

In the Matter of)	
)	
INDEPENDENCE BANK)	NOTICE OF CHARGES AND OF
EAST GREENWICH, RHODE ISLAND)	HEARING and PRAYER FOR
)	RELIEF
)	
(INSURED STATE NONMEMBER BANK))	FDIC-23-0046B
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The FDIC therefore institutes this proceeding to determine whether an order to cease and desist and an order for restitution should be issued against Respondent, pursuant to 12 U.S.C. § 1818(b).

The FDIC alleges as follows:

JURISDICTION

1. At all Relevant Times, the Bank was a corporation existing and doing business under the laws of the State of Rhode Island with its principal place of business in East Greenwich, Rhode Island.

2. At all Relevant Times, the Bank was an insured State nonmember bank subject to 12 U.S.C. §§ 1811-1831aa, 12 C.F.R. chapter III, and the laws of the State of Rhode Island.

3. At all Relevant Times, the Bank was subject to Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

4. At all Relevant Times, the Bank was subject to SBA rules and regulations, as well as SBA Loan Program Requirements, as interpreted by the SBA's Standard Operating Procedures.

5. At all Relevant Times, the FDIC was the Bank's "appropriate Federal banking agency" under 12 U.S.C. § 1813(q).

6. The FDIC has jurisdiction over the Bank and the subject matter of this proceeding.

RESPONDENT'S MISCONDUCT

7. At all Relevant Times, the Bank's sole business strategy was the origination of small business loans in amounts up to \$150,000, 85 percent guaranteed by the SBA (**SBA Loans**), under section 7(a) of the Small Business Act, 15 U.S.C. § 636(a) (**7(a) Loan Program**).

8. The 7(a) Loan Program is the SBA's primary program for providing financial assistance to small businesses. The Bank was granted delegated authority by the SBA to make eligibility determinations on these loans without SBA review.

9. The Bank was repeatedly notified by the SBA that the Bank was charging impermissible fees in connection with its origination of SBA Loans.

10. The SBA took multiple regulatory actions against the Bank, including suspending the Bank's participation in the 7(a) Loan Program starting on November 13, 2019. Since this suspension, the Bank has not originated any SBA Loans.

SBA Fee Requirements and the Bank's Representations About Fees

11. SBA regulations place strict limits on the fees that lenders may charge to borrowers or loan applicants, and provide that lenders may not charge any fees not specifically authorized by SBA regulations or the SBA Loan Program Requirements. *See* 13 C.F.R. § 120.221.

12. SBA regulations further require that all lenders comply and maintain familiarity with all SBA Loan Program Requirements. *See* 13 C.F.R. § 120.180. The SBA Loan Program Requirements include, among other things, the SBA's Standard Operating Procedure for the Lender and Development Company Loan Program (**SBA SOP**), which provides detail regarding the amount of fees and expenses that can be charged to SBA Loan applicants. *See* 13 C.F.R. §§ 120.10.

13. Under SBA regulations, as interpreted by the SBA SOP, the cost of underwriting a loan cannot be charged to SBA Loan applicants. *See* 13 C.F.R. §§ 120.180, 120.221; SOP 50 10 5(J), Sub B, Ch. 3, Section VI(A)(5).¹

¹ SOP 50 10 5 is updated regularly, and several versions were in effect during the Relevant Times. The section referenced herein are taken from SOP 50 10 5(J), which became effective on January 1, 2018; however, the relevant sections of SOP 50 10 5 did not substantively change during the Relevant Times.

14. Under SBA regulations, as interpreted by the SBA SOP, SBA Form 159(7a) must be filed to document any fees paid, *inter alia*, by the applicant for an SBA Loan. See §§ 120.180, 120.221; SOP 50 10 5(J), Sub B, Ch. 3, Section VIII(A) & (B).

15. The Bank made repeated representations to consumers that it did not charge any SBA Loan applicants any fees that were not authorized by the SBA on numerous documents provided to all SBA Loan applicants, including:

a. A statement on SBA Fee Disclosure Form and Compensation Agreement, SBA Form 159, that, “compensation must not include any expenses that are deemed by the SBA to be unnecessary in connection with the loan application or are prohibited by SBA rules”;

b. A representation on the SBA Settlement Sheet, SBA Form 1050, that, “All fees charged or to be charged or received in connection with the making of this loan are permitted by SBA’s regulations . . . It is further understood that all fees not specifically approved by the SBA are prohibited.” (emphasis in original); and

c. A certification from the Bank on the SBA Settlement Sheet, SBA Form 1050, that, “Neither the Lender nor its Associates, officers, agents, affiliates, or attorneys have charged or will charge or receive, directly or indirectly, any fees not permitted by SBA’s regulations and policies. . .”

