PUBLIC SUBMISSION

As of: August 06, 2008
Received date: Not specified
Status: Pending_Post
Tracking No. 806adbc3
Comments Due: August 04, 2008
Submission Type: Web

Docket: OTS-2008-0004
Unfair or Deceptive Acts or Practices

Comment On: OTS-2008-0004-0001
Unfair or Deceptive Acts or Practices

Document: OTS-2008-0004-DRAFT-0211
Comment on FR Doc # E8-10247

Submitter Information

Name: Joe Samuel
Address:
6200 South Quebec Street
Suite 330
Greenwood Village, CO, 80111
Email: joe.samuel@firstdata.com
Phone: 303-967-7195
Organization: First Data

General Comment

August 4, 2008

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW.
Washington, DC 20552

RE: OTS-2008-0004, Proposed Revisions to Regulation AA, Unfair or Deceptive Acts or Practices

Dear Chief Counsel:

On behalf of First Data Corporation, I am writing to express our concerns with the proposed revisions of Regulation AA jointly issued by the Federal Reserve Board, the Office of Thrift Supervision and the National Credit Union Administration. We understand the revised rules are intended to prohibit entities from engaging in

certain acts or practices in connection with consumer credit card accounts and overdraft services for deposit accounts, but the proposals will also create significant operational and costly compliance challenges for entities that act as service providers to financial institutions.

As background, First Data is a Denver-based technology services company that is the leading processor of electronic payment transactions. We rank in the top 320 on the Fortune 500 list and employ over 27,000 employees globally, with more than 18,000 of those employees in the U.S. Our services help consumers, businesses and governmental entities make payments for goods and services using virtually any form of payment ????????? credit card, debit and stored value card, electronic checks and paper checks ????????? at the point of sale and over the Internet. We own and operate the STAR debit network, one of the leading nationwide electronic funds transfer (EFT) networks, as well as the Instant Cash ATM network. Additionally, our Financial Services business segment provides credit and debit card processing services to financial institutions and other issuers of cards, such as consumer finance companies. These services include maintenance of cardholder accounts, authorizing and posting of consumer transactions, generating and printing cardholder statements, card embossing and fraud and risk management services.

Our comments span five areas within the proposed rules: 1) unfair acts or practices regarding time to make payments; 2) unfair acts or practices regarding allocation of payments; 3) unfair acts or practices regarding application of increased annual percentage rates to outstanding balances; 4) unfair acts or practices regarding overdraft services; and 5) the length of time allotted for covered entities to comply with the proposed revisions.

1. Unfair acts or practices regarding time to make payments
Proposal: Section 227.22(a): Except as provided in paragraph (c) of this section, a bank must not treat a payment on a consumer credit card account as late for any purpose unless the consumer has been provided a reasonable amount of time to make the payment. (b) A bank satisfies the requirements of paragraph (a) of this section if it has adopted reasonable procedures designed to ensure that periodic statements specifying the payment due date are mailed or delivered to consumers at least 21 days before the payment due date.

For more than 35 years, First Data has provided back-office services to financial institutions of all sizes that issue general-use credit cards, ATM and debit cards. We offer end-to-end card issuing solutions for every stage of our clients????????? customer lifecycle, including card issuing and activation, account and transaction processing, billing and payment processing, advanced print, electronic and voice customer communications, analytics and decisioning and assistance with association and governmental compliance.

Put more simply, the services we provide to our financial institution clients include manufacturing the plastic cards, embossing the cards with the cardholder information, adding the sticker that directs cardholders to call an 800 number to activate the card, mailing the card to the cardholder and activating the card when the cardholder follows the instructions on the sticker. Additionally, we mail the periodic statements associated with that card to the cardholder and operate call

centers that respond to cardholders who have questions or need to report a lost or stolen card. In this capacity, First Data is the United States Postal Service?????????s second largest customer in the country, and we annually mail over 1,000,000,000 (one billion) periodic statements on behalf of our clients.

As a result of this product offering, the provision that would require periodic statements to be delivered or mailed to cardholders at least 21 days before the payment due date would inordinately burden First Data. Many of our clients have accounts that cycle on either 20-day or 25-day due dates. While we are investigating the feasibility of prioritizing, for example, the periodic statements that have a 20-day due date cycle so that they are mailed first, the reality is that First Data would have to mail periodic statements for our clients in one day. Looking across the breadth of our client base, that translates to approximately 8-10 million statements in one day, and we simply do not have the resources or infrastructure to accomplish such a monumental task.

