mobile homes.

2. Section 590.4(d) prohibits charging a prepayment penalty. What happens when the loan documents provide for a minimum penalty of $100?

   A bank can charge a prepayment penalty on a mobile home loan. The provision in section 590.4(d) applies only if the bank wishes to preempt state usury laws on a loan secured by a first lien on a residential mobile home. (Refer to section 590.4(b)(1).) Therefore, the bank can charge a prepayment penalty if it does not exceed state usury laws on this type of loan.

Laws

12 USC 85, Rate of interest on loans, discounts and purchases
12 USC 1735f-7, Mortgages (usury preemption)

Regulations

12 CFR 7.7310, Charging interest at rates permitted competing institutions; charging interest to corporate borrowers
12 CFR 590, Preemption of state usury laws

OCC Issuances

Examining Circular 263, SMS Documentation Policy

Background and Summary

The Federal Deposit Insurance Corporation Improvement Act (FDICIA) of 1991 (Pub. L. 012-242, 105 Stat. 2236) was enacted on December 19, 1991. Section 228 of the FDICIA adds a new section 42 to the Federal Deposit Insurance Act (FDI Act) (12 USC 1831r-1) that imposes notice requirements on insured depository institutions that intend to close branches. An insured depository institution means any bank or savings association, as defined in section 3 of the FDI Act, the deposits of which are insured by the FDIC.

The law requires an insured depository institution to submit a notice of any proposed branch closing to the appropriate federal banking agency no later than 90 days before the proposed closing date. The required notice must include a detailed statement of the reasons to close the branch and statistical or other information to support those reasons.

The law also requires an insured depository institution to notify its customers of the proposed closing. The institution must mail a notice to the customers of the branch proposed to be closed at least 90 days before the proposed closing. The institution also must post a notice to customers in a conspicuous manner on the premises of the branch proposed to be closed at least 30 days before the proposed closing. Additionally, the law requires each institution to adopt policies for closings of the institution's branches.

1. To appraise the quality of the bank's compliance management system for branch closing requirements.

2. To determine the reliance that can be placed on the bank's compliance management system, including internal controls and procedures performed by the person(s) responsible for monitoring the bank's compliance review function for branch closing requirements.

3. To determine the bank's compliance with the branch closing requirements.

4. To initiate corrective action when policies or internal controls are deficient or violations of law or regulation are identified.

1. From the examiner who completed the Compliance Management System program, obtain information pertinent to the area of examination (historical examination findings, complaint information, and significant findings from compliance review and audit).

2. Through discussions with management and review of the following documents, determine whether the bank's internal controls are adequate to ensure compliance in the area under review. Identify procedures used daily to detect errors and violations promptly. Also review the procedures used to ensure compliance when changes occur.

   - ☐ Organizational charts.
   - ☐ Process flowcharts.
   - ☐ Policies and procedures.
   - ☐ Checklists, worksheets, and review documents.

3. Review compliance review and audit work papers, and determine whether:

   a. The procedures used address all regulatory provisions (see the Transactional Testing section).

   b. Steps are taken to follow-up on previously identified deficiencies.

   c. The procedures used include samples that cover all product types and decision centers.

   d. The work performed is accurate (through a review of some transactions).

   e. Significant deficiencies and their causes are included in reports to management and board.

   f. Corrective actions are timely and appropriate.

   g. The area is reviewed at an appropriate interval.

Transactional Testing

4. Determine whether the bank has adopted a branch closing policy that ensures compliance with the Joint Policy Statement on Branch Closing (Policy Statement) and section 42 of the FDI Act. (12 USC 31r-1(c)).

5. Determine whether the bank's procedures for closing a branch have been followed since the latter of December 19, 1991 or the last examination in which compliance was assessed with the policy statement on branch closing notices and section 42 of the FDI Act.

6. Determine whether the bank provided adequate notice of any branch closing to the OCC at least 90 days before the proposed closing of any branch closed on or after December 19, 1991 (12 USC 1831r-1(a)).

7. Determine if the bank mailed an adequate notice to its customers at least 90 days before the proposed closing of any branch closed on or after December 19, 1991 (12 USC 1831r-1(b)(2)(B)(ii)).

8. Determine if the bank posted a notice to branch customers in a conspicuous manner on the branch premises at least 30 days before the proposed closing of any branch closed on or after December 19, 1991 (12 USC 1831r-1(b)(2)(A)).

Conclusions

9. Summarize here *all* violations of law, regulation, or ruling and use when making SMS entries. (Refer to EC 263, "SMS Documentation Policy.")

Citation	Department	Violation	Recommendation	Policy Guide	Reference
a. ____	__________	________	_______________	___________	________
b. ____	__________	________	_______________	___________	________
c. ____	__________	________	_______________	___________	________
d. ____	__________	________	_______________	___________	________
e. ____	__________	________	_______________	___________	________

10. If the violation(s) noted in step 9 represent(s) a pattern or practice, determine the root cause by identifying weaknesses in internal controls, compliance review, training, management oversight, or other factors. Consider whether civil money penalties (CMP) or an enforcement action should be recommended (see CMP matrix).

11. Identify action needed to correct violations and weaknesses in the bank's compliance system as appropriate. Form a conclusion about the reliability of the compliance system for the area under review and provide conclusions to the examiner performing the Compliance Management System program.

12. Determine, in consultation with the examiner-in-charge (EIC), if violations or deficiencies in the compliance system are significant enough to merit bringing them to the board's attention in the report of examination. If so, prepare items for inclusion under the heading, Matters Requiring Board Attention, and under a Type 75 Follow-up Analysis.

13. Determine whether any items identified during this examination could materialize into a supervisory concern before the next on-site examination (consideration should be given to any planned: increase in activity in this area; personnel changes; policy changes; changes to outside auditors or consultants; changes in business strategy, etc.). If so, summarize your concerns and assess the potential risk to the institution and discuss with the EIC and/or appropriate bank personnel.

14. Discuss findings with bank management and obtain commitment(s) for corrective action.

Branch Closing Examination Checklist

Checklist Question	Yes	No
1. Does the insured depository bank have any branches, as defined in the Joint Policy Statement on Branch Closing (Policy Statement), that would subject it to the Policy Statement and section 42 of the FDI Act (12 USC 1831r-1)? or Has the insured depository bank closed any of its branches since December 19, 1991, that would subject it to the notification requirements of the Policy Statement and section 42 of the FDI Act? **NOTE**: If the answer to both of these questions is **NO**, do not proceed with the remaining portions of this checklist.		
2. Has the bank provided written notice of any branch closing to the OCC at least 90 days in advance of such closing (12 USC 1831r-1(a)(1))?		
3. Did the notice to the OCC contain: a. The identification of the branch to be closed (Policy Statement)? b. The proposed closing date (Policy Statement)? c. The specific reasons for closing the branch (12 USC 1831r-1(a)(2)(A))? d. Statistical or other information in support of the reason(s) and consistent with the bank's written policy for closing the branch (12 USC 1831r-1(a)(2)(B))?		
4. Did the bank provide written notice in a regular account statement or separate mailing to customers of the branch to be closed at least 90 days before such closing (12 USC 1831r-1(b)(2)(B))?		
5. Did the mailed customer notice contain: a. The location of the branch to be closed (Policy Statement)? b. The proposed closing date (Policy Statement)? c. A listing of alternative banking locations or a phone number to obtain banking service information for possible alternatives?		
6. Did the bank conspicuously display a notice to customers on the premises of the branch to be closed at least 30 days before such closing (12 USC 1831r-1(b)(2)(A))?		

Checklist Question	Yes	No
7. Did the notice posted on the bank premises contain: a. The proposed closing date (Policy Statement)? b. A listing of alternative banking locations or a phone number to obtain banking service information for possible alternatives (Policy Statement)?		
8. Has the bank adopted a written branch closing policy (12 USC 1831r-1(c))?		
9. Does the written branch closing policy include: (Policy Statement) a. Factors for determining the branch to close? b. Factors for determining the customers to notify? c. Procedures for providing the required notices?		

Joint Policy Statement on Branch Closing

Purpose

This policy statement provides guidance to insured depository institutions concerning requirements that an institution give prior notice of any branch closing and establish internal policies for branch closings.

Applicability

Section 42 of the Federal Deposit Insurance Act applies to the closing of a branch by an insured depository institution. The agencies consider a branch for purposes of section 42 to be a traditional brick-and-mortar branch, or any similar banking facility, at which deposits are received or checks paid or money lent. Thus, for example, notice pursuant to section 42 would not be required for the closing of an ATM or temporary branch. Institutions that are in doubt about the coverage of a particular closing should consult the appropriate federal banking agency.

An institution must file a branch closing notice whenever it closes a branch, including when the closing occurs in the context of a merger, consolidation, or other form of acquisition. Transactions subject to expedited approval under the Bank Merger Act (12 USC 1828) also must file a branch closing notice. The responsibility for filing the notice lies with the acquiring or resulting institution, but either party to such a transaction may give the notice. Thus, for example, the purchaser may give the notice before consummation of the transaction where the purchaser intends to close a branch following consummation, or the seller may give the notice because it intends to close a branch at or before consummation. In the latter example, if the transaction were to close ahead of schedule, the purchaser, if authorized by the appropriate federal banking agency, could operate the branch to complete compliance with the 90-day requirement without the need for an additional notice.

The law does not apply to mergers, consolidations, or other acquisitions, including branch sales, that do not result in any branch closings. In addition, the law does not apply where a branch is relocated. For purposes of this policy statement, a branch relocation is a movement within the same neighborhood that does not substantially affect the nature of the business or customers served. Generally, relocations will be found to have occurred only when short distances are involved: for example, moves across the street, around the corner, or a block or two away. Moves of less than 1,000 feet will generally be considered to be relocations. In less densely populated areas, where neighborhoods extend farther and a long move would not significantly affect the nature of the business or the customers served by the branch, a relocation may occur over substantially longer distances. Institutions that are in doubt about whether a relocation or closing has occurred should consult the appropriate federal banking agency.

Consolidations of branches are considered relocations if the branches are located within the same neighborhood and the nature of the business or customers served is not affected. Thus, for example, a consolidation of two branches on the same block following a merger would not constitute a branch closing. The same standards apply to consolidations as to relocations. Changes of services at a branch are not considered a branch closing, provided that the remaining facility constitutes a branch (as defined herein).[1]

In addition, section 42 does not apply when a branch ceases operation but is not closed by an institution. Thus, the law does not apply to:

- Temporary interruption of service caused by an event beyond the institution's control (e.g., a natural catastrophe), if the insured depository institution plans to restore branching services at the site in a timely manner. [2]

- Transferring back to the FDIC or Resolution Trust Corporation, pursuant to the terms of an acquisition agreement, a branch of a failed bank or savings association operated on an interim basis in connection with the acquisition of all or part of a failed bank or savings association, so long as the transfer

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1 The agencies note that where, after a reduction in services, the resulting facility no longer qualifies as a branch, section 42 would apply. Thus, notices of branch closing would be required if an institution were to replace a traditional brick-and-mortar branch with an ATM.

2 Section 42 would apply, however, if the institution were closed or did not reopen the branch following the incident. Although prior notice would not be possible in such a case, the institution should notify the customers of the branch and the appropriate federal banking agency in the manner specified by section 42 to the extent possible and as soon as possible after the decision to close the branch has been made.

occurs within the option period or within an occupancy period, not to exceed 180 days, provided in the agreement.

Notice of Branch Closing to the Agency

The law requires an insured depository institution to give notice of any proposed branch closing to the appropriate federal banking agency no later than 90 days before the date of the proposed branch closing. The required notice must include the following:

- Identification of the branch to be closed,
- The proposed date of closing,
- A detailed statement of the reasons for the decision to close the branch, and
- Statistical or other information in support of such reasons consistent with the institution's written policy for branch closings.

If an institution believes certain information included in the notice is confidential in nature, the institution should prepare such information separately and request confidential treatment. The agency will decide whether to treat such information confidentially under the Freedom of Information Act (5 USC 552).

