

Complaint

90 F.T.C.

IN THE MATTER OF
SECURITY INDUSTRIAL LOAN ASSOCIATION
ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING
ACTS

Docket 9006. Complaint, Jan. 28, 1975 — Final Order, Sept. 21, 1977

This order, among other things, requires a Richmond, Va. finance company to cease failing to provide consumers, in connection with the extension of credit, relevant information and disclosures required by Federal Reserve Board regulations.

Appearances

For the Commission: *Bernard Rowitz and Alan L. Cohen.*

For the respondent: *Albert G. Seidman, Port St. Lucie, Fla.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Security Industrial Loan Association, a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Acts, and the implementing regulation promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Security Industrial Loan Association is a corporation, organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia with its principal office and place of business located at 312 East Main St., Richmond, Virginia.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the lending of money to the general public directly and through brokers and finders.

PAR. 3. In the ordinary course and conduct of its business as aforesaid, respondent regularly extends consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

[2] PAR. 4. Subsequent to July 1, 1969, in the ordinary course of

business as aforesaid, respondent provides its customers with consumer credit cost disclosure statements.

By and through the use of the aforesaid consumer credit cost disclosures respondent:

1. Fails to include the broker's fee or finder's fee in the determination of the finance charge, as required by Section 226.4(a)(3) of Regulation Z.

2. Fails to disclose the broker's fee or finder's fee as a prepaid finance charge, as required by Section 226.8(e)(1) of Regulation Z, using the term "prepaid finance charge," as required by Section 226.8(d)(2) of Regulation Z.

3. Fails to itemize the components of the finance charge, as required by Section 226.8(d)(3) of Regulation Z.

4. Fails to disclose accurately the annual percentage rate computed in accordance with Section 226.5(b) of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

5. Fails to print the terms "finance charge" and "annual percentage rate" more conspicuously than other terminology, as required by Section 226.6(a) of Regulation Z.

6. Fails to disclose clearly the method of computing any unearned portion of the finance charge in the event of prepayment of the obligation, as required by Section 226.6(a) of Regulation Z.

7. Fails to identify the broker as a creditor, as "creditor" is defined in Section 226.2(m) of Regulation Z, as required by Section 226.6(d) of Regulation Z.

PAR. 5. Pursuant to Section 103(q) of the Truth in Lending Act respondent's aforesaid failures to comply with the provisions of Regulation Z constitute violations of the Act and, pursuant to Section 108 thereof, respondent has thereby violated the Federal Trade Commission Act.

INITIAL DECISION BY LEWIS F. PARKER, ADMINISTRATIVE LAW
JUDGE

MARCH 5, 1977

I. PRELIMINARY STATEMENT

The Commission's complaint in this proceeding issued on January 28, 1975, and charged respondent Security Industrial Loan Association (hereafter "SILA") with violating the Truth in Lending Act, 15 U.S.C. 1601, *et seq.* and Regulation Z, 12 C.F.R. 226, which was promulgated by the Board of Governors of the Federal Reserve System pursuant to authority granted by the Act.

The complaint alleges that SILA lends money to the general public directly and through brokers and finders and regularly extends consumer credit as that term is defined in Regulation Z and that through the use of [2] consumer credit cost disclosure statements it has violated the Truth in Lending Act and the Federal Trade Commission Act by:

1. Failing to include the broker's fee or finder's fee in the determination of the finance charge, as required by Section 226.4(a)(3) of Regulation Z.¹
2. Failing to disclose the broker's fee or finder's fee as a prepaid finance charge, as required by Section 226.8(e)(1) of Regulation Z, using the term "prepaid finance charge," as required by Section 226.8(d)(2) of Regulation Z.
3. Failing to itemize the components of the finance charge, as required by Section 226.8(d)(3) of Regulation Z.
4. Failing to disclose accurately the annual percentage rate computed in accordance with Section 226.5(b) of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.
5. Failing to print the terms "finance charge" and "annual percentage rate" more conspicuously than other terminology, as required by Section 226.6(a) of Regulation Z.
6. Failing to disclose clearly the method of computing any unearned portion of the finance charge in the event of prepayment of the obligation, as required by Section 226.6(a) of Regulation Z.
7. Failing to identify the broker as a creditor, as "creditor" is defined in Section 226.2(m) [3] of Regulation Z, as required by Section 226.6(d) of Regulation Z.

SILA filed its answer on April 23, 1975 denying all material allegations of the complaint. Prehearing conferences were held on May 13 and August 14, 1975, and evidentiary hearings were conducted on November 3, 4 and 5, 1975. Complaint counsel and counsel for SILA submitted proposed findings of fact and conclusions of law on or about January 14, 1976 and replies on or about February 4, 1976.

The following findings of fact, conclusions of law and order are based upon my evaluation of the whole record and the proposed findings and conclusions of law and replies filed by both parties. Proposed findings not adopted either verbatim or in substance are rejected either because they are irrelevant or because they are not supported by the record.

¹ Although Regulation Z was amended effective October 28, 1975, this was after the complaint issued. Therefore, all references are to those regulations which were amended and issued on September 30, 1974.

II. FINDINGS OF FACT

1. SILA is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its office and principal place of business located at 312 East Main St., Richmond, Virginia (Ans. Par. I).²

2. SILA was incorporated pursuant to the provisions of the Industrial Loan Associations Act of the Commonwealth of Virginia and conducts its business subject thereto and under the inspection and supervision of the State Banking Commission (Tr. 26, 61; RX 2). It is engaged in first [4] and second mortgage financing of residential properties and makes loans to homeowners, primarily for debt consolidation (Tr. 26). Finance charges are imposed in these transactions (CXs 1-39). The volume of loans made by SILA was between \$10,000,000 and \$11,000,000 in 1973 and approximately \$7,000,000 in 1974. SILA does business throughout Virginia, but conducts none outside of the Commonwealth (Tr. 27).

3. Respondent regularly extends "consumer credit" as that term is defined in Regulation Z, the implementing regulation of the Truth in Lending Act (Ans. Par. III).

4. Homeowners wanting loans from SILA apply either directly in person, by telephone or by letter, or are referred to it by small loan companies or savings and loan associations. Homeowners can also obtain loans from SILA through the services of mortgage brokers who submit applications on behalf of their clients (Tr. 28).

5. Mortgage brokers are not licensed or regulated by the Commonwealth of Virginia (Tr. 188-89) and the fee which they charge their clients is not established by statute. Although it often ranges between 9 and 10 percent of the loan proceeds (Tr. 95), there is no uniform fee which brokers charge; this is subject to negotiation between broker and borrower (Tr. 85, 96, 189; CXs 167, 172). In some instances, the fees are renegotiated at the time the loan is closed so that the broker will receive less than originally agreed upon (Tr. 89, 107, 154).

6. In a typical transaction involving a broker, SILA receives from the broker an application executed by his client. The broker also forwards a package including a credit report from the local credit bureau, a first mortgage verification form if there is such a mortgage,

² Abbreviations used in this decision are:

Tr. - Transcript of testimony
CX - Commission Exhibit
RX - Respondent's Exhibit
Ans. - Respondent's Answer to the Complaint
CPF - Complaint counsel's proposed findings
RPF - Respondent's proposed findings

title information, a copy of the fire insurance policy on the property, an independent appraisal of the property and a covering letter listing all of the enclosures (Tr. 30, 75, 185).

7. The covering letters placed in evidence are forms suggested by SILA (Tr. 42) and were used by at least two brokers in submitting loan applications to it (J. L. Levinson, CXs 85-90, 92-96, Tr. 77; Roy Hansen, CX 91). SILA has also issued rate books to brokers so that they can compute the charges it imposes on loans (Tr. 42, 184-85). [5]

8. If a SILA loan officer approves a loan, SILA informs the broker, when one is involved, of the terms and conditions of the loan and the name of the attorney who will close the loan. The closing attorneys are selected by SILA's general counsel (Tr. 31-32, 122-23, 251). If the closing is to take place in Richmond, the general counsel handles it (Tr. 119-20, 218). If the closing is to take place outside of Richmond, the general counsel forwards the loan papers to a selected local closing attorney under cover of a "forwarding sheet" which gives him instructions of a general nature and, depending on the individual loan, special instructions, including directions to pay some of the borrower's bills out of the loan proceeds (Tr. 34; CXs 40-50). Included in the loan papers which are sent to the closing attorneys are copies of SILA's Truth in Lending disclosure statements (Tr. 32).

9. One broker, Mr. Levinson, testified that it was his policy to send to SILA his broker's fee agreement which indicates the fee he will charge his client if a loan is approved and closed (Tr. 83; see *e.g.*, CX 87). However, it is not clear whether Mr. Levinson's policy was uniformly carried out by his office staff (Tr. 86-91). Although SILA's general counsel remembered seeing some broker's agreements in closed files in his office, he recalled no instance in which they were furnished to out-of-town closing attorneys (Tr. 119-20, 131-32). No other brokers give copies of their fee agreements to SILA (Tr. 45-46, 48, 52-53, 113, 132, 190-91, 209, 228).

10. The closing attorneys, whether they are SILA's general counsel or local counsel, are usually sent a copy of the broker's fee agreement by the broker since it is general practice to pay that fee out of the proceeds of the loan (Tr. 86, 103, 149-50, 156, 187, 206, 221). The closing attorneys also receive copies of Truth in Lending disclosure statements from some brokers (Tr. 193-94, 206). Other brokers do not furnish disclosure statements to the closing attorney (Tr. 79, 104).

11. The closing attorney conducts a title search on the property which will secure the loan and then communicates with the borrower to arrange a convenient time for settlement (Tr. 137, 168, 205-06). [6]

12. At settlement, the closing attorney explains SILA's disclosure

statement, delivers a copy to the borrower and has him sign one to be returned to SILA. He also gives the borrower notice of his right to rescind and a form of election not to rescind which is to be returned by the borrower in three days. The attorney then explains the terms of the loan and has the borrower execute the deed of trust. The attorney asks the borrower to endorse SILA's check and after it is endorsed, deposits it in an escrow account either before or after the rescission period expires (Tr. 104-08, 168, 206-07, 210).

