

[{{10-31-01p.A-2997}}](#)

[¶5255] In the Matter of Stutsman County State Bank, Jamestown, North Dakota (Insured State Nonmember Bank) FDICDocket No. 97-28b (4-20-99)

The Board denied Respondent's request to modify a Cease and Desist Order and Order for Reimbursement, finding that Respondent's failure to disclose, in the Initial Disclosure Statement, a Processing Fee as part of the finance charge on an open-ended credit plan, violated the Truth in Lending Act and Regulation Z. The Board agreed that such violations constituted a "clear and consistent pattern or practice of violations," and determined that such violations did not fall within any of the exceptions listed in the Truth in Lending Act which would allow the FDIC discretion to waive reimbursement. *(The petition for review of the Board's order and decision was denied by the United States Court of Appeals for the Eighth Circuit, 207 F.3d 464.) (This order was terminated by order of the FDIC dated 8-14-01; see ¶16,288.)*

[.1] Regulation Z—Disclosure in one integrated document

All disclosures required in the Initial Disclosure Statement must be set forth in one integrated document.
Reimbursement of Consumers for Clear and Consistent Pattern—See Truth in Lending Act Credits, Extension of Open-ended Credit, see Regulation Z

[.2] Truth in Lending Act—Reimbursement of Consumers at Discretion of FDIC

Unless there is a willful violation, the enforcing agency is given discretion in ordering reimbursement of fees improperly charged to consumers.

[.3] Truth in Lending Act—Reimbursement of Consumers nondiscretionary

Reimbursement by Respondent Bank, of consumer's charges is required if a disclosure error has occurred as a result of a "clear and consistent pattern or practice of violations," "gross negligence" or a "willful violation" intended to mislead consumers.

[.4] Truth in Lending Act—Reimbursement of Consumers for Clear and Consistent Pattern waived if exception met

The TILA statute provides four instances where the FDIC has discretion to waive reimbursement. If any of the exceptions is met, the FDIC may reduce or eliminate the reimbursement requirement.

[.5] Truth in Lending Act—Reimbursement of Consumers—Exceptions for technical and nonsubstantive error

The exception for violations that are "clearly technical and nonsubstantive" does not include disclosure errors such as Respondent's that could affect the outcome of a borrower's decision in credit shopping.

[.6] Truth in Lending Act—Reimbursement of Consumers—Exceptions for error of 10% or less of amount that should have been disclosed

This exception is intended to apply where failure to disclose a key element of the cost of the credit will be obvious to the consumer, causing no prejudice or [{{10-31-01 p.A-2998}}](#)deception. The facts here do not fit into the spirit or intent of the exception because even the most informed credit shoppers could be misled.

[.7] Truth in Lending Act—Reimbursement of Consumers at Discretion of FDIC—For serious and substantive Disclosure Errors

With serious and substantive disclosure errors, reimbursement is an appropriate remedy even if they were to exercise their discretion to not require reimbursement.

[.8] Truth in Lending Act—Reimbursement of Consumers—Discretion to Avoid Adverse Impact

The statute provides that the Board may grant a partial adjustment or a payout over an extended period of time if the ordered reimbursement would cause the Bank to be inadequately capitalized.

In the Matter of

**STUTSMAN COUNTRY STATE BANK
 JAMESTOWN, NORTH DAKOTA
 (Insured State Nonmember Bank)**

DECISION AND ORDER

FDIC-97-28b

This case is before the Board of Directors ("Board") of the Federal Deposit Insurance Corporation ("FDIC") on the Recommended Decision ("Decision" or "R.D.") of Administrative Law Judge Walter J. Alprin ("ALJ"), dated October 15, 1998, in which he recommends the issuance of a Cease and Desist Order under section 8(b) of the Federal Deposit Insurance Act ("FDI Act"), 12 U.S.C. §1818(b), against Stutsman Country State Bank, Jamestown, North Dakota ("the Respondent" or "the Bank"), for violations of the Truth in Lending Act ("TILA"), 15 U.S.C. §1601, et seq., and Regulation Z of the Board of Governors of the Federal Reserve System ("Federal Reserve"), 12 C.F.R. Part 226. The violations resulted from the Bank's failure to properly disclose the entire "finance charge" to certain credit card account holders. The ALJ also recommends that the improperly-disclosed amount be repaid to the affected consumers pursuant to section 108(e) of the TILA, 15 U.S.C. §1607(e).

BACKGROUND

Procedural History

On April 25, 1997, the FDIC issued a Notice of Charges and of Hearing ("Notice"), and a proposed Cease and Desist Order against the Bank under section 8(b) of the FDI Act seeking to halt violations of TILA and Regulation Z and to require reimbursement of affected Bank customers pursuant to section 108 of the TILA. The Bank contested the Notice, and the case was assigned to the ALJ for a hearing. The parties filed cross motions for summary disposition pursuant to 12 C.F.R. §308.29(a), and the ALJ has recommended that the FDIC's motion be granted and the remedies sought in the Notice be imposed. The Respondent's motion was denied. On November 12, 1998, the Respondent filed seven exceptions to the R.D. The FDIC filed one exception on November 13, 1998. Thereafter, the FDIC's Office of the Executive Secretary submitted the matter to the Board for a final decision.

Summary of the Undisputed Facts

The facts in this matter were stipulated by agreement of the parties on March 6, 1998. R.D. 20. Both parties agree that there is no genuine issue as to any material facts in connection with the motions. R.D. 4.

The Bank was examined for compliance with the TILA and Regulation Z on June 13, 1996. R.D. 21. Prior to this examination, the Bank offered and extended credit to consumers pursuant to an open-ended credit plan as defined in section 103(i) of the TILA, 15 U.S.C. §1602(i), and section 226.2(a)(20) of Regulation Z, 12 C.F.R. §226.2(a)(20). The open-ended credit accounts under the plan were secured by a deposit account established by the cardholder at the Bank. R.D. 21. With these applications for open-ended credit, the Bank charged a fee which it referred to as either a one-time processing fee or a one-time application processing fee ("Processing Fee"). R.D. 21. This Processing Fee was refunded to the applicant if his or her application for credit was not approved. R.D. 22. On the other hand, if the credit was approved, the Processing Fee was collected by the Bank by either debiting the applicant's checking account or by cashing the applicant's check. R.D. 22.

The Bank assessed and collected the Pro- ~~{6-30-99 p.A-2999}~~cessing Fee for each account opened from the time the Bank began offering the credit plan, at some point prior to the August 8, 1994, Compliance Examination, through the completion of the 1996 Compliance Examination. The Bank had stopped charging the Processing Fee during or shortly after the completion of the 1996 Compliance Examination. Prior to the elimination of the fee, however, the Bank had charged a Processing Fee, varying from \$27.00 to \$59.00, in connection with approximately 25,640 accounts for a total of approximately \$1,470,938. R.D. 22.

The Bank provided three types of disclosures in connection with these credit accounts. The first type of disclosure was intended to comply with section 226.5a of Regulation Z, 12 C.F.R. §226.5a, and will be referred to as the Application Disclosure Statement. The second type of disclosure was intended to comply with section 226.6 of Regulation Z, 12 C.F.R. §226.6, and will be referred to as the Initial Disclosure Statement. The third type of disclosure was intended to comply with section 226.7 of Regulation Z, 12 C.F.R. §226.7, and will be referred to as the Periodic Disclosure Statement. R.D. 22.

All Application Disclosure Statements disclosed that an applicant for the credit would be charged the Processing Fee and included the applicable amount to be charged to each applicant. R.D. 23. The Processing Fee was not disclosed or referenced at all in the Initial Disclosure Statement. R.D. 23. The Initial Disclosure Statement was provided to applicants approved for the credit and was mailed to consumers with their new credit cards. R.D. 23.

The FDIC determined that the Bank's failure to disclose the Processing Fee as a finance charge in the Initial Disclosure Statement was a violation of TILA and Regulation Z in the FDIC's 1996 Compliance Report. The 1996 Compliance Report noted that, as a consequence of this violation, the Processing Fee

should be reimbursed, and estimated total reimbursements for active accounts would total approximately \$1,470,938. R.D. 24. The Bank objected to and disagreed with the FDIC's charges and sought administrative review of the direction to reimburse affected customers. The FDIC denied the Bank's request for relief by letter dated February 13, 1997. R.D. 24.

As of October 31, 1997, the estimated amount of potential reimbursements required by the FDIC was reduced to approximately \$567,819 from the Compliance Examination's original estimate of approximately \$1,470,938. This reduction results from a regulatory policy permitting creditors to offset the amount of any reimbursement owed a consumer against any credit balances of the consumer that are in default. R.D. 25.

As of June 30, 1998, the Bank's total assets equaled \$122,453,000, and its total equity capital equaled \$8,576,000. The Bank was deemed "adequately capitalized" under section 38 of the FDI Act, 12 U.S.C. §1831o ("Section 38 Capital Category"). Using the Bank's capital ratios as of December 31, 1997, and assuming an immediate reduction in capital of \$567,819, the Bank's Section 38 Capital Category, after reimbursement, would remain unchanged.

The Recommended Decision

The ALJ addressed two basic issues in his Decision. The first was whether the failure to disclose the Processing Fee as a component of the finance charge in the Initial Disclosure Statement violated the TILA and section 226.6 of Regulation Z. After concluding that the actual disclosures by the Bank of the Processing Fee did not suffice under the law, the ALJ found that the Bank failed to disclose the total finance charge in the Initial Disclosure Statement in violation of the TILA and section 226.6 of Regulation Z. The second issue addressed by the ALJ was whether the FDIC should require the Bank to reimburse the Processing Fee to the affected consumers. The ALJ concluded that the FDIC was required under the TILA to order reimbursement.

