



March 30, 2009

VIA E-MAIL

Ms. Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW.,
Washington, DC 20551
regs.comments@federalreserve.gov
Docket No. R-1343

RE: Proposed Rule to amend Regulation E, Docket No. R-1343

Dear Ms. Johnson:

The Wisconsin Bankers Association (WBA) is the largest financial trade association in Wisconsin, representing approximately 300 state and nationally chartered banks, savings and loan associations and savings banks located in communities throughout the state. WBA appreciates the opportunity to comment on the Board of Governors of the Federal Reserve System's (FRB) proposed rule to amend Regulation E, which implements the Electronic Fund Transfer Act, and the official commentary to the regulation.

The proposal would limit the ability of a financial institution to assess an overdraft fee for paying automated teller machine (ATM) withdrawals and one-time debit card transactions that overdraw a consumer's account, unless the consumer is given notice of the right to opt-out of the payment of such overdrafts, and the consumer does not opt-out. As an alternative, the proposal would limit the ability of a financial institution to assess an overdraft fee of paying ATM withdrawals and one-time debit card transactions that overdraw a consumer's account, unless the consumer affirmatively consents, or opts-in, to the institution's payment of overdrafts for these transactions.

FRB's proposal would also prohibit a financial institution from assessing an overdraft fee if the overdraft would not have occurred but for a debit hold placed on funds in the consumer's account that exceeds the actual amount of the transaction.

While WBA shares FRB's desire to ensure consumers are provided with accurate and timely information regarding overdraft fees, it is important to remember that consumers have already been provided account disclosures containing this information at account opening and upon implementation of the overdraft service. Equally important to remember is that consumers are responsible for monitoring their deposit account balances and their withdrawal activity. Furthermore, consumers always have opportunities to contact their financial institution to pose any questions regarding their account including any fees associated with the account. For these and other reasons discussed below, WBA urges FRB to withdraw the proposal. However, if FRB does not do so, WBA submits the following comments and recommendations.

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Current Proposal and Comments

Opt-out v. Opt-in Notice Requirements

FRB's proposal contains two alternative approaches to achieve its stated goal of assisting consumers in understanding how overdraft services operate, and ensuring consumers have the opportunity to limit the overdraft costs associated with: any ATM withdrawals, whether made at proprietary or foreign ATMs; and any one-time debit card transaction, whether the consumer uses a debit card at the point-of-sale, in an online transaction, or in a telephone transaction.

Under the first approach, institutions would provide consumers with a notice of the consumer's right to opt-out of the institution's overdraft service for ATM withdrawals and one-time debit card transactions before the institution may assess any fees or charges to a consumer's account for payment of such overdrafts. Under this approach, the opt-out notice would generally be given at account opening and, subsequently, for each periodic statement cycle in which the institution assesses a fee or charge to the consumer's account for paying an overdraft, or at least once per statement cycle when any overdraft is paid pursuant to the overdraft service.

FRB has proposed a safe harbor opt-out period of 30 days after the consumer is provided an initial opt-out notice. During this period, an institution would generally be prohibited from assessing fees or charges for paying an overdraft for an ATM withdrawal or a one-time debit card transaction. An institution may be permitted to decide that a shorter waiting period could be adequate depending upon the circumstances.

Under the second approach, institutions would provide consumers with a notice of the consumer's right to opt-in to the institution's overdraft service for ATM withdrawals and one-time debit card transactions before the institution could assess fees or charges on the consumer's account for paying such overdrafts. Under this approach, additional notices would not be required once the consumer has opted-in to the overdraft service.

As stated earlier, WBA opposes the proposal and argues that any opt-out or opt-in notice requirement is excessive and unwarranted because consumers have already been provided information regarding overdraft fees and have opportunities to speak with their financial institution at any time regarding their account and any fee associated with the account. WBA offers that responsible actions by consumers to monitor their account balances coupled with existing TISA account disclosures and newly imposed periodic statement overdraft disclosures to be adequate. To further assist consumers with their responsibility to monitor account balances and activity, financial institutions already typically provide several methods by which consumers can check their account balances. These methods commonly include telephone, ATM inquiries, and on-line computer inquiries. WBA believes the new burdens imposed by the proposal far outweigh FRB's perceived benefits, and will only increase costs to consumers. WBA, therefore, respectfully requests FRB withdrawal its proposal.

If FRB proceeds with rulemaking, WBA generally recommends that the opt-out approach be taken; however, it does not support the proposed subsequent disclosure requirement, except to the extent it is discussed in the context of existing customers as addressed elsewhere in this letter. Providing one opt-out notice is sufficient to inform the consumer of the right to opt-out. In addition, WBA recommends the safe harbor period be

shortened to 10 days. WBA believes 10 days is a reasonable period for a consumer to reflect and make a decision on whether to opt-out.

WBA also recommends institutions be allowed flexibility in how they provide consumers with the means to opt-out, including: mail, electronically, at account opening and telephone; however, institutions should not be burdened with the cost of providing a toll-free telephone number particularly when there is flexibility in the methods by which the consumer can communicate his/her decision to opt-out.

Existing Deposit Accounts

FRB has proposed alternative rules for the treatment of accounts existing prior to the effective date of the final rule based upon the previously discussed opt-out approach or opt-in approach. Under the opt-out approach as noted earlier, an opt-out notice must be given to the consumer: (1) on *each* periodic statement reflecting an overdraft fee or charge an ATM withdrawal or one-time debit card transaction pursuant to the institution's overdraft service; or (2) at least once per statement cycle on any overdraft notice sent promptly to the consumer after the institution pays such an overdraft under the overdraft service.

