COMPLIANCE MAILBOX ONLINE EDITION 5

Answering questions about: customer privacy goofs; RESPA's "required provider list"; email lists and CAN-SPAM;who files the "HEOA" form; the case of the silent retiree;compliance with newer mortgage laws when a loan is a refi or a modification, not a new credit.

* * *

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 Center for Regulatory Compliance. 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 in parentheses after each answer. • Must bank make good for customer's privacy goof?

Q. Our bank's customer was scammed by someone who called, claiming to be from the bank. The fraudster asked for the customer's PIN and card number and then proceeded to withdraw funds from the customer's account. Are we required to reimburse the customer under a Reg E claim? We feel that this was obviously a scam and the customer should have known better than to reveal private information. Therefore, we believe that the customer "authorized" the transaction. Can we deny the claim?

A. The Commentary to Reg E 205.2(m) defines "Unauthorized Electronic Fund Transfer" as an "Access device obtained through robbery or fraud. An unauthorized EFT includes a transfer initiated by a person who obtained the access device from the consumer through fraud or robbery." The term "access device" includes debit cards; personal identification numbers (PINs), telephone transfer and telephone bill payment codes, and other means that may be used by a consumer to initiate an electronic fund transfer (EFT) to or from a consumer account. Based on this, we think this would be a valid Reg E claim. The bank should reimburse the customer. (3/11/10) RESPA "required provider list" has gone the way of the dodo Q. Is there a RESPA requirement that the name, address, and telephone number of a third-party provider, specifically a flood determination company, be disclosed on the GFE? A. Not under the new rules. The old "required provider" listing on the GFE under 3500.7(e) was removed during the last revision. Under the new rules, when the bank selects the service provider, the space in Block 3 only requires the bank to list the "service" required (e.g., flood determination) and the related estimated charge. The actual name of the provider will be required on the HUD-1. (3/11/10) Is Mortgage Department Opening a CAN-SPAM of worms? Q. My bank bought an email list of customers who had requested mortgage rates online. Our mortgage department wants to send an email to these customers with a coupon for a refund of their appraisal fee at closing. I pointed out that, according to my understanding, we must provide an opt-out mechanism within the email, under the CAN-SPAM Act. The mortgage people said that they believe this is unnecessary. They claim that is because the consumers wanted rate information and had therefore shared their email addresses with a third party. Do we need to comply with and provide an opt-out mechanism? A. The fact that the consumer indicated an interest gives you permission to contact that person, but it is still a commercial message requiring an opt-out. The Act covers all commercial messages, which the law defines as "any electronic mail message the primary purpose of which is the "commercial advertisement or promotion of a commercial product or service..." Only transactional or relationship messages are exempt. (3/11/10) According to the CAN-SPAM Act, the primary purpose of an email is transactional or relationship if it consists only of content that: 1. Facilitates or confirms a commercial transaction that the recipient already has agreed to; 2. Gives warranty, recall, safety, or security information about a product or service; 3. Provides information about a change in terms or features or account balance information regarding a membership, subscription, account, loan, or other ongoing commercial relationship; 4. Provides information about an employment relationship or employee benefits; or 5. Delivers goods or services as part of a transaction that the recipient already has agreed to. In your scenario, the bank is contacting the customer to attempt to entice that customer into applying for a mortgage at your bank. This is a commercial message and the opt-out is required. (3/11/10) Who files HEOA form?

Q. Under the new Higher Education Opportunity Act (HEOA) rules under Regulation Z, who completes the self-certification form, the student or the loan applicant? A. The loan applicant would complete the form. In some cases, the student and the applicant may be the same person. The proposed form states "Throughout this Applicant Self-Certification, ‘you' and ‘your' refer to the applicant who is applying for the loan. The applicant and the student may be the same person." (3/11/10) Case of the silent retiree

Q. We recently received an application from someone who has an excellent income. However, we subsequently learned that he is retiring in two weeks. This will reduce his income dramatically. Can we ask about future income or take his change in income into consideration when deciding whether to approve the loan? Or is that age discrimination under Regulation B? A. You may consider the fact that his income will be drastically reduced, as long as this is a factor you consider in making any loan, not just loans to older adults. For example, if a young adult is relying on income from a summer internship, you must also consider the fact that the internship income is temporary when underwriting your loan.