With regard to the first issue, the ALJ noted that both the FDIC and the Respondent agreed that the Processing Fee was a finance charge pursuant to 12 C.F.R. §226.4(a).¹ R.D. 5, 6. The parties also agreed that the Processing Fee was not included in the finance charge disclosures or otherwise referred to in any manner in the Initial Disclosure Statement. R.D. 6. In

¹ A finance charge includes "any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or condition of the extension of credit." 12 C.F.R. §226.4(a).

{{6-30-99 p.A-3000}}finding that this omission violated the TILA and Regulation Z, the ALJ rejected the Respondent's argument that the disclosures of the Processing Fee in the telephone script (read over the phone to credit applicants) and in the Bank's Credit Approval Letter satisfied the disclosure requirement in 12 C.F.R. §226.6.² The ALJ stated that section 226.6 "clearly and unambiguously requires that finance charges be disclosed in the Initial Disclosure Statement as a single, integrated document, and it is undisputed that Respondent omitted the processing fee from this disclosure." R.D. 8.

Having found a violation of the TILA and Regulation Z, the ALJ determined that the FDIC was required to order the Bank to reimburse the affected consumers pursuant to 15 U.S.C. §1607(e)(2). The ALJ found that, because the Bank's disclosure error evidenced a clear and consistent pattern or practice, the FDIC must require the Bank to reimburse the affected consumers under 15 U.S.C. §1607(e)(1). Here, the Respondent made disclosure errors to approximately 25,640 account holders over a course of nearly two years. R.D. 12. The ALJ also rejected the Respondent's argument that the exceptions set forth in 15 U.S.C. §1607(e) (2)(A)-(D), would allow the FDIC to waive reimbursement. R.D. 14–19.

Except for certain aspects of the ALJ's legal reasoning, the Board affirms the recommendation of the ALJ and adopts his Recommended Decision and Findings of Fact. The Board finds that, in this particular case, reimbursement is necessary because there was a clear and consistent pattern and practice of violation and that none of the four exceptions enumerated in 15 U.S.C. §1607 (e)(2)(A)-(D), which would allow the FDIC to waive reimbursement, are applicable.

Respondent's Exceptions

The Respondent filed seven exceptions. In the first exception, the Respondent argued that the Bank's Credit Approval Letter was sufficient disclosure of the Processing Fee as a finance charge under section 226.6 of Regulation Z. The Credit Approval Letter was sent to those consumers whose credit was approved, advising the consumers that they had authorized the Respondent to either cash a previously submitted check or debit the consumers' checking accounts for the amount of the specified Processing Fee. R.D. 7. The remainder of the Respondent's exceptions pertain to the reimbursement remedy recommended by the ALJ. Specifically, they are:

1. A consideration of equitable principles renders reimbursement impermissible;
2. Reimbursement is not permitted under section 108(e)(1);
3. Since there is no record that any consumer was misled by the Bank's disclosures and it is undisputed that every consumer was informed as to the fact and amount of the Processing Fee, reimbursement is prohibited by section 108(e)(2)(D) of the TILA;
4. Since there was no disclosure error, there was no pattern or practice involving an error;
5. The factors in section 108(e)(2) of the TILA militate against reimbursement; and
6. The Bank requests an unambiguous acknowledgement that the FDIC's allegations with respect to section 226.7, 12 C.F.R. §226.7, have been entirely dropped from this proceeding.

The arguments underlying the Respondent's exceptions will be discussed below. All of the exceptions are denied except the last.³

Enforcement Counsel for the FDIC filed one exception. Counsel asked that Article II of the proposed Order to Cease and Desist ("Order") be stricken because it requires reimbursement of a specific dollar amount, pointing out that Article IV requires the Bank to conduct a file search and reimburse the Processing Fee to each affected customer. Because the exact number of affected customers and the amount of the Processing Fee charged to each is unknown and will not be known until the file search is completed, the Board agrees that the Order should not include a requirement to reimburse a specific dollar amount, and the Order shall be so amended.

²The Bank has not argued that the disclosure of this charge in the Application Disclosure Statement satisfied its duty under the TILA.

³The Board notes that FDIC Enforcement Counsel stated that the allegations pertaining to section 226.7 of Regulation Z are no longer being pursued.

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ANALYSIS

For the reasons set forth below, the Board adopts the Findings of Fact and Conclusions of Law of the ALJ, subject to one clarification: having found a clear and consistent pattern or practice of violations, the Board is required to order reimbursement only after considering the four enumerated exceptions set forth in 15 U.S.C. §1607(e)(2)(A)-(D), which, if applicable, would allow the FDIC to use its discretion to waive reimbursement. Thus, the ALJ's Conclusion of Law number 8. should be modified to reflect that the FDIC must order the Bank to reimburse the affected consumers if a clear and consistent pattern or practice of violations is proven and none of the exceptions in 15 U.S.C. §§1607(e)(2)(A)-(D) applies. Since the Board finds that none of the exceptions applies in this case, reimbursement of the Processing Fee to the affected consumers is ordered.

Statutory Overview

The purpose of the TILA was to protect consumers and strengthen the competition among financial institutions and other entities in the business of extending consumer credit by facilitating the informed use of credit. By requiring that all information necessary to compare the terms and cost of credit options offered be made available to consumers, Congress intended to enable them to make meaningful choices from among competing credit opportunities. 15 U.S.C. §1601. Congress was also concerned about deceptive or confusing disclosures of credit terms and hoped that the required TILA disclosures would minimize the opportunities for such abuse. See, e.g., Beardsley, Truth In Lending Act: A Summary of Consumer Remedies, 22 S.D.L. Rev. 332 (1977). Regulation Z, codified at 12 C.F.R. §§226, *et. seq.*, was drafted by the Federal Reserve and provides the regulatory framework for consumer credit disclosure under the statute.

The Violation

Section 226.6(a)(4) of Regulation Z, 12 C.F.R. §226.4(a), mandates that the creditor shall disclose to the consumer the finance charge, and shall include "an explanation of how the amount of any finance charge will be determined, including a description of how any finance charge other than the periodic rate will be determined." This section also sets forth the requirements governing the disclosures that must be made in the Initial Disclosure Statement. It is undisputed that the Processing Fee was a "finance charge" within the meaning of section 226.4(a) of Regulation Z, 12 C.F.R. §226.4(a). It is also undisputed that no mention whatsoever of the Processing Fee was made in the Initial Disclosure Statement. The Respondent argues that the Processing Fee was disclosed on at least two other occasions, and that these other disclosures suffice under the statute. The Board disagrees with this assertion.

It is clear from the Official Staff Commentary that the disclosures contained in the Initial Disclosure

Statement must be made in one integrated document. The Official Staff Commentary, 12 C.F.R. Part 226, Supp. I §226.5, ¶5(2), which addresses the proper form of disclosures, provides:

The creditor may make both the initial disclosures (§226.6) and the periodic statement disclosures (§226.7) on more than one page, and use both the front and reverse sides, so long as the pages constitute an integrated document. An integrated document would not include disclosure pages provided to the consumer at different times or disclosures interspersed on the same page with promotional material.

The requirement that all disclosures required in the Initial Disclosure Statement be set forth in one integrated document is made explicit in this commentary. Unless demonstrably irrational, Federal Reserve Staff Opinions construing the TILA or Regulation Z are dispositive. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 100 S. Ct. 790 (1980). In a case similar to the one before us now, the Court of Appeals for the Eighth Circuit ruled that the separate disclosure of an attorney's fee, which was deemed to be a finance charge, failed to comply with the disclosure requirements of TILA. *First Acadiana Bank v. FDIC*, 833 F.2d 548, 551 (5th Cir.1987). The accurate disclosure of the finance charge is critical to consumer's ability to comparison-shop for credit, since it is the finance charge, together with the disclosure of the annual percentage rate ("APR"), that reveals the actual cost of the credit to the consumer. An informed consumer was the goal of Congress in enacting the TILA, and its requirements are strictly construed in [{{6-30-99 p.A-3002}}](#) favor of the consumer. *Murphy v. Household Finance Corp.*, 560 F.2d 206, 210 (6th Cir. 1977).

There is no dispute that the Initial Disclosure Statement and the Credit Approval Letter sent by the Respondent were not combined into one integrated document. Therefore, the Board concludes that the ALJ correctly found that a violation of the TILA and Regulation Z occurred and that the Respondent's exceptions pertaining to this issue are groundless.

Reimbursement

Section 108(e) of the TILA, which governs enforcement of the TILA, provides that an adjustment must be required if a disclosure error has occurred as a result of a "clear and consistent pattern or practice of violations," "gross negligence" or a "willful violation" intended to mislead. Absent a willful violation,⁴ however, the enforcing agency is given authority to require such adjustment "as it determines to be equitable" if one of four stated exceptions applies. 15 U.S.C. §1607(e)(1). See also, FDIC Interpretive Letter, FIL-19-97, March 10, 1997.⁵ First, it must be determined whether the disclosure error constituted either a willful violation intended to mislead the consumer, gross negligence or a clear and consistent pattern or practice. The ALJ found a clear and consistent pattern or practice on these facts, and the Board agrees. However, it must then be determined whether the disclosure error fits into any of the four exceptions enumerated in TILA, 15 U.S.C. §§1607(e)(2)(A)-(D). If it does, then the FDIC has discretion as to whether to require an adjustment. If it does not, then an adjustment is mandatory under the statute.

Although the ALJ found that "[t]he FDIC does not have discretion in requiring the Bank to make reimbursements to the card holders here, since it is mandatory where it has been found that Respondent engaged in a clear and consistent pattern or practice of violations"; the ALJ further stated that "in the interest of being thorough, the undersigned will review the elements involved in discretionary reimbursements." R.D. 13-14. Although the Board does not concur with the ALJ's legal conclusion that a pattern or practice finding eliminates all possibility of a discretionary adjustment, the Board agrees with the ALJ's conclusion that the disclosure error does not fit into any of the enumerated exceptions. Thus, the Board agrees that reimbursement is necessary.