Notice of Branch Closing to Customers

The law requires an insured depository institution that proposes to close a branch to provide notice of the proposed closing to the customers of the branch. A customer of a branch is a patron of an institution who has been identified with a particular branch by such institution through use, in good faith, of a reasonable method for allocating customers to specific branches. An institution that allocates customers to its branches based on where a customer opened his or her deposit or loan account will be presumed to have reasonably identified each customer of a branch. The agencies recognize that use of this means of allocation, and perhaps others, may result in certain branches not being assigned any customers, but believe that this result is permissible so long as the means of allocation is reasonable; if such a branch is closed, then notification to the appropriate agency and posting of a notice on the branch premises will suffice. Finally, an institution need not change its record keeping system in order to make a reasonable determination of who is a customer of a branch.

Under section 42, an institution must include a customer notice at least 90 days before the proposed closing in at least one of the regular account statements mailed to customers, or in a separate mailing. If the branch closing occurs after the proposed date of closing, no additional notice is required to be mailed to customers (or provided to the appropriate federal banking agency) if the institution acted in good faith projecting the date for closing and in subsequently delaying the closing.

The mailed customer notice should state the location of the branch to be closed, and the proposed date of closing, and either identify where customers may obtain service following the closing date or provide a telephone number for customers to call to determine such alternative sites.

Under section 42, an institution also must post notice to branch customers in a conspicuous manner on the branch premises at least 30 days before the proposed closing. This notice should state the proposed date of closing and identify where customers may obtain service following that date or provide a telephone number for customers to call to determine such alternative sites. An institution may revise the notice to extend the projected date of closing without triggering a new 30-day notice period.

In some situations, an institution, at its discretion and to expedite transactions, may mail and post notices to customers of a proposed branch closing that is contingent upon an event. For example, in the case of a proposed merger or acquisition, an institution may notify customers of its intent to close a branch upon approval by the appropriate federal banking agency of the proposed merger or acquisition.

Policies for Branch Closings

The law requires all insured depository institutions to adopt policies for branch closings. Each institution with one or more branches must adopt such a policy. If an institution currently has no branches, it must adopt a policy for branch closing before it establishes its first branch. The policy should be in writing and meet the size and needs of the institution.

Each branch closing policy adopted pursuant to section 42 should include factors for determining which branch to close and which customers to notify, and procedures for providing the notices required by the statute.

Compliance

As part of each compliance examination, the federal banking agencies will examine for compliance with section 42 of FDICIA to determine whether the institution has adopted a branch closing policy and whether the institution provided the required notices when it closed a branch. If an institution fails to comply with section 42, the appropriate federal banking agency may make adverse findings in the Community Reinvestment Act evaluation or take appropriate enforcement action.

Laws

12 USC 1831r-1, Notice of Branch Closure

OCC Issuances

Examining Circular 263, SMS Documentation Policy

Background and Summary

The Fair Debt Collection Practices Act (FDCPA), which became effective March 20, 1978, was designed to eliminate abusive, deceptive, and unfair debt collection practices. The law also protects reputable debt collectors from unfair competition and encourages consistent state action to protect consumers from abuses in debt collection (15 USC 1692).

Covered Debt

The FDCPA applies only to the collection of debt incurred by a consumer primarily for personal, family, or household purposes. It does not apply to the collection of corporate debt or to debt owed for business or agricultural purposes (15 USC 1692a(5)).

Covered Debt Collectors

Under FDCPA, a "debt collector" is defined as any person who regularly collects, or attempts to collect, consumer debts for another person or institution or uses a name other than its own when collecting its consumer debts (15 USC 1692a(6)).

That definition would include, for example, a bank that regularly collects debts for an unrelated institution. This includes reciprocal service arrangements in which one institution solicits the help of another in collecting a defaulted debt from a customer who has moved. As explained later, a bank attempting to collect a debt owed to itself is not a "debt collector" under FDCPA.

Debt Collectors Not Covered

A bank is not a debt collector under the FDCPA when it collects:

- Another's debts only in isolated instances (15 USC 1692a(6)).
- Its own debts under its own name (15 USC 1692a(6)).

- Debts it originated and sold, but continues to service (e.g., mortgage and student loans) (15 USC 1692a(6)(F)(ii)).

- Debts that were not in default when obtained (15 USC 1692a(6)(F)(iii)).

- Debts that were obtained as security for a commercial credit transaction (e.g., accounts receivable financing) (15 USC 1692a(6)(F)(iv)).

- Debts incidental to a *bona fide* fiduciary relationship or escrow arrangement (a debt held in the bank's trust department or mortgage loan escrow for taxes and insurance) (15 USC 1692a(6)(F)(i)).

- Debts collected for other institutions to which it is related by common ownership or corporate control, if the bank collects these debts only for those institutions and the principal business of the bank is not debt collection (15 USC 1692a(6)(B)).

Debt collectors who are *not* covered include:

- Bank officers or employees who collect debts owed to that bank in its name (15 USC 1692a(6)(A)).

- Legal process servers (15 USC 1692a(6)(D)).

Communications for Debt Collection

For communications with a consumer or third party about the collection of a debt, the term "consumer" is defined to include the borrower's spouse, parent (if the borrower is a minor), guardian, executor, or administrator (15 USC 1692c).

Communicating with the Consumer

A debt collector may not communicate with the consumer at any unusual time (generally before 8 a.m. or after 9 p.m. in the consumer's time zone) or at any place inconvenient to the consumer, unless the consumer or a court of competent jurisdiction has already given permission (15 USC 1692c(a)(1)).

A debt collector may not contact the consumer at his or her place of employment if the collector believes the employer prohibits such communications (15 USC 1692c(a)(3)).

If the debt collector knows the consumer has retained an attorney to handle the debt, and can easily ascertain the attorney's name and address, all contacts must be with that attorney, unless the attorney is unresponsive or agrees to allow direct communication with the consumer (15 USC 1692c(a)(2)).

Ceasing Communication with the Consumer

When a consumer refuses, in writing, to pay a debt or requests that the debt collector cease further communication, the collector must do so, except to advise the consumer that either:

- The collection effort is being stopped.
- Certain specified remedies ordinarily invoked may be pursued or, if appropriate, that a specific remedy will be pursued (15 USC 1692c(c)).

Mailed notices from the consumer are official when they are received by the debt collector.

Communicating with Third Parties

Unless the consumer or a court of competent jurisdiction provides otherwise, a debt collector may only contact the following parties when trying to collect a debt:

- The consumer.
- The consumer's attorney.
- A consumer reporting agency (if permitted by local law).
- The creditor.

- The creditor’s attorney.

- The debt collector’s attorney (15 USC 1692c(b)).

A debt collector who is unable to locate a consumer may ask a third party for the consumer’s home address, telephone number, and place of employment (location information). The debt collector must give his or her name and state that he or she is confirming or correcting location information about the consumer. Unless specifically asked, the debt collector may not name the collection firm or agency or reveal that the consumer owes any debt (15 USC 1692b(1) and (2)).

No third party may be contacted more than once unless the collector believes that the information from the first contact was wrong or incomplete and that the third party has since received better information, or unless the third party specifically requests additional contact (15 USC 1692b(3)).

A debt collector may not contact any third party by postcard. Contact by letter or telegram is allowed only if the envelope or content of the communication does not indicate the nature of the collector’s business (15 USC 1692b(4) and (5)).

A debt collector may not communicate with third parties after he or she learns that the consumer is represented by an attorney (15 USC 1692b(6)).

Validation of Debts

The debt collector must provide the consumer with certain basic information. Within five days of a debt collector’s initial communication with a consumer, he or she must send the consumer a written notice containing:

- The amount of the debt.

- The name of the creditor to whom the debt is owed.

- Notice that the consumer has 30 days to dispute the debt, or any portion thereof, before the debt collector will assume the debt to be valid.

- Notice that upon such written dispute, the debt collector will send the consumer a verification of the debt or a copy of any judgment.

- Notice that if, within the 30-day period, the consumer makes a written request for the name and address of the original creditor, if it is different from the current creditor, the debt collector will provide that information (15 USC 1692g(a)).

If, within the 30-day period, the consumer disputes in writing any portion of the debt or requests the name and address of the original creditor, the collector must stop all collection efforts until he or she mails to the consumer a copy of a judgment or verification of the debt, or the name and address of the original creditor (15 USC 1692g(b)).

Prohibited Practices

Harassment or Abusive Practices

A debt collector, in collecting a debt, may not harass, oppress, or abuse any person. Specifically, a debt collector may not (15 USC 1692d):

- Use or threaten to use violence or other criminal means to harm the physical person, reputation, or property of any person.

- Use obscene, profane, or other language that abuses the hearer or reader.

- Publish a list of consumers who allegedly refuse to pay their debts (except to a consumer reporting agency or to a legitimate user of consumer reports, as respectively defined under 15 USC 1681a(f) or 1681(b)(3) (sections 603(f) and 604(3) of the Fair Credit Reporting Act)).

- Advertise a debt for sale to coerce payment.

- Annoy, abuse, or harass persons by calling repeatedly their telephone numbers or allowing their telephones to ring continually.

- Make telephone calls without properly identifying oneself, except as allowed to obtain location information.

False or Misleading Representations

A debt collector, in collecting a debt, may not use any false, deceptive, or misleading representation. Specifically, a debt collector may not (15 USC 1692e):

- Falsely represent or imply that he or she is vouched for, bonded by, or affiliated with the United States or any state, including the use of any badge, uniform, or similar identification.

- Falsely represent the character, amount, or legal status of the debt, or of any services rendered, or compensation he or she may receive for collecting the debt.

- Falsely represent or imply that he or she is an attorney or that communications are from an attorney.

- Threaten to take any action that is illegal or not intended.

- Falsely represent or imply that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment or sale of any property or wages of any person, unless such action is lawful and intended by the debt collector or creditor.

- Falsely represent or imply that the sale, referral, or other transfer of the debt will cause the consumer to lose a claim of a defense to payment, or become subject to any practice prohibited by the FDCPA.

- Falsely represent or imply that the consumer committed a crime or other conduct to disgrace the consumer.

- Communicate, or threaten to communicate, false credit information or information which is, or should be, known to be false, including not identifying disputed debts as such.

- Use or distribute written communications that resemble or are falsely represented to be documents authorized, issued, or approved by any court, official, or agency of the United States or any state that creates a false impression of its source, authorization, or approval.

- Use any false representation or deceptive means to collect or attempt to collect a debt or to obtain information about a consumer.

- Fail to disclose clearly, except as allowed in acquiring location information, that he or she is attempting to collect a debt and that information obtained will be used for that purpose.

- Falsely represent or imply that accounts have been sold to innocent purchasers.

- Falsely represent or imply that documents are legal process.

- Use any name other than the true name of the debt collector's business, company, or organization.

- Falsely represent or imply that documents are not legal process or do not require action by the consumer.

- Falsely represent that he or she operates or is employed by a consumer reporting agency.

Unfair Practices

A debt collector may not use unfair or unconscionable means to collect or attempt to collect a debt. Specifically, a debt collector may not: (15 USC 1692f)

- Collect any interest, fee, charge, or expense incidental to the principal obligation, unless it was authorized by the original debt agreement or is otherwise permitted by law.

- Accept a check or other instrument postdated by more than five days, unless he or she notifies the consumer, in writing, of any intention to deposit the check or instrument. That notice must be made not more than 10 or less than three business days before the date of deposit.

- Solicit a postdated check or other postdated payment instrument to use as a threat or to institute criminal prosecution.

- Deposit or threaten to deposit a postdated check or other postdated payment instrument before the date on the check or instrument.

- Cause communication charges, such as those for collect telephone calls and telegrams, to be incurred by any person by concealing the true purpose of the communication.

- Take or threaten to repossess or disable property when the creditor has no enforceable right to the property or does not intend to do so, or if, under law, the property cannot be taken, repossessed, or disabled.

- Use a postcard to contact a consumer about a debt.

- Use any name or symbol, other than a debt collector's address, on any envelope when communicating with a consumer, that indicates the nature of the debt collector's business.

Multiple Debts

If a consumer owes multiple debts that are being collected by the same debt collector, payments must be applied according to the consumer's instructions. No payment may be applied to a disputed debt (15 USC 1692h).

Legal Actions by Debt Collectors

A debt collector may file a lawsuit to enforce a security interest in real property only in the judicial district in which the real property is located. Other legal actions may be brought only in the judicial district in which the consumer lives or in which the consumer signed the original contract creating the debt (15 USC 1692i).