16. By including Bank-executed documentation in SBA Loan closing packages, the Bank expressly represented to customers that it was not charging any prohibited fees but that all fees it charged were specifically approved by the SBA’s requirements.

17. Despite its representations, the Bank regularly charged impermissible fees to SBA Loan applicants, including for services that the Bank did not perform.

Impermissible Packaging Fees

18. The Bank charged SBA Loan applicants impermissible packaging fees.

19. Under SBA regulations, as interpreted by the SBA SOP, fees cannot be charged for services that are not performed. *See* 13 C.F.R. §§ 120.180, 120.221; SOP 50 10 5(J), Sub B, Ch. 3, Section VI(A).

20. The Bank did not perform any packaging services for its SBA Loan applicants. In fact, any packaging services provided to the Bank's SBA borrowers were provided by a third party. Despite the fact that it did not perform packaging services, the Bank collected fees for packaging services from its SBA borrowers and retained packaging fees it collected.

21. Additionally, SBA regulations, as interpreted by SBA SOP, require banks or third parties to retain documentation in each loan file to support any packaging fees charged to SBA Loan applicants. *See* 13 C.F.R. §§ 120.180, 120.221; SOP 50 10 5(J), Sub B, Ch. 3, Section VI(A)(2).

22. SBA regulations, as interpreted by SBA SOP, further require banks or third parties to itemize packaging fees charged to SBA Loan applicants when the fees are over \$2,500. *See* 13 C.F.R. §§ 120.180, 120.221; SOP 50 10 5(J), Sub B, Ch. 3, Section VI(A)(2)(a).

23. During the Relevant Times, the Bank failed to maintain required documentation in its loan files to support of the packaging services it claimed to have provided to SBA Loan applicants who were charged packaging fees. *See* 13 C.F.R. §§ 120.180, 120.221; SOP 50 10 5(J), Sub B, Ch. 3, Section VI(A)(2).

24. The packaging fees that the Bank collected from SBA Loan applicants were therefore prohibited under SBA regulations, as interpreted by SBA SOP.

25. During the Relevant Times, the Bank failed to itemize packaging fees over \$2,500 that it charged to SBA Loan applicants in violation of SBA regulations, as interpreted by SBA SOP. *See* 13 C.F.R. §§ 120.180, 120.221; SOP 50 10 5(J), Sub B, Ch. 3, Section VI(A)(2)(a).

26. Instead, the Bank provided generic, standardized documentation purporting to show the average cost for packaging fees over \$2,500, but it did not itemize the work performed on any individual SBA Loan applicant's loan.

27. The packaging fees over \$2,500 that the Bank charged to borrowers were therefore prohibited under SBA regulations, as interpreted by SBA SOP.

28. The standardized documentation that the Bank prepared related to packaging fees included several fees that are in fact underwriting functions for which the Bank cannot charge borrowers. *See* 13 C.F.R. §§ 120.180, 120.221; 13 C.F.R. § 120.221; SOP 50 10 5(J), Sub B, Ch. 3, Section VI(A)(5). Specifically, the Bank characterized activities such as processing credit scores, notifying applicants of preapproval, and preparing loan documents for underwriting as packaging services and collected fees for those services.

29. As described in the preceding paragraphs, the Bank charged fees in connection with its SBA lending program that were prohibited by applicable SBA regulations and thus was unjustly enriched by charging and collecting such fees.

Impermissible Closing Documentation Fees

30. SBA regulations, as interpreted by SBA SOP, prohibit flat fees and fees for legal expenses that are not charged for services performed by attorneys or paralegals on an hourly

basis. *See* 13 C.F.R. §§ 120.180, 120.221(e); SOP 50 10 5(J), Sub B, Ch. 3, Sections VI(A) (2)(B) & VI(H).

31. From 2017 to 2019, the Bank charged SBA Loan applicants a flat fee of either \$250 or \$500 for the preparation of loan closing documents for loan closings.

32. The Bank did not use attorneys or paralegals for the preparation of loan closing documents for loan closings.

33. The Bank did not charge the closing documentation fee based on the hourly rates of attorneys or paralegals.

34. The closing documentation fee included work that was considered an inherent lender function that the Bank was not permitted to charge to the borrower under SBA regulations, as interpreted by SBA SOP.