First, the Board affirms the ALJ's finding that the Respondent's disclosure violation constitutes a "clear and consistent pattern or practice of violations" under the TILA. The Eighth Circuit has ruled that a bank's failure to disclose a composite interest rate, involving almost 700 repetitions of the same violation over a two-year period, constituted a pattern or practice of violations. *First Nat'l Bank of Council Bluffs, Iowa v. OCC*, 956 F.2d 1456, 1462 (8th Cir. 1992). In amending the TILA to include the "pattern or practice" language, the Senate Committee Report on the 1980 Legislation stated "that [b]ecause most violations result from faulty procedures or misunderstanding of the act's provisions and are therefore repetitive in nature, it is the committee's expectation that the 'pattern or practice of violations' criterion will encompass the majority of understatements committed by creditors." S. Rep. No. 268, 96th Cong., 1st Sess. 26, *reprinted in* 1980 U.S. Code Cong. & Admin. News 262. Here, it is undisputed that the Processing Fee was charged by the Respondent in connection with approximately 25,640 ac-

⁴In the case of a willful violation which was intended to mislead the consumer, an agency is required to make an adjustment and does not have discretion. 15 U.S.C. §1607(e)(2). There is no evidence in the record in this case which shows a willful intent to deceive.

⁵Respondent incorrectly interprets the first sentence of 12 U.S.C. §1607(e)(1) in arguing in its Exceptions that the FDIC lacks authority to order reimbursement in this case under that section. The first sentence of section 1607(e)(1) states that the agency may require a creditor to make an adjustment of the customer's account "to assure that [the customer] will not be required to pay a Finance Charge in excess of the Finance Charge actually disclosed or the dollar equivalent of the annual percentage rate, whichever is lower. . . ." *Id.* In the Bank's view, no finance charge was inaccurately disclosed and the dollar equivalent of the APR disclosed is zero, that is, less than any undisclosed finance charge, so reimbursement is unwarranted.

The ALJ did not address this issue, but the Board has no difficulty overruling the exception. It is clear beyond peradventure that the finance charge was inaccurately disclosed. In addition, since the dollar equivalent of the APR cannot be calculated at the point actually reached in the transactions here, i.e., prior to any actual extensions of credit, the figure for comparison with the undisclosed finance charge is not zero, but, rather, is non-existent, so there is no comparison to be made under the statute. Any other interpretation of the operation of the statute disables the agency from acting to cure a blatant violation of Regulation Z. However, given the small credit lines available to the Bank's customers, the dollar equivalent of the annual percentage rate, in any case, would be small in comparison with the \$27–\$59 processing fee.

{{6-30-99 p.A-3003}}counts between the commencement of the program and the time of the 1996 Compliance Examination and, on every account, the finance charge disclosed by the Respondent in the Initial Disclosure Statement failed to include this item. Stipulations No. 13, 19. The ALJ was correct in finding that the Respondent's disclosure error constituted a clear and consistent pattern or practice of violations under the statute.⁶

There are four instances under the TILA where the FDIC has discretion to waive reimbursement. 15 U.S.C. §§1607(e)(2)(A)-(D). They occur when:

1. The error involves a fee or charge that would otherwise be excludable in computing the finance charge;
2. The error involved a disclosed amount which was 10 percent or less of the amount that should have been disclosed and either the APR or finance charge was disclosed correctly;
3. The error involved a total failure to disclose either the APR or finance charge; or
4. The error resulted from a unique circumstance involving clearly technical and nonsubstantive disclosure violations that do not adversely affect information provided to the consumer and that have not misled or deceived the consumer.

The Board agrees with the ALJ's conclusion that none of the exceptions are triggered by the facts presented. The overall policy underlying the exceptions is designed to give the enforcing agency a measure of discretion to reduce or eliminate the reimbursement remedy for certain non-willful violations. The ALJ found, and Enforcement Counsel argues, that none of the exceptions applies on these facts.

The first exception cannot be applicable here because the error was the Bank's failure to disclose a necessary component of the finance charge in the Initial Disclosure Statement. Likewise, the third exception listed cannot apply either since there was not a "total" failure to disclose either the finance charge or the APR.

The fourth exception, which is most frequently cited by institutions in requesting relief, contains four elements, all of which must be met before the exception will apply. The first element, "unique circumstances," is not defined in the legislative history of TILA, but the FDIC has interpreted the term to have the traditional meaning, including "unusual," "atypical," and "infrequent." FDIC Interp. Ltr. FIL-19-97, March 10, 1997. There is no evidence in the record that the Respondent's failure to disclose the Processing Fee arose from unique circumstances. Indeed, it appears that the error was anything but atypical and infrequent. The affidavit of Janice M. Odin, Vice-President of Operations of the Bank reveals that the Bank contracted with Equifax Card Services to provide all of its data processing services for the Initial Disclosure Statement at issue. Apparently, Equifax's computer system was not capable of including the Processing Fee as a finance charge on the Initial Disclosure Statement. This was not a unique and isolated error. The Respondent's error was a systemic problem, occurring some 25,000 times, and can hardly be said to be infrequent or unique. Whatever the nature of the problems with the Bank's data processing services, they do not excuse the Bank's failure to make required disclosures to its customers.

Additionally, the ALJ's conclusion that the inaccurate disclosure of the finance charge on the Initial Disclosure Statement cannot be construed as technical and nonsubstantive is correct. Where violations involving the finance charge are concerned, the requirement that the error be "clearly technical and nonsubstantive" generally cannot be met. FDIC Interp. Ltr.-FIL-19-97, March 10, 1997. Technical and

nonsubstantive violations do not include disclosure errors, such as those here, which could affect the outcome of a borrower's decision in credit shopping. See S. Rep. No. 368, 96th Cong. 1st Sess. 16–17 (1979). Since the finance charge was in fact understated, the violation was substantive in any event.

Similarly, when there is an understatement of the finance charge, it is not likely that there will be "no adverse effect on information provided to the consumer" and that the error would not have "misled or otherwise deceived the consumer." See FDIC

⁶The ALJ correctly states the reimbursement analysis at R.D. 10 and 14, but then he states that once a pattern or practice has been found the FDIC must require reimbursement unless such a remedy would adversely affect the Bank's safety and soundness. R.D. 13–14. This is an incorrect reading of the statute. Only when a willful violation is found is the possibility of a discretionary adjustment removed.

{{6-30-99 p.A-3004}}Interp. Ltr. FIL-19-97, March 10, 1997. There is no evidence in the record showing whether consumers were misled. However, given the language contained in the Initial Disclosure Statement indicating that the only finance charges assessed would be based on the applicable periodic rate or imposed in connection with cash advances, it is likely that at least some consumers were misled. See Attachment A, para. 6 of Enforcement Counsel's Motion for Summary Disposition. Thus, the Respondent has failed to meet any element contained in this exception which would allow the FDIC to waive reimbursement.

Turning finally to the second exception, the statutory language, as applied to the facts before the Board, does not present a clear roadmap as to its applicability. To paraphrase the statute further, it countenances a discretionary adjustment where the disclosure error involved the disclosure of a finance charge amount that was 10 percent or less of the amount that should have been disclosed and the APR was correctly disclosed. *The Law of Truth in Lending* (Rohner, ed.) ¶13.04[3] [c] at 13-23. Although there is no clear rationale for this exception to be found in the legislative history, it appears that this exception is closely related to the third exception set forth — total failure to disclose the APR or finance charge. The idea underlying both of these exceptions seems to be that such a total — or near total — failure to disclose a key element of the cost of the credit will be obvious to the consumer, and no prejudice is likely to result because the consumer will be unable to comparison shop and unlikely to consummate the transaction without obtaining clarification or correction.

Applying the 10 percent standard to this case, however, it is not obvious how this comparison is to be made in an open-ended credit transaction. Although Enforcement Counsel argues that the exception is inapplicable to open-ended credit disclosures, there is nothing in the statutory language or history to suggest that the Board can so conveniently write the exception out of the law. The problem, of course, is that, in these transaction as in all open-ended accounts where the eventual amounts of the finance charges will vary according to account balances and payments — the only dollar amount actually disclosed as a finance charge on the Initial Disclosure Statement was the \$2.00 that would be assessed for cash advances on the account. As the Board has found, this disclosure should have also included a disclosure of the Processing Fee — ranging from \$27 to \$59 — as another component of the finance charge. Clearly then, it could be argued that the "*amount* disclosed was less than 10% of the *amount* that should have been disclosed."

In spite of the arguable literal applicability of the statutory language, however, the Board does not believe that the present situation falls within the spirit and intent of the exception. Indeed, it appears that this exception was, like the others, aimed at granting the enforcement authority discretion in circumstances where the mistake was either insignificant as a practical matter or obviously an error,⁷ resulting in no consumer prejudice or deception in either situation. Here, the potential for consumer misunderstanding was not minimized by an obvious misstatement of the finance charge. This was an error that had a potential to mislead even the most informed credit shopper, and, as such, it is not within the range of situations which the Board finds were intended to be covered by the second exception.

Although the Board rejects the notion that the Bank may fall within exception (B), 15 U.S.C. §1607(d)(2) (B), as discussed above, it is also clear that, were the Board to consider an exercise of its discretion under the statute to waive reimbursement, the Board would nonetheless impose the reimbursement remedy ordered. Because the Board views this as a serious and substantive disclosure error, reimbursement would remain the appropriate remedy in this case.

The last consideration before ordering reimbursement under the TILA is whether reimbursement would have a significant adverse impact on the safety and soundness of the Bank. If so, the Board has discretion in fixing a remedy. The statute provides two options that the Board may use to avoid the

⁷Indeed it has been suggested that the exception was aimed at cases in which a decimal point was inadvertently misplaced, thus resulting in an understatement of the applicable amount or percentage. See

Truth in Lending Activities During 1980, 36 Business Lawyer 1133, 1155 (1981). See also FFIEC, Uniform Guidelines for Enforcement of Regulation Z, 63 F.R. 47495 (1998). Clearly that rationale would make sense in a case involving an understated APR or apparently complete, but misstated, finance charge amount. No cases have been found which supply further interpretive insight into the statutory language.