Furnishing Certain Deceptive Forms

No one may design, compile, and furnish any form knowing that it would be used to create a belief by the consumer that someone other than the creditor (a debt collector) is participating in the collection of a debt. Any person who designs, compiles, and furnishes such a form is subject to civil liability (15 USC 1692j and k).

Civil Liability

A debt collector who fails to comply with any provision of the FDCPA is liable for: (15 USC 1692k)

- Any actual damages sustained as a result of that failure.

- An additional damage as allowed by the court:

  – In an individual action, up to $1,000.
  – In a class action, up to $1,000 for each named plaintiff and an award to be divided among all members of the class of an amount up to $500,000 or 1 percent of the debt collector's net worth, whichever is less.

- Costs and a reasonable attorney's fee in any such action.

In determining the amount of liability, the court must consider the nature, frequency, and persistence of the violations and the extent to which they were intentional. In a class action, the court also must weigh the resources of the debt collector and the number of persons adversely affected.

Defenses

A debt collector is not liable for a violation if a preponderance of the evidence shows it was not intentional and was the result of a *bona fide* error that arose despite procedures reasonably designed to avoid it. The collector also is not liable if he or she, in good faith, relied on an advisory opinion of the Federal Trade Commission (FTC), even if the ruling is later amended, rescinded, or determined by a court or other authority to be invalid for any reason.

Jurisdiction and Statute of Limitations

Actions against debt collectors for FDCPA violations may be brought in any appropriate U.S. district court or other court of competent jurisdiction. The consumer has one year from the date on which the violation occurred to bring such an action.

Administrative Enforcement

The FTC is the primary enforcement agency for the FDCPA. The various financial regulatory agencies enforce the FDCPA for the banks they supervise. Neither the FTC nor any other agency may issue regulations governing the collection of consumer debts by debt collectors (15 USC 1692l).

Relationship to State Law

The FDCPA preempts state law only to the extent that it is inconsistent with the FDCPA. A state law that is more protective of the consumer is not considered inconsistent with the FDCPA (15 USC 1692n).

Exemption for State Regulation

The FTC may exempt certain classes of debt collection practices from the FDCPA requirements if the FTC has determined that state laws impose substantially similar requirements and that adequate provision for enforcement exists (15 USC 1692o).

1. To appraise the quality of the bank's compliance management system for the Fair Debt Collection Practices Act (FDCPA).

2. To determine the reliance that can be placed on the bank's compliance management system, including practices and procedures performed by the individual(s) responsible for monitoring the bank's compliance with the FDCPA.

3. To determine the bank's compliance with the FDCPA.

4. To initiate corrective action when policies, practices, or procedures are deficient or violations of law or regulation are identified.

1. From the examiner who completed the Compliance Management System program, obtain information pertinent to the area of examination (historical examination findings, complaint information, and significant findings from compliance review and audit).

2. Through discussions with management and review of the following documents, determine whether the bank's internal controls are adequate to ensure compliance in the area under review. Identify procedures used daily to detect errors and violations promptly. Also review the procedures used to ensure compliance when changes occur.

   - ☐ Organizational charts.
   - ☐ Process flowcharts.
   - ☐ Policies and procedures.
   - ☐ Loan and deposit documentation, and disclosures.
   - ☐ Checklists, worksheets, and review documents.
   - ☐ Computer programs.

3. Review compliance review and audit work papers, and determine whether:

   a. The procedures used address all regulatory provisions (see Transactional Testing section).

   b. Steps are taken to follow-up on previously identified deficiencies.

   c. The procedures used include samples that cover all product types and decision centers.

   d. The work performed is accurate (by reviewing some transactions).

   e. Significant deficiencies and their root causes, are included in reports to management and board.

f. Corrective actions are timely and appropriate.

g. The area is reviewed at an appropriate interval.

Transactional Testing

4. Select a sample of collection accounts and complete the FDCPA worksheet in the Appendix.

Conclusions

5. Summarize here *all* violations of law, regulation, or ruling and use when making SMS entries. (Refer to EC 263, "SMS Documentation Policy.")

Citation	Department	Violation	Recommendation	Policy Guide	Reference
a. ____	__________	________	_______________	___________	________
b. ____	__________	________	_______________	___________	________
c. ____	__________	________	_______________	___________	________
d. ____	__________	________	_______________	___________	________
e. ____	__________	________	_______________	___________	________

6. If the violation(s) noted above represent(s) a pattern or practice, determine the root cause by identifying weaknesses in internal controls, compliance review, training, management oversight, or other factors. Consider whether civil money penalties (CMP) or an enforcement action should be recommended (see CMP matrix).

7. Identify action needed to correct violations, and weaknesses in the bank's compliance system as appropriate. Form a conclusion about the reliability of the compliance system for the area under review and provide conclusions to the examiner performing the Compliance Management System program.

8. Determine, in consultation with the examiner-in-charge (EIC), whether violations or deficiencies in the compliance system are significant enough to merit bringing them to the board's attention in the report of

examination. If so, prepare items for inclusion under the heading, Matters Requiring Board Attention, and under a Type 75 Follow-up Analysis.

9. Determine whether any items identified during this examination that materialize into a supervisory concern before the next on-site examination (consideration should be given to any planned: increase in activity in this area; personnel changes; policy changes; changes to outside auditors or consultants; changes in business strategy, etc.). If so, summarize your concerns and assess the potential risk to the institution and discuss it with the EIC and/or appropriate bank personnel.

10. Discuss findings with bank management and obtain commitment(s) for corrective action.

Fair Debt Collection Practices Worksheet

Use this worksheet to perform transactional testing. Every "No" answer indicates a violation of law and should be explained fully in the work papers.

Name of Collection Account: Account #:										
Name of collector:	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
1. Did the bank communicate with the consumer or third parties in a manner not prohibited (15 USC 1692c)?										
2. Was the written validation notice furnished within the required time period (15 USC 1692g)?										
3. Did the validation notice comply with validation requirements (15 USC 1692g)?										
4. Were collection practices conducted in a non-abusive manner (15 USC 1692d, e, f, and j)?										
5. Were amounts collected expressly authorized by the agreement creating the debt by state law (15 USC 1692f)?										
6. Were all applied payments received as instructed and, when no instruction was given, were they applied only to undisputed debts (15 USC 1692h)?										
7. If the bank filed suit to collect the debt, was it filed in an authorized forum (15 USC 1692i)?										

Regulatory Interpretations – Questions and Answers

Coverage

1. When is a bank a debt collector?

   Generally, when a bank regularly participates in any arrangement, including reciprocal service agreements, with another person to collect defaulted consumer debts for that person, it is a debt collector for those debts only. In addition, if a bank uses a name other than its own in collecting its own consumer debts, it is a debt collector for such debts as well.

2. When is a debt in default?

   The act does not define when a debt is in default. In determining whether a debt is in default, the following factors, among others, are considered:

   - The creditor's customary policies and practices.
   - Terms of the contract.
   - Determinations by the originator.
   - State law.

3. May a bank regularly collect for another person without becoming a debt collector?

   Yes. If the bank is related to the other institution by common ownership or corporate control, it may collect consumer debts for that institution without becoming a debt collector provided that: (1) it collects debts only for related institutions; and (2) debt collection is not the bank's principal business. However, if it regularly collects defaulted debts for nonaffiliates, it also becomes a debt collector for regularly collected, defaulted affiliate debts.

4. Is a bank a debt collector if it collects a consumer debt in an isolated instance for a non-related person?

   No. A bank that collects in an isolated instance for a nonaffiliate is not covered. The bank must collect for others in the regular course of business before it becomes a debt collector.

5. When does a bank *regularly* collect debts due another?

   The act does not define what constitutes collecting debts "regularly." For purposes of examination, the following factors should be considered in determining if the bank *regularly* collects third party debts.

   - Whether the bank has entered into a formal agreement with another person to collect third party debts, such as American Bankers Association's reciprocal service agreement program.

   - Whether the bank has established procedures for collection of third party debts.

   - The ratio of third-party defaulted debts collected during the past 12 months to all defaulted debts collected.

   - The amount of time the bank spends in third party debt collection.

6. Are banks that service mortgages or student loans generally debt collectors?

   No. Banks are not debt collectors if they service debts that they originated or debts that were not in default when obtained by the bank. However, if a bank services a loan portfolio, it is a debt collector for those loans in the portfolio that it did not originate and that were in default when obtained.

7. Are bank trust departments debt collectors?

   No. The activities of trust departments are *bona fide* fiduciary activities that are exempt from the FDCPA.

8. Are banks debt collectors if they collect consumer debts held as security for an extension of commercial credit?

   No. This activity is specifically exempted.

9. Are employees or officers of banks considered debt collectors?

   No. They are not debt collectors as long as they collect the bank's debts in its name.

Third-party Communication When Bank Is Acting as a Debt Collector

10. May a bank communicate with persons other than the consumer to determine his or her location?

    Yes. However, the communication must be limited to location information, that is, a consumer's place of residence, phone number, or place of employment. The bank may not identify itself as a debt collector and nothing may be said about debt collection. If the bank knows the consumer is represented by an attorney, the bank may not communicate with any other person about the debt at issue.

11. May a bank discuss the debt with anyone other than the consumer?

    Yes. However, the bank may contact only:

    - Its attorney.
    - The consumer's attorney.
    - The creditor or creditor's attorney.
    - Consumer reporting agencies.
    - The consumer's spouse, parent, guardian, executor, or administrator.
    - Any other person obligated to pay the debt.

Prohibited Activities When Bank Is Acting as a Debt Collector

12. In general, what means of debt collection are banks prohibited from using?

    The bank cannot threaten violence or harm, swear, publish the consumer's name as a person who allegedly refuses to pay debts, advertise the sale of the debt to coerce payment, make excessive telephone calls, or fail to disclose the bank's identity on the telephone.

    Any other action that would harass, oppress or abuse anyone is prohibited. The bank also cannot make false representation about itself, the debt, or its rights or those of the consumer.

13. May a bank contact a consumer at his or her place of employment?

    The bank may not contact a consumer at his or her place of employment if it is against the consumer's wishes or if the bank knows or should know that the employer forbids such contacts.

14. May a bank contact a consumer who is represented by an attorney concerning the debt?

    No. However, the bank may contact the consumer to obtain the name and address of the attorney, or if the attorney permits the contact or fails to respond within a reasonable time.

15. May the bank be made to stop communicating with the consumer about the debt?

    Yes. If the consumer notifies the bank in writing that the consumer refuses to pay the debt or merely does not want any further contact with the bank, the bank must cease communication with the consumer. However, at that point the bank may still notify the consumer of its possible further actions.

16. May the bank collect an amount in excess of that authorized by the contract or permitted by state law?

    No.

17. May the bank accept postdated instruments?

    Yes. However, the act provides specific rules for accepting those instruments (see 15 USC 1692f(2) through (4)).

18. May a postcard be used in collection efforts?

    No.

19. May the bank threaten to repossess property?

    Yes, but only when there is a present right and intention to take possession of the property.

20. May the bank use an envelope that contains any language or symbol, indicating debt collection when communicating with a consumer?

    No.

Requirements When Bank Is Acting as a Debt Collector

21. What must the bank do when contacting a consumer for the first time?

    Within five days of its initial communication with the consumer, unless the consumer pays the debt in that time, the debt collector must send the consumer a written notice containing:

    - The amount of the debt.

    - The name of the creditor.

    - A statement that, unless the consumer disputes the validity of the debt within 30 days, the debt collector will assume the debt to be valid.

- A statement that if the consumer disputes the debt in writing within 30 days, the debt collector will obtain and mail the consumer verification of the debt.

- A statement that, upon the consumer's written request within the 30-day period, the debt collector will provide the name and address of the original creditor, if different from the current creditor.

22. If the consumer disputes the debt or requests the name and address of the original creditor, may the bank continue collection efforts?

    No. However, the bank may continue collection efforts after it provides the consumer with a copy of the written verification of the debt or the name and address of the original creditor.

Consequences of Noncompliance

23. What are the potential consequences of noncompliance with the act?

    In civil actions, individual consumers may recover actual damages, court costs, attorney's fees, and additional damages up to $1,000. Class action recoveries include the above for named plaintiffs and additional damages up to the lesser of $500,000 or 1 percent of the bank's net worth.

