consumer compliance supervisory HIGHLIGHTS

Federal Deposit Insurance Corporation

FDIC

June 2019

Contents

Introduction

This new Federal Deposit Insurance Corporation (FDIC) publication is intended to provide supervised institutions and the public with information and observations related to the FDIC's consumer compliance supervision activities in 2018. This publication provides a high-level overview of consumer compliance issues identified during the year through the FDIC's supervision of state non-member banks and thrifts.

The FDIC supervises nearly 3,500 state-chartered banks and thrifts that are not members of the Federal Reserve System (supervised institutions). Most of these institutions are community banks that provide credit and services locally. The FDIC is responsible for the supervision of state non-member banks for compliance with consumer protection, anti-discrimination, and community reinvestment laws, among other duties.[1] The FDIC conducts supervisory activities, including examinations, to review institutions' compliance posture. The consumer compliance examination program focuses on identifying, addressing, and mitigating the greatest potential risks to consumers, based on the business model and products offered by a particular institution. The supervisory approach apportions resources to areas of higher risk for consumer harm rather than focusing on evaluating technical compliance issues. This approach is used during examinations to assess institutions' compliance with federal consumer laws and regulations.

The purpose of this publication is to enhance transparency regarding the FDIC's consumer compliance supervisory activities.

This issue of the FDIC Consumer Compliance Supervisory Highlights:

- Provides an overview and summary of the overall consumer compliance performance of supervised institutions in 2018;
- Includes supervisory observations regarding factual findings identified at examinations resulting in violations of applicable consumer protection laws;
- Identifies examples of practices that may be useful in mitigating risks;[2] and
- Summarizes resources and information the FDIC makes available for supervised financial institutions that help institutions stay abreast of issues identified during examinations and may assist them in mitigating risks.

Summary of Overall Consumer Compliance Performance in 2018

The FDIC conducts periodic risk-based examination activities of supervised institutions for compliance with over 30 federal consumer protection laws and regulations. In 2018, the FDIC conducted approximately 1,200 consumer compliance examinations using a risk-focused process, based on the potential for bank compliance errors to have an adverse impact on banking customers. Overall, supervised institutions demonstrated strong and effective management of consumer compliance responsibilities.

The FDIC utilizes the Federal Financial Institutions Examination Council's (FFIEC) Uniform Interagency Consumer Compliance Rating System to conduct examinations and evaluate supervised institutions' adherence to the consumer compliance requirements. As of December 31, 2018, 98 percent of all FDIC-supervised institutions were rated satisfactory or better for consumer compliance ("1" or "2"). The high percentage of institutions rated satisfactory or better for consumer compliance indicates that the vast majority of supervised institutions maintain effective programs to manage their consumer compliance responsibilities, even during a period of significant regulatory change.

At the end of 2018, two percent of FDIC-supervised institutions were rated as less than satisfactory for consumer compliance (rated a "3" or more adverse). Institutions that were rated less than satisfactory for consumer compliance typically demonstrated weaknesses in the institution's overall compliance management system (CMS) that led to violations of law with material impact on consumers.

[1] The FDIC is responsible for maintaining stability and public confidence in the nation's financial system by insuring deposits, examining and supervising financial institutions for safety and soundness and consumer protection, making large and complex financial institutions resolvable, and managing receiverships. With regard to state non-member banks with assets of $10 billion or less, the FDIC has primary examination authority over these institutions' compliance with all consumer protection laws and regulations. With regard to state non-member banks with more than $10 billion in assets, the FDIC has primary examination authority over these institutions' compliance with consumer protection laws and regulations, except for Federal consumer financial laws as defined in 12 U.S.C. § 5481(14).

[2] Institutions are encouraged to tailor their compliance programs to their particular businesses and may employ different approaches to mitigate risks than those discussed in this document.

Description of Issues Identified in Examinations

While the vast majority of FDIC-supervised institutions managed their consumer compliance responsibilities effectively, the FDIC identified a number of compliance issues. The following describes some of the most salient issues identified by the FDIC during 2018 consumer compliance examinations including Overdraft Programs, Real Estate Settlement Procedures Act, Regulation E, Skip-A-Payment Loan Programs, and Lines of Credit.