{{6-30-99 p.A-3005}}adverse impact. First, the Board may grant a partial adjustment in the amount to be reimbursed. 15 U.S.C. §1607(e)(3)(A)(i). Second, if requiring full reimbursement would cause the Bank to become undercapitalized pursuant to section 1831o of Title 12, the Board may grant a partial adjustment or permit a payout over an extended period. 15 U.S.C. §1607(e)(3)(A)(ii).

Congress' use of the terms "safety and soundness" to describe the effect of the impact suggests an intent that the agency make an individualized determination of reimbursement in each case based on all of the facts and circumstances. However, Congress' grant of authority to make an adjustment in the case of an institution that would become undercapitalized as a result of reimbursement demonstrates a specific intent that the agency should treat that outcome as having the requisite impact under the statute. Accordingly, the Board must consider whether or not to grant some form of modified reimbursement.

As of June 30, 1998, the Respondent was deemed to be "adequately capitalized" under section 38 of the FDI Act and would remain so even after taking into account the estimated reduction of \$567,819, which the Board understands to be approximately the amount which should be reimbursed, and after offsetting any balances which are in default. Accordingly, the Board agrees with the ALJ's finding that ordering restitution would not significantly adversely impact the safety and soundness of the Bank based on the evidence in the record dated as of June 30, 1998.

Nonetheless, because the ALJ found that the Bank's capital seems to be in flux, the most recent data on the Bank's condition dates from almost nine months ago, and because the exact amount of the offset is not known with certainty, the Board is reluctant to order immediate and full restitution without some further inquiry into the Bank's financial condition. In the Board's view, the most reasonable way to proceed is for the Regional Office, based on the most recent information concerning the Bank's financial condition, to establish, after consultation with the Bank, if necessary, a schedule of reimbursement should full and immediate reimbursement put the Bank in danger of becoming undercapitalized.

CONCLUSION

For the foregoing reasons, the Board affirms the ALJ's Decision to issue an order to cease and desist under section 8(b) of the FDI Act, 12 U.S.C. §1818b, requiring the Bank to cease and desist from violations of the TILA and to reimburse the affected credit card holders pursuant to section 108 of the TILA, 15 U.S.C. §1607.

ORDER

Pursuant to section 8(b) of the FDI Act, 12 U.S.C. §1818(b), it is hereby ORDERED that:

1. Stutsman County State Bank, Jamestown, North Dakota, shall cease and desist from violations of the Truth in Lending Act, 15 U.S.C. §§1601-1693, and Regulation Z of the Board of Governors of the Federal Reserve System, 12 C.F.R. Part 226;
2. Stutsman County State Bank, Jamestown, North Dakota, shall make restitution of the Processing Fee to the affected credit card account holders in the amounts determined after a search of its files to identify all affected consumers;
3. Pursuant to 12 U.S.C. §1818(b)(2), this ORDER shall become effective thirty days after the service of the ORDER upon the Respondent and shall remain effective and enforceable except to such extent as it is stayed, modified, terminated, or set aside by a reviewing court; and
4. Within sixty days after the effective date of this ORDER, the Bank shall, pursuant to section 108(e) of the TILA, 15 U.S.C. §1607(e), identify the monetary adjustments to consumer accounts required by the Bank's failure to disclose the Processing Fee as required by section 226.6(a)(4) of Regulation Z, 12 C.F.R. §226.6(a)(4), consistent with the following guidelines:

A. Search its files to identify all affected consumers. This search should include all outstanding consumer credit card accounts opened since June 13, 1994, and all terminated loans of this type originated since June 15, 1994.

B. The Bank shall draft a letter to identified consumers to inform them of monetary adjustments. The Bank shall submit that letter or text for the prior approval of the Regional Director, Kansas City Regional Office, of the FDIC's Division of {{6-30-99 p.A-3006}}Compliance and Consumer Affairs ("Regional Director").

C. The Bank shall furnish this information to the Regional Director together with its most financial

information. Based on this information and such other information as he determines is necessary, the Regional Director shall determine whether full and immediate reimbursement would result in the Bank becoming undercapitalized pursuant to 12 C.F.R. §1831o. If the Regional Director determines that undercapitalization would result, he shall establish, in consultation with the Bank, a schedule permitting full reimbursement but avoiding undercapitalization.

D. The Bank shall send the monetary reimbursement to the affected consumers in the form of a cash payment or deposit into an existing unrestricted consumer asset account, which amount shall be the amount of the Processing Fee charged and collected from the consumer in connection with the opening of the credit card account, together with the letter or other text submitted by the Bank and approved by the Regional Director, under paragraph 4B of this ORDER.

E. The Bank shall notify the Regional Director within ten days after the completion of the reimbursement program, and the Bank shall maintain a complete record of the reimbursement program for review during the FDIC's next compliance examination or visit.

F. Subparagraph "D" notwithstanding, the Bank may, in lieu of providing such monetary adjustment, apply all or part of the reimbursement to the amount past due for any affected customer's account that is delinquent, in default or charged off if permissible under state law.

By direction of the Board of Directors.

Dated at Washington, D.C., this 20th day of April, 1999.

In the Matter of

**STUTSMAN COUNTY STATE BANK
JAMESTOWN, NORTH DAKOTA
Insured State Nonmember Bank)
Docket No. FDIC-97-28b**

**JUDGE'S ORDER ON
CROSS-MOTIONS FOR
SUMMARY DISPOSITION AND
RECOMMENDED DECISION TO
CEASE AND DESIST
(Issued October 15, 1998)**

**I. CROSS-MOTIONS FOR
SUMMARY DISPOSITION**

On August 20, 1998, Enforcement Counsel and Respondent filed Cross-Motions for Summary Disposition. On September 9 and 10, 1998, Respondent and Enforcement Counsel respectively replied in opposition. The issue involved in this proceeding is whether the Bank failed to make adequate disclosure to credit card account holders regarding a one-time processing fee pursuant to consumer law and whether the extent and manner of restitution, if any, shall be ordered.

A. BACKGROUND

On April 25, 1997, the FDIC issued a Notice of Charges and of Hearing ("Notice") seeking a Cease and Desist Order against Stutsman County State Bank ("the Bank" or "Respondent") under section 8(b) of the Federal Deposit Insurance Act, 12 U.S.C. §1818b, and seeking reimbursements for the affected bank customers pursuant to section 108 of the Truth In Lending Act ("TILA"), 15 U.S.C. §1607.

The Bank is charged with violating TILA and Regulation Z of the Board of Governors of the Federal Reserve System, 12 C.F.R. 226, through extending credit cards to consumers with a one-time processing fee which was collected, if the account was approved, by debiting the applicant's checking account at his or her bank or by cashing the applicant's check. Stips. 7-8.¹ Each open-end credit² account opened under this plan was secured by and limited to the balance of a deposit account established by the consumer at the Bank. The parties therefore refer to the plan as the "Secured Credit Card Plan." During the applicable time, the processing fee varied from \$27 to \$59 and was charged in connection with approximately 25,640 active accounts for a total of approximately

¹FDIC's and Respondent's Stipulated Findings Of Fact dated March 6, 1998.

²*Open-end credit* is defined as consumer credit extended under a plan in which 1) the creditor reasonably contemplates repeated transactions; 2) the creditor may impose a finance charge on an outstanding

unpaid balance; and 3) the amount of credit extended to a consumer may be contingent upon the outstanding balance being repaid. 12 C.F.R. §226.2(a)(20).

{{6-30-99 p.A-3007}}\$1,470,938. Stip. 9. FDIC reduced the total reimbursement sought from the Bank from \$1,470,938 to \$567,819. The reduction is due to a regulatory policy by which creditors may offset the amount of any reimbursement owed a consumer against any balances of the consumer that are in default. Stip. 24.

In each instance, the consumer was applying for a line of credit in the amount of \$100 and was required to secure the account. Respondent's Credit Approval Letter shows that an Account holder was expected to prepay fees of approximately \$96, a \$37 annual fee in addition to a processing fee varying from \$27 to \$59. Exhibit 2 of Respondent's Motion for Summary Disposition. The minimal credit line, fees assessed, and the fact that the Bank required the accounts to be secured in advance, all evidence the targeting of a high credit-risk consumer group. These were not sophisticated consumers.

The FDIC 1996 Compliance Report cited the Bank's failure to properly identify the processing fee as finance charge constituted a violation of TILA and Regulation Z. Stip. 16. The report indicated that amounts collected by reason of the violation were reimbursable and estimated total reimbursements of approximately \$1,470,938.

Enforcement Counsel assert the processing fee was a finance charge within the meaning of the statute and should have been disclosed to the consumer. Respondent claims that adequate disclosure under the law was made and even if it was not, the law does not require that reimbursements be made to the bank customers. Both parties agree that there are no factual disputes, and that only questions of law are to be determined without the need of an oral hearing on the record.

B. STANDARD FOR SUMMARY DISPOSITION

Pursuant to the Uniform Rules of Practice and Procedure which govern this proceeding, the administrative law judge may recommend to the Board of Directors issuance of a final order granting a motion for summary disposition if the undisputed facts and evidence submitted demonstrate that there is no genuine issue as to any material fact; and the moving party is entitled to a decision in its favor as a matter of law. 12 C.F.R. §308.29(a). Since the administrative law judge is not vested with the authority to grant a dispositive motion, the undersigned is limited to either denying a motion for summary disposition or *recommending* granting the motion. 12 C.F.R. §308.5(b)(7).

The undersigned finds that there is no genuine issue as to any material facts, and that the remaining issues are those of law.

