



1120 Connecticut Avenue, NW
Washington, DC 20036

1-800-BANKERS
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Nessa Feddis
Senior Federal Counsel
Phone: 202 663 5433
Nfeddis@aba.com

14 October 2005

By electronic delivery

Ms. Jennifer J. Johnson,
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

***Docket No. R-1234
Electronic Fund Transfer Act
Regulation E
70 Federal Register 49891, 25 August 2005***

The American Bankers Association (“ABA”) is pleased to submit our comments to the Federal Reserve Board’s (“Board”) request for comment on proposed revisions to Regulation E (Electronic Fund Transfer Act) and its commentary. The proposed revisions would clarify the disclosure obligations of automated teller machine (“ATM”) operators with respect to fees imposed on a consumer for initiating an electronic fund transfer or a balance inquiry at an ATM.

The American Bankers Association, on behalf of the more than two million men and women who work in the nation's banks, brings together all categories of banking institutions to best represent the interests of this rapidly changing industry. Its membership--which includes community, regional and money center banks and holding companies, as well as savings associations, trust companies and savings banks--makes ABA the largest banking trade association in the country.

Summary.

Section 205.16 of Regulation E provides that an ATM operator that imposes a fee on a consumer for initiating an electronic fund transfer or a balance inquiry must post notices at ATMs that a fee *will* be imposed. The proposed clarification provides that ATM operators may provide a notice that a fee *may* be imposed if there are circumstances in which an ATM fee will not be charged for a particular transaction. The Board had earlier proposed making the clarification in the commentary, but upon consideration of comments received now believes that it would be appropriate to make the clarification in the regulation itself.

As we wrote in our earlier comment letter dated 24 November 2004, we agree with the Board's approach. Clarifying that a fee "may" be charged if in fact it will not necessarily be imposed is sensible to fulfill the statutory purpose and to ensure that consumers better understand the meaning of the disclosure to avoid inconvenient choices. We also believe that the Board has authority to make the change pursuant to Section 904(c) of the Electronic Fund Transfer Act.

Background.

An informal survey of banks reveals that they currently use a variety of disclosures to comply with the ATM notice requirement of Regulation E:

- Many banks, including some large institutions, use the term "may" in their posted ATM notices. This ensures that potential users who will not be charged a fee are not discouraged from using the ATM before initiating a transaction.
- Some banks use term the "will" without clarifying any exceptions even though there may be exceptions. This decision may be based on the reasoning that using the same term contained in the regulation provides some legal safety and that there are legal risks in using a different, even if more accurate, word. Others may have previously used "may," but changed their notices for fear of lawsuits challenging the use of that term.
- Finally, some banks, use the term "will," and then explain the exceptions. For example, they may clarify that non-USA cardholders or members of certain banks or networks are not charged a fee or that there is no fee for a balance inquiry. While this disclosure is arguably safer from a legal liability perspective, it is also lengthier and harder to understand quickly.

The posted notice should be allowed to be short and general.

The purpose of the posted notice is to provide a kind of up-front alert that the potential ATM user could face a fee for using the ATM. It was not intended to necessarily provide specifics, which must also be provided, but are allowed to be provided on the screen once a transaction has been initiated.

Congress understood that fees and the circumstances of when they may be imposed will change over time and intended to avoid requiring ATM owners to physically replace notices posted at the ATM each time a fee or policy is changed. Rather, the details, that is, whether the fee will actually be imposed and the amount of the fee, may be disclosed on the screen prior to obligating the user. If Congress had intended the posted notice to serve as anything more than a general warning, disclosing that a fee "will" be imposed without providing the amount of the fee (which does

not have to disclosed) would be inadequate to allow the consumer to decide whether to continue with the transaction, as the fee amount is a significant factor in determining whether to proceed with the transaction.

Disclosing “will” and listing the exceptions may not be particularly helpful to consumers. First, as noted, the information is inadequate to make a decision if amount is not also disclosed. Second, the notice becomes unnecessarily lengthier, making it more difficult for the consumer to understand quickly. That the list of exceptions for a particular bank is modest today, is not a guarantee that it will not become longer over time. A longer notice also becomes more obscure and less likely to be read as spaces for notices is limited on ATMs and the fee notice competes with other notices (e.g. Regulation CC notice about availability of ATM deposits, ATM security information, logs of network participants, etc.) that may also have to be posted.

Requiring an explanation of all the exceptions may also be burdensome and costly. As noted, the exceptions may and do change over time. For example, non-U.S. cardholders usually are not charged a fee, but that could change. Banks may also choose to eliminate a fee for a balance inquiry. To make a change banks would have to replace all the posted notices, a result Congress did not intend.

The Board has the discretion to modify the statutory language.

Section 904 (c) of Regulation E provides:

Regulations prescribed hereunder may contain such classifications, differentiations, or other provisions and may provide for such adjustments and exception for any class of electronic fund transfers, as in the judgment of the Board are necessary or proper to effectuate the purposes of this title, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

We believe that in order to effectuate the purposes of the statute, for the reasons discussed above, that the Board needs to add flexibility to the provision to ensure that consumers are better informed and ATM operators not unnecessarily burdened.

The Board should clarify that banks may continue use of “will” even if a fee may not be imposed in some situations.

ABA is concerned that some banks have used the term “will” in their notices, in good faith relying on the existing regulation’s use of “will” to ensure compliance, even though they do not impose a fee in all instances. It would be unfair and burdensome in these instances to require that the notices be replaced to avoid potential lawsuits and significant liability. Therefore, we suggest that the Board clarify in the commentary that use of the term “will” is acceptable, even though there may be exceptions.

Conclusion.

ABA appreciates the opportunity to comment on this proposal. ABA strongly supports the Board's proposal to modify the regulation to clarify that the ATM posts notices at ATMs that a fee "may" be imposed if there are circumstances in which an ATM fee will not be charged for a particular transaction. This approach will help ensure consumers understand the meaning of the disclosure.

Sincerely,

A handwritten signature in cursive script that reads "Nessa E. Feddis". The signature is written in black ink and is positioned above the printed name.

Nessa Eileen Feddis