Overdraft Programs: Debit Card Holds and Transaction Processing

Background

An overdraft occurs when a consumer does not have sufficient funds in a deposit account to cover a transaction, debit, or withdrawal. Financial institutions that have implemented overdraft programs generally charge consumers overdraft fees when they pay transactions that result in an overdraft. If not properly disclosed, these programs can lead to violations of consumer laws and regulations, including Section 5 of the Federal Trade Commission Act for unfair and/or deceptive acts or practices.

Findings

Institutions' processing systems utilize an "available balance" method or a "ledger balance" method to assess overdraft fees.[3] The FDIC identified issues regarding certain overdraft programs that used an available balance method to determine when overdraft fees could be assessed. Specifically, FDIC examiners observed potentially unfair or deceptive practices when institutions using an available balance method assessed more overdraft fees than were appropriate based on the consumer's actual spending or when institutions did not adequately describe how the available balance method works in connection with overdrafts.[4]

Some institutions that use an available balance method assess overdraft fees on any point-of-sale (POS) signature-based transaction that settles against a negative available balance, even though the institution may have previously authorized the transaction based on sufficient funds available in the account at the time of authorization. This creates the possibility of an institution assessing overdraft fees in connection with transactions that did not overdraw the consumer's account.

For example, a consumer might begin the day with an account balance of \$50 and engage in a \$30 POS signature-based transaction. That transaction would authorize against a sufficient positive balance and would lower the consumer's available balance to \$20. If the consumer authorized another \$30 transaction, the second transaction would authorize against an insufficient available balance and lower the consumer's available balance to negative \$10 (-\$10). If the first transaction settled after the second transaction had posted, and if the institution's payment system assessed overdraft fees at final settlement, both transactions would be assessed overdraft fees, despite the fact that the consumer's balance was sufficient to cover the first transaction at the time the transaction was authorized.

In addition to the possibility of consumers incurring unwarranted overdraft fees, FDIC examiners determined that some institutions did not sufficiently disclose the manner in which their system assessed overdraft fees such that a reasonable consumer might not understand when an overdraft fee could be imposed.

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[3]A ledger balance method calculates the account balance based only on transactions settled during the relevant period. This method typically results in the balance reflected on a consumer's periodic statement. An available balance method calculates the account balance based on authorized (but not yet settled) transactions the financial institution is obligated to pay as well as settled transactions. The available balance is generally the amount to which the consumer has access, including the current balance, less debits, holds, and deposits not yet posted to the account. Among the holds that may impact the available balance are preauthorized holds placed on accounts by merchants in connection with debit card point-of-sale (POS) signature-based transactions. A delay of one to a few days can occur between the merchant's authorization and final settlement of a POS signature-based transaction. The account's available balance can decrease due to other intervening transactions and/or fees. Therefore, the POS signature-based transaction could exceed the account's available balance at the time of final settlement even if the available balance was sufficient to cover the transaction at the time it was authorized.

[4]In 2016, the FDIC along with the Consumer Financial Protection Bureau (CFPB), Federal Reserve, Office of the Comptroller of the Currency, and the National Credit Union Administration held an Interagency Overdraft Services Consumer Compliance webinar via the Federal Reserve's Outlook Live. See "Interagency Overdraft Services Consumer Compliance Discussion" available at https://www.consumercomplianceoutlook.org/outlook-live/2016/interagency-overdraft-services-consumer-compliance-discussion/ The webinar discussed overdraft practices and violations observed by the agencies.

In addition, the CFPB and the Federal Reserve have published articles about these practices. The CFPB Winter 2015 Supervisory Highlights, discusses overdraft practices and use of the available balance method. See CFPB Winter 2015 Supervisory Highlights available at https://files.consumerfinance.gov/f/201503_cfpb_supervisory-highlights-winter-2015.pdf. The Federal Reserve published its July 2018 Consumer Compliance Supervision Bulletin, discussing certain unfair or deceptive acts or practices involving overdrafts. See Federal Reserve July 2018 Consumer Compliance Supervision Bulletin available at https://www.federalreserve.gov/publications/2018-july-consumer-compliance-supervision-bulletin.htm

Mitigating Risk
The FDIC has observed examples of actions financial institutions have taken to mitigate risk related to overdraft practices and use of the available balance methods. For example:

- Providing clear and conspicuous disclosures related to the possible imposition of an overdraft fee in connection with use of the available balance method so that consumers can understand the circumstances under which overdraft fees will be assessed and make informed decisions to avoid the assessment of such fees; and
- When using an available balance method, ensuring that any transaction authorized against a positive available balance does not incur an overdraft fee, even if the transaction later settles against a negative available balance.