C. OVERVIEW OF TRUTH IN LENDING ACT AND REGULATION Z

The purpose of TILA and Regulation Z is to require the informed use of credit and awareness of the cost of credit through meaningful disclosure in order to protect the consumer against inaccurate and unfair credit practices. 15 U.S.C. §1601(a); 12 C.F.R. 226.1(b). Congress delegated authority to the Federal Reserve Board to expand the Act's legal framework by issuing regulations commonly known as Regulation Z, which provides a more complete outline of disclosure requirements. 12 C.F.R. §226.1; *Pearson v. Easy Living, Inc.*, 534 F. Supp. 884, 890 (1981).

TILA is liberally construed in favor of the consumer. See *Davis v. Werne*, 673 F. 2d 866, 869 (5th Cir. 1982). The Act is "designed to aid unsophisticated consumers, so that consumers are not easily misled as to the total costs of financing." *In re Wright*, 133 Bankr. 704, 707 (Bankr. E.D. Pa. 1991). The courts have held that complying with the spirit of TILA is not sufficient, but that strict compliance with required disclosures is necessary.

It is not sufficient to attempt to comply with the spirit of TILA in order to avoid liability. Rather, strict compliance with the required disclosures and terminology is required. Many violations of TILA involve technical violations without egregious conduct of any kind on the part of the creditor. However, Congress did not intend that creditors should escape liability for merely technical violations.

Smith v. No. 2 Galesburg Crown Finance Corp., 615 F. 2d 407, 416 (7th Cir. 1980). See Also *Thomka v. A.Z. Chevrolet, Inc.*, 619 F. 2d 246, 248 (3d Cir. 1980); *In re Steinbrecher*, 110 Bankr. 155, 161 (Bankr. E.D. Pa. 1990); *Pearson v. Easy Living, Inc.*, 534 F. Supp. 884 (1981).

{{6-30-99 p.A-3008}}

D. WHETHER A VIOLATION OCCURRED

1. Initial Disclosure Of The Processing Fee

A finance charge includes "any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit." 12 C.F.R. §226.4(a). Congress requires creditors to disclose all finance charges to prohibit creditors from circumventing TILA's objectives and burying the cost of credit. See *Mourning v. Family Publications Serv.*, 411 U.S. 356 (1973). As a condition to obtaining a Secured Credit Card Account from Respondent, the account holder was required to pay the processing fee, which was imposed directly by the creditor. Stip. #7–9. Enforcement Counsel assert, and Respondent does not refute, that the one-time processing fee was a finance charge.

A creditor is required to disclose to the consumer the circumstances under which a finance charge will be imposed and an explanation of how it will be determined before the first transaction is made under the open-end credit plan. 12 C.F.R. §226.5(b)(1) and 226.6(a). Although the Notice charges Respondent with also violating 12 C.F.R. §226.6. Accordingly, the undersigned limits this ruling to section 226.6 as well. It is undisputed that the processing fee was not included in the amount of the finance charge or referred to in any manner on the Initial Disclosure Statement the Bank provided to the approved applicants. Stip. 13. Respondent's Motion for Sum. Disp. at 4.

2. Supplemental Disclosure

Respondent maintains that although the processing fee was not disclosed in the Initial Disclosure Statement, the charge was revealed to all credit card applicants prior to their deciding whether or not to pay the fee. Respondent asserts that the processing fee was disclosed in the Bank's telephone script, a written text read over the phone to inquiring credit card applicants by a representative, as well as in the Bank's Credit Approval Letter. Respondent's Motion for Sum. Disp. at 4. The telephone script discloses the processing fee at three different times³ during the conversation. Exhibit 1 of Respondent's Motion for Sum. Disp. The Bank's Approval Letter advises applicants that they have authorized Respondent to debit the individual's checking account the amount of the specific processing fee. Exhibit 2 of Respondent's Motion for Sum. Disp.

Although Respondent claims to have complied with the requirements of 226.6 by supplementing the Initial Disclosure Statement with the Approval Letter and telephone script, the commentary to section 226.5, general disclosure, requires that the information revealed to the consumer be in one integrated document. The Official Staff Commentary, section 226.5-5(a)(2), provides in pertinent part the following:

The creditor may make both the initial disclosures (§226.6) and the periodic statement disclosures (§226.7) on more than one page, and use both the front and reverse sides, so long as the pages constitute an integrated document. *An integrated document would not include disclosure pages provided to the consumer at different times or disclosures interspersed on the same page with promotional material.* (Emphasis added.)

Neither party disputes that the Initial Disclosure Statement and the Approval Letter were not combined in one integrated document but were instead sent at different times. Accordingly, Respondent's revealing the processing fee in a supplementary document does not constitute compliance with the requirements.

3. The Bank's Violation

Respondent's actions comply with the spirit and general principles of TILA but violates the letter of the law. Section 226.6 clearly and unambiguously requires that finance charges be disclosed in the Initial Disclosure Statement as a single, integrated document, and it is undisputed that Respondent omitted the processing fee from this disclosure.

The disclosure statement provided to FDIC Examiner Owen L. Michelson during the 1996 Compliance Exam by Bank as representative copies of the Initial Disclosure Statement omitted the processing fee. *Declaration of Owen L. Michelson*, Exhibit to Enforcement Counsel's Motion For Summary Disposition. This statement represents to the card holders that the disclosures required by federal law are contained in the document. Since the finance charge was inaccurate

³Pages 5, 8, and 9.

{{6-3-99 p.A-3009}}accurate due to the omission of the processing fee, such statement was incorrect.

The Bank did disclose the processing fee at the application stage and in the Approval Letter and the undersigned does not believe Respondent attempted to deceive consumers by its omission in the Initial Disclosure Statement. The record does not reflect whether any consumers were misled by the omission.

Regardless, the "broad language of [15 U.S.C.] §1601 which sets out the purpose of the Act cannot be used to overrule the more specific language . . . " *Starvides v. Mellon Nat'l Bank and Trust Company*, 353 F. Supp. 1072, 1079 (W.D. Pa. 1973), aff'd 487 F. 2d 953 (3d Cir. 1973).

Fees separately disclosed to the consumer do not substitute for the need to follow TILA's specific requirements. In *First Acadiana Bank v. Federal Deposit Insurance Corp.*, 833 F. 2d 548 (1988), the bank required each car-loan borrower to have a bank-approved attorney prepare a chattel mortgage on the car. The bank did not include these attorneys' fees in the finance charge listed on the disclosure form to the consumer and also failed to include the fee in the computation for the annual percentage rate on the same form. Even though the fee was separately disclosed to the consumer, the Court held that bank violated TILA. Specifically, the Court provided the following:

We also do not believe, as the Bank contends, that separate disclosure of the attorneys' fee eliminated the need to comply with the Act's particular requirements. Congress unambiguously set forth the procedures necessary to ensure informed borrowing. Accurate disclosure of the finance charge and APR is essential to the "informed use of credit" Congress sought to achieve. See 15 U.S.C. §1601 (1982). Exclusion of these fees from the finance charge had the effect of understating the annual percentage rate by as much as ten percentage points.

Id. at 551.

For the reasons stated above, the undersigned finds that Bank violated section 226.6(a) of Regulation Z by its failure to include the processing fee as part of the finance charge in the Initial Disclosure Statement. The next issue is whether the account holders should be reimbursed by Respondent.

E. REIMBURSEMENT

1. Statutory Overview

TILA establishes discrete criteria governing whether the FDIC *shall, may, or shall not* order the creditor to reimburse the consumer. Generally, the FDIC is authorized to require a creditor to make an adjustment to the account of the person to whom credit was extended in order to assure that the person does not pay a finance charge in excess of the finance charge disclosed. 15 U.S.C. §1607(e)(1). The FDIC must require an adjustment when it determines that such disclosure error resulted from either a clear and consistent pattern or practice of violations, gross negligence, or a willful violation which was intended to mislead the person to whom the credit was extended. 15 U.S.C. §1607(e)(2).

Under 15 U.S.C. §1607(e)(2)(A)-(D), if the agency determines that the disclosure error was not an intentionally misleading, willful violation, the agency is not required to order adjustments if: (A) the error involved disclosure of a fee or charge that was excludable in computing the finance charge, (B) the error involved a disclosed amount which was 10% or less of the amount that should have been disclosed and the annual percentage rate was disclosed correctly, (C) the error involved a total failure to disclose the finance charge, in which event the agency may require such adjustment as it determines to be equitable; or (D) the error resulted from any other unique circumstance involving clearly technical and nonsubstantive disclosure violations that do not adversely affect information provided to the consumer and that have not misled or otherwise deceived the consumer. The FDIC is not required to order an adjustment if the violation was not willful and reimbursement would adversely affect the safety and soundness of the creditor. 15 U.S.C. §1607(e)(3).

2. Mandatory Reimbursement

The threshold issue is whether the disclosure error here evidences a clear and consistent pattern or practice. 15 U.S.C. §1607 (e)(1). If so, the FDIC must require the Bank to make the necessary reimbursements.

The statute does not define the phrase "pattern or practice" and case law provides little guidance. A careful reading of the statute makes it clear that a bank's isolated disclosure error would not constitute the repetitive

[{{6-30-99 p.A-3010}}](#)nature implicit in "pattern or practice." The statute is silent as to whether the phrase contemplates a specified amount of violations, length of time the violations occurred, or number of individuals affected by the disclosure violations and the weight to be given these factors if appropriate.

In *First National Bank of Council Bluffs, Iowa v. Office of the Comptroller of the Currency*, 956 F. 2d 1456 (8th Cir. 1992), the court considered the "pattern or practice of violations" language of TILA. In that case, the court held that the Bank's nondisclosure of the composite interest rate, which involved almost 700 violations against numerous individuals over two years, constituted a pattern or practice of violations. The decision clearly states that:

The "pattern or practice" provision was added to the Act by the Truth-in-Lending Simplification and

Reform Act of 1980, Pub. L. No. 96-221, 94 Stat. 168, 171. As the Comptroller noted, the Senate Committee Report on the 1980 Legislation stated "that '[b]ecause most violations result from faulty procedures or misunderstanding of the act's provisions and are therefore repetitive in nature, it is the committee's expectation that the 'pattern or practice of violations' criterion will encompass the majority of understatements committed by creditors.' S. Rep. No. 368, 96th Cong., 1st Sess 26, reprinted in 1980 U.S. Code Cong. & Admin. News 262." The Comptroller properly concluded that the Bank's nondisclosure of the composite interest rate, which involved almost 700 violations over two years, was "the type of violations to which [the Act's] adjustment provisions are directed."