Generally speaking, Reg B speaks to consideration of income in lending. According to Regulation B, Section 202.6(b)(5)A creditor shall not discount or exclude from consideration the income of an applicant or the spouse of an applicant because of a prohibited basis or because the income is derived from part-time employment or is an annuity, pension, or other retirement benefit; a creditor may consider the amount and probable continuance of any income in evaluating an applicant's creditworthiness. The Commentary to Reg B states: "A creditor may consider the applicant's occupation and length of time to retirement to ascertain whether the applicant's income (including retirement income) will support the extension of credit to its maturity." (3/11/10) Is Compliance With New Mortgage Laws Required When Loan Is A Refi Or Modification?

Q. If we modify or refinance a closed-end mortgage loan, do we have to check for compliance with the requirements under the new Mortgage Disclosure Improvement Act or Higher-Priced Mortgage Loan rules? A. According to the Federal Reserve Board's Regulation Z Commentary for 226.1(d)(3)-1 and 226.1(d)(5)-1, the requirements implemented in the regulation for the two topics identified "... apply to covered loans (including refinance loans and assumptions considered new transactions under Section 226.20)." The Commentary to 1(d)(5)-1.i. provides the following clarification: "General. A refinancing or assumption as defined in Section 226.20(a) or (b) is a new transaction and is covered by a provision of the final rules if the creditor receives an application for the transaction on or after that provision's effective date. For example, if a creditor receives an application for a refinance loan covered by Section 226.35(a) on or after October 1, 2009, and the refinance loan is consummated on October 15, 2009, the provision restricting prepayment penalties in Section 226.35(b)(2) applies. However, if the transaction were a modification of an existing obligation's terms that does not constitute a refinance loan under Section 226.20(a), the final rules, including for example the restriction on prepayment penalties, would not apply." If the transaction is considered a "new transaction" (e.g., refinancing or assumption), then you will need to comply with the various requirements implemented by the laws referenced. A modification, on the other hand, is generally not considered a "new transaction" unless it meets the definitions in the regulation. You will need to check with legal counsel to determine whether your specific loan transaction meets the precise definitions. (3/11/10)

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 Center for Regulatory Compliance. Disclaimer: Our answers do not provide, nor ar
to substitute for, professional legal advice.

The answers in this column were current as of the date in parentheses after each answer. From ABA's Compliance Center:

For ABA Member Banks Only: Get regular compliance news updates with ABA's Compliance Source E-Letter ABA member-bank employees have access to almost three dozen ABA news and information e-bulletins on important industry topics. One e-bulletin, THE Compliance Source, is dedicated to becoming your source for compliance information in the electronic world. Compliance Source is published each Monday throughout the year. In this changing regulatory environment, every compliance professional should subscribe THE Compliance Source. It will link you to recent compliance developments and alert you to upcoming compliance events. In addition to regular sections on "What's New in Review" and "On the Compliance Horizon," THE Compliance Source will have rotating sections including analysis of compliance issues by ABA staff in the "ABA Reports" section.

To subscribe, click here More compliance content from ABABJ.com:

Community Bank Compliance Officers: Be sure to check out our other compliance blog, "AML, Fraud, and Other Things." BSA expert John Byrne blogs on money-laundering and related matters with a definite point of view. Check it out

Community Bank Compliance Officers: Be sure to check out our other compliance blog, "Lucy and Nancy's Common Sense Compliance." Lucy Griffin and Nancy Derr-Castiglione, ABA BJ contributing editors, address compliance challenges with the smaller bank in mind. Check it out!