UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER OF THE CURRENCY

IN THE MATTER OF **CONSOLIDATED BANK, N.A.** HIALEAH, FLORIDA	)	Docket No. AA-EC-94-21

DECISION AND ORDER

I. Summary

This is a proceeding in which Consolidated Bank, N.A., Hialeah, Florida ("Bank") is asked to reimburse borrowers for admitted violations of the Truth in Lending Act, as amended by the Truth in Lending Simplification and Reform Act of 1980 (15 U.S.C. § 1607(e)(4)(A)) ("TILA"). At issue is the relevant period for which reimbursement must be made. TILA requires reimbursement for transactions consummated after the "immediately preceding examination." The Comptroller interprets this phrase to refer to the immediately preceding examination at which compliance with TILA was reviewed. Accordingly, the Comptroller orders the Bank to pay reimbursement in the amount of $143,517.21.

II. Procedural Background

On March 9, 1994, the Office of the Comptroller of the Currency ("OCC") issued a Notice of Charges ("Notice") to the Bank under authority of TILA. The Notice charged the Bank with: (1) failure to include mortgage insurance premiums as finance charges on certain residential mortgage loans; (2) understating finance charges; and (3) failure to disclose accurate annual percentage rates (APR) for certain loans. Based on these charges, the Notice called for reimbursement from the Bank to the affected customers.

The Bank filed an answer requesting a hearing. On June 17, 1994, the parties jointly submitted a Stipulation of Facts and Law ("Stipulation"), and on August 29 and September 22, 1994, the parties filed motions, and responses to motions, for summary disposition. Based on these motions and the Stipulation, on January 13, 1995, Administrative Law Judge Arthur L. Shipe (the "ALJ") issued a Recommended Decision in favor of the Bank.

III. The Comptroller's Decision

A. Factual Background

The facts in this case, which are contained in the Stipulation adopted by the ALJ, and hereby adopted by the Comptroller, are not in dispute and are summarized as follows. On September 4, 1991, the OCC concluded a consumer compliance examination of the Bank. Stipulation #6. On July 20, 1992, the OCC began another examination of the Bank using information as of June 30, 1992, and reported as of September 30, 1992. Stipulations #8 and 10. Only safety and soundness matters were examined during the September 30, 1992 examination. Stipulation #7.

On June 15, 1993, the OCC concluded a consumer compliance examination of the Bank in which it found that the Bank had failed to properly make disclosures regarding certain loans, resulting in violations of TILA and its implementing regulations. Stipulations # 13, 14, and 15. Pursuant to the Stipulation, the Bank has admitted to the violations and concedes that they constituted a clear and consistent pattern or practice of violations, but denies that they were willful. Stipulations #16 and 17.

The Bank has made proper reimbursements for all disputed loans originated after September 30, 1992. Stipulation #20. Enforcement Counsel, however, argues that the Bank

should be required to make reimbursements for loans originated between September 4, 1991, and September 30, 1992. The Bank has refused to do so. The amount in dispute is $143,517.21 on 63 loans. Stipulations #18 and 21.

B. Statutory Overview

Pursuant to Title 12 of the United States Code, the Comptroller is charged with the statutory responsibility of regulating the activities of national banks to ensure the safety and soundness of their operations and the banks' compliance with applicable laws and regulations. Consequently, TILA authorizes the Comptroller to ensure that national banks comply with its requirements, pursuant to the Comptroller's enforcement powers at 12 U.S.C. § 1818(b). See 15 U.S.C. § 1607(e)(1). The enforcement provisions of TILA, 15 U.S.C. § 1607, state that the OCC "shall require . . . an adjustment when it determines that [a] disclosure error [involving APR or the finance charge] resulted from (A) a clear and consistent pattern or practice of violations . . . ." 15 U.S.C. § 1607(e)(2). In addition, TILA provides that adjustments required pursuant to 15 U.S.C. § 1607 may be ordered only "in connection with violations arising from practices identified in the current examination and only in connection with transactions that are consummated after the date of the immediately preceding examination . . . ." 15 U.S.C. § 1607(e)(3)(i).

The Act does not define either the phrase "current examination" or the phrase "immediately preceding examination." Nor are the phrases defined in the implementing regulations issued by the Board of Governors of the Federal Reserve System. See 12 C.F.R. Part 226.

C. Discussion

In his Recommended Decision, the ALJ concluded that the term "immediately

preceding examination" means not the preceding examination at which the agency examined for compliance with TILA, but rather, the preceding examination of any type, whether or not the agency actually examined for such compliance. Accordingly, the ALJ recommended that the Bank not be required to make reimbursements for loans originated between September 4, 1991 (when the immediately preceding consumer compliance examination ended), and September 30, 1992 (the date of the Report of Examination for the immediately preceding examination of any kind).