Furthermore, the U.S. Postal Service is the lengthiest piece of the timing equation, since it requires seven days for mail time. For the majority of First Data?????????s clients, we are able to generate and mail the statement within three days. If this is shifted to one day, we would have to increase our operational footprint by at least 25% to build new operational facilities at a cost of at least $40-$50 million that First Data would have to incur.

Currently, under the 14-day timeframe allowed by Regulation Z, seven days of mail time is accounted for by the U.S. Post Office, and the cardholder has seven days to consider the payment. With the increase of online banking and the mass availability of periodic statements and transaction history offered online by financial institutions across the country (not to mention responsible activity by the cardholder to keep track of the purchases he/she has made), cardholders should already have a general idea of the balance that will be due to them come time to make a payment. Thus, it is not clear that the incremental benefit to consumers of having more time to make payments would outweigh the tremendous administrative burden that would be imposed on entities like First Data that offer these back-office services to financial institutions.

2. Unfair acts or practices regarding allocation of payments
Proposal: Section 227.23(a): Except as provided in paragraph (b) of this section, when different annual percentage rates apply to different balances on a consumer credit card account, the bank must allocate any amount paid by the consumer in excess of the required minimum periodic payment among the balances in a manner that is no less beneficial to the consumer than one of the following methods: (1): the amount is allocated first to the balance with the highest APR and any remaining portion to the other balances in descending order based on the applicable APR; (2) equal portions of the amount are allocated to each balance; or (3) the amount is allocated among the balances in the same proportion as each balance bears to the total balance.

As a processor of credit card transactions on behalf of financial institutions, First Data is concerned about the real-world application of this provision. For example, with regard to the first allocation method, how would a processor reconcile two or more balances that have the same APR? Which balance would get the overage?

Would we have to pro-rate the allocation, use the oldest balance or the highest balance?

With regard to the second and third allocation methods, there is a high potential for cardholders to pay more in interest than they currently pay. For example, the minimum payment due calculations could be changed so that even if a high balance is paid first, the low balances will remain on the account for a longer period of time and therefore generate additional interest.

Additionally, section 227.23 provides that payments could only be allocated to any promotional rate balance or deferred interest balance after other non-promotional balances have been fully paid, except that the entire amount of excess payments may be allocated to deferred interest balances in the last two billing cycles before the expiration of the deferred interest period. However, the majority of cardholders will not pay the promotional balance in full. Thus, the cardholder will then pay the accrued interest on balances that should have been paid in full and will not receive the benefit of the promotional offer. In many situations, the cardholder will actually incur more interest before the balances are paid in full. Further, if the deferred balance rate is equal to the standard rate, the cardholder will pay the interest on the deferred balance, which could have been eliminated completely by paying the promotional balance first.

If the Agency intends to move forward with this requirement, these and many other allocation questions would need to be addressed. We would also request that the effective date of the entire slate of Regulation AA revisions be lengthened to at least 24 months (rather than the proposed 12 months) to bring our systems into compliance with this complex and expensive mandate.

3. Unfair acts or practices regarding application of increased annual percentage rates to outstanding balances
Proposal: Section 227.24(a): Except as provided in paragraph (b) of this section, a bank must not increase the annual percentage rate applicable to any outstanding balance on a consumer credit card account.

In the example provided in Supplement 1 of the proposed revisions, as of December 30, a cardholder has a balance of $1,000 at an APR of 15% and the financial institution notifies the cardholder that the APR will increase to 20% on February 15. If the cardholder uses the card to purchase $2,000 on January 10 and $1,000 in purchases on January 20, the balance (assuming no other transactions) would be $3,000 on January 14. The financial institution would not be able to increase the APR on that $3,000 balance. The financial institution could apply the 20% APR to the $1,000 made on January 20, but it couldn?????????t do that until February 15.

Financial institutions adjust rates based on a number of factors including the price index, the risk attributed to the cardholder, the cardholder?????????s payment history, etc. A prohibition on repricing ?????????old money????????? not only adversely affects the economics of
the financial institution?????????s card offerings, but it will cause a substantial impact to First Data in terms of the technical application developments we will need to make

within our processing and printing systems.

Extending the example used above, if the cardholder starts out with a balance of $1,000 on December 30 with a 15% APR and doesn?????????t make a payment for six months, the cardholder would incur a penalty rate for lack of payment. However, under the proposal, that $1,000 balance would have to be treated uniquely from any additional balance that is subsequently added to the card since the 15% rate on that older balance couldn?????????t be changed. This would increase First Data?????????s ongoing operational costs because each separate balance adds incremental costs, and we could foreseeably face situations where we have to separately manage and process over a dozen different balances for each cardholder.