13. Some time after the expiration of the rescission period, if the borrower has not elected to rescind, the closing attorney disburses the loan (Tr. 105, 150, 207) in accordance with SILA's instructions (Tr. 104, 109, 113, 167, 169, 210, 242) which generally require the attorney to make certain payments to the borrower's creditors (as consented to by the borrower) and to pay the balance to the borrower (Tr. 113-14, 169, 210, 242).

14. In some cases, closing attorneys will draw checks from the balance of the proceeds at the borrower's request to pay outstanding debts, including the loan broker's fee (Tr. 114, 169, 211, 242-43).

15. After the closing, the attorney transmits to SILA the executed note, recorded deed of trust, the signed disclosure statement, rescission notice and election not to rescind, and a title policy, if required (Tr. 105-06, 207, 224). Three closing attorneys testified that they did not send respondent any statement showing how the proceeds of the loan were disbursed (Tr. 181, 207-08, 224); the fourth said that he sent such statements to SILA (Tr. 106). These statements show payments of their fee to brokers out of the loan proceeds (CXs 51-84).

16. Before the Truth in Lending Act was implemented, SILA directed loan brokers not to send their fee agreements to it (Tr. 70-71). SILA's general counsel told its closing attorneys that it would not authorize them to pay any broker's fee (RXs 3, 4) but did not discourage them from following the borrower's instructions: [7]

This does not mean that our office as well as other attorneys who close for Security will not cooperate if, at closing, there are delivered written directions signed by the borrower to withhold a given sum from the loan proceeds (RX 3).

If a client or a broker tenders a duly executed disbursement authority, this obligation should be honored as any other that a client may request be paid from the proceeds of the loan (RX 4).

17. SILA's disclosure statements do not list the broker (where one is involved) as a creditor, do not list the broker's fee as a prepaid finance charge, do not include the fee as a component of the finance

charge and do not include the fee as a component in computing the annual percentage rate (hereafter APR) (Tr. 6, 10; CXs 1-39; RX 1).

18. If the broker's fee had been included in computing SILA's APR, the APR would have been greater than that actually disclosed in SILA's statements (CX 217).

19. R.S. Jessie, acting Commissioner of Banking for Virginia, testified that under the statute relating to industrial loan associations, if SILA added the broker's fee in computing the APR, it would indicate to his examiners a prima facie violation because the APR would exceed the rate of interest allowed industrial loan associations (Tr. 291-301; CX 217). However, if it were clear that SILA was including the broker's fee as part of the APR for purposes of informing the borrower and was not actually imposing the fee as a condition for the loan, Mr. Jessie said no action would be taken even though technically SILA's disclosure statements revealed an APR higher than that allowed by statute (Tr. 308).

20. SILA's disclosure statements which were used between July 1, 1969 and March 13, 1974 did not have the terms "finance charge" and "annual percentage rate" printed thereon more conspicuously than all other terminology (CXs 1-39). [8]

21. Since March 14, 1974, SILA's disclosures statements have had the terms "finance charge" and "annual percentage rate" printed thereon more conspicuously than all other terminology (RX 1).

22. From July 1, 1969 through March 13, 1974, respondent's disclosure statements contained the following language:

Borrower shall have the right to anticipate payment of this debt at any time and shall receive a rebate for any unearned interest, which rebate shall be computed in accordance with the Standard Rule of 78 and shall be reduced by an anticipation premium equal to that portion of the contract interest allocable under such Rule to the next six payments (CXs 1-39).

This language repeats that of the Virginia statute governing the conduct of and rates that may be charged by industrial loan associations (RX 2).

23. Since March 14, 1974, respondent's disclosure statements have contained the following language:

Prepayment:

Borrower shall have the right to anticipate (prepay) this loan at any time and shall receive a rebate of the unearned interest portion of the FINANCE CHARGE computed in accordance with the Standard Rule of 78 less an anticipation (prepayment) premium equal to that portion of the contract interest allocable under such Rule to the next six payments (RX 1; Tr. 55).

24. No customers of SILA testified in this proceeding and there is

therefore no evidence that the language quoted in findings 23 and 24 is or was unclear to borrowers and that borrowers are or were unaware of their right to prepay loans obtained from SILA. [9]

III. CONCLUSIONS OF LAW

A. FAILURE TO INCLUDE THE BROKER'S FEE IN THE DETERMINATION OF THE FINANCE CHARGE

Brokers who obtain loans for their clients from SILA are arrangers for the extension of consumer credit³ and are therefore creditors under Regulation Z, as is SILA which extends consumer credit.⁴

SILA does not include the broker's fee in the determination of its finance charge (Finding 17), and the complaint alleges that it has violated Section 226.4(a)(3) of Regulation Z which includes loan fees, points, finder's fees, or similar charges in the definition of finance charges.

However, this section does not require disclosure of any information; it simply defines those charges which are "finance charges" and which must be disclosed pursuant to other sections. The enumerated charges are "finance charges" only if they are

... payable directly or indirectly by the customer, and imposed directly or indirectly by the creditor as an incident to or as a condition of the extension of credit. . . . (Section 226.4(a).)

[10] Since brokers are creditors and impose their fees on their customers incident to the extension of credit by SILA, it can be argued that these fees are finance charges under Section 226.4(a)(3), but this section, contrary to the complaint allegation, does not require the other creditor, SILA, to disclose the broker's fee as part of the finance charge in its Truth in Lending statements. However, since Section 226.4(a)(3) defines the broker's fee as a finance charge, complaint counsel argue that another part of Regulation Z, Section 226.6(d), imposes an obligation upon the lender to disclose the fee in his Truth in Lending statements.

This section states:

If there is more than one creditor in a transaction, each creditor shall be clearly identified and shall be responsible for making *only* those disclosures required by

³ Section 226.2(f):

" 'Arrange for the extension of credit' means to provide or offer to provide consumer credit which is or will be extended by another person under a business or other relationship pursuant to which the person arranging such credit receives or will receive a fee, compensation, or other consideration for such service. . . . "

⁴ Section 226.2(m):

" 'Creditor' means a person who in the ordinary course of business regularly extends or arranges for the extension of consumer credit. . . . "

this Part which are within his knowledge *and* the purview of his relationship with the customer (emphasis added).

In Letter No. 699, *CCH Consumers Credit Guide*, ¶30,996 (1973), the staff of the Federal Reserve Board stated that a loan broker's fee should be disclosed by the lender if he knows the amount of the fee.

In my decision in *Virginia Mortgage Exchange*, F.T.C. Dkt. 9007 (Initial Decision, August 18, 1975 [87 F.T.C. 182]), I refused to give any weight to this staff interpretation because, in my opinion, it failed to recognize the distinction between the "knowledge" and "purview" requirements but treated them as synonymous. *Id.* at p. 8.

I held in that proceeding that although the name of the lender was known by the broker, such knowledge was not within the purview of the relationship between the broker and his customer because it was not a legally significant aspect of that relationship. I decided, therefore, that the lender's name need not be revealed by the broker to the borrower. I also found that the broker need not reveal to the borrower the lender's method of computing the unearned portion of the finance charge in the event of prepayment of the loan. I reasoned that while the broker knew the lender's method of computing the unearned portion of the finance charge, that knowledge was not an essential aspect of the [11] relationship between the broker and his customer and was not within the purview of that relationship.

The Commission recently reversed by decision, *Virginia Mortgage Exchange*, F.T.C. Dkt. 9007 (Feb. 10, 1976) and entered an order which, *inter alia*, requires the broker to reveal to his customer the name of the creditor and to disclose the creditor's method of computing the unearned portion of the finance charge in the event of prepayment. The Commission disagreed with my interpretation of the word "purview" and held that:

In our view, all terms of a given loan fall within the "purview" or "scope" of the relationship between a customer and the broker who arranges that loan (p. 4) [87 F.T.C. at 198].

The Commission held that its construction of Section 226.6(d) is the one which is most consistent with the Truth in Lending Act since the purpose of the Act is "to ensure full disclosure of credit terms in situations involving brokered loans as well as those negotiated by a borrower directly with a lender" (p. 7) [87 F.T.C. at 200].

SILA is aware at some point before it offers to extend credit that its potential customer hired a broker to find a willing lender (Finding 4) but since there is no fixed brokerage fee, it does not know how much the broker will charge for his services (Findings 5, 9). Even if the broker disclosed his fee to the lender prior to closing, SILA's

disclosure of the fee might be inaccurate since the fee may be adjusted at closing (Finding 5).

These practical difficulties may be ignored, according to complaint counsel, because the closing attorney is SILA's agent, and everything which he knows about the transaction, including the broker's fee which is often paid out of the loan proceeds (Finding 10), can be imputed to his principal—in other words, that SILA has constructive if not actual knowledge of the amount of the broker's fee (CPF, pp. 5–6). However, they cite no authority for the proposition that everything which is revealed to the closing attorneys can be imputed to SILA. The general rule is to the contrary. A principal is

chargeable with, and bound by, the knowledge of or notice to his agent received while the agent is acting as such within the scope of [12] his authority and in reference to a matter over which his authority extends. 3 *Am. Jur. 2d Agency* §273 (1962). See also §276.

Before the Truth in Lending Act was implemented, SILA informed its attorneys that it would not authorize them to pay broker's fees (Finding 16) and since that time, payment of broker's fees out of the proceeds of the loan has been at the direction of the borrower, not SILA (Finding 14). Thus, if the broker's fee is paid by the closing attorney, that action is not within the scope of his express authority from SILA and his knowledge of the exact amount of the fee is not chargeable to SILA according to the law of agency.

Nevertheless, I am bound by the Commission's decision in *Virginia Mortgage Exchange, supra*, and I find that the amount of the broker's fee, since it can be easily discovered by SILA's closing attorneys, should be disclosed in its Truth in Lending statements. The overriding purpose of the Truth in Lending Act is full disclosure and in carrying out that purpose, the word "knowledge" should be given as expansive a construction as possible consistent with fairness. There is nothing unfair in requiring SILA to direct the closing attorneys to include the broker's fee in SILA's disclosure statements.