Id. at 1461-1462.

In the instant case, Respondent made over 25,000 disclosure errors over the course of nearly two years. The Bank began offering and extending credit to consumers under the open-end credit plan after the August 8, 1994 FDIC Compliance Examination. Stip. 6. In each and every Secured Credit Card Account opened from the time Respondent commenced the plan up to the 1996 Compliance Examination, the processing fee was not identified or described as a finance charge or included in the amount of the finance charge on the Initial Disclosure Statement provided to approved applicants. Stips 9, 13. There were an estimated 25,640 active Credit Card Account holders who had been charged the processing fee for a total estimated fee of \$1,470,938. Stip. 19. The disclosure errors did not occur sporadically during the applicable time period but occurred in each and every instance Initial Disclosure Statements were sent to approved applicants. The number of the violations and the individuals affected in the present case are greatly in excess of those in *First National Bank of Council Bluffs*, cited above, where the court found that a pattern or practice existed.

The sheer volume of the violations, length of time they occurred and the number of consumers affected here provide clear evidence of the existence of a pattern or a practice by any reasonable standard. This is not a borderline case involving few violations where it must be considered whether the number of violations is sufficient to constitute a pattern or practice.

The undersigned finds that Respondent engaged in a pattern or practice of violations as contemplated by TILA. The facts in this case do not support a finding that Respondent intentionally omitted the processing fee from the finance charge in the Initial Disclosure Statement. However, no such finding is necessary in determining whether a pattern or practice of violations existed.⁴ The FDIC does not have discretion in requiring the Bank to make reimbursements to the card holders here, since it is mandatory where it has been found that Respondent engaged in a "clear and consistent pattern or practice of violations."⁵ However, in the interest of being thorough, the undersigned will review the elements involved in discretionary reimbursements.

3. Discretionary Reimbursement

}If the disclosure error was not an intentionally misleading, willful violation evidencing a pattern or practice, and does not meet the mandatory reimbursement criteria, the agency has discretion in requiring resti-

⁴"[T]he Act mandates reimbursement where there has been either a "pattern or practice" or a willful violation, it is implied that the "pattern or practice" need not be intentional or in bad faith." *First Acadiana Bank v. Federal Deposit Insur. Corp.*, 833 F. 2d 548, 551 (5th Cir. 1987).

⁵Cases meeting the mandatory reimbursement criteria can still result in no adjustment being ordered if requiring restitution would adversely impact the safety or soundness of the institution. 15 U.S.C. §1607(e) (3). This section of TILA will be reviewed later.

{{6-30-99 p.A-3011}}tution. The agency need not require an adjustment if any of the four following factors exist: a) the error involved disclosure of a fee or charge that was excludable in computing the finance charge, b) the error involved a disclosed amount which was 10% or less of the amount that should have been disclosed and the annual percentage rate was disclosed correctly, c) the error involved a total failure to disclose the finance charge, in which event the agency may require such adjustment as it determines to be equitable; or d) the error resulted from any other unique circumstance involving clearly technical and nonsubstantive disclosure violations that do not adversely affect information provided to the consumer and that have not misled or otherwise deceived the consumer. 15 U.S.C. §§1607(e)(2)(A)-(D).

a. Excludable Fees

In the instant case, the processing fee cannot be construed as an excludable fee. 12 C.F.R. §226.4(c)1-7 of Regulation Z describes what charges may be excluded from the finance charge. Of the seven exceptions, only two are vaguely applicable. Section 226.4(c)(1) provides "Application fees charged to *all applicants, whether or not credit is actually extended.*" Emphasis added. The processing fee in the instant case was not an application fee as contemplated by the statute because it was refunded

if the application was not approved and therefore was not charged to "all applicants." Section 226.4(c)(4) states "Fees charged for participation in a credit plan, whether assessed on an annual or other periodic basis" are excluded from the finance charge. 12 C.F.R. §226.4(c)4. However, the processing fee involved in the present case was a *one-time* charge and accordingly, was clearly not assessed on a periodic basis. The processing fee cannot be excluded from the finance charge under any of these exceptions. Accordingly, the error here did not involve disclosure of a fee that was excludable in computing the finance charge under 15 U.S.C. §§1607(e)(2)(A).

b. 10% or Less Error Margin

Respondent completely failed to include the processing fee in the finance charge on the Initial Disclosure Statement. This was not an instance in which the processing fee was slightly misstated or inaccurate but the error involved the entirety of what should have been disclosed. The Bank could not avoid making adjustments to the consumers under 15 U.S.C. §§1607(e)(2)(B).

c. Total Failure to Disclose Finance Charge

}Respondent's Initial Disclosure Statement contained an inaccurate finance charge due to the omission of the processing fee, a component of the finance charge. However, the error did not involve the total failure to disclose the finance charge under 15 U.S.C. §§1607(e)(2)(C). This exception is inapplicable to Respondent.

d. Unique Circumstances

The agency may determine that a bank need not make restitution if the unintentional error resulted from any unique circumstances involving technical and nonsubstantive disclosure violations that do not mislead the consumer. In the instant case, Respondent argues that the omission of the processing fee in the Initial Disclosure Statement was a technical error. Respondent asserts that the contractor, Equifax Card Services, employed by Bank to generate and mail the Initial and Periodic Disclosure Statements, did not have the software capabilities to include the processing fee on the statements. Respondent's Motion for Sum. Disp. at 6.

The inaccurate disclosure of the finance charge on the Initial Disclosure Statement cannot be construed as nonsubstantive. "Accurate disclosure of the finance charge and APR is essential to the 'informed use of credit' Congress sought to achieve." *First Acadiana Bank* at 551. Also, a careful review by Bank officials of any one of the approximately 25,000 statements sent out to the Approved Cardholder at any time during the nearly two year period would have exposed the error.

Respondent asserts that the Bank promptly discontinued assessing the processing fee when the omission came to light. Respondent's Motion For Summary Disposition at 22-23. However, this action was not taken until demanded by the FDIC examiners during the 1996 Compliance Examination.

Whether any consumers were misled or deceived by the error is not readily apparent. Respondent's Initial Disclosure Statement reveals to consumers: "The only FINANCE CHARGES assessed on your account other [{{6-30-99 p.A-3012}}](#) than those assessed in a periodic rate, will be FINANCE CHARGES in connection with Cash Advances if part of your Plan." ¶6 of Attachment A to Enforcement Counsel's Motion for Summary Disposition. It is possible that despite previous disclosures to the consumer regarding the processing fee, individuals were still misled from the Initial Disclosure Statement's claim that the only finance charges assessed would relate to cash advances. For this exception to apply, the error must be nonsubstantive and the consumer must not have been deceived by the failure to disclose. The undersigned cannot make such a finding here. Accordingly, the Bank cannot avoid making restitution under this section, 15 U.S.C. §§1607(e)(2)(D).

For the reasons stated above, the undersigned finds that the agency could not reasonably refuse to require Respondent to make restitution under the above-referenced discretionary reimbursement criteria.

4. If Significant Adverse Impact, FDIC May Not Require Reimbursement

Under TILA, the agency may not require an adjustment for an unintentional disclosure error if doing so would significantly adversely impact the safety and soundness of the bank, even if mandatory reimbursement criteria are met. If the institution would be adversely impacted by making restitution, section 1607(3)(A)(i) and (ii) gives the agency discretion in requiring partial adjustment or full adjustment over an extended period of time to avoid causing the creditor to become undercapitalized pursuant to section 1831o of Title 12. 15 U.S.C. §1607(e) (3)(A)(i) & (ii).

As of March 31, 1997, the Bank's capital category, as calculated by the FDIC for the purpose of section 38 of the Act, 12 U.S.C. §1831o ("Section 38 Capital Category") was "significantly undercapitalized" and nine months later, "adequately capitalized" on December 31, 1997. Stip. 22, 26. As of December 31, 1997, the Bank's total assets equaled \$127,195,000, and its total equity capital equaled \$84,494,000. One percent of the net worth of the Bank on December 31, 1997, was \$84,940. Stip. 23. As of June 30, 1998, the Bank's total assets equaled \$122,453,000, and its total equity capital equaled \$8,576,000 and

Bank was deemed "adequately capitalized" under section 38 capital category. Enforcement Counsel is seeking to have Respondent make total reimbursements in the amount of \$567,819.

Using data as of December 31, 1997, and assuming an immediate reduction in capital of \$567,819, the Bank's Section 38 Capital Category after reimbursement would remain "adequately capitalized." Stip. 27. As of June 30, 1998, the Bank's section 38 capital category was "adequately capitalized" even taking into account a reduction of the adjustment sought. *Declaration Of Gerald Carman*, Exhibit to Enforcement Counsel's Motion. The Bank is capable of making the restitution sought.

The intent of section 1607(e)(3) is to prevent an institution from facing significant financial hardship or becoming undercapitalized under 12 U.S.C. §1831o as a result of making restitution. In the case at hand, FDIC determined Respondent to be significantly undercapitalized in March 1997, but adequately capitalized in December 1997 and June 1998. Respondent's capital status seems to be in flux. The undersigned wants to assure requiring the adjustment will not significantly and adversely impact Respondent and accordingly, recommends that Respondent have an extended period of time to make restitution as determined by the FDIC, if so ordered.

