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March 30, 2009

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

RE: Docket number R-1343; Regulation E (Electronic Fund Transfers)

Dear Ms. Johnson:

On behalf of the National Association of Federal Credit Unions (NAFCU), the only trade association that exclusively represents the interests of our nation's federal credit unions (FCUs), I am responding to the proposed rule to amend the Electronic Fund Transfers (EFT) Rule, or Regulation E.

NAFCU appreciates the Board's efforts to update Regulation E. We agree with the goal to provide clear and accurate disclosures to consumers regarding overdraft payment programs. However, we have concerns with several aspects of the proposed rule. Certain portions of the rule would be cost prohibitive to put into affect. Further, a number of measures would provide minimal – if any – benefit to consumers. In fact, some aspects of the proposed rule would likely create more consumer confusion. Accordingly, as further discussed in the specific comments below, we oppose the proposed rule as currently drafted.

Issues Impacting Both the Opt-Out and Opt-In Alternatives

The Board requested comment on the opt-out and opt-in alternatives provided in the proposed rule. While NAFCU has concerns with both options, we believe the final rule should allow both alternatives so that credit unions may employ whichever choice they believe works best for their business and their members.

Requiring Overdraft Protection for Some but Not All Payment Options

Both the op-out and opt-in alternatives in the proposed rule include draft alternatives that allow a financial institution to condition the consumer's option to use overdraft services for checks on the consumer also using overdraft protection for ATM withdrawals and one-time debit card transactions. NAFCU strongly supports this

alternative approach. Many credit unions' automated payment processing systems do not have the capability to distinguish between an ATM withdrawal, a debit card purchase, a check or an ACH payment. Consequently, a final rule that requires credit unions to provide overdraft protection for only certain payments would create a costly burden as many credit unions would either need to reconfigure software systems or change to a new system in order to distinguish between each type of payment.

The Board also sought comment on whether the proposal should apply to recurring debit card and ACH transactions. While NAFCU believes choosing overdraft protection based on the type of payment is unfeasible, if the final rule does require financial institutions to distinguish by payment type, reoccurring debit and ACH transactions should not be included in the final rule. As the proposed rule indicates, the Board recognizes that consumers are more likely to want checks to be honored, as opposed to ATM withdrawals or one-time debit transactions because checks are more often used for essential items. Reoccurring debit and ACH transactions, like checks, are generally used for the same sort of essential payments, such as mortgages, car loans, insurance and utilities. As such, reoccurring debit and ACH transactions should be grouped with check payments, which the Board has already determined should not be included in the rule. Moreover, consumers are increasingly using reoccurring debit and ACH transactions in the place of checks for these types of purchases. Consequently, if these transactions are grouped with ATM withdrawals and one-time debit transactions, it could result in consumers losing overdraft protection for just the type of important payments that the Board recognized should be exempted when it chose not to include check overdraft fees in the proposed rule.

Different Features for Accounts that do not Carry Overdraft Protection

In order to protect against financial institutions "compelling" consumers to agree to overdraft protection, accounts with and without overdraft protections must be substantially similar. Specifically, the rule states that institutions may vary account terms "provided that the differences in the terms, conditions, or features are not so substantial that they would discourage a reasonable consumer from exercising his or her right to opt out...." NAFCU understands the intent behind this proposal. However, we would ask that the Board consider providing specific examples of what would and would not trigger this provision. The "reasonable consumer" standard does provide flexibility; however, it provides little guidance for institutions that must make different pricing decisions based on account features.

Debit Holds

NAFCU opposes the debit hold proposal in the rule as it unreasonably places a burden on financial institutions for holds placed by merchants. NAFCU appreciates that the proposal has been limited to apply only to transactions where the actual amount can be determined within a short period of time; however, we believe the rule still creates a large and unreasonable burden on the financial institution.

Restaurants and gas stations almost certainly can determine the final cost shortly after the initial hold is placed on the account. However, there is no corresponding requirement for the restaurant or gas station to quickly relay that information to its processor, which, in turn, must relay the information to the institution that issued the debit card. Simply put, the rule makes the debit card issuer responsible for the results of holds placed on the card by third parties. This issue is exacerbated by the fact that card network rules require the financial institution to pay on pre-authorized debit card holds. NAFCU believes that the Board should consider consulting with the Federal Trade Commission (FTC) as it has authority over these types of merchants. Should the FTC require restaurants and gas stations and their processors to promptly release the hold and report the actual transaction, the rule would be more workable. However, the proposal still has significant problems.

