American Bankers Association
Building Success. Together.

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By electronic delivery

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Ms. Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20051

Re: Docket Number R-1343
Proposed Amendments to Regulation E
Electronic Fund Transfer Act

Dear Ms. Johnson,

The American Bankers Association (ABA)[1] appreciates the opportunity to comment on the Federal Reserve Board's (the Board) proposed amendments and clarifications to Regulation E and the Official Staff Interpretations on overdraft services (the Proposed Rule).[2] The Proposed Rule seeks to clarify certain aspects of the Board's November 17, 2009, final rule amending Regulation E to limit the ability of financial institutions to assess overdraft fees for paying automated teller machine (ATM) and one-time debit card transactions that overdraw a consumer's account (the Final Rule).[3]

ABA commends the Board for its efforts to develop strong regulations that ensure transparency and consumer choice with respect to overdraft services while considering the operational issues involved in meeting customer needs and demands. Since publication of the Final Rule, the banking industry has been working hard to understand its compliance obligations in order to make the necessary system changes and to ensure that its communications with customers are transparent and educational. Throughout this process, the Board staff has been accessible and helpful in answering many of the questions that have arisen. ABA notes its appreciation for the staff's responsiveness to these questions.[4]

The proposed clarifications to the Final Rule address several areas of confusion; however, our members have identified additional issues that require further clarification. We respectfully request that the Board consider the following as it adopts its final amendments to Regulation E and the Official Staff Interpretations.

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[1] The American Bankers Association brings together banks of all sizes and charters into one association. ABA works to enhance the competitiveness of the nation's banking industry and strengthen America's economy and communities. Its members – the majority of which are banks with less than $125 million in assets – represent all segments of the industry's $13 trillion in assets and employ over 2 million men and women.
[2] 75 Fed.Reg. 9120 (March 1, 2010).
[3] 74 Fed.Reg. 59033 (November 17, 2009).
[4] In addition, it should be noted that ABA member banks valued the Board's telephone briefing on the Final Rule and the consumer information about the rule that has been posted on the Board's website.

Comments on the Proposed Rule:

1. Clarification of the requirement to provide written confirmation

Section 205.17(b)(1) states that a bank may not assess an overdraft fee or charge on a consumer's account for paying an ATM transaction or one-time debit card transaction unless the bank:

i. Provides the consumer with a notice in writing, or if the consumer agrees, electronically;
ii. Provides a reasonable opportunity for the consumer to affirmatively consent, or opt-in;
iii. Obtains the consumer's affirmative consent, or opt-in; and
iv. Provides the consumer with confirmation of the consumer's consent in writing, or if the consumer agrees, electronically.[5]

The fourth requirement – the requirement to "provide" the consumer with confirmation of the consumer's consent in writing, or if the consumer agrees, electronically – has generated many questions from our members, particularly those considering allowing customers to consent by telephone or at the ATM, assuming that is operationally possible. Comment 17(b)-7, as currently drafted, provides:

> A financial institution may comply with the requirement in §205.17(b)(1)(iv) by providing to the consumer a copy of the consumer's completed opt-in form or by sending a letter or notice to the consumer acknowledging that the consumer has elected to opt in to the institution's service.[6]

In response to inquiries about this requirement, the Board proposes revision of comment 17(b)-7 by adding, "An institution may not assess any overdraft fees or charges on the consumer's account until the institution has sent the written confirmation. An institution complies with this requirement if it has adopted reasonable procedures designed to ensure that the written confirmation is sent before fees are charged."[7] ABA appreciates the Board's attempt to clarify this requirement but urges the Board to provide more flexibility in providing confirmation and to recognize practical and operational issues so that customers who have initiated a request that their bank authorize an overdraft have that request honored.

Most of the questions about confirmation arise when considering how to confirm a customer's affirmative consent communicated by telephone. As the Board recognizes, some customers will not choose to opt in to overdraft services until the need arises, often in an emergency when they are anxious to have the transaction approved. Banks want to be able to accommodate these customers.

The current confirmation requirement poses operational obstacles that will make it difficult, if not impossible, for banks to honor the customer's request in these instances. For example, a bank mailing a confirmation may not be able to show that it has "sent" the confirmation prior to authorizing the transaction pursuant to a customer's telephone opt-in. We therefore respectfully

[5] *See* 74 Fed.Reg.*supra,* at 59052.
[6] *Id.* at 59055.
[7] 75 Fed.Reg.*supra,* at 9124.

request that the Board modify the proposed commentary to require that the confirmation be sent "promptly" after consent, for example, no later than the close of business on the next business day. The "example" should be clearly stated as such so that it is clear that other means of prompt confirmation are permitted.

Providing prompt notice of confirmation after the transaction will not harm consumers. First, it is the customer taking the initiative to opt in, so there is no surprise. Indeed, it is at a time when customers are arguably more informed about the implications of their choice than they are at other times. Second, the rule already recognizes that there will be instances when the consent will be received after a fee is imposed because the rule requires that it be "sent," not received, before the fee is imposed. Indeed, the confirmation is intended to remind customers of their choice and their right to revoke their consent. Third, banks may refund overdraft fees for those consumers who truly did not intend to opt-in, and a consumer is free to revoke consent at any time.

However, the customer whose transaction was *denied* cannot be made whole after the fact. Lack of flexibility on the timing for providing the confirmation means that customers will in some cases not have their requests honored – at a time when they need or want it most. As the Board recognizes, a balance must be struck between accommodating these customers and ensuring that they understand the nature of their choice. Providing the confirmation notice promptly after receiving consent strikes this balance. Given that customers will receive notice both before and after their consent as well as a reminder about their right to revoke, customers will be adequately informed, so their choice should be accommodated.