Furthermore, according to the Commission decision in *Virginia Mortgage Exchange, supra*, knowledge of the broker's fee can be viewed as being within the purview of the relationship between SILA and its customers because "[a]ny interpretation of Section 226.6(d) must take into account the manifest purpose of the law to ensure full disclosure of credit terms in situations involving brokered loans. . . ." (p. 7 [87 F.T.C. at 200].)

While this interpretation may be somewhat inconsistent with the ordinary meaning of the words "knowledge" and "purview," it seems to me that if, as the Commission held in *Virginia Mortgage Exchange*,

supra, it is necessary under Regulation Z for the broker to disclose the name of the lender even though the borrower already knows his name, it is even more essential for the borrower to have the broker's fee revealed to him on the lender's disclosure statement because the fee is, according to Regulation Z, a component of the total finance charge. [13]

B. FAILURE TO DISCLOSE THE BROKER'S FEE AS A PREPAID
FINANCE CHARGE

Section 226.8(e)(1) of Regulation Z requires the disclosure of

Any finance charge paid separately, in cash or otherwise, directly or indirectly to the creditor or with the creditor's knowledge to another person, or withheld by the creditor from the proceeds of the credit extended.

According to Section 226.8(d)(2), the charges must be disclosed as a "prepaid finance charge."

Complaint counsel argue that since the broker's fee is a finance charge, these sections require SILA to disclose such charge on its Truth in Lending statements (CPF, p. 12). Section 226.8(a) requires that disclosures such as those referred to in Sections 226.8(e)(1) and 226.8(d)(2) be made "in accordance with §226.6 and to the extent applicable. . . ."

My discussion of the "knowledge" and "purview" requirements of Section 226.6(d) in part A, *supra*, is applicable here. Since the broker's fee is within the knowledge of SILA and the purview of its relationship with its customers, the fee must be disclosed on its Truth in Lending statements as a prepaid finance charge.

C. FAILURE TO ITEMIZE THE COMPONENTS OF THE FINANCE
CHARGE

Section 226.8(d)(3) requires the disclosure of

. . . the total amount of finance charge, with description of each amount included, using the term "finance charge."

Since SILA does not include the broker's fee in computing its finance charge (Finding 17), complaint counsel argue that it has failed correctly to disclose the total amount of the finance charge as required by this section (CPF, p. 12). However, Section 226.8(a), the general rule which requires the disclosures enumerated in the specific following sections such as 226.8(d)(3), only requires them [14] to the extent they are called for by Section 226.6. As in parts A and B above, the issue, thus, is what information must be disclosed pursuant to Section 226.6(d). For the same reasons which I gave in

parts A and B, *supra*, I find that SILA must list the broker's fee in its disclosure statements when itemizing the components of its finance charge.

D. FAILURE TO DISCLOSE ACCURATELY THE ANNUAL
PERCENTAGE RATE

SILA does not include the broker's fee as a component in computing its APR and the APR which is disclosed to its customers is therefore less than if the broker's fee were included (Findings 17-18).

Section 226.8(b)(2) of Regulation Z requires, with exceptions not applicable here, the disclosure of the creditor's finance charge expressed as an annual percentage rate using that term. Sections 226.5(b)(1) and (2) require disclosure of the APR with an accuracy at least to the nearest quarter of one percent and if SILA must include the broker's fee as a component of the finance charge, the difference between the true APR and that actually disclosed by SILA would exceed the tolerance level established by Sections 226.5(b)(1) and (2) (CX 217).

Since the multiple creditor provision of Regulation Z (Section 226.6(d)) controls the disclosures required by Section 226.8(b)(2), SILA has failed to disclose accurately the APR because the broker's fee is within its knowledge and the purview of its relationship with its customers.

E. FAILURE TO IDENTIFY THE BROKER AS A CREDITOR

According to Section 226.2(m) of Regulation Z, the brokers involved in the transactions herein are "creditors." Although SILA does not disclose them as creditors on its Truth in Lending statements (Finding 17), it knows when brokers are involved in a given transaction and knows their names (Findings 4, 6), and it could, with no inconvenience, disclose this information to its borrower-customers if Regulation Z required such disclosure. [15]

Section 226.6(d) states that if there is more than one creditor in a transaction, "each creditor shall be clearly identified" but only if the "disclosures required by this Part" are "within his knowledge and the purview of his relationship with the customer."

The knowledge requirement of this section is met, and applying the reasoning of the Commission's decision in *Virginia Mortgage Exchange*, the name of the broker is within the purview of the relationship between lender and borrower. Therefore, SILA should have revealed the broker's name as a creditor in its disclosure statements.

F. FAILURE TO PRINT THE TERMS "FINANCE CHARGE" AND
"ANNUAL PERCENTAGE RATE" MORE CONSPICUOUSLY THAN
OTHER TERMINOLOGY

SILA's disclosure statements which were in use between July 1, 1969 and March 13, 1974 did not have the terms "finance charge" and "annual percentage rate" printed thereon more conspicuously than all other terminology (Finding 20). Therefore, SILA has not complied with Section 226.6(a) of Regulation Z:

Except with respect to the requirements of §226.10, where the terms "finance charge" and "annual percentage rate" are required to be used, they shall be printed more conspicuously than other terminology required by this Part. . . .

SILA agrees that the disclosure statements it employed until March 14, 1974 had other terms printed in the same size type as "finance charge" and "annual percentage rate" but argues that these deficiencies were minor in nature and highly technical (RPF, p. 10).

The language of much of Regulation Z is highly technical because it deals with a complex subject but the requirements of Section 226.6(a) are clear, precise and cannot be misinterpreted. While SILA's failure to comply with this section may have been inadvertent and, in that sense, was "technical," this is not a consideration which excuses it from liability. See *Certified Building Products, Inc.*, F.T.C. Dkt. 8875 (Oct. 5, 1973), *aff'd.*, *Thiret v. FTC*, 512 F.2d 176 (10th Cir. 1975). [16]

The ALJ's curious distinction between technical and substantive violations of this law can find neither support nor refuge in the statutory framework and purpose of the act and implementing regulations.

G. FAILURE TO DISCLOSE CLEARLY THE METHOD OF COMPUTING
THE UNEARNED PORTION OF THE FINANCE CHARGE IN THE
EVENT OF PREPAYMENT

Section 226.6(a) of Regulation Z sets forth the general rule that the disclosures required by other sections

shall be made clearly, conspicuously, in meaningful sequence, in accordance with the further requirements of this section, and at the time and in the terminology prescribed in applicable sections.

SILA permits its customers to anticipate, or prepay, their loan at any time and receive a rebate for any unearned interest. However, there is a prepayment penalty which reduces this rebate. This rebate is:

computed in accordance with the Standard Rule of 78 and shall be reduced by an

anticipation premium equal to that portion of the contract interest allocable under such Rule to the next six payments.

The quoted language was used in SILA's disclosure statements prior to March 14, 1974 (Finding 22). Although there is no evidence of how consumers might have interpreted this language (Finding 24), I can infer what it meant to the average consumer when it was used in SILA's disclosure statements. *E.g.*, *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 386 (1965); *J. B. Williams Co. v. FTC*, 381 F.2d 884, 890 (6th Cir. 1967), *cert. denied*, 352 U.S. 956 (1967).

While the quoted language might have revealed to the borrower that he could prepay his debt, this would have been much clearer if instead of using the phrase "anticipate [17] payment," SILA had stated: "Borrower shall have the right to prepay this loan. . . ."⁵

Furthermore, it is probable that even if the average consumer was aware that he could prepay the loan, SILA's prior disclosure statements did not reveal to him that his rebate would be reduced by a penalty. The words "reduced by an anticipation premium" did not clearly disclose this fact. Therefore, I find that SILA's prior statements did not disclose clearly the method of computing the unearned portion of the finance charge in the event of prepayment and did not comply with Section 226.6(a) of Regulation Z.

The language which was used by SILA did repeat the language of the Virginia statute governing Industrial Loan Associations⁶ and SILA urges that it cannot be held liable for a violation of Regulation Z because of Section 226.8(b)(7) and a formal interpretation of that section by the Federal Reserve Board (RPF, p. 12).

SILA's argument is that Section 226.6(a) is general in its terms and is superseded by sections which are specifically applicable to particular disclosures. Such a section is 226.8(b)(7) which requires "[i]dentification of the method of computing any unearned portion of the finance charge in the event of prepayment in full of the [18] obligation." In its interpretation of this section (12 C.F.R. 226.818), the Board held that the methods of computing rebates are so complex that if they were repeated in a disclosure statement, they might detract from other disclosures. Therefore, the Board ruled that the requirement of Section 226.8(b)(7) is satisfied "simply by reference by name to the 'Rule of 78's' or other method."

Since its disclosure statement referred to an "other method"

⁵ And the disclosure statements now used by SILA state:

Borrower shall have the right to anticipate (prepay) this loan. . . ." (Finding 23.)

⁶ Any natural person borrowing from an industrial loan association shall have the right to anticipate payment of his debt at any time and shall receive a rebate for any unearned interest, which rebate shall be computed in accordance with the Standard Rule of 78 and shall be reduced by an anticipation premium equal to that portion of the contract interest allocable under such rule to the next six payments" (RX 2, §6.1-234).

authorized by a state statute and repeated its language, SILA argues that it has complied with Section 226.8(b)(7). That would seem to be correct; however, the complaint alleges a violation of Section 226.6(a) and I see nothing inconsistent in holding that respondent has not complied with this section even though it may have met the requirements of Section 226.8(b)(7).

This issue is not without difficulty for it is probable that respondent adopted the statutory language in the belief that it was complying with its obligation with respect to disclosure of prepayments rights. But respondent's good faith is not a defense if the language which it has adopted is unclear and potentially deceptive, as I believe it is. *FTC v. Algoma Lumber Co.*, 291 U.S. 67 (1934); *Koch v. FTC*, 206 F.2d 311 (6th Cir. 1953).