    Administrative enforcement of the act for banks may involve actions under Section 8 of the Federal Deposit Insurance Act, including cease and desist orders requiring that actions be taken to remedy conditions resulting from violations.

Laws

15 USC 1692, Fair Debt Collection Practices Act

OCC Issuances

Examining Circular 263, SMS Documentation Policy

Background and Summary

On March 1, 1984, the Federal Trade Commission (FTC) adopted its Credit Practices Rule, effective March 1, 1985, pursuant to the authority granted the FTC under the Federal Trade Commission Act (FTC Act), 15 USC 57a(a)(1)(B) and 15 USC 45(a)(1). Under the FTC Act, the FTC is authorized to promulgate rules that define and prevent "unfair or deceptive acts or practices" in or affecting commerce in extensions of credit to consumers. Section 18(f) of the FTC Act, 15 USC 57a(f), provides that, whenever the FTC promulgates a rule prohibiting practices deemed unfair or deceptive, the Board of Governors of the Federal Reserve System (Board) must adopt a substantially similar rule, with some exceptions, prohibiting such practices by banks.

In April 1985, the Board adopted its credit practices rule, thereby amending Regulation AA, Unfair or Deceptive Acts or Practices (12 CFR 227). The Board modified certain provisions of the FTC's rule to take into account the needs and characteristics of the banking industry. The effective date of the Federal Reserve Board's rule is January 1, 1986.

The rule prohibits banks from using: (1) certain provisions in their consumer credit contracts; (2) certain late charge accounting practices; and (3) deceptive cosigner practices. It also requires that a disclosure notice be given to a cosigner before becoming obligated. Banks are prohibited from enforcing in purchased contracts the same provisions that they are not allowed to include in their consumer credit contracts.

The rule applies to all consumer credit contracts other than those for the purchase of real estate. It prohibits banks from using certain remedies to enforce consumer credit obligations. Under the rule, banks may not include those remedies in their consumer credit contracts, and, if banks purchase contracts that contain a prohibited provision(s), they may not enforce the provision(s).

Prohibited provisions are:

- A confession-of-judgment clause (also known as a cognovit or warrant of attorney), which permits a creditor to obtain a judgment based on the borrower's agreement in advance that, in the event of a suit on the obligation, the borrower waives the right to notice and the opportunity to be heard.

- A waiver of exemption in which the consumer relinquishes a statutory right protecting his or her home and other necessities from seizure to satisfy a judgment, unless the waiver applies solely to property that serves as security for the obligation.

- An assignment of future wages that gives the bank the right to receive the consumer's wages or earnings directly from the consumer's employer, unless the assignment constitutes a payroll deduction plan or other preauthorized-payment plan and is revocable by the consumer.

- The taking of nonpossessory security interests in household goods, unless such goods are purchased with the credit extended by the bank.

The rule also prohibits a practice known as "pyramiding late charges." Under the pyramiding provision, a bank may not assess multiple late charges based on a single late payment that is subsequently paid.

The bank also is prohibited from misrepresenting a cosigner's liability and is required to give a cosigner, before becoming obligated in a consumer credit transaction, a disclosure notice that explains the nature of the cosigner's obligations and liabilities under the contract.

Enforcement

The Board's rule applies to all banks and their subsidiaries. For national banks it applies not only to the bank itself but also to their subsidiaries, federal branches, and federal agencies of foreign banks. The Office of the Comptroller of the Currency also has enforcement responsibility for those banks.

State Exemptions

The rule provides that states may seek exemptions from its requirements when the state law provides a level of protection substantially equivalent to, or greater than, that afforded by the rule.

1. To appraise the quality of the bank’s compliance management system for the Credit Practices Rule.

2. To determine the reliance that can be placed on the bank’s compliance management system, including practices and procedures performed by the person(s) responsible for monitoring the bank’s compliance with the Credit Practices Rule.

3. To determine the bank’s compliance with the Credit Practices Rule.

4. To initiate corrective action when policies, practices, or procedures are deficient or when violations of law or regulation are identified.

1. From the examiner who completed the Compliance Management System program, obtain information pertinent to the area of examination (historical examination findings, complaint information, and significant findings from compliance review and audit).

2. Through discussions with management and review of the following documents, determine whether the bank's internal controls are adequate to ensure compliance in the area under review. Identify procedures used daily to detect errors and violations promptly. Also review the procedures used to ensure compliance when changes occur (e.g., changes in loan documents and software programs).

   - ☐ Organizational charts.
   - ☐ Process flowcharts.
   - ☐ Policies and procedures.
   - ☐ Loan documentation and disclosures.
   - ☐ Checklists, worksheets, and review documents.
   - ☐ Computer programs.

3. Review compliance review and audit work papers, and determine whether:

   a. The procedures used address all regulatory provisions (see Transactional Testing section).

   b. Steps are taken to follow-up on previously identified deficiencies.

   c. The procedures used include samples that cover all product types and decision centers.

   d. The work performed is accurate (by reviewing some transactions).

   e. Significant deficiencies and their root causes are included in reports to management and board.

   f. Corrective actions are timely and appropriate.

g. The area is reviewed at an appropriate interval.

Transactional Testing

4. Obtain and test a sample of consumer loans using the worksheet in the Appendix. The sample should include loans originated by the bank and those acquired by the bank that were originated by other creditors.

5. Summarize your findings from the worksheet and continue with step 6.

Conclusions

6. Summarize here *all* violations of law, regulation, or ruling and use when making SMS entries. (Refer to EC 263, "SMS Documentation Policy.")

Citation	Department	Violation	Recommendation	Policy Guide	Reference
a. ____	__________	________	_______________	___________	________
b. ____	__________	________	_______________	___________	________
c. ____	__________	________	_______________	___________	________
d. ____	__________	________	_______________	___________	________
e. ____	__________	________	_______________	___________	________

7. If the violation(s) noted above represent(s) a pattern or practice, determine the root cause by identifying weaknesses in internal controls, compliance review, training, management oversight, or other factors. Consider whether civil money penalties (CMP) or an enforcement action should be recommended (see CMP matrix).

8. Identify action needed to correct violations and weaknesses in the bank's compliance system as appropriate. Form a conclusion about the reliability of the compliance system for the area under review and provide conclusions to the examiner performing the Compliance Management System program.

9. Determine, in consultation with the examiner-in-charge (EIC), whether violations or deficiencies in the compliance system are significant

enough to merit bringing them to the board’s attention in the report of examination. If so, prepare items for inclusion under the heading, Matters Requiring Board Attention, and under a Type 75 Follow-up Analysis.

10. Determine whether any items identified during this examination could materialize into a supervisory concern before the next onsite examination (consideration should be given to any planned: increase in activity in this area, personnel changes, policy changes, changes to outside auditors or consultants, changes in business strategy, etc.). If so, summarize your concerns and assess the potential risk to the institution and discuss with the EIC and/or appropriate bank personnel.

11. Discuss findings with bank management and obtain commitment(s) for corrective action.

Credit Practices Rule Worksheet

This worksheet can be used to test the adequacy of the work completed by the compliance officer and/or to conduct an independent test using a sample chosen by the examiner. Answer the following questions with a "Yes" or a "No." Every "Yes" answer indicates a violation of law or an internal deficiency and must be explained fully in the work papers.

Name of Borrower: Loan #	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
1. Do consumer credit contracts originated by the bank contain any of the following prohibited provisions or has the bank attempted to enforce: 1) a confession of judgment; 2) a waiver of statutory property exemption; 3) an assignment of wages or other earnings (except where permitted); or 4) a blanket security interest in household goods 12 CFR 227.13(a),(b),(c),(d)?										
2. If the bank acquires loans originated by other creditors, does it attempt to enforce any of the following prohibited practices: 1) a confession of judgment; 2) a waiver of statutory property exemption; 3) assignment of wages or other earnings except where permitted); 4) a blanket security interest in household goods 12 CFR 227.13(a),(b),(c),(d)?										
3. Has the bank taken a nonpossessory security interest in household goods in nonpurchase money security transactions 12 CFR 227.13(d)?										

Name of Borrower: Loan #	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
4. Has the bank engaged in any prohibited cosigner practices 12 CFR 227.14(a)?										
5. Has the bank failed to provide each cosigner, before becoming contractually obligated, the required notice or one that is substantially similar (whether separate or contained in the credit documents) 12 CFR 227.14(b)?										
6. Does the bank collect or attempt to collect a late charge on a timely payment because of the consumer's failure to pay a late charge attributable to a prior delinquent payment 12 CFR 227.15?										

Questions and Answers

The staff guidelines on the Credit Practices Rule – subpart B of Regulation AA – are in a question-and-answer format. The questions are identified by hyphenated numbers. The first part of the number indicates the regulatory section; the second part, the sequential order of a particular question within that section. For example, 13(d)-1 indicates the first question in section 227.13(d). Headings are included to make it easier for users to locate questions.

Section 227.11 – Authority, Purpose, and Scope

11(c)-1: *Penalties for noncompliance.* What are the penalties for noncompliance with the rule?

Administrative enforcement of the rule for banks may involve actions under section 8 of the Federal Deposit Insurance Act (12 USC 1818), including cease-and-desist orders. The orders require that actions be taken to remedy violations. If the terms of an order are violated, the federal supervisory agency may impose penalties of up to $1,000 per day for each day that the bank is in violation of the order.

11(c)-2: *Industrial loan companies.* Are industrial loan companies subject to the Board's rule?

Industrial loan companies insured by the Federal Deposit Insurance Corporation are covered by the Board's rule.

Section 227.12 – Definitions

12(a) Consumer

12(a)-1: *Type of transaction covered.* What type of transaction is covered by the rule?

The rule covers credit obligations of consumers to acquire goods, services, or money primarily for personal, family, or household use. The rule does not apply to loans made to purchase of real property.

12(a)-2: *Business vs. consumer purpose.* How can a bank determine whether credit extensions will be used for business and are not covered by the rule?

Although there is no precise test for what constitutes business-purpose credit – as opposed to credit primarily for personal, family, or household purposes – banks may consider the factors described in the official staff commentary to Regulation Z (Truth in Lending, 12 CFR 226) on this issue. The factors include:

- The relationship of the borrower's primary occupation to the acquisition. The more closely related, the more likely the loan will be used for business.

- The degree to which the borrower will personally manage the acquisition. The more there is personal involvement, the more likely the loan will be used for business.

- The ratio of income from the acquisition to the total income of the borrower. The higher the ratio, the more likely the loan will be used for business.

- The size of the transaction. The larger the transaction, the more likely the loan will be used for business.

- The borrower's statement of purpose for the loan.

Examples of business-purpose credit include:

- A loan to expand a business, even if it is secured by the borrower's residence or personal property.

- A loan to improve a principal residence by putting in a business office.

- A business account used occasionally for consumer purposes.

Example of consumer-purpose credit include:

- Credit extensions by a company to its employees or agents if the loans are used for personal purposes.
- A loan secured by a mechanic's tools to pay a child's tuition.
- A personal account used occasionally for business purposes.

12(a)-3: *Agricultural purpose loans.* Are loans made for agricultural purposes covered by the rule?

A loan made for an "agricultural purpose" – as that term is defined in the official staff commentary to Regulation Z – would not be a loan made primarily for personal, family, or household use and would not be subject to the rule. An agricultural-purpose loan would include loans for the planting, propagating, nurturing, harvesting, catching, storing, exhibiting, marketing, transporting, processing, or manufacturing of food, beverages (including alcoholic beverages), flowers, trees, livestock, poultry, bees, wildlife, fish, or shellfish by a natural person engaged in farming, fishing, or growing crops, flowers, trees, livestock, poultry, bees, or wildlife.

12(a)-4: *Real property loan – not secured by property purchased.* Does the rule apply when a consumer obtains a loan to purchase real property, but secures it with other collateral, such as a savings account or other real property?

No, the rule would not apply since the loan will be used to purchase real property.

12(a)-5: *Home-improvement loans.* Is a home-improvement loan made by a bank to a consumer who has secured it with his or her home subject to the rule?

Yes, the transaction is subject to the rule, since the loan will not be used to *purchase* real property.

12(a)-6: *Mobile home and houseboat purchases.* Is a purchase of a mobile home or houseboat exempt from the rule as a purchase of real property?

