FEDERAL RESERVE SYSTEM

12 CFR Part 205

[Regulation E; Docket No. R-1282]

Electronic Fund Transfer

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Proposed rule; request for comments.

SUMMARY: The Board is proposing to amend Regulation E, which implements the Electronic Fund Transfer Act, to withdraw the interim final rules for the electronic delivery of disclosures issued March 30, 2001. The interim final rules address the timing and delivery of electronic disclosures, consistent with the requirements of the Electronic Signatures in Global and National Commerce Act. Compliance with the 2001 interim final rules is not mandatory. Thus, removing the interim rules from the Code of Federal Regulations would reduce confusion about the status of the provisions and simplify the regulation. Similar rules are being proposed under other consumer fair lending and financial services regulations administered by the Board.

DATES: Comments must be received on or before **[insert date that is 60 days after the date of publication in the Federal Register]**.

ADDRESSES: You may submit comments, identified by Docket No. R-1282, by any of the following methods:

- Agency Web Site: http://www.federalreserve.gov. Follow the instructions for submitting comments at http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.
- Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.
- E-mail: regs.comments@federalreserve.gov. Include the docket number in the subject line of the message.
- FAX: (202) 452-3819 or (202) 452-3102.
- Mail: Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, N.W., Washington, DC 20551.

All public comments are available from the Board's web site at www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed

electronically or in paper in Room MP-500 of the Board's Martin Building (20th and C Streets, N.W.) between 9:00 a.m. and 5:00 p.m. on weekdays.

FOR FURTHER INFORMATION CONTACT: John C. Wood or David A. Stein, Counsels, Division of Consumer and Community Affairs, at (202) 452-2412 or (202) 452-3667. For users of Telecommunications Device for the Deaf (TDD) only, contact (202) 263-4869.

SUPPLEMENTARY INFORMATION:

I. Background

The purpose of the Electronic Fund Transfer Act (EFTA), 15 U.S.C. 1693 et seq., is to provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer (EFT) systems, and to provide individual consumer rights. The Board's Regulation E (12 CFR part 205) implements the EFTA. Examples of types of transfers covered by the EFTA and Regulation E include transfers initiated through an automated teller machine (ATM), point-of-sale (POS) terminal, automated clearinghouse (ACH), telephone bill-payment plan, or remote banking service. The EFTA and Regulation E require financial institutions to provide certain disclosures to consumers in writing, including but not limited to initial disclosures of terms and conditions of an EFT service, documentation of EFTs by means of terminal receipts and periodic account activity statements, and change in terms notices. Certain persons other than financial institutions are also required to comply with specific disclosure provisions of Regulation E.

Board Proposals Regarding Electronic Disclosures

On May 2, 1996, the Board proposed to amend Regulation E (Electronic Fund Transfers) to permit financial institutions to provide disclosures by sending them electronically (61 FR 19,696). Based on comments received, in 1998 the Board published an interim rule permitting the electronic delivery of disclosures under Regulation E (63 FR 14,528, March 25, 1998) and similar proposals under Regulations B (Equal Credit Opportunity), M (Consumer Leasing), Z (Truth in Lending), and DD (Truth in Savings) (63 FR 14,552, 14,538, 14,548, and 14,533, respectively, March 25, 1998).

Based on comments received on the 1998 proposals, in September 1999 the Board published revised proposals under Regulations B, E, M, Z, and DD (64 FR 49,688, 49,699, 49,713, 49,722 and 49,740, respectively, September 14, 1999). At the same time, the Board published an interim rule under Regulation DD allowing depository institutions to deliver disclosures on periodic statements in electronic form if the consumer agreed (64 FR 49,846, September 14, 1999). While these rulemakings were pending, federal legislation was enacted addressing the use of electronic documents and records, including consumer disclosures.

Federal Legislation Addressing Electronic Commerce

On June 30, 2000, the President signed into law the Electronic Signatures in Global and National Commerce Act (the E-Sign Act) (15 U.S.C. 7001 et seq.). The E-Sign Act provides that electronic documents and electronic signatures have the same validity as paper documents and handwritten signatures. The E-Sign Act contains special rules for the use of electronic disclosures in consumer transactions. Under the E-Sign Act, consumer disclosures required by other laws or regulations to be provided or made available in writing may be provided or made available, as applicable, in electronic form if the consumer affirmatively consents after receiving a notice that contains certain information specified in the statute, and if certain other conditions are met.