In combination with the above provision for a standard rate change, the constraints placed on penalty pricing would also cause increased processing costs for First Data. As a third party processor, we would need to be able to identify and apply multiple penalty rates at varying intervals depending on the consumers????????? activities and the types of balances maintained on the account.

Under the requirements in Regulation Z, this information would also have to be included on the periodic statement. Even in a table format, multiple balances linked to different APRs could get very confusing to cardholders. This seems to run contrary to the Federal Reserve Board?????????s efforts to make the disclosures on the statements more simple and easy for cardholders to understand.

4. Unfair acts or practices regarding overdraft services
Proposal: Section 227.32(a)(1) General Rule: a bank must not assess a fee or charge on a consumer?????????s account in connection with an overdraft service, unless the bank provides the consumer with the right to opt out of the bank?????????s payment of overdrafts and a reasonable opportunity to exercise that opt-out and the consumer has not opted out. The consumer must be given notice and an opportunity to opt out before the bank?????????s assessment of any fee or charge for an overdraft, and subsequently at least once during or for any periodic statement cycle in which any fee or charge for paying an overdraft is assessed.

We do not oppose the idea of allowing customers to opt out of their financial institution?????????s overdraft protection programs. However, we want to ensure that this proposal is not intended to give consumers the ability to opt out of a transaction in real time at either the point of sale (POS) or at an ATM. Following are some examples as to why the current construct of the payments system makes real-time opt-out highly impractical.

o Overdraft at the Point of Sale
Historically, PIN POS networks have prohibited the display or printing of balance information at POS terminals or on POS receipts for privacy reasons. There are a variety of PIN POS terminal configurations, and generally the display will not support balance information display with the balance type (current, available, etc).

For those POS terminals with screens that are too small to support the number of characters that would be necessary to convey an overdraft message, replacement would be the only option. Such a measure would come at considerable cost. For example, we process for approximately four million merchant locations in the

U.S. If, on average, each of these merchant locations has three to five POS terminals in use, then approximately 15 million to 25 million terminals would need to be replaced in order to support this proposed mandate from a purely hardware perspective. The cost of point of sale terminals varies and can exceed $1,000 per device. Using these numbers, the replacement cost could range from $15 to $25 billion.

In addition, as receipts are typically printed behind the counter and handled by the retailer employee, it has been considered a significant privacy issue to have balance information available for viewing by the retailer employee. Further, when transactions are denied for reasons other than bad PIN (e.g. insufficient funds, over limit, hot card, or expired card) the denial information that is provided to the retailer employee ????????? and to the cardholder at the point of sale device ????????? is limited to
general denial information.

Again, it has always been considered to be a privacy concern (and potential security risk) to provide detailed denial information to the consumer when the information may be (or is) viewable by the retailer employee. Further, consumers would experience a diminution in privacy if such information was transmitted on a screen of sufficient size to transmit the information since these messages would be viewable by others in line at the retail location or by the cashier. Faced with potential embarrassment, rejected transactions, or lengthier time to process due to the additional messaging, consumers may reject electronic transactions in favor of the (limited) float still available through checks. Retailers would likely find such a mandate anathema to their ongoing efforts to reduce the time it takes to get consumers through checkout lanes.

o Overdraft at an ATM
When a consumer utilizes an ATM owned by his or her issuing financial institution, this is described as an ?????????on-us????????? transaction. In this case, the consumer

inserts his ATM card into an ATM owned by his financial institution, enters his PIN and selects a transaction option. The ATM sends the transaction information to the entity operating the ATM. In some cases financial institutions operate their own ATM system (generally larger institutions), but more often, institutions use third party processors to operate ATMs on their behalf. The on-us ATM transaction is transmitted either directly to the institution (if the institution operates their own ATMs) or to a third party processor where it is either authorized on behalf of the institution or sent to the institution for authorization. The financial institution or third party processor then verifies funds availability and, where applicable, authorizes the transaction and posts a debit to the consumers account. The consumer then collects his cash and receipt. If the financial institution or third party processor determines that funds are not available, or the transaction cannot be approved for some other reason (bad PIN, closed account, etc.), the consumer receives a denial message.