The issue of whether purchases of mobile homes or houseboats are covered by the rule depends on how these dwellings are treated under state law. If the applicable state law considers them real property, as opposed to personal property, transactions for their purchase would be exempt from the rule.

12(a)-7: *Construction loans.* Are construction loans and loans made to provide permanent financing exempt from the rule as purchases of real property?

Yes, construction loans and loans made to provide permanent financing are considered loans for the purchase of real property and is not subject to the rule.

12(a)-8: *Assumptions.* A bank makes a loan for the purchase of real property. The loan is assumed by a new purchaser. Would the assumption be considered a transaction "for the purchase of real property" and not covered by the rule?

Yes, an assumption of a loan made to purchase real property is considered a transaction "for the purchase of real property" and is not covered by the rule.

12(a)-9: *Refinancing of real property loans.* Is a loan that was made to purchase real property and refinanced by the bank still exempt from the rule?

The new loan will be exempt from the rule as long as its primary purpose is to refinance the original debt (for example, to take advantage of lower interest rates). The amount outstanding on the original loan, which is now being refinanced, must represent substantially the entire amount of the new loan; any additional credit extended for the new loan must be incidental to the primary purpose of refinancing.

12(a)-10: *Lease transactions.* Are consumer lease transactions covered by the rule?

The rule covers only consumer credit obligations. A lease transaction would be covered by the rule only if it is a credit sale as defined in Regulation Z.

12(a)-11: *Trusts.* Are extensions of credit made to a consumer through a trust covered by the rule?

Yes, such extensions of credit are covered by the rule, unless the credit is being extended through a nonprofit trust.

12(b) Cosigner

12(b)-1: *Cosigner – basic definition.* Who is a cosigner under the rule?

Any natural person who assumes liability for the obligation of a consumer (including, for example, a surety, guarantor, or other accommodation party), and who does so without receiving goods, services, or money in return for the obligation, or, in the case of open-end credit, without receiving the contractual right to obtain extensions of credit on the account, would be considered a cosigner for purposes of the rule.

12(b)-1a: *Business entities as cosigners.* If a partnership or a corporation cosigns a consumer credit obligation, is such an entity a cosigner for purposes of the rule? Must the bank provide a cosigner notice?

No, the rule applies only to natural persons who are cosigners. Consequently, the rule does not require a bank to provide a cosigner notice when a partnership, corporation, or other business entity serves as a cosigner on a consumer credit obligation.

12(b)-1b: *Dealer guarantee.* Must the bank provide a cosigner notice to a dealer when it and, for example, an automobile dealer, agree that the bank will purchase a consumer credit obligation from the dealer and the dealer guarantees the obligation?

No, the rule is not intended to apply in such recourse agreement situations when the bank purchases dealer paper.

12(b)-2: *Person's signature requested as a condition to credit or as a condition for forbearance.* Is a person a cosigner if a bank requests his or her signature as a condition to granting credit to another person, or for forbearance on collection of a consumer's obligation that is in default?

Yes, such a person would be a cosigner if he or she is asked to sign as a condition to granting credit to another person, or for forbearance on collection of an obligation that is in default, provided that the person assumes liability for a consumer's obligation without receiving goods, services, or money in return. A person is not a cosigner if he or she who is asked to sign the credit obligation (for example, for the purchase of an automobile or an open-end credit card account) decides to appear on the title to the automobile being purchased, or to have access to the credit card line.

12(b)-3: *Joint applicants.* What happens when two people visit a bank to apply for a loan and appear to be applying jointly? Can the bank assume that they are applying as joint applicants, or does the rule require the bank to determine if both of the applicants will actually be "receiving goods, services, or money in return for the obligations"?

When two people visit a bank to apply for a loan and appear to be applying jointly, the rule does not require a bank to conduct a detailed inquiry into the extent to which both persons are "receiving goods, services, or money in return for the obligation." In most cases, persons applying together will be coborrowers and will not be covered by the rule. The cosigner provision would not apply:

- If two people apply together for a loan to purchase items for their shared use or to be owned jointly.

- If two people apply jointly for a credit card account and both have the contractual right to draw on the account, even if one of the applicants eventually chooses not to use the account.

The cosigner provision would apply if a consumer applies for a loan with a friend or relative and, during the application process, the loan officer determines that the the friend or relative will not receive any benefit from the loan and that he or she is applying with the consumer solely to aid that person in obtaining credit (for example, when the loan proceeds will be used to pay the consumer's dental expenses or buy furniture for his or her home or apartment).

12(b)-4: *Signature to perfect security interest – relationship to Regulation B.* The rule does not consider a spouse whose signature is required by state law on a credit obligation to perfect a security interest to be a cosigner. Does this affect a creditor's obligation under the signature rules of Regulation B (Equal Credit Opportunity, 12 CFR 202), which limit the circumstances in which a creditor may require a cosigner?

No, the rule does not permit a creditor to obtain the signature of a nonapplicant spouse, or any person, in violation of Regulation B. The rule merely addresses whether a bank must give a cosigner notice when a person's signature is required on the credit obligation to perfect a security interest; however, whether a bank is permitted to obtain such a signature is controlled by Regulation B.

12(b)-5: *Hypothecating security.* Is a person who hypothecates security for another's obligation a cosigner?

No. A person who merely offers security for a loan, and in so doing signs a security agreement, but not the note, contract, or other document that would render the cosigner liable on the underlying obligation, is not a cosigner under the rule.

12(d) Household Goods

12(d)-1: *Basic definition of household goods.* What is included in the term "household goods"?

"Household goods" includes clothing, furniture, appliances, linens, china, crockery, kitchenware, and personal effects of the consumer and his or her dependents. The term does not include works of art, electronic entertainment equipment (other than one television and one radio), items acquired as antiques, and jewelry (except wedding rings).

12(d)-2: *Duplicates of household goods.* Can duplicate items of household goods be used to secure a consumer credit obligation?

The definition of "household goods" includes one television and one radio, but it does not similarly limit furniture or any of the other items included in the definition. Consequently, duplicates of any items included in the definition, other than those of a television or a radio, are covered by the prohibition.

12(d)-3: *Personal effects.* What are "personal effects" for purposes of the "household goods" definition?

The term "personal effects" should be construed narrowly and is limited to those items that a person ordinarily would carry on his or her person and possessions of a uniquely personal nature. This includes items such as personal papers, family photographs, or a family Bible. It does not include musical instruments, typewriters, firearms, bicycles, snowmobiles, cameras and camera equipment, sporting goods, and stamp and coin collections.

12(d)-4: *Appliances as fixtures.* Do appliances considered "fixtures" under state law still fall under the "household goods" definition?

No. Under some state laws, appliances are considered fixtures, and, as such, they become part of the realty. A bank that takes a security interest in realty in such cases would not violate the rule's prohibition against taking a security interest in household goods.

12(e) Obligation

12(e)-1: *Transactions in excess of $25,000.* Is a credit transaction for an amount that exceeds $25,000 excluded from the rule's requirements?

Unlike Regulation Z, the credit practices rule does not use a dollar amount to determine whether a transaction is covered by the rule. However, it is a factor in determining whether a transaction is for a business or consumer purpose. (See question 12(a)-2.)

Section 227.13 – Unfair Credit Contract Provisions

13-1: *Retroactive effect –- bank's own contract.* May the bank enforce a contract provision ultimately prohibited by the rule, if it entered into a contract with a consumer before the effective date of the rule?

Yes, the rule is not intended to have retroactive effect (see, however, question 15-8).

13-2: *Retroactive effect-purchased paper written before effective date of rule.* May a bank enforce a provision ultimately prohibited by the rule and contained in paper purchased by a bank after January 1, 1986, from a third party that was written before the rule's effective date?

Yes, the bank could enforce the provision since, at the time the paper was written, the provision was not prohibited.

13-3: *Refinancing and renewals – original credit obligation entered into before effective date of rule.* Assume that a bank entered into a credit obligation before the effective date of the rule and that it contained a provision ultimately prohibited by the rule. Assume further that the credit obligation is refinanced after the effective date of the rule. May the refinanced obligation contain the prohibited provision, or is the refinancing subject to the rule? Does the same hold true for renewals of the original credit obligation?

A refinancing or renewal entered into after the effective date of the rule is subject to the rule and may not contain a contract provision prohibited by it.

13-4: *Open-end account-future advances made under the plan.* May the bank enforce contract provisions for future advances made under the plan after January 1, 1986 if it entered into an open-end credit obligation with a consumer before the effective date of the rule and contract provisions in the agreement were ultimately prohibited by the rule?

Yes, contract provisions ultimately prohibited by the rule can be enforced then, since the advances are contained in an open-end agreement entered into before the effective date of the rule, and the rule is not intended to have retroactive effect (see, however, question 15-8).

13-5: *Prohibited provisions in cosigner agreement.* May a bank include any of the provisions prohibited by the rule in the documents obligating a cosigner on a consumer credit obligation (for example, in a guaranty agreement)?

A bank may not include any of the prohibited provisions in the documents obligating a cosigner. The agreement between the bank and the cosigner, even if executed separately, is part of the consumer credit obligation and subject to the rule's prohibitions.

13(a) Confession of Judgment

13(a)-1: *Basic definition; coverage.* What is a confession of judgment provision?

A confession of judgment is a contract clause in which the debtor consents in advance to allow the creditor to obtain a judgment against the debtor without prior notice or an opportunity for the debtor to be heard in court. Such provisions are sometimes referred to as "cognovit" provisions. The Board's rule prohibits confessions of judgment that involve anticipatory waivers of procedural due process in the context of consumer credit obligations. It does not prohibit a debtor from acknowledging liability, or from otherwise entering into a negotiated settlement, after a legal action has been instituted.

The confession-of-judgment provision also does not affect a power of attorney in a mortgage loan obligation or deed of trust for purposes of foreclosure; nor does the provision affect a power of attorney given to expedite the transfer of pledged securities or the disposal of repossessed collateral, or to allow the prompt cancellation of insurance in an insurance-premium finance contract.

13(a)-2: *Language limiting confession-of-judgment provision.* May the bank include in multipurpose credit contracts a confession-of-judgment clause with qualifying language indicating that the clause is not applicable in a consumer-purpose loan (e.g., "You confess judgment to the extent the law allows," or "This clause applies only in business-purpose loans")?

No. The rule's public-policy purpose prohibits a bank from including a confession-of-judgment clause in a consumer credit contract, even with limiting language. Therefore, when a multipurpose form is used for a consumer-purpose loan, the bank must cross out, blacken in, or otherwise indicate clearly the removal of the prohibited clause from the loan document.

13(b) Waiver of Exemption

13(b)-1: *Basic definition.* What is a waiver-of-exemption clause?

A waiver-of-exemption clause is a contract provision under which the debtor agrees to waive a property exemption provided by state law. Generally, state-property exemptions protect the debtor's home and other necessary items, such as furniture and clothing, from attachment or execution to satisfy the judgment debt. Under the rule, a waiver is permitted if it applies solely to property given as security for the consumer credit obligation.

13(b)-2: *Nonpurchase-money transactions.* Does a waiver of a state homestead exemption for a nonpurchase-money security interest (such as a second trust or a home equity line of credit) violate the rule, if it applies only to the property that is subject to the security interest?

No, the waiver of a homestead exemption provision in the rule is not violated in the nonpurchase-money security interest situation as long as it applies only to the property that secures the transaction.

13(b)-3: *Language of contract provision limiting applicability of waiver.* Would a clause in a bank's consumer credit contract that states, "I waive my state property exemption to the extent the law allows," be permitted under the rule?

No, in spite of the limiting language "to the extent the law allows," the clause is an overly broad waiver and would be prohibited by the rule. A clause in a consumer credit contract providing that the consumer waives an exemption "as to property that secures this loan" would be a permissible waiver-of-exemption provision under the rule.

13(c) Assignment of Wages

13(c)-1: *Basic definition.* What is an assignment-of-wages clause?

Under an assignment-of-wages clause, the debtor assigns future wages to the creditor in the event of default. Unlike a garnishment, a court judgment is not required. Typically, once a debtor defaults, the creditor presents the assignment of wages to his or her employer, who pays the agreed portion of the employee's wages directly to the creditor.