The undersigned recommends granting Enforcement Counsel's Motion for Summary Disposition and denies Respondent's Motion for Summary Disposition for the reasons stated above. The Recommended Decision is found below.⁶

II. RECOMMENDED DECISION

As stated above, on April 25, 1997, the FDIC issued a Notice of Charges against Respondent seeking a Cease and Desist Order under section 8(b) of the Federal Deposit Insurance Act ("FDI Act"), 12 U.S.C. §1818b and reimbursement for the affected credit card holders pursuant to section 108 of TILA discussed above, 15 U.S.C. §1607. The FDIC may issue a Cease and Desist Order if any depository institution is, has, or is about to engage in an unsafe or unsound banking practice or, is, has, or is about to violate a law, rule, or regulation. 12 U.S.C. §1818(b).

⁶Pursuant to 12 C.F.R. §308.29(d), if the undersigned determines that summary disposition is warranted, he shall submit a recommended decision to that effect to the Board of Directors.

{{6-30-99 p.A-3013}}

A. FINDINGS OF FACT⁷

1. Stutsman County State Bank ("the Bank"), a corporation existing and doing business under the laws of the State of North Dakota, is, and has been at all times pertinent to this proceeding, an insured State nonmember bank. The Bank is subject to the Federal Deposit Insurance Act, ("the Act"), 12 U.S.C. 1811-1831u, as well as to the Rules and Regulations of the FDIC ("Rules") 12 C.F.R. Part 308, the Truth in Lending Act ("TILA"), 15 U.S.C. §§1601-1692o, Regulation Z of the Board of Governors of the Federal Reserve System ("Regulation Z"), 12 C.F.R. Part 226, and the laws and regulations of the State of North Dakota. The Federal Deposit Insurance Corporation ("FDIC") has jurisdiction over the Bank and the subject matter of this proceeding pursuant to section 3(q) of the Act, 12 U.S.C. §1813(q), and section 108(a)(1)(C) of TILA, 15 U.S.C. §1607(a)(1)(C).

2. The Bank is, and at all times pertinent to this proceeding has been a creditor within the meaning of section 103 (f) of TILA, 15 U.S.C. §1602(f) and section 226.2(a)(17) of Regulation Z, 12 C.F.R. §226.2(a)(17).

3. The Bank was examined for compliance with TILA, Regulation Z and various consumer laws and regulations on June 13, 1996 ("1996 Compliance Examination.")

4. Prior to the 1996 Compliance Examination, the Bank was last examined for compliance with TILA and Regulation Z on August 8, 1994 ("1994 Compliance Examination.")

5. The last three FDIC safety and soundness examinations of the Bank were commenced March 17, 1997, June 17, 1996, and August 8, 1994, and were conducted as of December 31, 1996, March 31, 1996 and March 31, 1994, respectively.

6. Subsequent to the 1994 Compliance Examination, the Bank commenced offering and extending credit to consumers pursuant to an open-end credit plan as defined in section 103(i) of TILA, 15 U.S.C. §1602(i), and section 226.2(a)(20) of Regulation Z, 15 C.F.R. §226.2(a)(20). Each open-end credit account opened under this plan was secured by a deposit account established by the cardholder at the Bank.

7. In connection with applications for Secured Credit Card Accounts, the Bank charged a fee which at various times it referred to as either a one-time processing fee or a one-time application processing fee ("Processing Fee"). The Processing Fee was refunded to the applicant if his/her application for the

Secured Credit Card Account was not approved.

8. If an application for the Secured Credit Card Account was approved, the Processing Fee was collected by the Bank by either debiting the applicant's checking account at his/her bank or by cashing the applicant's check.

9. The Processing Fee was assessed and collected as stated in Findings of Fact 7 and 8 for each and every Secured Credit Card Account opened from the time the Bank commenced offering Secured Credit Card Accounts through the completion of the 1996 Compliance Examination. The Bank ceased charging the Processing Fee during or shortly after the completion of the 1996 Compliance Examination. During this time period the Processing Fee varied from \$27.00 to \$59.00 and was charged in connection with approximately 25,640 active accounts for a total of approximately \$1,470,938.

10. The Bank provided three types of disclosures in connection with its Secured Credit Card Accounts. The first type of disclosure was intended to comply with section 226.5a of Regulation Z, 12 C.F.R. §226.5a, and will be referred to as the Application Disclosure Statement. The second type of disclosure was intended to comply with section 226.6 of Regulation Z, 12 C.F.R. §226.6, and will be referred to as the Initial Disclosure Statement. The third type of disclosure was intended to comply with section 226.7 of Regulation Z, 12 C.F.R. §226.7, and will be referred to as the Periodic Disclosure Statement.

11. In all instances, the Application Disclosure Statement disclosed that an applicant for a Secured Credit Card Account would be charged the Processing Fee and disclosed the applicable amount to be charged. An early version of the Application Disclosure Statement also indicated that the Processing Fee was a finance charge.

12. The Initial Disclosure Statement was provided to applicants who were approved for the Secured Credit Card Account and

⁷The below Findings of Fact were stipulated to by the parties on March 6, 1998, unless otherwise stated.

[{{6-30-99 p.A-3014}}](#) was mailed to consumers with their new credit cards.

13. The Processing Fee was not identified or described as a Finance Charge or included in the amount of the Finance Charge on the Initial Disclosure Statement the Bank provided to applicants whose application for the Secured Credit Card Account was approved ("Secured Credit Card Holder").

14. The Initial Disclosure Statement did not discuss or reference the Processing Fee in any manner.

15. Applicants who were approved for the Secured Credit Card Account and who paid the Processing Fee by authorizing a debit to their deposit account at a financial institution or who had paid by check could obtain a refund of the Processing Fee if they requested that the Bank cancel their Secured Credit Card Account prior to the consumer's use of the Secured Credit Card Account. As an example, in March, 1996, 1,569 individuals requested a refund of their Processing Fees and a cancellation of their participation in their Secured Credit Card Accounts. Of this number, 1,171 individuals requested cancellation before they had been charged Processing Fees and 306 individuals (some of whom had received their cards and some of whom had not) requested cancellation after they had paid Processing Fees. The Bank issued refunds to all of these 1,477 individuals. The remaining 92 individuals had both received and used their credit cards, and the Bank did not issue any refunds of Processing Fees to these individuals.

16. The FDIC cited the Bank's failure to describe the Processing Fee as a finance charge a violation of TILA and Regulation Z in the FDIC's 1996 Compliance Report. The 1996 Compliance Report indicated that the Processing Fee was reimbursable and estimated total reimbursements for active accounts of approximately \$1,470,938.

17. By letter (the "Bank Letter") dated July 26, 1996, addressed to John P. Misiewicz, Regional Manager (now Regional Director) of the FDIC's Kansas City Regional Office of the Division of Compliance and Community Affairs the Bank objected to and disagreed with the FDIC's charges and assertions that the Bank's credit card program was in violation of the Truth in Lending Act and Regulation Z, and the Bank also requested relief from reimbursing customers affected by the alleged violations cited in the 1996 Report of Compliance Examination.

18. The FDIC did not modify or change its assertions and charges that the Bank had violated Regulation Z, and the Bank's request for relief was denied by the FDIC's Director of Compliance and Community Affairs, Carmen J. Sullivan, by letter dated February 13, 1997.

19. As of February 13, 1997, the date of the FDIC's denial of the Bank's request, there were an estimated 25,640 active Credit Card Account holders who had been charged the Processing Fee and the total of the Processing Fees charged these customers was an estimated \$1,470,938.

20. As of March 31, 1997, the Bank's total assets and "Tier 1 Capital" as defined in Part 325 of the Rules, 12 C.F.R. Part 325, without accounting for any potential reimbursement pursuant to the Truth in Lending Act, equaled \$142,926,000 and \$6,041,000, respectively.

21. As of March 31, 1997, the Bank's capital ratios, as calculated in accordance with Part 325 of the FDIC Rules, 12 C.F.R. Part 325, were: Total risk-based capital ratio 6.60%

Tier 1 risk-based capital ratio 5.35%

Leverage ratio 4.22%

22. As of March 31, 1997, the Bank's capital category, as calculated by the FDIC, for the purpose of section 38 of the Act, 12 U.S.C. §1831o ("Section 38 Capital Category") was significantly undercapitalized."

23. As of October 31, 1997, the estimated amount of potential reimbursements required by the FDIC due to the Bank charging the Processing Fee had been reduced to approximately \$567,819 from the original estimate of approximately \$1,470,938 as of the Compliance Examination. The reduction is the result of the regulatory policy of permitting creditors to offset the amount of any reimbursement owed a consumer against any balances of the consumer that are in default.

24. As of December 31, 1997, the Bank's total assets equaled \$127,195,000, and its total equity capital equaled \$8,494,000. One percent (1%) of the net worth of the Bank on December 31, 1997, was \$84,940.

25. As of December 31, 1997, the Bank's capital ratios, as calculated in accordance with Part 325 of the FDIC Rules, 12 C.F.R. Part 325, were:

[\[6-30-99 p.A-3015\]](#)

Total risk-based capital ratio 9.91%

Tier 1 risk-based capital ratio 8.60%

Leverage ratio 6.77%

26. As of December 31, 1997, the Bank's Section 38 Capital Category was "adequately capitalized."

27. Using data as of December 31, 1997, and assuming an immediate reduction in capital of \$567,819, the Bank's capital ratios, as calculated in accordance with Part 325 of the FDIC's Rules, 12 C.F.R. Part 325, would be:

Total risk-based capital ratio 9.34%

Tier 1 risk-based capital ratio 8.02%

Leverage ratio 6.31%

and the Bank's Section 38 Capital Category after reimbursement would remain "adequately capitalized."

28⁸. As of June 30, 1998, the Bank's total assets equaled \$122,453,000, and its total equity capital equaled \$8,576,000 and Bank was deemed "adequately capitalized" under section 38 capital category. In addition, as of June 30, 1998, the Bank's capital ratios as calculated in accordance with Part 325 of the FDIC Rules, 12 C.F.R. Part 325 were:

Total risk-based capital ratio 10.58%

Tier 1 risk-based capital ratio 9.29%

Leverage ratio 7.18%

The above ratios, include a negative adjustment to capital for a \$1.4 million arbitration award against the Bank for \$567,819 in estimated reimbursements under the Truth in Lending Act.