Specifically, the ALJ concluded that he was "unable to find that it is absurd to conclude that the occurrence of any examination might be statutorily specified as the event cutting off restitution claims." RD at 8. (emphasis added). The ALJ rejected as untenable Enforcement Counsel's interpretation of "immediately preceding examination" as referring to the last examination covering compliance with TILA. Id. The ALJ's approach, as the Recommended Decision notes, is in accordance with the reasoning of a 1992 decision by the United States Court of Appeals for the Eighth Circuit, First Nat'l Bank of Council Bluffs v. OCC, 956 F.2d 1456 (8th Cir. 1992). Relying on Council Bluffs, the ALJ concluded that Enforcement Counsel's interpretation:

> would have the cutoff event depend upon the varying examination practices of the several banking agencies. For example, it is stated that the Federal Deposit Insurance Corporation conducts compliance examinations concurrently with other examinations, but that the OCC and the Board of Governors of the Federal Reserve System conduct separate, and less frequent compliance examinations. Those examinations may be conducted up to eight years apart.

RD at 8.

The Comptroller concludes that both the decision in Council Bluffs and the ALJ's Recommended Decision are incorrect in that they define the term "examination" in the phrase "immediately preceding examination" without considering the surrounding context. The

more reasoned way to read "examination" is to give the term the same meaning each time it appears in § 1607(e).

The language of § 1607(e) indicates that each of the seven references to "examination" must refer to a consumer compliance examination.[1] Six of these references appear in § 1607(e)(3), and the other in § 1607(e)(6). The former, § 1607(e)(3), provides in part:

> (i) with respect to creditors that are subject to examination by the agencies referred to in paragraphs (1) through (3) of subsection (a) of this section, [no adjustment shall be ordered] except in connection with violations arising from practices identified in the current examination and only in connection with transactions that are consummated after the date of the immediately preceding examination, except that where practices giving rise to violations identified in earlier examinations have not been corrected, adjustments for those violations shall be required in connection with transactions consummated after the date of the examination in which such practices were first identified;
>
> (ii) with respect to creditors that are not subject to examination by such agencies, [no adjustment shall be made] except in connection with transactions that are consummated after May 10, 1978 . . . .

(emphasis added).

The first time the term "examination" is used in subsection (e)(3)(i), and the only time it is used in subsection (e)(3)(ii), is in the context of "examination by the agencies," that is, the federal banking agencies. Because the effect of subsections (e)(3)(i) and (ii) is to set up different rules for different types of creditors depending on whether TILA violations are

---

[1] This analysis of the statutory language is supported by a letter in the record, to Enforcement Counsel from Griffith L. Garwood, Director, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, dated August 29, 1994. The letter is a response to Enforcement Counsel's request for the Board's interpretation of the term "immediately preceding examination," the request evidently having been made in connection with the instant proceeding. The views of the Board's senior staff are especially deserving of deference because, in addition to its enforcement authority, the Board is the rule writer and principal interpreter of TILA. Ford Motor Credit v. Milhollin, 444 U.S. 555, 565 (1980) ("Unless demonstrably irrational, Federal Reserve Board staff opinions construing the Act or Regulation should be dispositive . . . .").

identified in an examination, it is apparent that the term "examination" as used in those phrases refers to an examination for compliance with TILA.

"Examination" appears five additional times in subsection (e). Four of those instances specifically refer to identifying violations of TILA. The relevant phrases in § 1607(e)(3) are: "violations arising from practices identified in the current examination," "violations identified in earlier examinations," and "the examination in which such practices were first identified." Such "violations" and "practices" relate to TILA. Moreover, § 1607(e)(6) makes reference to the "written examination report" that identifies the TILA violations. Thus, there is no question that in these instances, "examination" refers to a TILA compliance examination.

This leaves only the one occurrence of the term "examination" in the phrase "immediately preceding examination" in subsection (e)(3)(i) with a potentially ambiguous meaning. Given that each of the other six occurrences of the word "examination" in § 1607(e) refers directly or by clear implication to TILA compliance, the term "immediately preceding examination" should be construed consistently with those other references. Ratzlaf v. U.S., 114 S.Ct. 655, 657 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears.")

In addition, the legislative history of § 1607(e)(3)(i) indicates that "immediately preceding examination" was intended to refer to the most recent examination at which TILA compliance was reviewed.[2] Section 1607(e)(3)(i), as it was enacted, was introduced by

---

[2]The linchpin of the ALJ's analysis is that the phrase "immediately preceding examination" is unambiguous, and OCC's interpretation of the phrase is contrary to its plain meaning. RD at 6-10. Accordingly, the ALJ essentially dismissed as "extraneous matters" TILA's legislative history, along with the OCC's concerns regarding the absurd results that could arise from the ALJ's broad interpretation of the phrase. Id. at 6.

Senator Garn as an amendment to the TILA Simplification and Reform Act, which was Title V of the Depository Institutions Deregulation and Monetary Control Act. Senator Garn explained that his amendment was based on provisions in a statement of interagency enforcement policy on Regulation Z issued by the Federal Financial Institutions Examination Council (FFIEC). 125 Cong. Rec. S29913 (daily ed. Oct. 29, 1979). The FFIEC enforcement policy referred to by Senator Garn does not define the phrase "immediately preceding examination." But it describes the analogous phrase "current examination" as used in § 1607(e)(3)(i) as the "most recent examination . . . in which compliance with Regulation Z was reviewed." 45 Fed. Reg. 48,712, 48,713 (1980) (emphasis added). Thus, since § 1607(e)(3)(i) was based on the FFIEC's Regulation Z enforcement policy, it is reasonable to conclude that Congress intended the phrase to mean the preceding examination at which compliance with Regulation Z was reviewed.