As I view the relationship between Sections 226.6(a) and 226.8(b)(7), satisfaction of the latter's requirements (as interpreted by the Board) does not mean that one has fully complied with the general rule that disclosures shall be clear and conspicuous. It is apparent that Section 226.8(b)(7) and the Board's interpretation are based on a predicate which does not exist here—that is, that the borrower is aware that his rebate is subject to reduction by a penalty. The Board recognizes that an actuarial explanation of the method of computing the rebate is so complex that it need not be revealed, but the Board has not authorized the use of language which conceals the fact that a penalty will be assessed if the loan is prepaid, since this disclosure involves no complex explanation and does not detract from other disclosures. Since the penalty is an integral part of the method which SILA uses in computing the unearned portion of its finance charge in the event of prepayment, SILA's failure clearly to disclose its existence violate Section 226.6(a) of Regulation Z. [19]

H. DISCONTINUANCE

As of March 14, 1974, SILA changed its disclosure statements in two respects. The terms "finance charge" and "annual percentage rate" are now more conspicuous than all other terminology (Finding 21) and the fact that there is a penalty in the event of prepayment of the loan is disclosed, although there may still be some confusion caused by retention of the words "anticipation" and "premium" (Finding 23).

SILA's discontinuance of two of the practices challenged in the complaint occurred before its issuance but after respondent was aware of the Commission's investigation of the adequacy of its disclosure statements. Discontinuance under these circumstances gives no assurance that the practices will not be resumed and an

appropriate cease and desist order should enter. See *e.g.*, *Zale Corp.*, 78 F.T.C. 1233, 1240 (1971); *Spencer Gifts, Inc. v. FTC*, 302 F.2d 267 (3d Cir. 1962); *Coro, Inc. v. FTC*, 338 F.2d 149, 153 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965).

I. ORDER

SILA has violated several sections of Regulation Z and this calls for, at the minimum, an order prohibiting repetition of these or similar violations. However, complaint counsel propose an order which would not be so limited but would, in addition, require SILA to cease and desist from:

Failing, in any consumer credit transaction or advertisement, to make all disclosures, determined in accordance with Sections 226.4 and 226.5 of Regulation Z, in the manner, form and amount required by Sections 226.6, 226.8, 226.9 and 226.10 of Regulation Z. (CPF, p. 26.)

All of the requirements of Regulation Z are in furtherance of the central purpose of the Truth in Lending Act, which is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit" (Truth in Lending Act, 15 U.S.C. 1601). Where there is such a close relationship between [20] various sections of a statute or its implementing regulations, it has been held that the Commission may prohibit not only those practices which were found to be illegal but also future violation of related statutory or regulatory mandates. *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 391-93 (1959).

On the other hand, while the Commission's discretion to outlaw related future violations is broad, its power is not unlimited where the violations are not flagrant or where they occur in an uncertain area of the law. *Grand Union Co. v. FTC*, 300 F.2d 92, 100 (2d Cir. 1962). See also *Swanee Paper Corp. v. FTC*, 291 F.2d 833 (2d Cir. 1961), *cert. denied*, 368 U.S. 987 (1962).

Nevertheless, the Commission issued a broad order under similar circumstances in *Virginia Mortgage Exchange, supra*, and no less is called for here. Since respondent has used disclosure statements in all loan transactions covered by Regulation Z, I see no need for an order provision requiring it to post signs on its premises which disclose to consumers their right to receive such statements.

J. SUMMARY

1. The Commission has jurisdiction over the subject matter of this proceeding and over the respondent.

2. Respondent has failed to include the broker's fee in the determination of the finance charge in its disclosure statements as required by Section 226.4(a)(3) of Regulation Z and has therefore violated the Truth in Lending Act and the Federal Trade Commission Act (15 U.S.C. 1602(q) and 1607(c)).

3. Respondent has failed to disclose the broker's fee as a prepaid finance charge in its disclosure statements as required by Sections 226.8(e)(1) and 226.8(d)(2) of Regulation Z and has therefore violated the Truth in Lending Act and the Federal Trade Commission Act (15 U.S.C. 1602(q) and 1607(c)).

4. Respondent has failed to itemize the components of the finance charge in its disclosure statements as required by Section 226.8(d)(3) of Regulation Z and has therefore [21] violated the Truth in Lending Act and the Federal Trade Commission Act (15 U.S.C. 1602(q) and 1607(c)).

5. Respondent has failed to disclose accurately the APR in its disclosure statements computed in accordance with Section 226.5(b), as required by Section 226.8(b)(2) of Regulation Z and has therefore violated the Truth in Lending Act and the Federal Trade Commission Act (15 U.S.C. 1602(q) and 1607(e)).

6. Respondent has failed to print the terms "finance charge" and "annual percentage rate" more conspicuously than other terminology in its disclosure statements as required by Section 226.6(a) of Regulation Z and has therefore violated the Truth in Lending Act and the Federal Trade Commission Act (15 U.S.C. 1602(q) and 1607(c)).

7. Respondent has failed to disclose clearly in its disclosure statements the method of computing any unearned portion of the finance charge in the event of prepayment of the obligation as required by Section 226.6(a) of Regulation Z and has therefore violated the Truth in Lending Act and the Federal Trade Commission Act (15 U.S.C. 1602(q) and 1607(c)).

8. Respondent has failed to identify the broker as a creditor in its disclosure statements as required by Section 226.6(d) of Regulation Z and has therefore violated the Truth in Lending Act and the Federal Trade Commission Act (15 U.S.C. 1602(q) and 1607(c)).

Therefore, the following order should be, and is, entered:

ORDER

It is ordered, That respondent Security Industrial Loan Association, a corporation, its successors and assigns and its officers, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in

connection with any [22] extension of consumer credit or advertisement to aid, promote or assist, directly or indirectly, any extension of consumer credit as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. 226) of the Truth in Lending Act (Pub. Law 90-321, 15 U.S.C. 1601, *et seq.*), do forthwith cease and desist from:

1. Failing to include the broker's fee or finder's fee in the determination of the finance charge, as required by Section 226.4(a)(3) of Regulation Z.

2. Failing to disclose the broker's fee or finder's fee as a prepaid finance charge, as required by Section 226.8(e)(1) of Regulation Z, using the term "prepaid finance charge," as required by Section 226.8(d)(2) of Regulation Z.

3. Failing to itemize the components of the finance charge, as required by Section 226.8(d)(3) of Regulation Z.

4. Failing to disclose accurately the annual percentage rate computed in accordance with Section 226.5(b) of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z. [23]

5. Failing to print the terms "finance charge" and "annual percentage rate" more conspicuously than other terminology, as required by Section 226.6(a) of Regulation Z.

6. Failing to disclose clearly the method of computing any unearned portion of the finance charge in the event of prepayment of the obligation, as required by Section 226.6(a) of Regulation Z.

7. Failing to identify the broker as a creditor, as "creditor" is defined in Section 226.2(m) of Regulation Z, as required by Section 226.6(d) of Regulation Z.

8. Failing, in any consumer credit transaction or advertisement, to make all disclosures, determined in accordance with Sections 226.4 and 226.5 of Regulation Z, in the manner, form and amount required by Sections 226.6, 226.8, 226.9 and 226.10 of Regulation Z.

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed [24] change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of any successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondent deliver a copy of this order to cease and desist to all present and future personnel of respondent engaged in the extension of consumer credit, and that respondent

secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That respondent shall, within sixty (60) days after the effective date of the order served upon it, file with the Commission a report in writing, signed by respondent, setting forth in detail the manner and form of its compliance with the order to cease and desist.

OPINION OF THE COMMISSION

By DOLE, *Commissioner*

The chief issue in this case is whether a lender has violated the Truth in Lending Act by failing to include the broker's fee in the determination of the finance charge disclosed to the borrower in consumer credit transactions.

The complaint was issued on January 28, 1975, charging respondent Security Industrial Loan Association¹ with violations of the Truth in Lending Act², Regulation Z³ promulgated thereunder, and the Federal Trade Commission Act⁴ by failing to provide certain information in consumer credit cost disclosure statements given to customers. The complaint alleged that SILA committed these violations by failing: to include the broker's fee in the determination [2] of the finance charge; to disclose the broker's fee as a prepaid finance charge; to itemize the components of the finance charge; to disclose accurately the annual percentage rate; to print the terms "finance charge" and "annual percentage rate" more conspicuously than other terminology; to disclose clearly the method of computing any unearned portion of the finance charge in the event of prepayment of the obligation; and to identify the broker as a creditor.

At the conclusion of the hearing, Administrative Law Judge Lewis F. Parker sustained each of the charges of the complaint. He ordered SILA to cease and desist from engaging in the violations charged.

This case is before us on respondent's appeal from the Initial Decision.

BACKGROUND

The facts of this matter, as set forth in the Initial Decision,⁵ are not

¹ Hereinafter "SILA."

² 15 U.S.C. 1601, *et. seq.*

³ 12 C.F.R. 226, *et. seq.*

⁴ 15 U.S.C. 41, *et. seq.*

⁵ The following abbreviations are used in this opinion: I.D. — Initial Decision (Finding No.); I.D. p. — Initial Decision (Page No.); CX — Commission Exhibit; RX — Respondent's Exhibit; RB — Respondent's Appeal Brief; CAB — Complaint Counsel's Answering Brief; RRB — Respondent's Reply Brief; Tr. — Transcript of Testimony; TROA — Transcript of Oral Argument before Commission; ALJ — Administrative Law Judge.

in substantial dispute.⁶ They will be summarized below.