B. DISCUSSION

Pursuant to section 8(b) of the Federal Deposit Insurance Act, the FDIC may issue a Cease and Desist Order if Respondent engaged in unsafe or unsound banking practices or violated a law, rule, or regulation. 12 U.S.C. §1818(b). As discussed previously in this order and will not be repeated here, the undersigned finds that Respondent's omission of the processing fee in the finance charge on the Initial Disclosure Statement constitutes an inaccurate disclosure and a violation of the Truth in Lending Act and section 226.6 of Regulation Z. 15 U.S.C. §1607(e), 12 C.F.R. 226.6 Accordingly, Respondent has violated a law, rule, or regulation within the meaning of the statute.

That Respondent has discontinued assessing the processing fee does not negate the need for a Cease and Desist Order. *See Bank of Dixie v. Federal Deposit Insurance Corporation*, 766 F. 2d 175 (5th Cir. 1985). Even if the offensive practice has been abandoned, the FDIC has the discretion to enter a Cease and Desist Order. Accordingly, the undersigned recommends the FDIC impose a Cease and Desist Order on Respondent under section 8(b) of the Federal Deposit Insurance Act, 12 U.S.C. §1818(b) and, that Respondent make adjustments to the consumers in the amount of \$567,819 under section 108(e) of the Truth in Lending Act, 15 U.S.C. §1607(e), as discussed above.

C. CONCLUSIONS OF LAW

1. The Federal Deposit Insurance Corporation ("FDIC") has jurisdiction over the Bank and the subject matter of this proceeding pursuant to section 3(q) of the FDI Act, 12 U.S.C. §1813(q), and section 108(a)(1)(c) of TILA, 15 U.S.C. §1607(a)(1)(C).

2. The Bank is, and at all times pertinent to this proceeding has been, a creditor within the meaning of section 103(f) of TILA, 15 U.S.C. §1602(f), and section 226.2(a)(17) of Regulation Z, 12 C.F.R. §226.2(a)(17). At all relevant times, the Bank was an "insured depository institution," as defined in 12 U.S.C. §1813(c)(2) and within the meaning of 12 U.S.C. §1818(b).

3. The Processing Fee was, at all times pertinent to this proceeding, a finance charge within the meaning of section 226.4(a) of Regulation Z, 12 C.F.R. §226.4(a).

4. Section 226.6(a)(4) of Regulation Z, 12 C.F.R. §226.6(a)(4), requires the Processing Fee be disclosed on the Initial Disclosure Statement provided pursuant to section 226.6 of Regulation Z, 12 C.F.R. §226.6.

5. The Bank violated section 226.6(a)(4) of Regulation Z, 12 C.F.R. §226.6(a)(4), because it omitted the processing Fee from the initial disclosure statement it provided consumers who received a Secured Credit Card Account.

6. As a result of the Bank's failure to disclose the Processing Fee on the Initial Disclosure Statement, the finance charge was inaccurately disclosed within the meaning of section 108(e)(1) of TILA, 15 U.S.C. §1607(e)(1).

⁸This fact did not appear in the joint stipulations of fact but in *Declaration of Gerald Carman* dated August 19, 1998, at page 5, attached as an exhibit to Enforcement Counsel's Motion for Summary Disposition.

[{{6-30-99 p.A-3016}}](#)

7. The Bank's omission of the Processing Fee from the finance charge on the Initial Disclosure Statement with respect to 25,640 active Credit Card Account holders over approximately a two-year period, constitutes a clear and consistent pattern or practice of violations within the meaning of section 108(e)(2) of TILA, 15 U.S.C. §1607(e)(2).

8. Section 108(e)(2) of TILA, 15 U.S.C. §1607(e)(2), requires that the FDIC order the Bank to make adjustments to the affected consumers if a clear and consistent pattern or practice of violations is proven.

9. Section 108(e)(3) of TILA, 15 U.S.C. §1607(e)(3), permits the FDIC to require the Bank to make the full adjustment in such partial payments and over an extended period of time, which the agency considers to be reasonable, to avoid causing the Bank to become undercapitalized.

10. The FDIC has authority to issue Cease and Desist Orders pursuant to section 8(b) of the FDI Act, 12 U.S.C. §1818(b).

11. The Bank violated a law, rule or regulation within the meaning of section 8(b) of the FDI Act, 12 U.S.C. §1818(b).

D. RECOMMENDATION

}The undersigned recommends that the Board of Directors issue a final order granting a motion for summary disposition pursuant to 12 C.F.R. §308.29(a). There is no genuine issue as to any material fact and Enforcement Counsel is entitled to a decision in its favor as a matter of law.

Further, the undersigned recommends the issuance of a Cease and Desist Order with restitution to the affected consumers in the amount of **\$567,819** under section 108(e) of the Truth in Lending Act, 15 U.S.C. §1607(e) and section 8(b) of the FDI Act, 12 U.S.C. §1818(b). Pursuant to Section 108(e)(3) of TILA, 15 U.S.C. §1607(e)(3), the undersigned also recommends permitting the Bank to make the full adjustment in partial payments over an extended period of time, as the FDIC deems reasonable, to avoid a significant adverse impact on the Bank.

In the Matter of

**STUTSMAN COUNTY STATE BANK
JAMESTOWN, NORTH DAKOTA
(Insured State Nonmember Bank)
Docket No. FDIC-97-28b**

PROPOSED ORDER TO CEASE AND DESIST

On April 25, 1997, the FDIC issued a Notice of Charges and of Hearing ("Notice") seeking a Cease and Desist Order against Stutsman County State Bank ("Bank" or "Respondent") under section 8(b) of the Federal Deposit Insurance Act, 12 U.S.C. §1818b, and seeking reimbursements for the affected bank customers pursuant to section 108 of the Truth in Lending Act ("TILA"), 15 U.S.C. §1607. On August 20, 1998, Enforcement Counsel and Respondent filed Cross-Motions for Summary Disposition. On September 9 and 10, 1998, each party replied in opposition. On October 15, 1998, pursuant to 12 C.F.R.

§§308.5(b)(7) and 308.29, the undersigned recommended granting Enforcement Counsel's Motion for Summary Disposition.

Based upon the record in this matter and Judge's Order On Cross-Motions For Summary Disposition And Recommended Decision, the Board of Directors finds that Respondent violated section 108(e) of the Truth in Lending Act, 15 U.S.C. §1607(e) and section 226.6 of Regulation Z 12 C.F.R. §226.6.

NOW THEREFORE, pursuant to the authority vested in the FDIC by 12 U.S.C. §1818(b), and for the reasons set forth in the accompanying decision, the Board of Directors orders that:

ARTICLE I

Respondent shall cease and desist from violations of law, rule or regulations.

ARTICLE II

Respondent shall make restitution to the affected Credit Card Account Holders in the amount of **\$567,819**. (The Payment Plan shall be set forth here in terms which the FDIC deems reasonable).

ARTICLE III

Pursuant to 12 U.S.C. §1818(b)(2), this Order shall become effective 30 days after the service of the Order upon Respondent and shall remain effective and enforceable except to such extent as it is stayed, modified, terminated, or set aside by the FDIC or a reviewing court.

ARTICLE IV

IT IS FURTHER ORDERED, that within 60 days after the effective date of this OR- [10-31-00 p.A-3017](#)DER, the Bank shall, pursuant to section 108(e) of TILA, 15 U.S.C. §1607(e), identify, notify, and provide monetary adjustments to all consumers affected by the Bank's failure to disclose the processing application fee as required by section 226.6(a)(4) of Regulation Z, 12 C.F.R. §226.6(a)(4), consistent with the following guidelines:

(A) Search its files to identify all affected consumers. This search should include all outstanding consumers credit card accounts opened since June 13, 1994, and all terminated loans of these type originated since June 15, 1994.

(B) The Bank shall draft a letter to identified consumers to inform them of monetary adjustments. The Bank shall submit that letter or text for the prior approval of the Regional Director of Kansas City Regional Office of the FDIC's Division of Compliance and Consumer Affairs ("Regional Director").

(C) The Bank shall send the monetary reimbursement to the affected consumers in the form of a cash payment or deposit into an existing unrestricted consumer asset account, which amount shall be the amount of the processing fee charged and collected from the consumer in connection with the opening of the credit card account, together with the letter or other text submitted by the Bank and approved by the Regional Director, under paragraph 3(b) of this ORDER.

(D) The Bank shall notify the Regional Director within 10 days after the completion of the reimbursement program, and the Bank shall maintain a complete record of the reimbursement program for review during the FDIC's next compliance examination or visit.

(E) Subparagraph (C) notwithstanding, the Bank may, in lieu of providing such monetary adjustment, apply all or part of the reimbursement to the amount past due for any affected customer's account that is delinquent, in default or charged off if permissible under State law.

IT IS SO ORDERED, this day of October 15, 1998.

Robert E. Feldman
Executive Secretary

CERTIFICATE OF SERVICE

I hereby certify that on October 15, 1998, I caused a true copy of the above to be served on each of the following by first class mail or by *federal express overnight mail delivery:

Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20429
Arthur L. Beamon, Associate General Counsel

Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20429
Gerald F. Lamberti, Regional Counsel
*Edward Lanning, Esq.
John Oldenburg, Esq.
Federal Deposit Insurance Corporation
2345 Grand Boulevard, Suite 1600
Kansas City, MO 64108
Phillip H. Schwartz
Regional Counsel
*C. Duane Curtis, Esq.
Lynn R. Dadisman, Esq.
5100 Poplar Avenue
Suite 1900
Memphis, Tennessee 38137
Susan E. Barnes, Esq.
*Roderick I. Mackenzie, Esq.
Lindquist & Vennum
4200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
Charlene C. Pierce
Secretary to Judge Alprin