An article published by the minority counsel to the Consumer Affairs Subcommittee of

---

In the exercise of its power under 12 U.S.C. § 481 to make a thorough examination of all the affairs of the bank," the OCC has developed separate examinations for different aspects of a bank's operations, including consumer compliance, data processing, trust activities, and commercial operations. Specialized examinations also have been undertaken to focus on highly leveraged transactions and on real estate lending practices. State of the Bank and Credit Union Insurance Funds: Hearings Before the Subcomm. on Fin. Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Finance and Urban Affairs, 101st Cong., 2d Sess. 11-12 (1989) (statement of Robert L. Clarke, Comptroller of the Currency). In addition, since 1985, the OCC has assigned all eleven multinational banks and, subsequently, all national banks with over $10 billion in assets to full-time resident examiners who examine these banks on a continuing basis. Deposit Insurance Reform: Hearings Before the House Subcommittee on Financial Institutions Supervision, Regulation and Insurance, Committee on Banking, Finance and Urban Affairs, 101st Cong., 2d Sess. (1990) (statement of Robert L. Clarke, Comptroller of the Currency), reprinted in OCC Q.J., Vol. 9, No. 4, at 15, 18; The Role of the OCC in Approving Mergers That Involve National Banks: Hearings Before the House Committee on Banking, Finance and Urban Affairs, 102d Cong., 1st Sess. (1991) (statement of Robert L. Clarke, Comptroller of the Currency), reprinted in OCC Q.J., Vol. 10, No. 4, at 17, 20. In the latter situation, it is not at all clear what would constitute the "immediately preceding examination."

the Senate Banking Committee, almost contemporaneously with the passage of the 1980 amendments to TILA, discussed the intent of Congress in mandating restitution back to the "immediately preceding examination." The article noted that "[t]he intent was to relate restitution to the performance of individual institutions. It was believed that this could be accomplished most effectively by juxtaposing the restitution time periods to the time intervals between individual institutions' consumer compliance examinations." Climo, Simplification and Reform of the Truth in Lending Act, J. Retail Banking 55, 61-62 (June 1980). Because the article was published soon after the amendments took effect and the author was involved in drafting the legislation, the author's comments are instructive.

Given TILA's remedial purpose and the judicial policy of liberally construing its language in favor of the consumer,[3] it is not likely that Congress intended to have a bank regulatory agency waive liability for TILA violations simply because the agency has conducted a review of the bank's trust department or electronic data processing function, for example, in between TILA examinations. If the OCC wanted to preserve the bank's liability, the OCC would either have to examine for TILA during every trust, EDP, and commercial examination or never examine for anything other than TILA. Clearly, this is an absurd result. American Tobacco Co. v. Patterson, 456 U.S. 63, 71 (1982)(statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible).

For these reasons, the Comptroller concludes that the term "immediately preceding examination," as used in 15 U.S.C. § 1607(e), refers to the preceding examination at which

---

[3]Rodash v. AIB Mortgage Co., 16 F.3d 1142, 1144 (11th Cir. 1994). See Smith v. Fidelity Consumer Discount Co., 898 F.2d 896, 898 (3d Cir. 1990); Bizier v. Globe Financial Services, 654 F.2d 1, 3 (1st Cir. 1981); McGowan v. King, Inc., 569 F.2d 845. 848 (5th Cir. 1978).

the agency examined for compliance with TILA.

IV. ORDER

Based upon the entire record of the proceedings and the Recommended Decision of the Administrative Law Judge, and for the reasons set forth in the accompanying Decision, the Comptroller hereby:

A. Denies the Bank's Motion for Summary Judgment;

B. Grants Enforcement Counsel's Motion for Summary Judgment; and

C. Orders the Bank to pay reimbursement in the amount of $143,517.21.

IT IS SO ORDERED this 8th day of June, 1995.

EUGENE A. LUDWIG
Comptroller of the Currency

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER OF THE CURRENCY

IN THE MATTER OF CONSOLIDATED BANK, N.A. HIALEAH, FLORIDA	)	Docket No. AA-EC-94-21

ORDER

Issuance of the Comptroller's Decision in the above matter is hereby extended pursuant to 12 C.F.R. § 19.13 until July 5, 1995.

So Ordered, the 9th day of June, 1995.

EUGENE A. LUDWIG
Comptroller of the Currency

To: Pedro J. Martinez-Fraga, Esq.
Gustavo J. Lamelas, Esq.
Attorneys for Consolidated Bank, N.A.

Neil M. Robinson, Esq.
Attorney for the Enforcement &
Compliance Division
Office of the Comptroller
of the Currency