

May 20, 1975

Dear

You have inquired whether sections 5.110 and 5.111 of the Credit Code prohibit a bank, which has not complied with these sections (right to cure and cure of default), from exercising the privilege of set-off on a consumers' deposits where the set-off is utilized in the case of a default consisting of the debtor's failure to make a payment on a consumer loan due to the bank.

If we assume that the default has consisted of the consumer's failure to make a required payment and that the creditor had not afforded the debtor the notice of cure on a previous default for non-payment, then it is the opinion of the Bureau that the set-off by the bank would have been in violation of §5.111 where the notice provisions of §5.110 had not been complied with by the bank for default of the consumer loan.

Subsection (2) of section 5.111 provides, in part, that "... a creditor may neither accelerate maturity of the unpaid obligation nor take possession of collateral because of that default..." By thus restricting the creditors ability to accelerate, prior to compliance with the notice requirements, the Code eliminates any possible justification by the creditor to "set-off" where the default has consisted only of failure to make a required payment.

In those cases where a consumer's account at the creditor-bank had been pledged as collateral for the loan, the prohibition against possession of collateral would also be effective against the creditor until such time as proper notice of the consumer's right to cure had been given by the creditor.

The sections relating to a consumer's right to cure represent one of the primary consumer protections afforded by the Credit Code. It would be inconsistent with the intention of the Legislature to permit a creditor to avoid the protection afforded to consumers by these sections merely by utilizing a set-off device.

Respectfully,

John E. Quinn  
Superintendent

JEQ/jh