

Determining Whether TIL Restitution is Required

Overview

This section provides information that relates to the identification of reimbursable Truth in Lending violations, reimbursement calculations, and the determination of appropriate corrective action.

Section 108(e)(2) of the Truth in Lending Act (Act) directs that the FDIC shall require “adjustments” (monetary reimbursement) to consumers for understated annual percentage rates (APR) or finance charges (FC). Unless other statutory or regulatory exemptions are met, the FDIC is required to seek reimbursement and may not waive or grant relief from reimbursement. If an institution does not voluntarily comply with the law and make reimbursement, §108(e)(4) of the Act authorizes the FDIC to order institutions to make monetary adjustments to the accounts of consumers where an APR or FC was understated.

In general, the FDIC must require restitution when understatement of the cost of borrowing results from a clear and consistent pattern or practice of violations, gross neglect, or a willful violation intended to mislead the consumer. This parallels the reimbursement requirements of §108(e)(2) of the Act. In such instances, a file search may be requested to detect loans containing specific problems requiring reimbursement.

Historically, the FDIC has treated a request made by non-member banks seeking relief from making reimbursement under the Truth in Lending Act, 15 USC §1601 et seq. (TILA), as an application under its regulations. The Board has delegated authority to the Director of the Division of Supervision and Consumer Protection to grant or deny these requests. The Director may further delegate this authority to the Regional Directors, but only to deny requests where the amount of reimbursement totals less than \$25,000.

The TILA grants the enforcement agencies very little discretion to grant relief from reimbursement for violations. Because of this limited discretion, the FDIC has not been able to grant relief in many instances. However, should a nonmember bank wish to pursue a request for relief, the request will be processed within the following time frames:

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

Legal Requirements

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

There are four instances where the FDIC has discretion to waive reimbursement. Three of these exceptions are straightforward and fact specific:

1. The error involves a fee or charge that would otherwise be excludable in computing the finance charge.
2. The error involved a disclosed amount which was 10 percent or less of the amount that should have been disclosed and either the annual percentage rate (APR) or finance charge was disclosed correctly; or
3. The error involved a total failure to disclose either the APR or finance charge.
4. The fourth exception is the one most frequently cited by an institution in requesting relief. It is the one that is most difficult to meet since it contains four elements, **all four of which must be met for the exception to apply**. The conditions are that:
 - The error resulted from a unique circumstance;
 - The disclosure violations are clearly technical and non-substantive;
 - The disclosure violations do not adversely affect information provided to the consumer; *and*
 - The disclosure violations have not misled or otherwise deceived the consumer.

Under provisions of the Act, a financial institution will generally have no civil or regulatory liability if it takes two affirmative corrective actions. Within 60 days of “discovering” an error (but before institution of a civil action or receipt of a written notice of error from a consumer), the financial institution must both:

- Notify the consumer of the error, *and*
- Reimburse the consumer for overcharges

An error is “discovered” if the institution either identifies the error through its own procedures or if it is disclosed in a written examination report. If the financial institution attempts to correct a disclosure error by merely redisclosing the required information accurately, without reimbursing