SILA is a corporation engaged in first and second mortgage financing of residential properties, making loans to homeowners within Virginia primarily for debt consolidation. Finance charges are imposed on these transactions.⁷

Homeowners desiring loans from SILA either apply directly, are referred to SILA by small loan companies or savings and loan associations, or utilize the services of mortgage brokers who submit applications on their behalf. The fees charged by brokers are not established by statute; they often range between 9 and 10 percent of the loan proceeds,⁸ but are not uniform [3] and are subject to negotiation between broker and borrower.⁹ In some instances, the broker's fee is renegotiated just prior to the closing of the loan,¹⁰ but this occurs infrequently.¹¹

In a typical transaction involving a broker, SILA receives from the broker a loan application executed by the client, along with a package of materials relevant to the application and a covering letter listing the enclosures. SILA furnishes to brokers forms for the covering letters and rate books which can be used to compute the brokerage fee.¹²

When SILA approves a loan, it informs the broker, if one is involved, of the terms and conditions of the loan and the name of the attorney who will close the loan. SILA's general counsel acts as the closing attorney if the closing is to be held in Richmond, where both SILA and its general counsel are located. If the closing is to be held outside of Richmond, the general counsel selects a local closing attorney and forwards the loan papers to him. These are sent under cover of a "forwarding sheet" providing general instructions to the closing attorney and, on occasion, special instructions, such as directions to pay specified bills of the borrower out of the loan proceeds.¹³ Copies of SILA's Truth in Lending disclosure statements are included in the loan papers sent to the closing attorneys.¹⁴

Prior to implementation of the Truth in Lending Act, SILA directed loan brokers not to send their fee agreements to it. In letters to its closing attorneys, SILA advised that it would not authorize them to pay any broker's fee, but that written directions signed by

⁶ RB 2.

⁷ I.D. 1-2.

⁸ Tr. 91-92, 95-96, 189; CX 51-83.

⁹ I.D. 4-5.

¹⁰ Tr. 89, 107, 154.

¹¹ Tr. 93, 115, 154.

¹² I.D. 6-7.

¹³ I.D. 8.

¹⁴ Tr. 32, 219.

the borrower to withhold a given sum from the loan proceeds should be honored.¹⁵ The record [4] reflects that brokers do not provide copies of their fee agreements directly to SILA.¹⁶ However, copies of the broker's fee agreements are usually sent to the closing attorneys, whether SILA's general counsel or local counsel, since it is general practice for the closing attorney to pay that fee out of the proceeds of the loan.¹⁷ Some brokers also provided copies of their Truth in Lending disclosure statements to closing attorneys, whereas others did not.¹⁸

After receiving the loan papers, the closing attorney conducts a title search on the property securing the loan and arranges a convenient time for settlement with the borrower. At settlement, the closing attorney explains SILA's disclosure statement, the loan documents, and the terms of the loan. He gives the borrower a copy of SILA's disclosure statement, notice of the right to rescind, and a form of election not to rescind which is to be returned by the borrower after the three-day rescission period. The attorney has the borrower execute the deed of trust and endorse SILA's check. The attorney deposits the endorsed check in an escrow account pending expiration of the rescission period.¹⁹ If the broker has furnished his disclosure statement to the closing attorney, it is given to the borrower by the attorney.²⁰

Upon expiration of the rescission period and receipt of a signed statement from the borrower that he has elected not to rescind, the closing attorney disburses the loan proceeds from the escrow account in accordance with SILA's instructions. These generally require the attorney to make specified payments to the borrower's creditors, with the borrower's consent, and to pay the balance to the borrower. If the closing attorney has been furnished with the broker's agreement and the borrower has verified it, he will draw a check on the escrow account to the order of the broker for the amount specified.²¹

[5] After the closing, the attorney transmits to SILA the executed note, recorded deed of trust, the signed disclosure statement, rescission notice and election not to rescind, and a title policy if required. Of the four closing attorneys who testified at the hearing, three stated that they did not send to SILA any statement showing how the proceeds of the loan were disbursed. The fourth stated that

¹⁵ I.D. 16; RX 3, 4.

¹⁶ I.D. 9.

¹⁷ I.D. 10.

¹⁸ Tr. 193-194, 206; 104.

¹⁹ I.D. 11-12.

²⁰ Tr. 79, 185, 194, 197, 206.

²¹ I.D. 13-14; Tr. 114, 169, 211, 242-243.

he did send such statements to SILA; these statements show payments to brokers of the fee.²²

SILA's disclosure statements do not list the broker as a creditor, do not list the broker's fee as a prepaid finance charge, do not include the fee as a component of the finance charge, and do not include the fee as a component in computing the annual percentage rate.²³

I. Failure to Disclose Broker's Fee and to Identify Broker

Respondent SILA does not dispute the finding²⁴ that it has failed to incorporate the broker's fee and to identify the broker in its disclosure statements, but argues that it is not obligated to do so by the Truth in Lending Act and Regulation Z.

The purpose of the Truth in Lending Act is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uniformed use of credit."²⁵ Regulation Z, promulgated by the Board of Governors of the Federal Reserve System pursuant to the Act, requires as a general rule that any creditor extending credit other than open end make the disclosures required by the regulation for any transaction consummated on or [6] after July 1, 1969; generally, the disclosures must be made before the transaction is consummated.²⁶

SILA regularly extends consumer credit in the ordinary course of business, and is therefore a creditor under Regulation Z.²⁷ Brokers who obtain loans for their clients from SILA are arrangers for the extension of consumer credit who receive a fee for their service; accordingly, they are also creditors under Regulation Z.²⁸ The broker's fee is a [7] finance charge within the meaning of Section 226.4(a)(3) of Regulation Z.²⁹

²² I.D. 15.

²³ I.D. 17.

²⁴ *Id.*

²⁵ Truth in Lending Act, §102.

²⁶ Section 226.9(a):

General rule. Any creditor when extending credit other than open end credit shall, in accordance with §226.6 and to the extent applicable, make the disclosures required by this section with respect to any transaction consummated on or after July 1, 1969. Except as otherwise provided in this section, such disclosures shall be made before the transaction is consummated.

²⁷ Section 226.2(m):

Creditor means a person who in the ordinary course of business regularly extends or arranges for the extension of consumer credit. . . .

²⁸ Section 226.2(f):

"Arrange for the extension of credit" means to provide or offer to provide consumer credit which is or will be extended by another person under a business or other relationship pursuant to which the person arranging such credit receives or will receive a fee, compensation, or other consideration for such service. . . .

Regulation Z was amended effective October 28, 1975. Several provisions at issue in this proceeding were redesignated, such as Section 226.2(f), which is now Section 226.2(h). Since the amendment was effective after the complaint issued, all references are to Regulation Z as it existed when the complaint issued.

²⁹ Section 226.4(a)(3):

(Continued)

Since both SILA and the broker are creditors in brokered transactions, the provisions of Section 226.6(d) of Regulation Z dealing with multiple creditors apply and are at the heart of this matter. Section 226.6(d) provides:

If there is more than one creditor in a transaction, each creditor shall be clearly identified and shall be responsible for making only those disclosures required by this part which are within his knowledge and the purview of his relationship with the customer. If two or more creditors make a joint disclosure, each creditor shall be clearly identified. . . .

Under Section 226.6(d), if both SILA and the broker join in making a single disclosure, the broker's fee must be reflected as a finance charge on the disclosure statement. Where, as here, separate disclosures are made, the broker's fee must be incorporated into the lender's disclosure statement only if it is within SILA's knowledge and the purview of its relationship to the customer.

Respondent argues that no satisfactory showing was made that it had knowledge of the broker's fee in any transaction when it prepared its disclosure statement, when it was forwarded for review to its general counsel, when all loan documents were forwarded by the general counsel to the closing attorney, when the disclosure statement was delivered to the borrower, or when the loan transaction was consummated.³⁰ [8] We agree with respondent that the record does not establish that brokers have provided copies of their fee agreements directly to SILA before consummation of the loan transaction.³¹

However, it was established that SILA's closing attorneys, whether the general counsel or local counsel, are usually sent a copy of the broker's fee agreement by the broker, since as a matter of general practice the closing attorney pays that fee out of the loan proceeds. Every closing attorney testifying at the hearing stated that he normally received the broker's fee agreement almost simultaneously with receipt of notice of the loan from SILA.³² The fact that the broker's fee agreements were sent to the closing attorneys prior to

[T]he amount of the finance charge in connection with any transaction shall be determined as the sum of all charges, payable directly or indirectly by the customer, and imposed directly or indirectly by the creditor as an incident to or as a condition of the extension of credit, whether paid or payable by the customer, the seller, or any other person on behalf of the customer to the creditor or to a third party, including any of the following types of charges: . . . Loan fee, points, finder's fee, or similar charge.

³⁰ RB 9-10.

³¹ I.D. 9. One broker testified that it was his policy to send his fee agreements to SILA, Tr. 83, but he did not know whether this policy was in fact carried out by his employees. Tr. 86-91. A former general counsel of SILA recalled seeing some brokers' agreements in closed files in his office, but could recall no instance in which such agreements were received from SILA. Tr. 131-132. These agreements could have been received from brokers or closing attorneys, before or after the loan transaction was consummated.

³² Tr. 103 (Cutler); 148-149, 154, 156 (Lawrence); 206 (Brooks); 221, 226 (Dobbins).

the closing of the loan was corroborated by the testimony of the brokers.³³ There was also testimony indicating that the broker's disclosure statement, setting forth the brokerage fee, was often given to the borrower by the closing attorney.³⁴

It is clear that the closing attorneys normally had knowledge of the amount of the broker's fee prior to closing the loan. Complaint counsel assert that since the closing attorney is SILA's agent, is given the responsibility to close the loan, and receives knowledge of the broker's fee as part of the closing transaction, this knowledge is imputable to SILA.³⁵ The general rule is that the knowledge of an agent acquired [9] while acting within the scope of his authority and in reference to a matter over which his authority extends must be imputed to the principal. *Armstrong v. Ashley*, 204 U.S. 272, 283 (1907); see generally 3 Am. Jur. 2d Agency §273 (1962); 4 ALR 3d 224 (1965). The ALJ rejected complaint counsel's argument that SILA is chargeable with the closing attorney's knowledge of the amount of the fee. He ruled that because SILA informed its closing attorneys (before the Truth in Lending Act was implemented) that it would not authorize them to pay brokers' fees and subsequently payment of those fees has been made at the direction of the borrower, not SILA, payment of the fee by the closing attorney is not within the scope of his express authority from SILA and his knowledge of the exact amount of the fee is not chargeable to SILA.³⁶

In our opinion, the ALJ took an unduly narrow view of the agency relationship between SILA and its closing attorney. We find that receipt by the closing attorney of the broker's fee agreement was within the scope of his employment to close the loan. Conduct is within the scope of employment if it is "of the same general nature as that authorized, or incidental to the conduct authorized." Restatement (Second) of Agency §229 (1957). An agent's knowledge is to be imputed to a principal in a particular transaction if "the agent at some time had some duties to perform on behalf of the principal with respect to the transaction, although the agent need not have acquired his knowledge in connection with those duties." *Dawn Donut Company v. Hart's Food Stores, Inc.*, 267 F.2d 358, 363 (2d Cir. 1959). Despite SILA's letters to its closing attorneys advising that it would not authorize them to pay any broker's fee, the closing attorneys have, as a general practice, paid that fee out of the proceeds in

³³ Tr. 84-86 (Levinson), 187 (Hansen).