13(c)-2: *Exceptions.* Are there any exceptions to the assignment-of-wages prohibition?

Yes, the following types of wage assignments are permitted under the rule:

- Assignments that are revocable at the will of the debtor.
- Payroll deduction plans regardless of revocability.
- Revocable preauthorized-payment plans (governed by the Electronic Fund Transfer Act, 15 USC 1693 et. seq.) for electronic fund transfers to accounts from wages.
- Assignments of wages already earned at the time of the assignment.

13(c)-3: *Retroactivity.* Does the rule's prohibition against wage assignments apply to a loan agreement entered into by the bank before the effective date of the rule?

No. The rule does not invalidate or prevent enforcement of any wage assignments that were executed before January 1, 1986, the effective date of the rule, even though they may cover wages payable or earned after that date.

13(c)-4: *Payment plans entered into after transaction begins.* What happens if, sometime after entering into a credit transaction, a consumer decides that he or she would like to make payments by payroll deduction or by having the payments deducted from wages and electronically transferred to the bank as payment on an account. Would this be considered a prohibited wage assignment under the rule?

Although most consumers authorize payroll deduction plans and preauthorized-payment plans at the commencement of the credit obligation (as is contemplated by the rule), their enrollment in payroll deduction or preauthorized-payment plans after the obligations have begun is permissible under the rule as long as consumers request participation voluntarily.

13(c)-5: *Offer of a commission as security.* Is the rule's prohibition against a bank's taking an assignment of a consumer's future wages violated if a bank takes as security for a loan a consumer's commission (for example, a real estate agent's commission) that has been earned, but not yet received, by the consumer?

No, this would not be a prohibited wage assignment since the consumer's commission has already been earned at the time of the assignment; the fact that it has not yet been received by the consumer does not affect its treatment under the rule.

13(d) Security Interest in Household Goods

13(d)-1: *Definition of type of security interest prohibited.* What type of security interest is prohibited by the Board's rule?

The Board's rule specifically prohibits banks from taking nonpossessory security interests – other than purchase money security interests – in items defined as household goods. The rule is intended to prevent consumers from losing basic necessities, which usually have little resale value. The Board's rule does not prohibit a security interest in real property, a security interest in items not defined as household goods, or a possessory security interest (for example, a pawn or pledge) in a consumer's household goods.

13(d)-2: *Voluntary offerings of household goods.* Is the bank allowed to accept household goods offered voluntarily by a consumer as collateral on a nonpurchase-money loan?

No. The bank cannot accept household goods as collateral, even if offered voluntarily.

13(d)-3: *Refinancing – original loan purchase money.* Assume that a bank entered into a loan transaction with the consumer – either before or after the effective date of the rule – that involved taking a purchase-money security interest in household goods. Assume further that the loan is refinanced. May the bank retain its security interest in the household goods? Does it make a difference if the new loan is for a larger amount or if it is refinanced more than once?

The bank may retain its security interest in household goods, even if the new transaction is for a larger amount and regardless of how often it is refinanced.

13(d)-3a: *Refinancing (new creditor) – original loan purchase money.* Using the same facts as those stated in question13(d)-3, assume that the consumer refinances the loan with a different bank. May that bank acquire the security interest of the purchase-money lender in household goods without violating the rule?

Yes, the bank may acquire the security interest of the purchase-money lender without violating the rule.

13(d)-4: *Cross-collateral and future-advances clauses.* Does the rule prohibit a cross-collateral or future-advances clause in a security agreement for household goods that provides that the household goods would serve as security for other loans, both current and future, made by the bank to the debtor?

A cross-collateral or future-advances clause would violate the rule's prohibition on taking a security interest in household goods, when the clause is so broad in its applicability that it goes beyond loans that are refinancing or consolidations of the original loan (which contained the purchase-money security interest in household goods) and extends to other loans, current or future, that the bank makes to the debtor.

13(d)-5: *Refinancing – releasing a portion of security interest.* When a bank has entered into a purchase-money loan transaction secured by household goods and advances additional funds to the consumer in subsequent refinancing of that transaction, must it release a proportionate amount of the security interest in the household goods, as the original loan amount decreases?

The rule does not require a proportionate reduction of the security interest as the original loan amount decreases; such may be required, however, by state law.

13(d)-6: *Bill-consolidation loans.* May Bank A, in making a bill-consolidation loan, secure its loan with the security interest in household goods taken in the original credit transaction with Bank B, which was a purchase-money credit transaction and which will be paid in full by the bill-consolidation loan?

Yes, no distinction is made under the rule between a consolidation loan made by a creditor, who already holds the purchase-money security interest, and one made by a different creditor.

13(d)-7: *Refinancing by sales contract vs. direct loan.* May a purchase-money security interest in household goods that is acquired by a sales contract be retained, if the contract is consolidated or refinanced by a direct loan instead of another sales contract?

Yes, a bank may retain the security interest in the household goods, even though the sales contract is consolidated or refinanced by a direct loan.

13(d)-8: *Documentation of purchase-money loan.* How is the purchase money nature of a loan to be documented?

The rule contains no specific documentation requirements. To prove compliance, however, the creditor may place a note or statement in the loan file attesting to the purchase-money nature of a loan; include a check-box in the contract indicating whether the transaction was a purchase-money loan; or reserve a place in the contract revealing how the proceeds will be used.

13(d)-9: *Appliances as fixtures.* When a bank takes a security interest in realty and, under state law, fixtures are part of the realty, does the bank violate the prohibition against taking a security interest in household goods?

No. (See question 12(d)-4.)

13(d)-10: *Security interest in substituted household goods.* Does a bank violate the rule by retaining a security interest in household goods that have been substituted by the consumer for those in which the bank originally had a permissible purchase-money security interest?

A security interest in substituted household goods would violate the rule's prohibition on taking a nonpurchase-money security interest in household goods unless the goods were substituted pursuant to a warranty; as such, the goods would be considered part of the original purchase-money transaction under the rule.

Section 227.14 – Unfair or Deceptive Practices Involving Cosigners

14-1: *State-required cosigner notice.* If a state law also requires that a notice be given to a cosigner can that notice substitute for the federal notice?

No, a state notice cannot be substituted for the federal notice, unless a state has obtained an exemption from the federal cosigner provision as provided for in section 227.16 of the rule. When state law requires that a notice be given to cosigners, the bank may give both notices. The bank could, for example, include both notices in the documents evidencing the credit obligation or on a separate document, unless such would be prohibited by state law (see question14(b)-7 on how to handle language in the federal notice that is inconsistent with state law provisions).

14-2: *Record retention.* Must a bank retain a copy of the cosigner notice it gives its customers?

Generally, the rule does not contain any record-retention requirements. A bank should be able, however, to demonstrate that its procedures ensure that the cosigner notice is provided as required by the rule (see question14(b)-9, which discusses the inclusion of acknowledgment statements and signature lines on the cosigner notice).

14(a) Prohibited Practices

14(a)-1: *Retroactivity of cosigner provision.* If a bank has entered into a loan transaction before January 1, 1986, in which a cosigner was involved, but at which time the cosigner notice was not required, can the bank attempt to collect against the cosigner after January 1, 1986, should the debtor default?

Yes, the bank can attempt to collect from the cosigner, since the rule does not apply retroactively to obligations entered into before the rule's effective date.

14(a)-2: *Purchase of third-party paper.* Would a bank violate the rule by purchasing after January 1, 1986, an obligation in which a required cosigner notice was not given or by attempting to collect from the cosigner?

A bank that purchases an obligation in which the cosigner notice was not given would not be considered to have obligated the cosigner in violation of the rule. The purchasing bank would violate the rule, however, if it attempts to *collect* the debt from the cosigner.

14(b) Disclosure Requirement

14(b)-1: *Timing of cosigner notice.* When in the transaction must the cosigner notice be given?

The cosigner notice must be given to the cosigner before he or she becomes obligated on the transaction. This means that the cosigner should receive the notice before the event that makes the cosigner liable. In the case of open-end credit, the cosigner should receive the notice before becoming obligated for any fees or transactions on the account.

14(b)-2: *Oral vs. written notice.* May the cosigner notice be given orally to a cosigner?

No, the cosigner notice must be in writing.

14(b)-3: *Form of cosigner notice.* Must the cosigner notice be given in a form that the cosigner can keep?

No, the cosigner notice need not be in a form that the cosigner can keep.

14(b)-4: *Acknowledgment of receipt.* Must the cosigner notice be signed by the cosigner?

The rule does not require that the cosigner sign the cosigner notice or otherwise acknowledge its receipt (see question 14(b)-9 on permissible additions to the cosigner notice).

14(b)-5: *Type-size, format requirements.* Must the cosigner notice be in a particular type size or format?

No, the rule does not specify a particular type size, style, or format. The rule does require, however, that the notice be clear and conspicuous.

14(b)-6: *Clear and conspicuous.* What is meant by the rule's requirement that the cosigner notice be "clear and conspicuous"?

A cosigner notice is clear and conspicuous if it is noticeable, readable, and understandable. When the notice is included in the body of the documents evidencing the obligation, the cosigner notice must be prominent or distinctive--that is, noticeable and readable. Any modifications or additions to the notice should not jeopardize its clarity.

14(b)-7: *Modifying the cosigner notice; inconsistency with state law provisions.* Must a bank give a cosigner notice identical to that stated in the rule, or can it modify the notice? What if language in the federal notice is inconsistent with state law provisions?

Under the rule, a bank must give a cosigner notice that is substantially similar to the one set forth in the rule; the notice does not have to be identical. Language in the notice may be deleted or modified to take into account the rights and responsibilities of cosigners under applicable state law. Language may be deleted or modified if it is inapplicable or if it inaccurately reflects the agreement with the cosigner. For example, the federal cosigner notice states that a bank can collect from a cosigner without first collecting from the borrower. It also states that a bank can garnish a cosigner's wages. If either of these statements is inaccurate under state law, the inaccurate language may be deleted or modified. In addition, minor editorial changes can be made to the notice, such as changing the word "borrower" to "account holder" or the word "debt" to "account," as appropriate.

14(b)-8: *Guarantee language in cosigner notice.* If a bank does not consider the cosigner a guarantor, may it modify the cosigner notice in the rule that states, "You are being asked to guarantee this debt?"

The word "guarantee" is used in the cosigner notice in its generic or colloquial sense merely to describe the fact that the cosigner has an obligation to repay the debt. The underlying contract, not the notice, defines or determines a cosigner's liability. However, if use of the term conflicts with or causes confusion under state law, language such as, "You are being asked to become liable on this debt" can be substituted.

14(b)-9: *Additional information included on notice.* If the cosigner notice is given on a separate document, may a bank place additional information on the document? May the bank print the notice on its letterhead?

Yes, a bank may print the notice on its letterhead. The bank also may include additional information on the document, such as:

- The date of the transaction.
- The loan amount.
- Name(s) and addresses.
- The account number and other information describing or identifying the debt in question.
- Acknowledgment of receipt language.
- A signature line.

Generally, any additional information should be written concisely so as not to detract from the notice's message. Moreover, care should be taken not to add unnecessary information to the notice.

14(b)-10: *Cosigner notice on credit application.* May the cosigner notice be placed on a credit application form?

Yes, the cosigner notice may be placed on a credit application form.

14(b)-11: *Documents of principal debtor vs. those of cosigner.* What happens if the document obligating the cosigner is separate from that obligating the principal debtor? May the cosigner notice be included in the document obligating the cosigner?

Yes. When the cosigner is required to sign a separate document that obligates the cosigner, the cosigner notice may be included in that document.

14(b)-12: *Multiple cosigners.* If two or more cosigners are involved in a transaction, must each receive the cosigner notice?

Yes, each cosigner must be given the cosigner notice. However, since there is no requirement in the regulation that the cosigner notice be given in a form that the cosigner can retain (see question 14(b)-3), each cosigner does not have to receive his or her own notice. One notice that served to notify all cosigners is sufficient.

14(b)-13: *Continuing guaranties.* When must a bank give the cosigner notice to a guarantor who has executed a guaranty for not only the original loan, but also for future loans of the primary debtor? Must a cosigner notice be given to the guarantor with each subsequent loan to the primary debtor?