Real Estate Settlement Procedures Act (RESPA) Section 8 Violations

Background
RESPA was enacted to give consumers a better understanding of the home purchase and settlement process and to protect consumers from unnecessarily high settlement charges resulting from certain practices. One of the practices that Congress sought to eliminate through the enactment of RESPA was the payment of referral fees, kickbacks, and other unearned fees. Of particular interest to Congress was the payment by settlement service providers of fees in exchange for the referral of a consumer's business. Any person who gives or accepts a fee, kickback, or thing of value (payments, commissions, gifts, tangible item or special privileges) for the referral of settlement business is in violation of Section 8(a) of RESPA. Any person who gives or accepts any portion, split, or percentage of a charge for real estate settlement services, other than for services actually performed, is in violation of Section 8(b) of RESPA. Appendix B of Regulation X addresses the meaning and coverage of the prohibition against kickbacks and unearned fees.

The FDIC identified RESPA violations at financial institutions. These matters involved apparent payment of illegal kickbacks, disguised as above-market payments for lead generation, marketing services, and office space or desk rentals.

Findings
Evasions of RESPA's Anti-Kickback Provisions
RESPA permits bona fide payments for goods actually furnished and services actually performed. Lenders may enter into bona fide agreements for the rental of office space; however, such rental arrangements must be based on general market value of the rented space and cannot be used to conceal the payment of illegal referral fees. The FDIC found that certain arrangements, structured as purported payments for rental facilities, were used to disguise illegal payments for referrals of mortgage business.

Specifically, the FDIC identified concerns with institutions' office/desk rental programs. One issue involved institutions that purportedly leased offices or desk space from realtors and home builders, where the amounts paid to realtors and home builders greatly exceeded the fair market value of the rentals. Another issue involved desk rentals that appeared to be sham or subterfuge arrangements to disguise the payment of impermissible mortgage referral fees.

RESPA permits lenders to enter into bona fide marketing and advertising agreements; however, such arrangements must be based on fair market value of the advertising and marketing services actually received, and cannot be used to conceal the payment of illegal referral fees. The FDIC found that certain arrangements, structured as marketing agreements, were actually used to disguise illegal payments for referrals of mortgage business.

Mitigating Risk
Depending on the facts and circumstances at a particular institution, there are a variety of ways to mitigate risk. Through our examinations and supervisory experience, the FDIC has observed and recognized certain risk-mitigating activities that other institutions may find useful. For example:

- Providing training to executives, senior management, as well as staff responsible for and involved in mortgage lending operations;
- Performing due diligence when considering new third-party relationships entered into by the bank, or any individuals employed at or under contract to the bank, that generate leads or identify prospective mortgage borrowers;
- Reviewing applicable law, guidance, and statements from regulatory agencies and authorities on RESPA Section 8; and
- Staying abreast of RESPA Section 8 regulatory requirements through training resources.

Regulation E – Mistakes Made in the Consumer Liability/Error Resolution Process

Background
Regulation E implements the Electronic Fund Transfer Act (EFTA), which gives consumers certain rights when engaging in electronic fund transfers (EFTs). EFTs include transfers through automated teller machines (ATMs), point of sale (POS) terminals and automated clearinghouse (ACH) systems. Regulation E outlines procedures that financial institutions must follow for investigating and resolving EFT errors alleged by consumers. The regulation details consumer liability for unauthorized transfers and outlines procedures for resolving errors.

Findings
The FDIC has identified instances where some financial institutions have either misapplied the regulation or failed to comply with requirements of Regulation E resulting in violations cited in examinations.