³⁴ Tr. 79, 194, 197, 206.

³⁵ CAB 6-7.

³⁶ I.D. p. 12. Although he determined that the closing attorneys' knowledge of the broker's fee is not imputable to SILA, the ALJ held that "the amount of the broker's fee, since it can be easily discovered by SILA's attorneys, should be disclosed in its Truth in Lending statements." I.D. p. 12. With respect to this holding, see n. 38 *infra*.

accordance with SILA's further statement in the letters that the borrower's directions to withhold a given sum from the loan proceeds should be honored. Even though the closing attorney may have been acting for the borrower in disbursing the broker's fee to the broker, this disbursement was of the same general nature as the disbursement authorized by SILA to creditors of the borrower, was incidental to the conduct authorized, and was part of the transaction of closing the loan. In paying the broker's fee, the closing attorney was acting as a dual agent, [10] and his knowledge was to be imputed to SILA despite the fact that he may have been acting for the borrower at the same time.³⁷ Therefore, we hold that the knowledge requirement of Section 226.6(d) of Regulation Z was met.³⁸

Having concluded that the brokerage fee was within SILA's knowledge, we must next determine whether it was within the purview of SILA's relationship with the customer. Respondent contends that since the lender is not privy to the negotiations between the broker and his client, and the brokerage agreement is executed prior to any communications between the borrower [11] and the lender, the fee is outside the purview of SILA's relationship with the customer.³⁹

³⁷ "In actions by a third party against one of two principals who had been represented by an attorney in a dual capacity, it has frequently been held that the knowledge of the attorney would be imputed to the defendant-principal, notwithstanding the fact that the attorney may have been acting for the other principal at the same time." 4 ALR 3d 224, 245 (1965).

³⁸ Complaint counsel made the alternative argument that, under the circumstances, SILA's knowledge that a broker is involved and that a fee is being charged in a particular transaction is enough to satisfy the knowledge requirement of Section 226.6(d), and that it is then SILA's duty to find out what the amount of the broker's fee is. TROA 35-37. Complaint counsel based this argument upon SILA's continuing, established relationship with loan brokers, (CX 214, Respondent's Answer to Request for Admissions Par. 24), its issuance to them of loan application forms and rate books, and its knowledge that brokers receive a fee for their services. CAB 8-10. The fact that SILA knows that a particular broker is involved, by receipt of the loan application from the broker, does obviously require SILA to disclose the identity of the broker in its disclosure statement in accordance with Section 226.6(d) if the purview requirement is met, as discussed below. Given our holding regarding the agency relationship between SILA and the closing attorneys, we need not reach the question of whether SILA's knowledge that a broker's fee is involved in a particular loan is enough to meet the knowledge requirement of Section 226.6(d) as to the amount of the fee. We do note, however, that where the lender knows that a broker's fee is being charged in a loan transaction, and the amount of the fee tends to fall within a narrow range, as here (9-10 percent of the loan proceeds), a strong argument could be made that the broker's fee is within the lender's knowledge for purposes of Section 226.6(d), and that the lender must make a reasonable effort to ascertain the precise amount, pursuant to Section 226.6(f). See n. 55 *infra*. There may well be other circumstances where the relationship between lender and broker imposes the same duty on the lender. It appears that SILA and its attorneys are easily able to find out the amount of the broker's fee. Tr. 49, I.D. p. 12. See Landers, Determining the Finance Charge Under the Truth in Lending Act, 1977 A.B.F. Res. J. 45, 64-65 (1977).

³⁹ RB 12-14.

We cannot accept this argument. The purview requirement was addressed by us in *Virginia Mortgage Exchange*, 87 F.T.C. 182 (1976), where the issue was whether a broker must disclose the name of the lender and the formula for computing the unearned finance charge in the event of prepayment of a loan. In ruling that the broker must make these disclosures, we stated: "In our view, all terms of a given loan fall within the 'purview' or 'scope' of the relationship between a customer and the broker who arranges the loan." 87 F.T.C. at 198. We observed that this construction of Section 226.6(d) best comports with the manifest purpose of the Truth in Lending Act, which is to ensure full disclosure of credit terms in situations involving brokered loans as well as those negotiated by a borrower directly with a lender.

Likewise, we believe that all terms of a given loan and all charges incidental to it fall within the purview of the lender's relationship with the customer. The broker's fee represents a substantial cost to the borrower in obtaining a loan, and should be disclosed by the lender in its disclosure of the cost of credit when the knowledge requirement is met, as it is here. This is not a situation where there are two separate lenders, such as one providing a first mortgage and the other a second mortgage; it was that kind of situation for which the purview requirement was designed, relieving one lender from disclosing the second lender's terms where the latter's extension of credit is not within the purview of the relationship of the first lender with his customer.⁴⁰[12]

We believe that SILA's failure to include the broker's fee in its disclosure statements has frustrated the Truth in Lending Act's basic purpose of enabling consumers to comparison shop for credit among the credit terms available from different sources and thereby avoid the uniformed use of credit through full disclosure. This is graphically illustrated by Commission Exhibit 217. The exhibit reflects what the annual percentage rate would be on eighteen of SILA's disclosure statements if the broker's fee had been included in the finance charge

⁴⁰ *Virginia Mortgage Exchange*, 87 F.T.C. at 201 n. 4.

Our construction of Section 226.6(d) is consistent with the pertinent Federal Reserve Board opinion letter. That letter states:

[W]ith respect to the lender's disclosure statement, the loan brokerage fee would need to be disclosed only if it is within the lender's knowledge and the purview of his relationship with the customer, as prescribed by §226.6(d). The lender obviously cannot disclose the fee if he is not aware of it. On the other hand, should the loan brokerage fee be paid directly by the lender to the loan broker (for example, if the fee is withheld from the loan's proceeds and is paid to the broker), the fee would be within the lender's knowledge and it should be disclosed on the lender's disclosure statement. Federal Reserve Board Letter No. 699, CCH Consumers Credit Guide ¶30,996 (Special July 19, 1973).

As in the example cited by the opinion letter, in the instant matter the broker's fee is withheld from the loan's proceeds and is paid to the broker by the lender's closing attorney. Federal Reserve Board staff letters are to be accorded great deference. *Virginia Mortgage Exchange*, 87 F.T.C. at 200; *Philbeck v. Timmers Chevrolet, Inc.*, 499 F.2d 971, 976-977 (5th Cir. 1974).

and annual percentage rate. In one example discussed by complaint counsel,⁴¹ SILA disclosed to Mr. and Mrs. Boone that the annual percentage rate of their loan was 12.50 percent. The Boones were apprised by the broker that his fee would be \$500.00. If they decided to shop for credit, contacted a lender directly, and were informed that he would provide credit at a 15 percent annual percentage rate for a loan involving no broker, would they be able to meaningfully use those figures? Only if they were unusually dedicated and fastidious comparison shoppers would they be likely to ascertain that the annual percentage rate for the SILA loan, with the broker's fee included, was 19 percent. [13]

We hold that respondent's failure to include the broker's fee in the determination of the finance charge in its disclosure statements violated Sections 226.4(a) and 226.6(d) of Regulation Z since the fee was a component of the total finance charge and was within SILA's knowledge and the purview of its relationship with the customer. Respondent therefore violated the Truth in Lending Act and, pursuant to Section 108(c) of that Act, 15 U.S.C. 1607(c)(1970), engaged in an unfair or deceptive act or practice under Section 5 of the Federal Trade Commission Act.⁴²

Since the broker's fee is within the knowledge of SILA and the purview of its relationship with its customers and respondent has failed to disclose it, respondent has violated the Truth in Lending Act and Federal Trade Commission Act by failing to disclose the broker's fee in its disclosure statements as a prepaid finance charge, pursuant to Sections 226.8(e)(1) and 226.8(d)(2) of Regulation Z;⁴³ failing to itemize the components of the finance charge in its disclosure statements as required by Section 226.8(d)(3) of Regulation Z;⁴⁴ failing to disclose [14] accurately the annual percentage rate in its

⁴¹ CAB 14.

⁴² Our holding here could have the result of consumers being furnished with similar statements by both broker and lender. Cf. *Virginia Mortgage Exchange*, 87 F.T.C. at 201. We continue to believe that the option presented by Section 226.6(d) of all creditors in a transaction providing a single joint disclosure statement, listing the names of each creditor and all necessary credit terms, has great benefits with respect to clarity and economy. If multiple creditors do not choose to make a joint disclosure, furnishing similar separate disclosures is far preferable to furnishing separate disclosures with random omissions.

⁴³ Section 226.8(e)(1) requires the disclosure of

Any finance charge paid separately, in cash or otherwise, directly or indirectly to the creditor or with the creditor's knowledge to another person, or withheld by the creditor from the proceeds of the credit extended. According to Section 226.8(d)(2), the charges must be disclosed as a "prepaid finance charge."