The cosigner notice should be provided before the guarantor becomes obligated on the guaranty – that is, at the time the guaranty is executed. The cosigner notice need not be given to the guarantor with each subsequent loan made to the primary debtor, since the cosigner is already obligated under the original contract to guarantee future indebtedness. However, since the guarantor is being asked to guarantee, not only the original debt, but also the future debts of the primary obligor, the cosigner notice should be modified to reflect accurately the extent of the guaranty obligation. For example, the first sentence of the cosigner notice could read, “You are being asked to guarantee this debt, as well as all future debts of the borrower entered into with this bank through December 31, 1987.”

14(b)-13a: *Continuing guaranties -- open-end plan.* If a cosigner executes a guaranty on an open-end credit plan (that is, one guaranteeing all advances made under the plan), does the bank have to modify the cosigner notice to indicate that all advances made under the plan are guaranteed?

No, the bank is not required to modify the cosigner notice since the future advances are all being made as part of the same open-end credit plan.

14(b)-14: *Renewal or refinancing of credit obligation.* Must a bank give a cosigner another notice when a credit obligation is renewed or refinanced?

If under the terms of the original credit agreement the cosigner is obligated for renewals or refinancing of the credit obligation, a bank would not be required to give another cosigner notice at the time of each renewal or refinancing.

14(b)-15: *Placement of cosigner notice above the signature line.* When the cosigner notice is included in the documents evidencing the consumer credit obligation, must it be located above the place reserved for the cosigner’s signature?

The regulation does not specify the location of the cosigner notice when it is contained in the documents evidencing the consumer credit obligation. Since a bank must, however, provide the notice to the cosigner before he or she becoming obligated on the consumer credit transaction, placement of the notice above the cosigner’s signature line would seem wise.

14(b)-16: *Foreign language translation.* May a foreign language translation of the cosigner notice be provided?

Yes, a foreign language translation of the cosigner notice may be provided.

14(b)-17: *Contract in foreign language.* If the underlying contract is in a foreign language, must the cosigner notice be in the same language?

Yes, the cosigner notice should be provided in the same language as that used in the underlying contract.

Section 227.15 – Unfair Late Charges

15-1: *Basic definition of prohibition on unfair late charges.* What does the rule prohibit for the imposition of late charges?

Under the rule banks are prohibited from levying or collecting any delinquency charge on a payment, when the only delinquency is attributable to late fees or delinquency charges assessed on earlier installments, and the payment is otherwise a full payment for the applicable period and is paid on its due date or within an applicable grace period.

15-2: *Skipped payments.* If a consumer misses or partially pays a monthly payment and fails to make up that payment month after month, may the bank assess a delinquency charge for each month in which a lapse occurred?

Yes, the rule does not prohibit the bank from assessing a delinquency charge for each month that the skipped payment remains outstanding.

15-3: *Multiple late charges assessed on payment subsequently paid.* Assume the following: A consumer's payments are $40 a month. The consumer makes his or her February payment in full, but makes it late. The bank assesses a $5 late charge. The consumer makes the March payment of $40 on time, but fails to pay the $5 late charge. The bank uses part of the March payment to pay off the outstanding late charge and considers the March payment deficient, may the bank assess another late charge?

No, the bank cannot assess another late charge since the March payment was made in full and on time.

15-4: *Subsequent payment made late.* Assume the same facts as those detailed in 15-3, but that the consumer makes the March payment of $40 late. May the bank assess another late charge?

Yes, the bank may assess another late charge since the consumer failed to make the March payment on time.

15-5: *Partial payment short more than the amount of outstanding late fee.* Assume the same facts as those detailed in 15-3, but that the consumer only pays $20 of the $40 March payment. May the bank assess another late charge?

Yes, the bank may assess another late charge since the consumer failed to make the March payment in full.

15-5a: *Allocation of excessive payment.* Assume that beginning in January a consumer's payment on an installment loan is $40 a month. The consumer pays only $35 of a $40 January payment and a late charge of $5 is imposed on the account. If the following month's payment is for $45, may the creditor use the extra $5 to pay off the late charge and impose another late charge since the previous month's payment is still deficient $5?

If a consumer's payment could bring the account current except for an outstanding late charge, no additional late charge may be imposed.

15-6: *Open-end credit plans.* Does the rule's late-charges provision operate in an open-end credit plan that involves a periodic statement reflecting a late charge upon its imposition, as well as a minimum payment amount that informs the consumer of the full amount due to remain current on the account?

No, the rule's provision on late charges does not operate in an open-end credit plan in which the bank discloses late charges to the consumer as they are imposed and informs he or she of the full amount to be paid for the applicable period to remain current on the account.

15-7: *Interest limitations.* Does the rule prohibit a bank from imposing interest on an unpaid late fee?

The rule does not address the issue of whether interest may be imposed on unpaid late fees.

15-8: *Retroactivity of prohibition on unfair late charges.* Does the prohibition apply to obligations entered into before the rule's effective date?

Yes. Unlike the other provisions in the rule which do not affect obligations entered into before its effective date, the prohibition on unfair late charges applies to all outstanding consumer credit obligations regardless of when they were transacted.

Section 227.16 – State Exemptions

16-1: *Applicability of exemption granted by another agency.* If the FTC grants an exemption from a provision(s) of its rule, can banks subject to the Board's rule take advantage of that exemption or must the state apply to the Board for an exemption?

Exemptions that are granted by the FTC apply only to those creditors covered by that agency's rule. The state agency would have to apply to the Board for an exemption for banks under the its rule.

16(a) General Rule

16(a)-1: *Who may request an exemption.* May a private person or a bank apply for an exemption?

No, neither private persons nor banks may apply for an exemption from the rule's provisions. The rule provides that "an appropriate state agency" may apply for an exemption.

16(a)-2: *Criteria for exemption.* When may a state agency apply for an exemption?

A state agency may apply for an exemption from the rule's provisions when:

- There is a state requirement or prohibition in effect that applies to any transaction(s) to which a provision of the rule applies.

- The state requirement or prohibition affords a level of protection to consumers that is substantially equivalent to, or greater than, that allowed by the rule's provision.

16(b) Applications

16(b)-1: *Board guidelines on exemption applications.* Does the Board have guidelines for applying for an exemption from the rule?

Yes, a state agency applying for an exemption should use the procedures set forth in appendix B to Regulation Z. These procedures indicate: locations to file an application; contents of the application; supporting documents to accompany the application; factors for Board determinations; consequences of favorable and adverse Board determinations; and procedures for revoking an exemption.

16(b)-2: *Deadline for exemption application.* Must a state agency submit its exemption application by the effective date of the rule to receive consideration?

There is no deadline for submitting an exemption application. Applications can be submitted anytime before or after the effective date of the rule.

16(b)-3: *Exemptions granted.* Which states have been granted an exemption from the Board's rule"?

Wisconsin was granted an exemption from all provisions of the Board's rule effective November 20, 1986, for transactions of $25,000 or less. New York was granted an exemption from the cosigner provisions of the Board's rule effective January 21, 1987, for transactions of $25,000 or less. In both Wisconsin and New York, transactions in excess of $25,000 are subject to the Board's rule, but compliance with state law is deemed compliance with the federal law. California was granted an exemption from the cosigner provisions of the Board's rule effective August 1, 1988. These exemptions do not apply to federally chartered banks.

Laws

15 USC 57a(f), Unfair or Deceptive Acts or Practices

Regulations

12 CFR 227, Unfair or Deceptive Acts or Practices Regulation

OCC Issuances

Examining Circular 263, SMS Documentation Policy

Background and Summary

The Consumer Leasing Act of 1976 (15 USC 1667), implemented by Regulation M (12 CFR 213), is intended to ensure meaningful and accurate disclosure of the terms of personal property leases for personal, family, or household use to enable the consumer to:

- Compare various lease terms more easily.
- Limit the balloon payments in consumer leasing.
- Compare lease terms with credit terms, where appropriate.

1. To appraise the quality of the bank's compliance management system for the Consumer Leasing Act.

2. To determine the reliance that can be placed on the bank's compliance management system, including practices and procedures performed by the person(s) responsible for monitoring the bank's compliance with the Consumer Leasing Act.

3. To determine the bank's compliance with the Consumer Leasing Act.

4. To initiate corrective action when policies, practices, or procedures are deficient, or when violations of law or regulation are uncovered.

1. From the examiner who completed the Compliance Management System program, obtain information that is pertinent to the area of examination (historical examination findings, complaint information, and significant findings from compliance review and audit).

2. Through discussions with management and review of the following documents, determine whether the bank's internal controls are adequate to ensure compliance in the area under review. Identify procedures used daily basis to detect errors and violations promptly. Also, review the procedures used to ensure compliance when changes occur (e.g., changes in interest rates, service charges, computation methods, and software programs).

   - ☐ Organizational charts.
   - ☐ Process flowcharts.
   - ☐ Policies and procedures.
   - ☐ Loan documentation and disclosures.
   - ☐ Checklists, worksheets, and review documents.
   - ☐ Computer programs.

3. Review compliance review and audit work papers, and determine whether:

   a. The procedures used address all regulatory provisions (see Transactional Testing section.

   b. Steps are taken to follow up on previously identified deficiencies.

   c. The procedures used include samples that cover all product types and decision centers.

   d. The work performed is accurate (through a review of some transactions).

e. Significant deficiencies and their root causes are included in reports to management and board.

f. Corrective actions are timely and appropriate.

g. The area is reviewed at an appropriate interval.

Transactional Testing

4. Select and review lease files for each type of lease to determine if disclosures are made before consummation of the lease agreement (12 CFR 213.4(a)(2)).

5. Review disclosures obtained in the sample for accuracy and ascertain whether the required information is disclosed. The Consumer Leasing Act worksheet is provided to assist the examiner in determining compliance.

6. Check renegotiated or extended leases of single and multiple items to determine whether proper and applicable redisclosures are made (12 CFR 213.4(h)).

7. Review advertising copy from the last 12 months to determine if required disclosures are made when triggering terms are used (12 CFR 213.5).

8. Determine if records and evidence of compliance are maintained for two years (12 CFR 213.6).

Conclusions

9. Summarize here *all* violations of law, regulation, or ruling and use when making SMS entries (refer to EC 263, "SMS Documentation Policy").

Citation	Department	Violation	Recommendation	Policy Guide	Reference
a. ____	__________	________	_______________	___________	________
b. ____	__________	________	_______________	___________	________

c. ____ _________ _______ _____________ __________ ________

d. ____ _________ _______ _____________ __________ ________

e. ____ _________ _______ _____________ __________ ________

10. If the violation(s) noted above represent(s) a pattern or practice, determine the root cause by identifying weaknesses in internal controls, compliance review, training, management oversight, or other factors. Consider whether civil money penalties (CMP), suspicious activity reporting, or an enforcement action should be recommended (see CMP matrix).

11. Identify action needed to correct violations and weaknesses in the bank's compliance system, as appropriate. Form a conclusion about the reliability of the compliance system for the area under review and provide conclusions to the examiner performing the Compliance Management System program.

12. Determine, in consultation with the examiner-in-charge (EIC), if violations or deficiencies in the compliance system are significant enough to merit bringing them to the board's attention in the report of examination. If so, prepare items for inclusion under the heading, Matters Requiring Board Attention, and under a Type 75 Follow-up Analysis.

13. Determine whether any items identified during this examination that could materialize into a supervisory concern before the next on-site examination (consideration should be given to any planned increase in activity in this area, planned personnel changes, planned policy changes, planned changes to outside auditors or consultants, planned changes in business strategy, etc.). If so, summarize your concerns and assess the potential risk to the institution and discuss with the EIC and/or appropriate bank personnel.

14. Discuss findings with bank management and obtain commitment(s) for corrective action.

Consumer Leasing Worksheet

This worksheet should be completed and included in the work papers. Review the files for appropriate disclosures and place an "X" or other mark in instances of noncompliance. Every "X" answer indicates a violation of law or an internal deficiency and must be fully explained in the work papers.