Incorrect Calculation of Consumer Liability for Unauthorized Transfers

1. **Misapplying timing requirements to determine consumer's liability regarding unauthorized transactions not involving an access device, e.g., electronic debits through the ACH system.**

   Section 1005.6(b)(3) of Regulation E states in part:

   > A consumer must report an unauthorized EFT that appears on a periodic statement within 60 days of the financial institution's transmittal of the statement to avoid liability for subsequent transfers. If the consumer fails to do so, <u>the consumer's liability may not exceed the amount of the unauthorized transfers</u> that occur <u>after</u> the close of 60 days and <u>before</u> notice to the institution, and that the institution establishes would not have occurred had the consumer notified the institution within the 60-day period. (*Emphasis added*)

   The FDIC found that some institutions have misapplied the Regulation, i.e., how to calculate the consumer's liability, and the timing requirements. For example, some institutions misinterpreted the regulation by refunding consumers for only those unauthorized charges made within 60 days from the date the consumer provided notification to the financial institution rather than refunding the unauthorized charges that occurred within the 60-day time period from the transmittal of the first periodic statement containing the unauthorized charges. In some instances where the institution credited the consumer's account based on the 60-day time period from notification instead of the 60-day time period from when the periodic statement was transmitted, the amount refunded to the consumer was understated.

   Example: Ms. Smith maintains a consumer checking account with her financial institution. Beginning in November 2018, unauthorized ACH debits began to be taken out of her account. The transmittal of the first periodic statement reflecting the unauthorized ACH debits was on December 3, 2018. Ms. Smith did not closely or regularly monitor her account and did not realize these unauthorized transactions occurred until March 12, 2019, when she notified her financial institution. In response, Ms. Smith's financial institution refunded the unauthorized ACH debits occurring January 12, 2019 through March 12, 2019 (i.e., the 60-day time period from Ms. Smith's notification). However, the financial institution should have refunded the unauthorized ACH debits occurring from December 3, 2018 through January 31, 2019 (i.e., the 60-day time period from when the periodic statement evidencing the unauthorized ACH debits was transmitted).

   The Official Interpretations to Regulation E make clear that where the consumer fails to provide notice within the 60-day time frame, the consumer may be liable for any transfers occurring after the close of the 60 days and before notice is provided to the financial institution. Therefore, the correct time period for which Ms. Smith is responsible for unauthorized ACH debits is from February 1, 2019, the day after the end of the initial 60-day notice period expires, until March 11, 2019, the date of her notification. Ms. Smith is not responsible for the unauthorized ACH debits occurring during the 60-day time frame from the transmission of the periodic statement (i.e., December 3, 2018 through January 31, 2019).

Error Resolution Process

2. **Not beginning the investigation promptly when notified of a potential error.**
   An institution's investigation of an error claim must begin promptly upon the receipt of an oral notification, even if the institution requires the consumer to provide written confirmation of the error under Section 1005.11(b)(2) in the Official Interpretations to Regulation E. After receiving an oral notification regarding an error, the institution may require confirmation of the error in writing

from the consumer. If the institution requires written confirmation of an alleged account error, and the confirmation is not received within 10 business days, the institution need not provide provisional credit to the consumer while investigating the error. Nevertheless, as provided in the Official Interpretations to Regulation E, 12 C.F.R Part 1005, Supp. I, Section 1005.11(c)(2), a financial institution "must begin its investigation promptly upon receipt of an oral notice. It may not delay until it has received a written confirmation."

The FDIC found some financial institutions failed to investigate consumer error claims promptly upon receipt of oral notification in violation of Regulation E.

3. **Discouraging the filing of error resolution requests.** Similarly, although Regulation E permits financial institutions to require consumers to provide written confirmation of an error under Section 1005.11(b)(2), the FDIC has observed financial institutions implementing onerous requirements for initiating an error investigation or resolving consumer error claims. Some of these have included: (1) requiring consumers to visit a branch to file an error notification; (2) requiring consumers to submit a notarized affidavit regarding the error; (3) requiring consumers to file a police report; and/or (4) requiring consumers to agree to assist law enforcement and/or serve as witnesses in any action brought against the individuals responsible for the unauthorized transaction.

   In some instances, the FDIC concluded that such prerequisites had, or were likely to have, a "chilling effect" on consumers and may have unfairly discouraged consumers from asserting their rights in violation of Regulation E and Section 5 of the Federal Trade Commission Act.

4. **Not providing notice upon completion of the investigation.**
   Regardless of the outcome of an investigation, a financial institution must notify the consumer of its investigation findings. Section 1005.11(c) establishes the timing requirements and extent of an investigation when a consumer has asserted a potential error. Section 1005.11(d) sets forth the requirements when no error occurred, or when an error occurred that was different from that reported by the consumer.