However, the customer whose transaction was *denied* cannot be made whole after the fact. Lack of flexibility on the timing for providing the confirmation means that consumers will in some cases not have their requests honored – at a time when they need or want it most. As the Board recognizes, a balance must be struck between accommodating these customers and ensuring that they understand the nature of their choice.

ABA also urges the Board to provide additional clarification about the form of the opt-in and confirmation notices. Section 205.4(a) provides generally that the disclosures "required under this part shall be . . . in writing, and in a form the consumer may keep." However, section 205.17(b) provides that the opt in notice and confirmation be "in writing, or if the consumer agrees, electronically," but does not specify that they must be in a form the consumer may keep, raising questions about whether the general provision applies. While footnote 32[8] of the supplementary information to the Final Rule states that the disclosures must be "in a form the consumer may keep," clarification in Section 205.17(b) itself would avoid any ambiguity.

2. Clarification of Commentary to 179b)-4.

The commentary to 17(b)-4 describes how a financial institution may provide consumers with a "reasonable opportunity" to opt in. The comment provides four examples of reasonable

[8] *See* 74 Fed.Reg. *supra* at 59041(Because the disclosures are not required to be in written form, electronic disclosures made under this section are not subject to compliance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (15 U.S.C. 7001 et seq.) which only applies when information is required to a consumer in writing. The notice is, however, subject to Regulation E's general requirement that disclosures be clear and readily understandable and in a form the consumer may keep. *See* 12 C.F.R. §205.4(a)(1)).

methods: by mail, by telephone, by electronic means, and in person. Questions have arisen about whether banks must offer each of these channels and whether, for example, they could require that the consent be in writing so that the bank has a record of the decision. ABA requests that the Board state specifically that banks may *choose* to offer any or all of these methods. Then, applying section 205.17(f) which requires a bank to provide a consumer with the right to revoke consent "in the manner made available to the consumer for providing consent,"[9] a bank that limits the methods for opting in, may also limit the means to revoke that consent accordingly.

3. Clarification of Commentary to 17(b)-9.i and ii

ABA appreciates the Board's proposed addition of comment 17(b)-9.i clarifying that when a consumer's negative balance is attributable in part to a check, ACH, or recurring debit card transaction and an ATM or one-time debit card transaction, a bank is not prohibited from charging a daily or sustained overdraft fee. The proposed comment also states that in those instances when "mixed" transactions cause an account to be overdrawn and to trigger sustained overdraft fees, the date on which the sustained overdraft fee may be assessed is determined by the date on which the check, ACH, or recurring debit card transaction was paid into overdraft.[10] ABA believes that the Board's clarification is consistent with the intent of the Final Rule, which only prohibits the assessment of overdraft fees on consumer accounts that have not opted in for an ATM or one-time debit card transactions.

We also appreciate the examples the Board provides in proposed comment 17(b)-9.ii to illustrate the application of the rule. However, ABA urges the Board to delete one of the assumptions noted as a preface to the examples, specifically, assumption (d), the assumption that the institution "allocates deposits to account debits in the same order in which it posts debits."[11] The use of the word "allocates" suggests that banks apply deposits to particular debits, following a specific "allocation order" of credits to particular debits – an incorrect assumption that creates confusion. We are not aware of any bank that "allocates" or applies deposits to particular debit transactions, nor do we understand how that might work.

Moreover, at the conclusion of its discussion of sustained overdraft fees in the supplementary information to the Proposed Rule, the Board states, "The proposed rule does not, however, require transactions to be posted or deposits to be allocated in the manner set forth in the example. Institutions may post transactions or allocate deposits as permitted by applicable law."[12] Inserting an assumption into an example that has no resemblance to any actual practice makes the example confusing, distracting, and not informative. Thus, we respectfully request the Board to delete assumption (d) from the discussion of the application of the rule and to delete references to allocation order in example b of comment 17(b)-9.ii, or delete example b entirely.

[9] 74 Fed.Reg. *supra* at 59053.
[10] 75 Fed.Reg. *supra* at 9125.
[11] 75 Fed.Reg. *supra* at 9125.
[12] *Id.* at 9123 (emphasis added).

4. *Technical amendment of section 205.17(f)*

Finally, ABA urges the Board to make a technical amendment to section 205.17(f) which describes the consumer's continuing right to revoke consent. Section 205.17(f) states, "A consumer may affirmatively consent to the financial institution's overdraft service at any time in the manner described in the notice required by paragraph (b)(1)(i) of this section."[13] Sub-paragraph (i), however, refers to the opt-in notice itself, not the methods that a bank makes available to its consumers to express their consent.[14] We assume that the Board's intended reference was to sub-paragraph (ii), which establishes the requirement that an institution provide a reasonable opportunity for the consumer to affirmatively consent to an institution's overdraft services. ABA suggests the following amendment of the language of section 205.17(f): "A consumer may affirmatively consent to the financial institution's overdraft service at any time in the manner described in ~~the notice required by~~ paragraph (b)(1)~~(i)~~ (ii) of this section."

Conclusion

ABA appreciates the opportunity to comment on the Proposed Rule. If you have any questions about these comments, please contact the undersigned at (202) 663-5073 or via e-mail at voneill@aba.com.

Sincerely,

Virginia O'Neill

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[13] 74 Fed.Reg. *supra* at 59053.
[14] 74 Fed.Reg. *supra* at59052.