Loan Name			
1. Property description (12 CFR 213.4(g)(1))			
2. Payment at consummation (12 CFR 213.4(g)(2))			
3. Payment schedule (12 CFR 213.4(g)(3))			
4. Total of taxes and fees (12 CFR 213.4(g)(4))			
5. Total of other charges (12 CFR 213.4(g)(5))			
6. Insurance coverage cost, type and amount required (12 CFR 213.4(g)(6))			
7. Warranties and guarantees (12 CFR 213.4(g)(7))			
8. Identity of those responsible for servicing and maintaining property (12 CFR 213.4(g)(8))			
9. Description of security interest (12 CFR 213.4(g)(9))			
10. Penalty and delinquency charge (12 CFR 213.4(g)(10))			
11. Statement of purchasing option (12 CFR 213.4(g)(11))			
12. Conditions of termination (12 CFR 213.4(g)(12))			
13. Lessee's liability if estimated and realizable values differ (12 CFR 213.4(g)(13))			
14. Statement on appraisal, when applicable (12 CFR 213.4(g)(14))			
15. Value of property at consummation, itemized total lease obligation at the end of the lease term and difference between them* (12 CFR 213.4(g)(15))			

***NOTE:** If the lessee's liability at the end of the lease term is based on the estimated value of the leased property, there is a rebuttable presumption that the estimated value of the leased property at the end of the lease term is unreasonable and not in good faith to the extent that it exceeds the realized value by more than three times the average payment allocable to a monthly period and that the lessor cannot collect the amount of such excess liability without first going to court (unless there is unreasonable wear or use or excessive use).

Laws

15 USC 1667, Consumer Leasing Act

Regulations

12 CFR 213, Consumer Leasing Regulation

OCC Issuances

Examining Circular 263, SMS Documentation Policy

Right to Financial Privacy Act — Introduction

Background and Summary

The Right to Financial Privacy Act of 1978 became effective on March 10, 1979. It was enacted to acknowledge that financial institution customers have a right to expect that their financial activities will have a reasonable amount of privacy from federal government scrutiny. It establishes (12 USC 3401):

- Specific procedures for government authorities to follow in seeking information about a customer's financial records.
- Limitations and duties on financial institutions before the release of information sought by government agencies.

The act generally requires that the customer receive:

- A written notice of the agency's intent to obtain financial records.
- An explanation of why the records are sought.
- A statement describing procedures to follow if the customer wishes to withhold such records or information. Under certain circumstances, the notice may be delayed or waived.

Before passage of the act, customers could neither challenge government access to their financial records, nor know that those records were being provided to a government authority. In *United States* v*. Miller*, 425 U.S. 435 (1976), the Supreme Court held that financial records kept by the bank are the bank's property rather than that of the customer. As such, the customer had neither legal interest, which could be protected, in records kept by the bank, nor could the customer limit government access to those accounts. The Right to Financial Privacy Act was adopted principally in response to that decision.

Definitions

The act defines a "customer" as any person or his or her representative who uses or is using any service of a bank. It also includes any person for whom the bank is acting, or has acted, as a fiduciary. However, a corporation or partnership of six or more persons does not constitute a customer (12 USC 3401(5)).

Requirements

To obtain access to the customer's financial records, the act requires, with certain exceptions, that the government authority obtain one of the following (12 USC 3402):

- An authorization, signed and dated by the customer, that identifies the records being sought, the reasons for the request, and the customer's rights under the act.
- An administrative subpoena or summons.
- A search warrant.
- A judicial subpoena.
- A formal written request by a government agency (to be used only if no administrative summons or subpoena authority is available).

If a bank receives an information request, it may not release the customer's records until the government authority seeking them certifies in writing that it has complied with the applicable provision of the act (12 USC 3403(b)).

The bank must maintain a record of all disclosures to a government authority pursuant to customer authorization. The record should include the date, the name of the government authority, and an identification of the records disclosed. Generally, the customer has a right to inspect that record (12 USC 3404(c)).

Although there are no specific record retention requirements in the act, banks should retain copies of all administrative and judicial subpoenas, search warrants and formal written requests by federal government agencies or departments along with the written certification required (12 USC 3404(b)).

Under the act, a bank must begin to assemble the required information upon receipt of the agency's summons or subpoena, or a judicial subpoena. It must be prepared to deliver the records upon receipt of the written certificate of compliance (12 USC 3411).

Cost Reimbursements

One section of the act allows, with certain exceptions, the bank to receive payment from a government authority requesting information. This may include costs for assembling, reproducing, or transporting records, or any other costs reasonably necessary or incurred in gathering and delivering the requested information. The Federal Reserve Board's Regulation S establishes the rates and conditions under which these payments may be made (12 USC 3415).

Exceptions to Notice and Certification Requirements

Under the act, a bank may:

- Notify law enforcement officials if it has information relevant to a violation of the law (12 USC 3403(c)).

- Submit copies of financial records to any court or agency when perfecting a security interest, proving a claim in bankruptcy, or collecting a debt for itself or a fiduciary (12 USC 3403(d)(1)).

- Release records that are not individually identifiable with a particular customer (12 USC 3413(a)).

- Provide records that must be reported in accordance with any federal statute or rule (e.g., the Bank Secrecy Act) (12 USC 3413(d)).

The act does not apply to:

- Records sought by a supervisory agency for its supervisory, regulatory, or monetary functions. This includes examinations and any investigations relating to consumer complaints (12 USC 3413(b)).

- Records sought in accordance with procedures authorized by the Internal Revenue Code. (Records intended to be accessed by procedures authorized by the Tax Reform Act of 1976.) (12 USC 3413(c))

- With the exception of cost reimbursement and the restricted use of grand jury information, a subpoena issued in conjunction with proceedings before a grand jury (12 USC 3413(I)).

- Records sought by the General Accounting Office for an authorized proceeding or audit directed at a federal agency (12 USC 3413(j)).

If the agency and the customer are parties to a suit, records may be obtained under the Federal Rules of Civil and Criminal Procedure (12 USC 3413(e)).

The Securities and Exchange Commission (SEC) is covered by the act, although it can obtain customer records from a bank without prior notice to the customer by means of an order from a U.S. district court. However, the SEC must provide the certificate of compliance to the bank along with the court order prohibiting the disclosure of the fact that the documents have been obtained. The court order will set a delay of notification date after which the customer will be informed by the bank that customer records have been obtained.

Exceptions to Notice Requirements — Certification Is Required

The act does not apply when a bank is being investigated whether the investigation also is directed at a customer. However, the federal agency seeking access to customer records must provide the bank with the required certification of compliance (12 USC 3413 (h)(1)(A)).

Records also may be provided incidental to processing a government loan, loan guaranty, loan insurance agreement, or default upon a government-guaranteed or insured loan. Again, the federal agency seeking access must provide the bank with the written certification of compliance (12 USC 3413 (H)(1)(B) and (h)(6)).

The federal agency also must give to the loan applicant a notice of its access rights when the customer initially applies for the loan. The bank is required to keep a record of all disclosures made to government authorities which the customer is entitled to inspect.

No notice is required and the customer may not challenge any access when (12 USC 3414(a)):

- The government engages in authorized foreign intelligence activities.

- The Secret Service conducts its protective functions.

A certificate of compliance must be furnished to the bank.

Delayed Notice Requirements

Under certain circumstances, courts may authorize delayed notice to customers that government authorities have obtained their financial records. Customer notice may be delayed for periods up to 90 days, if the government convinces the court that notice would result in:

- Endangering the life or physical safety of any person.

- Flight from prosecution.

- Destruction of or tampering with evidence.

- Intimidation of potential witnesses.

- Seriously jeopardizing or unduly delaying an investigation, trial, or official proceeding.

Delayed notice of no later than 90 days also is allowed for search warrants.

Civil Liability

Any government agency that obtains, or any bank or bank employee who discloses, information in violation of the act is liable for: (12 USC 3417)

- Actual damages.

- $100, regardless of the volume of records involved.

- Court costs and reasonable attorney's fees.

- Such punitive damages as the court may allow for willful or intentional violations.

A bank that relies in good faith upon a federal agency's certification may not be held liable to a customer for the disclosure of financial records. An action can be brought up to three years after the date of violation or of its discovery.

Right to Financial Privacy Act — Examination Objectives

1. To appraise the quality of the bank's compliance management system for the Right to Financial Privacy Act.

2. To determine the reliance that can be placed on the bank's compliance management system, including practices and procedures performed by the person(s) responsible for monitoring the bank's compliance with the Right to Financial Privacy Act.

3. To determine the bank's compliance with the Right to Financial Privacy Act.

4. To initiate corrective action when policies, practices, or procedures are deficient, or when violations of law or regulation are identified.

1. From the examiner who completed the Compliance Management System program, obtain information pertinent to the area of examination (historical examination findings, complaint information, and significant findings from compliance review and audit).

2. Through discussions with management and review of the following documents, determine whether the bank's internal controls are adequate to ensure compliance in the area under review. Identify procedures used daily to detect errors and violations promptly. Also review the procedures used to ensure compliance when changes occur.

   - ☐ Organizational charts.
   - ☐ Process flowcharts.
   - ☐ Policies and procedures.
   - ☐ Checklists, worksheets, and review documents.
   - ☐ Computer programs.

3. Review compliance review and audit work papers, and determine whether:

   a. The procedures used address all regulatory provisions (see Transactional Testing section).

   b. Steps are taken to follow-up on previously identified deficiencies.

   c. The procedures used include samples that cover all product types and decision centers.

   d. The work performed is accurate (through a review of some transactions).

   e. Significant deficiencies and their root causes are included in reports to management and board.

f. Corrective actions are timely and appropriate.

g. The area is reviewed at an appropriate interval.

Transactional Testing

4. If requests for customers' financial records have been received, obtain and test a sample of them using the worksheet in the Appendix to determine the bank's level of compliance with the act.

Conclusions

5. Summarize here *all* violations of law, regulation, or ruling and use when making SMS entries. (Refer to EC 263, "SMS Documentation Policy.")

Citation	Department	Violation	Recommendation	Policy Guide	Reference
a. ____	__________	________	_______________	___________	________
b. ____	__________	________	_______________	___________	________
c. ____	__________	________	_______________	___________	________
d. ____	__________	________	_______________	___________	________
e. ____	__________	________	_______________	___________	________

6. If the violation(s) noted above represent(s) a pattern or practice, determine the root cause by identifying weaknesses in internal controls, compliance review, training, management oversight, or other factors. Consider whether civil money penalties (CMP) or an enforcement action should be recommended (see CMP matrix).

7. Identify action needed to correct violations and weaknesses in the bank's compliance system as appropriate. Form a conclusion about the reliability of the compliance system for the area under review, and provide conclusions to the examiner performing the Compliance Management System program.

8. Determine, in consultation with the examiner-in-charge, if violations or deficiencies in the compliance system are significant enough to merit bringing them to the board's attention in the report of examination. If so, prepare items for inclusion under the heading, Matters Requiring Board Attention, and under a Type 75 Follow-up Analysis.

9. Determine whether any items identified during this examination could materialize into a supervisory concern before the next on-site examination (consideration should be given to any planned increase in activity in this area, planned personnel changes, planned policy changes, planned changes to outside auditors or consultants, planned changes in business strategy, etc.). If so, summarize your concerns and assess the potential risk to the institution and discuss with the EIC and/or appropriate bank personnel.

10. Discuss findings with bank management and obtain commitment(s) for corrective action.

Right to Financial Privacy Act Worksheet

This worksheet can be used to test the adequacy of the work completed by the compliance officer and/or to conduct an independent test using a sample chosen by the examiner. Answer the following questions with a "Yes" or a "No." Each "No" answer indicates a violation of law or an internal deficiency and must be explained fully in the work papers.

Name of Customer:	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
1. Were records provided to government authorities only after receiving proper written certification 12 USC 3403(b)?										
2. Does the bank's policy prohibit requiring customer authorization for disclosures of financial records as a condition of doing business 12 USC 3404(b)?										
3. Are appropriate records of all disclosures made of the customer's records to a government authority for a government loan, guaranty, or insurance program maintained?										
4. Did the bank allow the customer to examine the records upon request 12 USC 3413(h)(6)?										
5. Does the bank maintain appropriate records, including a copy of the request and the identity of the government authority, when disclosing financial records to a government authority?										
6. If requested, was the customer provided a copy of the records (unless blocked by a court order) 12 USC 3404(c)?										

Laws

12 USC 3401 et seq., Right to Financial Privacy Act

OCC Issuances

Examining Circular 263, SMS Documentation Policy