COMPLIANCE MAILBOX ONLINE EDITION 13: THEN AND NOW FOR COMPLIANCE

A special look at how answers to compliance questions have evolved

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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 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.

The ABA Compliance Center staff recently decided to look back at how the answers to some common questions have evolved in a relatively short time-just few years. You'll find the results interesting. But just make sure you follow the latest answers in complying!

Brewing up a solution to a premium blend

Q. My bank is giving a coffee pot to anyone opening a money market account with $25,000. The value of the coffee pot is $50 and the shipping, warehousing, tax, and packaging costs come to $5 per pot. Does the bank give the customer a 1099 for $50 or for $55?

2006 response

A. According to Federal Reserve Regulation Q, a premium on a deposit must be calculated using, "The value of the premium or, in the case, of articles of merchandise, the total cost (including taxes, shipping, warehousing, packaging, and handling costs)..." This total amount must be reported on a 1099, not just the cost of the actual premium alone. Therefore, your 1099 should be for $55.

July 2011 response

A. The answer is still the same except the answer is now based on IRS regulations and not Reg Q-which has been withdrawn.

Good Faith Estimates and revised loan amounts

Q. If a customer applies for a mortgage loan, and we send all the required early disclosures, and then the customer changes the loan amount requested, thus causing an increase in fees and charges, should we send the customer another Good Faith Estimate (GFE)?

2007 response

A. There is no requirement to redisclose the GFE, as it is just that-an estimate. Providing the GFE is triggered by taking the application, and you meet the intent of the law by sending the first one within the time period required by the Real Estate Settlement Procedures Act. Sending a second GFE after the three-day period is not a regulatory issue: It is not required and is the result of a change in circumstances beyond the application trigger. Changed circumstances, even changes in fees, do not trigger a new requirement for a GFE. That being said, your HUD-1 must reflect the final fee and cost information.

Nevertheless, failure to provide an updated GFE under circumstances where changes are significant could raise examiner eyebrows if there is a pattern of under-disclosures of fees that consistently appear on the HUD-1. Additionally, if the closing costs will change significantly, providing a second GFE is just good customer service. Think of it as if you were the borrower: You would not want to be "surprised" at the closing table by fees that had changed substantially from what you were told to expect. Sometimes it is just the right thing to do.

July 2011 response

A. RESPA guidance indicates the only time a revised GFE is required is when the borrower and lender agree to lock the interest rate (see Question #19 under GFE-General of the RESPA FAQs). In all other situations a revised GFE is permitted as long as there is a valid "changed circumstance." A borrower-requested change, such as an increase in the loan amount requested, is generally considered a valid "changed circumstance." Additionally, please remember that a revised GFE would be required in order to increase certain estimated fees. For example, if the institution charged a fixed percentage of the loan amount as an origination charge, then a revised GFE would be required in order to increase the amount of this fee. Otherwise, the original dollar amount of the origination fee could not increase.

CTR exemptions for local government?

Q. Our bank is beginning a banking relationship with a local government agency. The agency qualifies for a Phase I exemption from currency transaction reports (CTRs). Does that mean that we have to wait until the agency conducts cash transactions for over $10,000 before it can be exempted? Or can the bank file an exemption form the same day we establish the relationship?

2008 response

A. According to the information on Phase I CTR exemptions (31 C.F.R. 103.22(d)(2)(i)-(v)) any bank that wishes to designate a customer as an exempt person must file FinCEN Form 110, "Designation of Exempt Person" (DOEP), with the IRS Detroit Computing Center "within 30 days after the first transaction to be exempted." (Emphasis added.) Because the requirement for exemption is the need to file a CTR, the DOEP form should not be filed until an exemptible transaction occurs.

July 2011 Response

A. FinCEN guidance indicates that banks are no longer required to file a designation of exempt person ("DOEP") form for, or conduct an annual review of, customers who are other depository institutions operating in the U.S.; U.S. or State governments; or entities acting with governmental authority. Exemption of a Phase I entity covers all transactions in currency with the exempted entity, not only transactions in currency conducted through an account. (The DOEP filing and annual review are still required for businesses listed on a major national stock exchange ("listed businesses"), non-listed businesses, and payroll customers.)

Revealing credit scores to consumers

Q. We utilize a publicly available credit scoring system as a basis for approving or denying a consumer loan application. When we provide the consumer with the Adverse Action Notice, is it acceptable to state that the consumer was denied based on his or her credit score? Do we have to provide the customer with the actual score?

2006 response

A. There is no requirement to provide the applicant with the actual score. However, your Adverse Action Notice cannot simply state that the score was insufficient. According to Section 202.9(b)(2) of Federal Regulation B, creditors must provide a statement of specific reasons for denial. "Statements that the adverse action was based on the creditor's internal standards or policies or that the applicant, joint applicant, or similar party failed to achieve a qualifying score on the creditor's credit scoring system are insufficient," states Reg B. The creditor must also list the reasons why the applicant failed to achieve an adequate score. Refer to model Form C-3 in Appendix C of Regulation B.

July 2011 response

A. The Regulation B rules in the 2006 response have not changed in that lenders must still provide the Regulation B reasons in adverse action notices. The lender must still provide the Regulation B reasons for adverse action notice in addition to the credit score information and key factors adversely affecting the credit score, and the Reg B Adverse Action Model Notices have been modified to include this information. The new credit score disclosure requirements of the Dodd-Frank Act require creditors to disclose credit scores and related information to consumers in adverse action notices under the Fair Credit Reporting Act (FCRA) if a credit score was used in taking adverse action. The Dodd-Frank Act requires that FCRA adverse action notices and risk-based pricing notices include "credit scores" as defined in FCRA along with other information related to credit scores. This notice must contain:

1. A statement that a credit score is a number that takes into account information in a consumer report and that a credit score can change over time to reflect changes to the consumer's credit history.

2. The credit score used by the person making the credit decision.

3. The range of possible credit scores under the model used to generate the credit score.

4. All of the key factors that adversely affected the credit score, which shall not exceed four factors, except that if one of the key factors is the number of inquiries made with respect to the consumer report, the number of key factors shall not exceed five.

5. The date on which the credit score was created.

6. The name of the consumer reporting agency or other person that provided the credit score.

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