COMPLIANCE MAILBOX ONLINE EDITION 4

Answering questions about: "selling" monetary instruments to noncustomers; exemptions of checks from the "next-day" rule; status of CD penalties; when a home loan isn't a home loan; and a disagreement with lenders over RESPA.

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Leslie Callaway, CRCM, ABA Compliance Project Manager, and Mark Kruhm, CRCM, ABA Senior Compliance Analyst, and other ABA experts, answer ABA member questions here and in the print edition of ABA Banking Journal. Member banks only may submit questions to: compliance@aba.com. Callaway and Kruhm work in ABA's Compliance Center. For more services from the Center, see the bottom of this blog.

Disclaimer: Our answers do not provide, nor are they intended to substitute for, professional legal advice. The answers in this column were current as of the date of publication of this blog.

Is this "swap" covered by BSA?

Q. Our general policy is not to "sell" monetary instruments to non-customers. However, one of our tellers made an even exchange of an on-us check for a bank cashier's check in an amount between $3,000 and $10,000 for a non-customer. Is that transaction considered the issuance of a monetary instrument for $3,000 or more in currency, and consequently, a transaction covered by the BSA recordkeeping rule Sec. 103.29?

A. In order to determine what you should do, you need to deconstruct the transaction. Because the check is drawn on an account at your bank, you have to "cash" the check to withdraw the funds from your customer's account to move the funds to the cashier's check account in order to issue the cashier's check. Because of the way the item must be processed, you are creating a cash transaction, even though no physical cash changes hands.

Although the negotiable instrument recordkeeping rules are based on transactions in currency, because you essentially have to "cash the check out" in order to exchange it for a cashier's check, recordkeeping is required. Specifically, 31 CFR 103.29 requires banks to verify the identity of persons purchasing monetary instruments for currency in amounts between $3,000 and $10,000 and to maintain records of all such sales. For a non-customer, the bank's records must contain, at a minimum, the following: name and address; Social Security or alien identification number; date of birth; date of purchase; type(s) of instrument purchased; serial number(s) of the instruments purchased; dollar amounts of each instrument purchased; and specific identifying information used to verify the purchaser's identity.

When cashier's checks can be exempted from "next-day" rule

Q. Can we put a hold on a check that is a cashier's check? Cashier's checks are normally subject to next-day availability, but we have had some instances in which customers have deposited cashier's checks that were fraudulent.

A. By law, cashier's checks get next-day availability-as long as they are deposited in person to a teller into the account of the named payee. Regulation CC does not allow placing a longer hold, unless one of the exception conditions is met. Reg CC stipulates that a bank cannot implement a policy to extend holds on a particular class of checks. However, if an institution has a reasonable belief that a particular item will not be paid, it can use the exception hold "reasonable cause to doubt collectability," but the bank must have "reasonable belief," (i.e., you called the bank the check was drawn on, and it said it wouldn't clear). In addition, if your customer doesn't know the party who sent them the check. (e.g., "I won the Canadian lottery, and I didn't even enter!"), your bank can refuse to accept the check for deposit. You could instead treat it as a collection item. However, such action should only be taken on a case-by-case basis.

CD penalties are just that, not fees

Q. Is a penalty for early withdrawal of a CD considered a maintenance or activity fee under Regulation DD?

A. No, it is considered a penalty, regardless of whether it is a mandatory penalty as required under Regulation D (12 CFR 204.2(c)(1)(i)) or a bank-imposed penalty requiring the forfeiture of a specified number of days of interest for early withdrawals. Although this must be disclosed per Reg DD (12 CFR 230.4(6)(ii)), it is still classified as a penalty and not a fee.

When a home loan isn't a "home loan"

Q. We have a loan that is secured by a CD, but the loan's purpose was for purchase of the customer's primary dwelling. When we input the information into our Home Mortgage Disclosure Act Loan Application Register system, we received a message that in order for the loan to not be secured by a dwelling, it must be classified as a home improvement loan. How do we report it correctly?

A. The definition of "home purchase" under 203.2(h) of Regulation C is "a loan secured by and made for the purpose of purchasing a dwelling." Therefore, if the loan to purchase a dwelling is secured solely by a CD or by any items other than a dwelling then it would not be HMDA reportable.

A disagreement with lenders over RESPA

Q. We interpret the Real Estate Settlement Procedures Act FAQs of the Department of Housing and Urban Development to mean that we must disclose owner's title insurance on the good-faith estimate for all purchase transactions, even though we do not require that coverage. Our lenders disagree, stating that because "the GFE is a disclosure of charges the borrower is ‘likely to incur in connection with the settlement'," that we should not be required to disclose owners title insurance because it is unlikely that it will be purchased with the transaction. Do you agree with the lenders' interpretation? A. We do not agree with your lenders on this issue. The fact that you don't "require" the coverage is irrelevant-HUD wants borrowers to know this is a cost that could be associated with their loan.

According to Question 1 on p. 27 of HUD's FAQs regarding the GFE and block 5:

"Q. Do loan originators have to provide a price for owner's title insurance on the GFE?

"A. Loan originators must provide an estimate of the charge for an owner‘s title insurance policy in Block 5-‘Owner‘s title insurance' on the GFE on all purchase transactions. For non-purchase transactions, the loan originator may enter NA (Not Applicable) in this block."

The instructions in HUD's Regulation X state, "Block 5, "Owner's title insurance."-In this block, for all purchase transactions the loan originator must provide an estimate of the charge for the owner's title insurance and related endorsements, regardless of whether the providers are selected or paid for by the borrower, seller, or loan originator."

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