Count I – Violations of SBA Regulations – Packaging Fees that the Bank Did Not Perform

35. The FDIC incorporates the allegations of the preceding paragraphs as if fully restated herein.

36. Under SBA regulations, as interpreted by the SBA SOP, fees cannot be charged for services that are not performed. *See* 13 C.F.R. §§ 120.180, 120.221; SOP 50 10 5(J), Sub B, Ch. 3, Section VI(A).

37. From 2017 through 2018, the Bank routinely charged borrowers for packaging services that the Bank did not perform, and retained those fees.

38. In fact, the Bank did not perform packaging services for its SBA borrowers.

39. By charging, collecting and retaining fees for packaging services that it did not perform, the Bank violated SBA regulations.

Count II – Violations of SBA Regulations – Failure to Properly Document Packaging Fees

40. The FDIC incorporates the allegations of the preceding paragraphs as if fully restated herein.

41. Under SBA regulations, fees not expressly authorized to be charged to SBA Loan applicants are prohibited. *See* 13 C.F.R. § 120.221.

42. As described in the preceding paragraphs, SBA regulations, as interpreted by the SBA SOP, require that the Bank document all packaging services in each loan file, regardless of the amount charged. SBA regulations, as interpreted by the SBA SOP, further require that the Bank itemize all packaging services provided when packaging fees are over \$2,500. *See* 13 C.F.R. §§ 120.180, 120.221; SOP 50 10 5(J), Sub B, Ch. 3, Section VI(A)(2).

43. The Bank failed to document the packaging services provided in each loan file or itemize packaging services when the packaging fees were over \$2,500.

44. Instead, the Bank merely placed a standardized document showing what it claimed were average fees for packaging services in each SBA loan file.

45. By charging packaging fees without the required documentation, the Bank violated SBA regulations.

Count III – Violations of SBA Regulations – Charging Packaging Fees for Underwriting Functions

46. The FDIC incorporates the allegations of the preceding paragraphs as if fully restated herein.

47. SBA regulations, as interpreted by the SBA SOP, prohibit lenders from charging borrowers for underwriting functions. *See* 13 C.F.R. §§ 120.180, 120.221; SOP 50 10 5(J), Sub B, Ch. 3, Section VI(A)(5).

48. The Bank routinely charged SBA borrowers for underwriting functions, and improperly characterized those activities as packaging services.

49. By charging borrowers purported packaging fees for what were in fact underwriting functions, the Bank violated SBA regulations.

Count IV – Violations of SBA Regulations – Impermissible Closing Documentation Fees

50. The FDIC incorporates the allegations of the preceding paragraphs as if fully restated herein.

51. As described in the preceding paragraphs, at all Relevant Times, the Bank collected a flat fee for closing documentation from each SBA borrower.

52. The closing documentation was not prepared by attorneys or paralegals and billed on an hourly basis. Accordingly, it was not an allowable expense for legal services. *See* 13 C.F.R. §§ 120.180, 120.221(e); SOP 50 10 5(J), Sub B, Ch. 3, Section VI(H).

53. The flat fee for preparation of closing documentation is not otherwise authorized by SBA regulations, as interpreted by the SBA SOP. *See* 13 C.F.R. § 120.221. Accordingly, the closing documentation fees charged by the Bank were prohibited.

54. By charging prohibited closing documentation fees, the Bank violated SBA regulations.

Count V – Violations of Section 5 of the FTC Act

55. The FDIC incorporates the allegations of the preceding paragraphs as if fully restated herein.

56. Section 5 of the FTC Act, 15 U.S.C. § 45, prohibits any unfair or deceptive act or practices in or affecting commerce.

57. As described in the preceding paragraphs, the Bank charged fees in connection with its SBA lending program that were prohibited by applicable SBA regulations. Specifically, the Bank charged the following fees in violation of SBA regulations:

- a. Packaging fees for packaging services that the Bank did not provide to borrowers;
- b. Packaging fees that the Bank charged without maintaining required documentation in its loan files;
- c. Packaging fees in amounts over \$2,500 without providing the required itemization of the services provided;
- d. Packaging fees for activities that were actually loan underwriting; and
- e. Closing documentation fees for services that were not performed by attorneys or paralegals and billed on an hourly basis.