When a consumer utilizes an ATM not owned by his or her issuing financial institution, this is described as a ?????????not-on-us????????? ATM transaction. In this case, the consumer inserts his ATM card into an ATM owned by an entity other than his financial institution, enters his PIN and selects a transaction option. The ATM

sends the transaction message to the ATM owning institution?????????s system (if they operate their own ATMs) or to the third party processor who operates the ATMs on behalf of the ATM owner. The acquiring institution or its third party processor sends the message to the ATM network in which the acquiring institution participates. That network forwards the transaction to the issuer or the issuer?????????s third party processor. The transaction is authorized, settled and posted. The authorization response transaction is sent back to the ATM network, and on to the entity operating the ATM and then to the ATM terminal. The consumer then collects his cash and receipt. If the issuing financial institution determines that funds are not available or the transaction cannot be approved for some other reason, the consumer receives a denial message.

There are numerous potential variables to the aforementioned foreign ATM transaction, including whether the issuer and acquirer utilize third party processors and whether the issuer and acquirer both participate in the same ATM network.

Currently, financial institutions provide consumers with real time account balances for ATM transactions that are authorized against a balance file (e.g. by the institution against their own DDA system, or by a third party processor who holds a positive balance file on behalf of a financial institution). In situations where a third party processor authorizes the transaction on behalf of a financial institution, the balance information is updated based on the transaction authorized by the processor. In situations where authorizations can occur in multiple places (one authorization point for PIN debit transactions, a second authorization point for signature debit transactions, a third authorization point for transactions occurring in the institution branch), the balance information for ATM transactions is current only based on the authorized PIN debit transactions.

It is important to note that in many instances, a consumer who visits an ATM may not be given the option to check his or her account balance. For example, the ATM itself may be limited in the information it displays to the consumer because it is an older model and was not designed and manufactured to allow for software upgrades. In another example, the financial institution could be authorizing its own transactions against its own DDA system, but the account balances are not available when an entity is providing stand-in authorization for that financial institution. In yet another example, the financial institution may have a third party authorize transactions on its behalf against a positive balance file, but the account balances would not be available during stand-in processing. Finally, a financial institution may have a third party authorize transactions on its behalf against a card file and daily limits, but the balances are never available at an ATM.

Furthermore, available account balances are only as current as the file that is being used (e.g. third party processors usually get one balance file each business day) and they only reflect transactions that have been processed by the third party processor. Therefore, those balances would not reflect teller deposits, withdrawals or transactions processed by another third party processor.

The bottom line is that there are a number of factors that make overdraft decisions at the POS or at an ATM nearly impossible. As discussed, these factors range from the diversity of processing mechanisms that financial institutions and

merchants use (from online or ?????????real time????????? processing to processing by the financial
institution to processing by a third party processor), to transaction authorization modes (which may be balanced via the financial institution?????????s demand deposit account system or refreshed only once per day at a third party processor, for example) and the age of the balance information. Balance information may represent only a certain portion of the transactions that the consumer has performed during the current cycle. Ultimately, to accomplish real-time overdraft decisions at the POS or ATM would be extremely expensive and a significant administrative burden in terms of IT development, as it would require a complete re-engineering of the payments system to accomplish.

5. The effective date for covered entities to comply with the proposed revisions
Currently, the proposed rules are scheduled to go into effect one year after they are finalized. This timeframe is too short to accomplish the changes contemplated by the proposed rules. As a result, we strongly urge the agencies to enact an effective date of at least 24 months. Based on our analysis of the proposed rules, we have concluded that an approximate 24-28 month effective date is necessary for the following reasons:
o 3 ????????? 4 months to analyze the final rules
o 6 ????????? 8 months to develop the required programming changes
o 3 ????????? 4 months to perform testing (this is a conservative estimate, since it may take longer than 3-4 months to discover the impact on sub systems)
o 4 ????????? 6 months for client disclosures and roll out to clients
o 4 ????????? 6 months to ensure the functionality of our new systems comply with the way that the clients have interpreted the revised rules

In conclusion, we are sympathetic to the Federal Reserve Board?????????s intention to curtail certain credit card industry practices deemed to be abusive, but we strongly urge the Agency to thoughtfully and judiciously weigh the perceived benefit to consumers against the real limitations, real costs, and significant operational challenges facing other parties within the payments system.

Thank you for the opportunity to comment on such an important public policy issue. Please feel free to contact me with any questions, comments, or concerns you may have.

Sincerely,
Joe Samuel
Senior Vice President, Public Policy and Community Relations
(303) 967-7195
Joe.samuel@firstdata.com