   The FDIC has found that some financial institutions either do not provide a written notice pursuant to Section 1005.11(d)(1), or do not include all of the required information in the written notice. If the provisional credit is reversed, the consumer should be notified, pursuant to Section 1005.11(d)(2), that the institution will honor checks, drafts, or similar instruments and preauthorized transfers from the consumer's account (without charge to the consumer as a result of an overdraft) for five business days after notification (subject to the conditions specified in Regulation E). In addition to disclosing the institution's findings, the written explanation must also note the consumer's right to request the documents that the institution relied upon in making its determination.

Mitigating Risk
There are a number of activities that institutions may engage in to mitigate the risks of noncompliance with Regulation E. For example:

- Maintaining tracking logs covering the various timing requirements to ensure compliance with Regulation E's requirements from the time an error is alleged to the time an investigation is completed; and
- Training new staff and conducting periodic refresher training for existing staff to ensure staff understands Regulation E's requirements.

Skip-A-Payment Loan Programs

Background
Skip-A-Payment or Deferred Payment programs provide consumers with the ability to skip a loan payment. Generally, financial institutions offer Skip-A-Payment programs in December or January each year as consumers are often seeking ways to manage their budget or increase cash flow around the holiday season. While Skip-A-Payment programs may provide temporary financial relief to consumers, improper disclosure of the terms of these programs can raise the risk of unfair or deceptive practices.

Findings
Several issues were identified by the FDIC regarding Skip-A-Payment programs where institutions failed to provide consumers with adequate disclosures about essential terms of Skip-A-Payment programs and their impact on consumers' loans in violation of Section 5 of the Federal Trade Commission Act.

The following are examples of issues that were identified at institutions: (1) failure to adequately disclose that enrollment in a Skip-A-Payment program would lead to paying additional interest over the life of the loan and a larger final payment; (2) failure to disclose that the Skip-A-Payment offer does not affect real estate borrowers' escrow payment obligations, resulting in some consumers incurring escrow shortages or deficiencies; and (3) the practice of assessing late fees for the month that the customer's payment was skipped.

Failure to provide consumers with the disclosures that adequately describe the terms of a Skip-A-Payment program and the financial impact on a borrower's loan could result in an unfair or deceptive practice.

Mitigating Risk
The FDIC has observed examples of actions financial institutions have taken to mitigate potential risks related to their Skip-A-Payment programs. For example:

- Providing consumers with clear and adequate disclosures that detail how the program will work and the potential impact of the program on a consumer's loan;
- Clearly defining customer eligibility criteria;
- Providing training to staff in advance of launching the program; and
- Setting monitoring protocols for adherence to institutions' policies.

Lines of Credit – Finance Charge Calculation and Disclosure

Background
Financial institutions offer consumer-purpose lines of credit, including home equity lines of credit and personal unsecured lines of credit. Regulation Z requires, among other things, the accurately calculated finance charges on periodic statements and disclosure of important credit terms, such as the annual percentage rate (APR).

Findings
The FDIC identified instances in which institutions did not accurately calculate or properly disclose finance charges or APRs on periodic statements, resulting in understated finance charges and APRs for loans that exceeded the permitted tolerances under Regulation Z. The causes of these issues include:

- The balance used to calculate the finance charge was incorrect; and
- Start-up fees were not included in the finance charge disclosures provided to consumers.

Resources & Information for Financial Institutions

The FDIC provides resources and information for financial institutions to support their efforts to manage consumer compliance responsibilities effectively. Many of these resources in electronic form can be found on the FDIC's Director's Resource Center at https://www.fdic.gov/regulations/resources/director/. The Director's Resource Center is dedicated to providing useful information and resources for directors and officers of FDIC-insured institutions. Some of the resources provided include information about the Director's College Program, materials from past Directors' College and outreach events, a regulatory calendar, supervisory guidance related to consumer compliance topics, and technical assistance videos. The FDIC's technical assistance video program currently covers topics, such as:

- Community Reinvestment Act - https://www.fdic.gov/regulations/resources/director/virtual/cra.html
- Flood Insurance - https://www.fdic.gov/regulations/resources/director/technical/flood.html
- Mortgage Rules
    - Ability to Repay/Qualified Mortgages - https://www.fdic.gov/regulations/resources/director/technical/atr.html
    - Loan Originator Compensation – https://www.fdic.gov/regulations/resources/director/technical/lo.html
    - Small Servicers - https://www.fdic.gov/regulations/resources/director/technical/servicing.html

In addition to these resources, each FDIC Regional Office provides FDIC-supervised institutions with quarterly newsletters to keep them abreast of consumer compliance related regulatory changes, updates, and issues identified by examiners during examination activities. Financial institutions examined by the FDIC that wish to receive these quarterly newsletters can contact their designated Regional Office.