⁴⁴ Section 226.8(d)(3) requires the disclosure of

... the total amount of the finance charge, with description of each amount included, using the term "finance charge."

disclosure statements computed in accordance with Section 226.5(b) of Regulation Z, as required by Section 226.8(b)(2);⁴⁵ and by failing to identify the broker as a creditor in its disclosure statements, as required by Section 226.6(d) of Regulation Z.⁴⁶

Several concerns raised by respondent with respect to incorporation of the broker's fee in its disclosure statement should be addressed here. The state statute relating to industrial loan associations under which SILA operates⁴⁷ sets forth a maximum rate of interest allowed to be charged by industrial loan associations. Respondent is concerned that if it were to include the broker's fee in computing the annual percentage rate, this would produce on the disclosure statement an annual percentage rate indicating a prima facie violation of the state statute.⁴⁸ Since SILA's disclosure statements which incorporate the broker's fee must itemize the components of the finance charge in accordance with Section 226.8(d)(3) of Regulation Z, it will be clear from the [15] face of the statements that the broker's fee is a component of the finance charge and entered into the calculation of the annual percentage rate.⁴⁹

Respondent is also concerned that, by incorporating a broker's fee over which it has no control in its disclosure statement, it may be responsible for furnishing a false statement if the broker's fee reported to it is inaccurate.⁵⁰ One source of this concern is that the broker's fees are sometimes renegotiated just prior to closing the loan; this occasionally occurs when the loan granted by SILA is lower than that applied for, resulting in the broker receiving a lower fee than originally agreed upon with the borrower.⁵¹ However, the record indicates that this occurs only in a small minority of instances,⁵² and

⁴⁵ Section 226.8(b)(2) requires disclosure of "... the finance charge expressed as an annual percentage rate, using the term 'annual percentage rate,' " with exceptions not applicable here.

Section 226.5(b) requires disclosure of the annual percentage rate with an accuracy at least to the nearest quarter of 1 percent.

⁴⁶ Section 226.6(d) provides that when the knowledge and purview requirements are met, "if there is more than one creditor in a transaction, each creditor shall be clearly identified." The broker's name is known to SILA, both directly upon receipt from the broker of a loan application executed by the client, and as imputed from the closing attorney. For the reasons discussed above with respect to the broker's fee, the name of the broker is within the purview of the relationship between lender and borrower.

⁴⁷ Industrial Loan Associations Act of the Commonwealth of Virginia. I.D. 2; RX 2.

⁴⁸ TROA 20-22.

⁴⁹ At the hearing, the acting Commissioner for Banking for Virginia testified that if SILA added the broker's fee in computing the annual percentage rate, it would indicate to his examiners a prima facie violation of the state statute. I.D. 19; Tr. 291-301; CX 217. However, if it were clear that SILA was including the broker's fee in determining the annual percentage rate for purposes of informing the borrower and was not actually imposing the fee as a condition for the loan, he stated that no action would be taken. Tr. 306.

⁵⁰ TROA 28-29. At the oral argument, respondent's counsel stated that it was because of this concern that SILA advised brokers, prior to implementation of the Truth in Lending Act, not to send their fee agreements to it. TROA 28.

⁵¹ Tr. 89, 107, 154; TROA 28.

⁵² Tr. 93, 115, 154.

when it does occur the closing attorney has knowledge of the adjusted amount prior to the closing of the loan.⁵³ This is generally necessary for the closing attorney to make the distribution of the loan proceeds. Respondent is further concerned that since the broker's fee is outside SILA's control, it has no way of validating the accuracy of the information as to the total fee charged by the broker.⁵⁴ Because the closing attorney generally receives a copy of the broker's fee agreement, has knowledge of the final brokerage fee before closing the loan, and makes the disbursement to the broker [16] based upon that information, we think it unlikely that the amount known to him would be inaccurate. If, however, the brokerage fee reported to SILA or the closing attorney is inaccurate, SILA would not be responsible for any false disclosure in the absence of knowledge of such inaccuracy (e.g., a computational error made by a broker that is not obvious on the face of the brokerage agreement). Lack of knowledge of the correct fee would be as complete a defense under Section 226.6(d) as lack of knowledge that any fee was charged. Similarly, SILA would not be liable if the inaccuracy were due to an adjustment of the fee by the broker after closing without the lender's knowledge, pursuant to Section 226.6(g) of Regulation Z.

Furthermore, where the precise amount of the total broker's fee is not known in a particular instance, or SILA is aware that the final fee may differ from the reported fee, SILA would not be liable under Section 226.6(f) of Regulation Z for any inaccurate disclosure as long as it made a reasonable effort to ascertain the amount and used an estimated amount which is (1) clearly identified as such, (2) reasonable, (3) based upon the best information available, and (4) not used for the purpose of circumventing the disclosure requirements of Regulation Z.⁵⁵

II. Failure to Disclose Clearly the Method of Computing the Unearned Portion of the Finance Charge in the Event of Prepayment

SILA allows its customers to prepay their loan at any time and receive a rebate for any unearned interest. This rebate is reduced by a prepayment penalty. From July 1, 1969, through March 13, 1974, SILA's disclosure statements contained the following language regarding prepayment:

Borrower shall have the right to anticipate payment of this debt

⁵³ Tr. 154, 226.

⁵⁴ TROA 28-29.

⁵⁵ 12 C.F.R. 226.6(f).

at any time and shall receive a rebate for any unearned interest, which rebate shall be computed in accordance with the Standard Rule of 78 and shall be reduced by an anticipation premium [17] equal to that portion of the contract interest allocable under such Rule to the next six payments.⁵⁶

The complaint charged that SILA has failed to disclose clearly the method of computing any unearned portion of the finance charge in the event of prepayment of the obligation, as required by Section 226.6(a) of Regulation Z. That section sets forth the general rule regarding disclosure requirements and is applicable to all other sections of Regulation Z. It provides:

Section 226.6(a) *Disclosures; general rule.* The disclosures required to be given by this part shall be made clearly, conspicuously, in meaningful sequence, in accordance with the further requirements of this section, and at the time and in the terminology prescribed in applicable sections.

Respondent contends that it has not violated Section 226.6(a) because it has repeated the language of the Virginia statute governing industrial loan associations.⁵⁷ It claims that it has thereby complied with another section of Regulation Z, Section 226.8(b)(7), which requires "[i]dentification of the method of computing any unearned portion of the finance charge in the event of prepayment in full of the obligation." In interpreting this section, the Federal Reserve Board has stated that the methods of computing rebates under many state statutes are so complex that if they were repeated on a disclosure statement, they might detract from other important disclosures. Consequently, the Board ruled that the rebate identification requirement is satisfied by reference to the applicable statutory method.⁵⁸ It is respondent's view that [18] Section 226.8 (b)(7), as interpreted by the Board, is specifically applicable to a particular disclosure and supersedes the more general disclosure requirement of Section 226.6(a).

We agree with the ALJ that SILA has violated Section 226.6(a) by failing to disclose clearly that the borrower can prepay his debt and that the rebate he receives is reduced by a penalty. As the ALJ determined, the fact that SILA allows prepayment would have been

⁵⁶ I.D. 22; CX 1-39.

⁵⁷ RX 2; RB 14.

⁵⁸ Section 226.818(c):

Many State statutes provide for rebates of unearned finance charges under methods known as the "Rule of 78's" or "sum of the digits" or other methods. In view of the fact that such statutory provisions involve complex mathematical descriptions which generally cannot be condensed into simple accurate statements, and which if repeated at length on disclosure forms could detract from other important disclosures, the requirement of rebate "identification" is satisfied simply by reference by name to the "Rule of 78's" or other method, as applicable.

much clearer to the average consumer if instead of stating that the borrower can "anticipate payment," SILA had used language along the following lines: "Borrower shall have the right to prepay this loan. . . ." SILA's disclosure that the rebate would be "reduced by an anticipation premium" did not clearly reveal that the rebate was subject to a penalty.⁵⁹ The ALJ found that the meaning [19] of the language employed by respondent was unclear to consumers. Although there was no consumer testimony at the hearing, we conclude, based on our own review of respondent's forms, that the ALJ properly assessed the inadequacy of the language used by respondent. It is well established that the Commission may determine that the meaning of language is deceptive or unclear on the basis of its expertise. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 386 (1965); *J. B. Williams Co. v. FTC*, 381 F.2d 884, 890 (6th Cir. 1967).

We reject SILA's argument that the general requirement of Section 226.6(a) of Regulation Z, mandating that all disclosures be made clearly, is somehow superseded by Section 226.8(b)(7) and the Board's Interpretation 226.818. This provision, as interpreted by the Board, merely deals with *identification* of the statutory method of computing the rebate of unearned finance charges. It in no way excuses compliance with the general rule that requisite disclosures, such as that the borrower's rebate for prepaying the debt is reduced by a penalty, be made clearly and conspicuously. As the ALJ aptly stated,

It is apparent that Section 226.8(b)(7) and the Board's interpretation are based on a predicate which does not exist here—that is, that the borrower is aware that his rebate is subject to reduction by a penalty. The Board recognizes that an actuarial explanation of the method of computing the rebate is so complex that it need not be revealed, but the Board has not authorized the use of language which conceals the fact that a penalty will be assessed if the loan is prepaid, since this disclosure involves no complex explanation and does not detract from other disclosures. Since the penalty is an integral part of the method which SILA uses in computing the unearned portion of its finance charge in the event of prepayment, SILA's failure clearly to disclose its existence violates Section 226.6(a) of Regulation Z.⁶⁰

⁵⁹ SILA has made these disclosures somewhat clearer since March 14, 1974, when it began using the following language in its disclosure statements:

Prepayment: Borrower shall have the right to anticipate (prepay) this loan at any time and shall receive a rebate of the unearned interest portion of the finance charge computed in accordance with the Standard Rule of 78 less an anticipation (prepayment) premium equal to that portion of the contract interest allocable under such Rule to the next six payments.

I.D. 23; RX 1; Tr. 55.

The ALJ stated that there still may be some confusion caused by retention of the words "anticipation" and "premium." I.D. p. 19. Although the disclosure would be clearer without the word "anticipation," the inclusion of the central notion of prepayment aids consumer understanding of this language. However, use of the word "premium" still renders the language employed by SILA unclear to consumers; a premium connotes, in common parlance, a "reward." Oxford English Dictionary 1281 (1971); Webster's Seventh New Collegiate Dictionary 617 (1969). The language would be made clearer if "penalty" were substituted for "premium."

⁶⁰ I.D. p. 18.

[20] We also reject respondent's further argument that the requirement of Section 226.6(a) that disclosures be made "clearly" and "conspicuously" only refers to the physical characteristics of the disclosure rather than its ability to communicate.⁶¹ The general rule of Section 226.6(a) is intended to advance the fundamental purpose of the Truth in Lending Act — to promote the informed use of credit and to assure meaningful disclosure of credit terms.⁶² To construe the general disclosure requirement of the Act's implementing regulation as only applicable to the graphic presentation of the requisite disclosures, rather than to their language and meaning, would seriously erode the regulation's effectiveness in carrying out the purpose of the Act.