Under the opt-in approach, FRB has proposed that if the consumer has not opted-in within 60 days of receiving the opt-in notice, the institution must cease assessing any fees or charges to existing consumer accounts for paying an ATM withdrawal or one-time debit card transaction pursuant to the institution's overdraft service, except where otherwise permitted by the proposal.

WBA argues that the decision to permit an item to clear against a consumer's deposit account is a decision which should rest solely with the financial institution; however, if the proposal is finalized, WBA again recommends that the opt-out approach be taken and that an opt-out notice be provided to the consumer only *once*. Thus, for existing accounts, the opt-out notice would be provided either on: (1) the first periodic statement following the effective date of the rule which reflects a fee or charge for an overdraft that the institution has paid; or (2) the first overdraft notice following the effective date of the rule which is promptly sent to the consumer after an overdraft is paid by the institution.

If FRB does not heed WBA's recommendations and instead adopts the opt-in approach, WBA urges that institutions should be permitted to presume that existing customers have elected to opt-in to the institution's overdraft service unless the consumer informs the institution otherwise within 60 days of the consumer receiving the opt-in notice.

Conditioning the Opt-Out

FRB also seeks comment on whether or not to permit an institution to condition a consumer's opt-out of overdraft services for ATM withdrawals and one-time debit card transactions on the consumer also opting out of the service with respect to other types of transactions.

Recognizing the operational issues that could arise from a "partial" opt-out, FRB's proposal provides an alternative that expressly permits institutions to condition the consumer's ability to opt-out of the institution's overdraft service for ATM withdrawals and one-time debit card transactions on the consumer also opting out of the institution's

overdraft service for checks and other transaction types such as ACH transactions and preauthorized EFTs.

If the proposal is finalized, WBA recommends institutions be permitted to apply the consumer's opt-out decision across the board to affect any item regardless of the manner in which the item is presented against the deposit account. This is the only viable option because some institutions may not have the operational capability to apply the consumer's decision only to certain selected payment methods, such as the ATM transaction or point-of sale transaction.

Available Account Terms, Conditions and Features

To implement the consumer's decision under the proposal, institutions would be required to provide: (1) an account that has the same terms, conditions, or features that are provided to consumers who do not opt-out, except for features that limit the institution's payment of overdrafts for ATM withdrawals and one-time debit card transactions; or (2) an account that varies in terms, conditions or features for the account that does not permit the payment of ATM and one-time debit card overdrafts, provided that the differences are not so substantial that they discourage a reasonable consumer from exercising his/her right to opt-out of the payment of such overdrafts.

If FRB adopts final rules, WBA recommends that the second option be employed. This would allow the institution some flexibility based upon operational capabilities and other factors. For some institutions, it may mean that the same exact terms, conditions and features will be provided regardless of the consumer's decision, and for others it will reduce the burden of trying to force a one-size-fits-all account approach, where that might prove operationally difficult or impossible.

In addition, if FRB finalizes the proposal, WBA recommends institutions be permitted to delay the submission of an ATM or debit card application until the consumer has made their initial decision. WBA believes this delay should not be considered an action to penalize or deter a consumer's election, but would permit institutions the ability to most efficiently program the card and the associated account in accordance with the consumer's overdraft program election.

Debit Holds

FRB's proposal also impacts "debit holds" on consumer accounts, with limited exceptions. FRB describes a debit hold to be a block or hold on funds in a consumer's account when the consumer has used a debit card to make a purchase to ensure that the consumer has sufficient funds in his/her account when the transaction is presented for settlement.

Under the proposal, institutions would be prohibited from assessing a fee or charge for paying an overdraft pursuant to the institution's overdraft service if the overdraft would not have occurred but for a debit hold placed on the consumer's account where the amount of the hold exceeds the actual transaction amount.

FRB has proposed a safe harbor that would allow a financial institution to assess a fee or charge for paying an overdraft that is caused solely by a debit hold if the institution has adopted practices and procedures designed to remove the hold within a reasonable

period of time. FRB has proposed that safe harbor period to be within two hours of authorization of the transaction.

If FRB finalizes its proposal, WBA recommends FRB lengthen its proposed safe harbor period to one business day following authorization. For many transactions which result in debit holds, many financial institutions do not have the operational capability or staff to release debit holds within the proposed safe harbor. WBA also recommends FRB require merchants to submit such transactions for settlement within the safe harbor period in order for institutions to react to the settlement.

Implementation of Final Rule

If FRB finalizes its proposal, WBA recommends FRB delay the implementation of its final rule until no sooner than 18 months from issuance of the final rule. Sufficient time must be permitted to financial institutions so that they can work with third party vendors and processors, create new disclosures, and reprogram/install and test systems.

Conclusion

WBA repeats its opposition to the current proposal and urges FRB to withdraw it in its entirety. However, if FRB does not do so, WBA advises FRB to adopt the recommendations made above, as they better align with WBA members' overdraft service practices and procedures which, in turn, impose less burden and cost.

Once again, WBA appreciates the opportunity to comment on FRB's proposed revisions to Regulation E and its official staff commentary.

Sincerely,

Kristine Cleven
Assistant Vice President - Legal