The FDIC's Email Subscription is available to the public and provides FDIC updates, including information regarding consumer compliance related matters. To sign up for the FDIC alerts, visit https://service.govdelivery.com/accounts/USFDIC/subscriber/new.

Appendix A: Most Frequently Cited Violations and Enforcement Actions

During 2018, FDIC examiners identified violations that range in severity from highest to lowest level of concern (Level 3, 2, and 1) for a number of regulations. The violations noted for the purposes of this publication focuses on violations resulting in a Level 3 or Level 2. Level 1 violations are not included due to their low severity and isolated or sporadic nature.

Violations that have resulted in significant harm to consumers or members of a community are classified as Level 3/High Severity. These violations typically result in a request or a requirement that the institution provide restitution in excess of $10,000 (in aggregate), and other examples include pattern or practice violations of anti-discrimination provisions, including redlining or widespread discouragement. Violations reflecting systemic, recurring, or repetitive errors that represent a failure of the bank to meet a key purpose of an underlying regulation or statute are classified as Level 2/Medium Severity. These violations may have had a small, but negative impact on consumers or have the potential to have a negative impact if uncorrected. Level 2 violations may also include those resulting in potential restitution in an amount below the Level 3 threshold.

Statute/Regulation	Level 3 Violations		Level 2 Violations		Total Violations	
	#	%	#	%	#	%
Truth in Lending Act (Regulation Z)	2	0.2	322	25.4	324	25.5
Truth in Savings Act (Regulation DD)	5	0.4	135	10.6	140	11.0
Electronic Funds Transfer (Regulation E)	3	0.2	123	9.7	126	9.9
Flood Disaster Protection Act (FDPA)	0	0.0	112	8.8	112	8.8
Equal Credit Opportunity Act (Regulation B)	2	0.2	83	6.5	85	6.7
Total Most Commonly Cited Violations	**12**	**0.9**	**775**	**61.1**	**787**	**62.0**

The FDIC conducted examinations and mailed 1,269 Reports of Examinations (ROEs) in 2018. The five most frequently cited statutes/regulations identified represent 62 percent of all Level 3 and Level 2 violations cited and are:

The most frequently cited violations within each of the statutes/regulations cited in 2018 are:

- Truth in Lending Act (Regulation Z) –failure to properly calculate or disclose the finance charge or annual percentage rate for mortgage loans; and disclosing fees on the closing disclosure that exceeded the tolerances permitted by the regulation;
- Truth in Savings Act (Regulation DD) –failure to include applicable and accurate information on account disclosures;
- Electronic Funds Transfer (Regulation E) –failure to properly investigate and determine whether an error occurred and transmit the results of the investigation and determination to the consumer within the prescribed timeframe after receiving notice of the error;
- Flood Disaster Protection Act (FDPA) –making, increasing, extending or renewing a designated loan with no flood insurance coverage, or an insufficient amount of flood insurance coverage; and
- Equal Credit Opportunity Act/Regulation B –failure to provide applicants with a notice in writing of the applicant's right to receive a copy of all written appraisals developed in connection with the application within three business days of receiving the application for credit; charging unmarried joint applicants higher fees for credit reports than married joint applicants for residential and consumer loans; erroneously obtaining information about the applicant or other person's race, color, religion, national origin, or sex in connection with a credit transaction for specific loan products prohibited from collecting such information; and, failure to provide specific and principal reasons for adverse action to applicants denied credit.

In addition, the FDIC issued a total of 21 consumer compliance-related formal enforcement actions where Civil Money Penalties (CMPs) were issued against institutions under delegated authority totaling approximately $3.5 million for 2018. Restitution paid to consumers totaled approximately $18.1 million to 268,918 consumers pursuant to formal enforcement actions and approximately $4 million to 49,000 consumers in voluntary payments for 2018.