58. The Bank made express false representations that all fees charged in connection with its SBA lending program were authorized and approved by the SBA and complied with all applicable regulations and requirements for SBA lenders, when in fact it charged prohibited fees.

59. The Bank omitted material information when it engaged in SBA lending without disclosing that it was charging fees that were prohibited by applicable SBA regulations.

60. Reasonable consumers would have understood the Bank's express representations and omissions to mean that the Bank was not charging any fees that were not authorized by applicable SBA regulations.

61. The fact that the Bank was charging fees that were prohibited by SBA regulations was material information.

PRAYER FOR RELIEF

62. By virtue of each of the paragraphs set forth above in this Notice, the FDIC has determined that the Bank violated Section 5 of the FTC Act, 15 U.S.C. § 45, and violated SBA regulations, by charging certain impermissible fees in connection with the Bank's SBA lending program, and that the Bank was unjustly enriched as a result thereof, and prays that an appropriate Cease and Desist Order be issued against the Bank pursuant to the provisions of Sections 8(b) of the FDI Act, 12 U.S.C. § 1818(b), including an order that the Bank pay restitution in an amount found to be appropriate pursuant to Section 8(b)(6)(A) of the FDI Act, 12 U.S.C. § 1818(b)(6)(A).

NOTICE OF HEARING

63. Notice is hereby given that the hearing on the Notice will be held in Providence, Rhode Island, within 60 days from the date of service of this Notice on the Bank, or on such date or at such place as may be set by the parties to this action and the Administrative Law Judge appointed to hear this matter, for the purpose of taking evidence on the above-mentioned charges in order to determine whether a Cease and Desist Order should be issued under the FDI Act requiring the Bank to establish and maintain procedures to ensure the compliance with applicable

laws and regulations and correct the problems reported to the Bank by the FDIC as set forth in this Notice.

64. The hearing is to be held before an Administrative Law Judge to be appointed by the Office of Financial Institution Adjudication (**OFIA**) pursuant to 5 U.S.C. § 3105. The hearing will be open to the public, unless the FDIC shall determine that an open hearing would be contrary to the public interest, and in all respects will be conducted in compliance with the provisions of the FDI Act and Part 308.

65. The Bank is directed to file an answer to this Notice within 20 days from the date of service of this Notice on the Bank, as provided by 12 C.F.R. § 308.19. The original and one copy of all papers to be filed or served in this proceeding shall be filed with the Office of Financial Institution Adjudication (**OFIA**), 3501 N. Fairfax Drive, Suit VS-D8116, Arlington, VA 22226-3500, pursuant to section 308.10 of the FDIC's Rules of Practice and Procedure, 12 C.F.R. § 308.10. Failure to answer within the 20-day time period shall constitute a waiver of the right to appear and contest the allegations contained in this Notice and shall, upon the FDIC's motion, cause the Administrative Law Judge or the FDIC to find the facts in this Notice to be as alleged and to issue an appropriate Cease and Desist Order.

66. Copies of all papers filed or served in this proceeding shall be served upon Debra A. Decker, FDIC Administrative Officer, Federal Deposit Insurance Corporation, 550 17th Street, N.W., Washington, DC 20429-9990 (Respondent is encouraged to file any subsequent documents electronically with the FDIC Administrative Officer at ESSEnforcementActionDocket@FDIC.gov); Seth Rosebrock, Assistant General Counsel, Enforcement Section, Federal Deposit Insurance Corporation, 550 17th Street, N.W., Room MB-3024, Washington, DC 20429; Michael P. Farrell, Counsel, Consumer Protection & Compliance

Unit, Federal Deposit Insurance Corporation, 550 17th Street, N.W., Room F-2006, Washington, DC 20429; Anthony J. Borzaro, Senior Attorney, Administrative Enforcement & Investigation Unit, Federal Deposit Insurance Corporation, 550 17th Street, N.W., Room MB-3070, Washington, DC 20429; David A. Schecker, Regional Counsel, Boston Area Office, Federal Deposit Insurance Corporation, 15 Braintree Hill Office Park, Braintree, MA 02184; and Matthew H. Doyle, Senior Attorney, Boston Area Office, Federal Deposit Insurance Corporation, 15 Braintree Hill Office Park, Braintree, MA 02184.

Pursuant to delegated authority.

Dated at Washington, D.C., this 9th day of November, 2023.

/s/

Mark Pearce
Director
Division of Depositor and Consumer Protection