We hold that by failing to disclose in clear, unambiguous language that borrowers may prepay their debt and that the rebate they will receive will be reduced by a penalty, SILA has violated Section 226.6(a) of Regulation Z, as charged.

III. Failure to Print The Terms "Finance Charge" and "Annual Percentage Rate" More Conspicuously Than Other Terminology

SILA's disclosure statements which were in use between July 1, 1969 and March 13, 1974 did not have the terms "finance charge" and "annual percentage rate" printed thereon more conspicuously than all other terminology.⁶³ Therefore, SILA has not complied with Section 226.6(a) of Regulation Z:

Except with respect to the requirements of §226.10, where the terms "finance charge" and "annual percentage rate" are required to be used, they shall be printed more conspicuously than other terminology required by this Part. . . .

Even though SILA's violation of Section 226.6(a) here may have been technical or "minor,"⁶⁴ this does not excuse it from liability. See *Certified Building Products, Inc.*, 83 F.T.C. 1004, 1041 (1973), *aff'd sub nom. Thiret v. FTC*, 514 F.2d 176 (10th Cir. 1975). [21]

IV. Discontinuance

The ALJ found that since March 14, 1974, SILA has made two changes to its disclosure statements: the terms "finance charge" and

⁶¹ RB 15.

⁶² Truth in Lending Act, §102. See *Mourning v. Family Publication Service*, 411 U.S. 356, 377-378 (1973).

⁶³ I.D. 20; CX 1-39.

⁶⁴ RB 16.

“annual percentage rate” are now more conspicuous than other terminology,⁶⁵ and the fact that a penalty is imposed in the event of prepayment of the debt is now disclosed.⁶⁶

We agree with ALJ that since discontinuance of these practices challenged in the complaint occurred after respondent was aware of the Commission’s investigation, there is no assurance that these practices will not be resumed and an appropriate cease and desist order should enter.⁶⁷

ORDER

The order issued by the ALJ prohibits SILA from engaging in the violations found to have occurred, with respect to the failure to make certain disclosures required by Section 226.6 of Regulation Z and the failure to make certain disclosures in the manner required by the regulation. The Commission has determined to adopt this order. The first provision of the order requires SILA to include the broker’s fee in the determination of the finance charge. This provision is supported by our finding that SILA’s closing attorneys normally had knowledge of the amount of the broker’s fee prior to closing the loan, and our conclusion that the brokerage fee was within SILA’s knowledge and the purview of its relationship with the customer. Order provisions 2, 3, and 4 prohibit violations stemming from SILA’s failure to incorporate the broker’s fee in the finance charge. If in the future SILA is of the opinion that it no longer has knowledge of the broker’s fee through its closing attorneys, it may petition the Commission to reopen the proceeding for the purpose of altering, modifying, or setting aside these provisions due to changed conditions of fact pursuant to Section 3.72 of the Commission’s Rules of Practice. However, as we discussed in note 38 *supra*, even if SILA can demonstrate that it no longer has constructive knowledge through its closing attorneys of the broker’s fee, the circumstances of its relationships with brokers may still provide it with knowledge of their fees within the meaning of Section 226.6(d) of Regulation Z. [22]

Order provision 7 prohibits SILA from failing to identify the broker as a creditor. This provision is supported by our finding that in brokered transactions SILA has knowledge of the broker’s identity by virtue of receipt of the loan application from the broker and our conclusion that, as to the broker’s identity, the knowledge and purview requirements of Section 226.6(d) of Regulation Z are present.

⁶⁵ I.D. 21.

⁶⁶ I.D. 23.

⁶⁷ See, e.g., *Fedders v. FTC*, 529 F.2d 1398 (2d Cir.), cert. denied, 45 U.S.L.W. 3244 (October 5, 1976); *Certified Building Products*, *supra*.

As with the order provisions discussed above, of course, SILA may petition the Commission to reopen on the basis of changed conditions relating to this provision.

Order provision 5 remedies a specific violation and needs no elaboration. Order provision 7 requires SILA to make a clear disclosure of the methods of computing any unearned portion of the finance charge in the event of prepayment of the obligation. The foundation for this provision is our holding that SILA has failed to disclose in clear, unambiguous language that borrowers may prepay their debt and that the rebate they will receive will be reduced by a penalty. As discussed in note 59 *supra*, continued use of the word "premium" which renders the prepayment disclosure language used by SILA unclear to consumers would violate provision 7 of the order, in the Commission's opinion.

Finally, the order requires SILA to cease and desist from:

Failing, in any consumer credit transaction or advertisement, to make all disclosures, determined in accordance with Sections 226.4 and 226.5 of Regulation Z, in the manner, form and amount required by Sections 226.6, 226.8, 226.9 and 226.10 of Regulation Z.

This order provision is appropriate, for the disclosures required by the Truth in Lending Act and Regulation Z bear a close relationship and the Commission may prohibit not only those practices which were found to be illegal but also future violations of related statutory or regulatory mandates. *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 391-393 (1959). As we stated in *Virginia Mortgage Exchange*, 87 F.T.C. at 202, in issuing a broad order under similar circumstances, it is [23] well established that the Commission "is not limited to prohibiting 'the illegal practice in the precise form' existing in the past. *FTC v. Ruberoid*, 343 U.S. 470, 473 (1952). This agency, like others, may fashion its relief to restrain 'other like or related unlawful acts.' *NLRB v. Express Pub. Co.*, 312 U.S. 426, 436 (1941)"; *FTC v. Mandel Brothers Inc.*, 359 U.S. at 392; *see also Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611 (1946); *Fedders Corp. v. FTC*, 529 F.2d 1398 (2d Cir.), *cert. denied*, 45 U.S.L.W. 3244 (October 5, 1976).

The findings and conclusions of the administrative law judge are adopted as the findings and conclusions of the Commission, except to the extent that they are inconsistent with this opinion. An appropriate order is appended.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of respondent from the initial decision; and

The Commission having considered the oral arguments of counsel, their briefs, and the whole record; and

The Commission, for reasons stated in the accompanying opinion, having denied in full the appeal of respondent's counsel; accordingly

It is ordered, That, except to the extent that it is inconsistent with the Commission's opinion, the initial decision of the administrative law judge be, and it hereby is, adopted together with the opinion accompanying this order as the Commission's final findings of fact and conclusions of law in this matter;

It is further ordered, That the following cease and desist order be, and it hereby is, entered: [2]

ORDER

It is ordered, That respondent Security Industrial Loan Association, a corporation, its successors and assigns and its officers, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension of consumer credit or advertisement to aid, promote or assist, directly or indirectly, any extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. 226) of the Truth in Lending Act (Pub. Law 90-321; 15 U.S.C. 1601, *et seq.*), do forthwith cease and desist from:

1. Failing to include the broker's fee or finder's fee in the determination of the finance charge, as required by Section 226.4 (a)(3) of Regulation Z.

2. Failing to disclose the broker's fee or finder's fee as a prepaid finance charge, as required by Section 226.8(e)(1) of Regulation Z, using the term "prepaid finance charge," as required by Section 226.8(d)(2) of Regulation Z.

3. Failing to itemize the components of the finance charge, as required by Section 226.8(d)(3) of Regulation Z.

4. Failing to disclose accurately the annual percentage rate computed in accordance with Section 226.5(b) of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

5. Failing to print the terms "finance charge" and "annual percentage rate" more conspicuously than other terminology, as required by Section 226.6(a) of Regulation Z.

6. Failing to disclose clearly the methods of computing any unearned portion of the finance charge in the event of prepayment of the obligation, as required by Section 226.6(a) of Regulation Z. [3]

7. Failing to identify the broker as a creditor, as "creditor" is

defined in Section 226.2(m) of Regulation Z, as required by Section 226.6(d) of Regulation Z.

8. Failing, in any consumer credit transaction or advertisement, to make all disclosures, determined in accordance with Sections 226.4 and 226.5 of Regulation Z, in the manner, form and amount required by Sections 226.6, 226.8, 226.9 and 226.10 of Regulation Z.

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of any successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondent deliver a copy of this order to cease and desist to all present and future personnel of respondent engaged in the extension of consumer credit, and that respondent secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That respondent shall, within sixty (60) days after the effective date of the order served upon it, file with the Commission a report in writing, signed by respondent, setting forth in detail the manner and form of its compliance with the order to cease and desist.

Complaint

90 F.T.C.

IN THE MATTER OF

S. S. KRESGE COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT*Docket C-2901. Complaint, Sept. 22, 1977 — Decision, Sept. 22, 1977*

This consent order, among other things, requires a Troy, Mich. general merchandise retailer, to cease authorizing or instituting credit collection suits in counties other than where a defendant resides or signed the relevant contract. Further, where such suits have already been initiated, the firm is required to terminate them, vacate any rendered judgments, and give notice to concerned parties that such action has been taken.

*Appearances*For the Commission: *Eddie W. Correia.*For the respondent: *J. Wallace Adair, Howrey & Simon, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that certain acts and practices used by attorneys engaged by collection agencies with whom respondent S. S. Kresge placed retail credit accounts for collection violated Section 5 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the public interest, issues this complaint:

PARAGRAPH 1. S. S. Kresge Company is a Michigan corporation with its principal office located at 3100 West Big Beaver, Troy, Michigan.

PAR. 2. Respondent is a general merchandise retailer, engaged in the advertising, offering for sale, sale and distribution of clothing, household goods, appliances, tools and various other articles of merchandise.

PAR. 3. In the course and conduct of its business as aforesaid, respondent now causes the sale, ships and distributes its merchandise to purchasers located in various States of the United States. Therefore, respondent maintains a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. In the course and conduct of its business, respondent extended credit to holders of its credit card (herein referred to as retail credit accounts) for the purpose of facilitating consumers' purchases of respondent's merchandise.

PAR. 5. In the course of attempting to collect allegedly delinquent