the consumer, correction has not been effected. Consumer reimbursement is an inseparable part of the correction action.

Procedures for Making a Request

If an institution requests relief from reimbursement, it should do so within 60 days of receipt of the report of examination containing the request to conduct a file search and make restitution to affected customers. The request should be directed to the attention of the Regional Director and must address the statutory factors contained in §108(e) of the TILA. The Regional Director will notify the institution of the receipt of the request and that pending a final determination, the institution is not required to complete corrective action on the restitution request.

Process for Making Restitution

Restitution must be made expeditiously. When lump sum payments to consumers are required to be made, they must be provided to the consumer either by official check or a deposit into an existing unrestricted consumer asset account, such as an unrestricted savings, checking or NOW account. If, however, the loan that triggered reimbursement is delinquent, in default, or has been charged off, the institution may apply all or part of the reimbursement to the amount past due, if permissible under law.

There have been instances where institution personnel have inappropriately asked consumers to return reimbursement checks to the institution. This is not permissible. The FDIC views any such attempt to prevent unrestricted access by the consumer to reimbursement proceeds as a serious breach of fiduciary duty as well as a violation of law and regulation. These violations will be subject to enforcement action including, but not limited to, assessment of civil money penalties, orders to cease and desist, and possible removal/prohibition orders.

Determining Whether a Pattern or Practice Exists

The Truth in Lending Act (§108(e)) requires reimbursement when a disclosure error involving an understated APR or finance charge exceeds the allowed tolerance and results from a "clear and consistent pattern or practice of violations." The term "pattern or practice" is not defined by the Act, Regulation Z or the Official Staff Commentary to the Regulation, the Interagency Policy Guide, or the FFIEC's interpretive Questions and Answers.

However, the usual interpretation has been that a "pattern or practice" exists where there are more than isolated occurrences involving violations; however, a determination of whether a "pattern or practice" exists will depend on the facts and circumstances of individual situations.

Examiners should use the following guidance to determine if a pattern or practice exists for reimbursement purposes during the review of their initial sample of loans:

- If the frequency of a violation represents at least ten percent of the credit transactions sampled that have the same features or that are subject to the same regulatory requirements; and
- Within the given category of credit transactions two or more violations of the same type have been identified; then
- Examiners should determine if the cause of the violation is other than a random error. This may require the examiner to expand the sample of types of loans with violations to verify if the hypothesis of a particular pattern or practice is correct. In situations involving small samples where the number or percentage of violations noted are within the lower ranges of the minimum frequency requirements, examiners should always review additional files of the same type (if available) to confirm or refute the initial hypothesis.

Satisfying any one of the following three criteria will help demonstrate the existence of a pattern OR practice leading to violations discovered during the sampling process:

- Conduct grounded in written or unwritten policy, procedure or established practice.
- Similar conduct by an institution toward multiple consumers.
- Conduct having some common source or cause within the institution's control.

Examiners should note that the minimum number of two violations would satisfy the ten percent minimum frequency requirement only in samples containing fewer than 25 loans. In a sample containing 55 loan transactions, at least six violations would be required to demonstrate a ten percent frequency for consideration of a hypothesis that a pattern or practice may exist.

Examiners should be certain that both the number of violations (numerator) and total sample of credit features reviewed (denominator) support their determination. Properly identifying the universe being sampled for the denominator is a key factor in this process.

- For example, samples of unsecured installment loans are normally separated from home mortgage loans, but it may be reasonable to combine them when a violation is discovered that involves the same or similar omission of credit-insurance disclosures, even though the types of loans are quite different. A review of two mortgage loans and three unsecured consumer loans, where credit life insurance was financed as part of the transactions, all lacked the affirmative written request for insurance and accompanying initials or signature, thereby reflecting a pattern or practice leading to the violations.

- In other cases, some combinations or separations of samples may be impacted by findings concerning the separation of banking functions, such as between employees or between different branch offices of the institution. For example, it is discovered that a new loan officer in the installment loan area has not been disclosing the amount of the premiums for disability insurance to customers, yet the mortgage loan department provides the correct disclosure when offering that insurance to customers. In this situation, it would be more appropriate to combine the samples from both departments because the cause of the error is solely within the installment loan area and confined to one loan officer.
- In another example, in a review of 65 consumer loans, errors in credit insurance disclosures were discovered in all six loans involving consumer purchases of credit life insurance; however, no errors were discovered in 59 loans where the consumer did not purchase credit insurance. The frequency of violations in this case is 100 percent (six of six instances) as these were the loans where the disclosures were required to be made but were not made correctly.
- Another example would be where violations are found involving private mortgage insurance (PMI). To further test whether this error would constitute a pattern or practice, the examiner should sample additional mortgage loans where the purchase of PMI was required. It would not be appropriate to consider loans where PMI was not a requirement for the loan.

In a situation where violations are discovered in some construction loans, it would not be correct to consider all real estate loans as the applicable universe. The universe in that situation should consist of only construction loans to determine whether a particular pattern or practice was the cause of the violation.

References

Joint Statement of Policy: Administrative Enforcement of the Truth in Lending Act—Restitution (FFIEC Policy Guide on Reimbursement)
http://www.fdic.gov/regulations/laws/rules/5000-300.html#5000administrativeeo

FIL 20-98: Reimbursible Violations of the Truth in Lending Act
http://www.fdic.gov/news/news/financial/1998/fil9820a.html

DCA RD Memo 99-010: Joint Statement of Policy on the administrative enforcement of the Truth in Lending (TIL) Act – Restitution (Policy Statement) and Questions and Answers (Q&A) pertaining to this Policy.
http://fdic01/division/dsc/memos/memos/direct/6430-12.pdf