First, the rule would require considerable software improvements or personal examination of each account when an overdraft fee is assessed, in order to determine if the account was overdrawn and then if the account would have been overdrawn regardless of the hold. Second, the rule puts the burden on the financial institution to promptly waive or refund the fee. This second issue only reinforces the first problem, which would require credit unions to significantly reconfigure their software and payment system processes in order to ensure the fee is promptly refunded.

As not-for-profit, cooperative financial institutions, credit unions cater to their member/owners. Consequently, in the event that a member is assessed an overdraft fee in a situation such as this, the problem – in most situations – can be remedied by a simple call to the credit union. Given that credit unions will generally refund the fee once it is brought to their attention, the issue for credit union members is a very small one. Conversely, the time and cost the rule would require of credit unions are substantial.

NAFCU opposes this portion of the proposal as it requires credit unions to effectively remove a debit hold without any corresponding requirements for the party that actually placed the hold. Further, the costs are substantial while the benefits for credit union members are negligible.

Opt-Out Proposal

The opt-out proposal is the superior of the two alternatives, should the Board only adopt one of the two options included in the draft rule. The proposal authorizes financial institutions to present consumers with the opt-out information at the time the account is opened and to require the consumer to make a decision at that point. NAFCU strongly encourages the Board to keep that provision in the final rule.

Additional Notice Requirements

NAFCU has several concerns with the additional notice requirements proposed for institutions that employ an opt-out method. The proposed rule would require financial institutions to send a notice of the right to opt-out every time a member is

assessed an overdraft fee. NAFCU believes this is unduly burdensome for a number of reasons. First, consumers may be confused as to why they are receiving additional information on a service which they were already informed of at the account opening and which they have chosen to include as an option on their account. Second, NAFCU is concerned that the final rule may require notice of the right to opt out only when there has been an overdraft fee assessed. This presents one of two problems for credit unions. If the notice of the right to opt out must be sent separate from the regular monthly statement, the rule will impose significant new printing and mailing costs. Alternatively, if the right to opt out may be included in the regular monthly statement, credit unions would be required to create a dynamic statement where the language is only included in monthly statements where a fee is assessed.

To address these issues, NAFCU supports one of two alternatives. First, once a member has been provided the opportunity to opt out, the credit union should not be required to continue sending opt out notices whenever an overdraft fee is assessed. Federal regulations already require a litany of other disclosure. Given that members will be provided an initial opportunity to opt out, it is unclear what advantage repeated additional opt-out disclosures will provide. Further, NAFCU's membership has indicated that overdraft protection is a highly sought after service. Consequently, this is not a case where credit union members are being provided a service they do not want or desire. Alternatively, if the Board decides that credit unions need to provide additional opt-out disclosures, NAFCU recommends that the final rule allow the opt-out to be included in the monthly statement the member already receives. Moreover, credit unions should be authorized to include a notice similar to the A-9(B) Model opt-out form on every monthly statement. Allowing the disclosure to appear on each statement would simplify the process for financial institutions as they would not need to create a dynamic statement that provides disclosure only for those months that the member is assessed a fee.

Opt-In Proposal

NAFCU understands the merits of an opt-in proposal. In fact, many of our members already use an opt-in method for overdraft protection. However, a universal opt-in requirement is unnecessary. First, it would be burdensome for credit unions that already have an opt-out system in place. Moreover, it is not clear that that the costs to modify from an opt-out to an opt-in system provide substantial benefits for consumers.

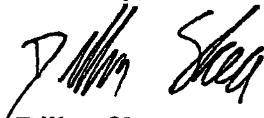
NAFCU supports the proposal allowing financial institutions to provide the opt-in notice at account opening and to require members to make a decision at that time whether to accept or reject the service. Likewise, NAFCU was pleased to see that institutions that do employ an opt-in method would not be required to provide additional disclosures whenever a fee is assessed.

Conclusion

We appreciate the opportunity to comment on the Board's proposed changes to Regulation E. In order to alleviate the regulatory burden for credit unions, we encourage

the Board to authorize both the opt-in and the opt-out rule which would allow credit unions to choose the mechanism that works best for their business and their members. We are very concerned about the costs associated with requiring credit unions to provide overdraft protection on a piecemeal basis and strongly support the option to allow financial institutions to provide the services for either all payments or no payments. Finally, the debit hold proposal will be extremely difficult and expensive to administer while providing questionable value to credit union members.

Sincerely,



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