The E-Sign Act, including the special consumer notice provisions, became effective October 1, 2000, and did not require implementing regulations. Thus, financial institutions are currently permitted to provide in electronic form any disclosures that are required to be provided or made available to the consumer in writing under Regulations B, E, M, Z and DD if the consumer affirmatively consents to receipt of electronic disclosures in the manner required by section 101(c) of the E-Sign Act.

The Interim Final Rules

On April 4, 2001, the Board published for comment interim final rules to establish uniform standards for the electronic delivery of disclosures required under Regulation E (66 FR 17,786). Similar interim final rules for Regulations B, M, Z, and DD were published on March 30, 2001 (66 FR 17,322 (M) and 17,329 (Z)), and April 4, 2001 (66 FR 17,779 (B) and 17,795 (DD)). The interim final rules incorporated most of the provisions that were part of the 1999 proposals.

Each of the interim final rules incorporated, but did not interpret, the requirements of the E-Sign Act. Financial institutions and other persons, as applicable, generally were required to obtain consumers' affirmative consent to provide disclosures electronically, consistent with the requirements of the E-Sign Act.

The 2001 interim final rule for Regulation E established uniform requirements for the timing and delivery of electronic disclosures. Under the interim rule, disclosures could be sent to an e-mail address designated by the consumer, or could be made available at another location, such as an Internet web site. If the disclosures were not sent by e-mail, financial institutions would have to provide a notice to consumers alerting them to the availability of the disclosures. Disclosures posted on a web site would have to be available for at least 90 days to allow consumers adequate time to access and retain the information. Financial institutions also would be required to make a good faith attempt to redeliver electronic disclosures that were returned undelivered, using the address information available in their files. Similar provisions were included in the interim final rules adopted under Regulations B, M, Z, and DD.

Commenters on the interim final rules identified significant operational and security concerns with respect to the requirement to send the disclosure or an alert notice to an e-mail address designated by the consumer. For example, commenters stated that some consumers do not have e-mail addresses or may not want personal financial information sent to them by e-mail. The commenters also opposed the requirement for redelivery in the event a disclosure was returned undelivered. In addition, many commenters asserted that making the disclosures available for at least 90 days, as required by the interim final rule, would increase costs and would not be necessary for consumer protection.

In August 2001, in response to comments received, the Board lifted the previously established October 1, 2001 mandatory compliance date for all of the interim final rules. (66 FR 41,439, August 8, 2001.) Thus, institutions are not required to comply with the interim final rules. Since that time, the Board has not taken further action with respect to the interim final rules on electronic disclosures in order to allow electronic commerce, including electronic disclosure practices, to continue to develop without regulatory intervention and to allow the Board to gather further information about such practices.

II. The Proposed Rules

The Board is proposing to amend Regulation E and the official staff commentary by (1) withdrawing portions of the 2001 interim final rule on electronic disclosures that restate or cross-reference provisions of the E-Sign Act and accordingly are unnecessary; (2) withdrawing other portions of the interim final rule that the Board now believes may impose undue burdens on electronic banking and commerce and may be unnecessary for consumer protection; and (3) adding certain provisions to provide guidance regarding electronic disclosures. (Similar amendments are also being proposed by the Board, in today's issue of the Federal Register, under Regulations B, M, Z, and DD.)

Because compliance with the 2001 interim final rules is not mandatory, removing this material from the Code of Federal Regulations would reduce confusion about the status of the electronic disclosure provisions and simplify the regulation. Certain provisions in the interim final rules, including provisions addressing foreign language disclosures, were not affected by the lifting of the mandatory compliance date and accordingly are now in final form; these provisions would not be deleted.

Since 2001, industry and consumers have gained experience with electronic disclosures. During that period, the Board has received no indication that consumers have been harmed by the fact that compliance with the interim final rules is not mandatory. The Board has also reconsidered certain aspects of the interim final rules, such as sending disclosures by e-mail, in light of concerns about data security, identity theft, and "phishing" (i.e., prompting consumers to reveal confidential personal or financial information through fraudulent e-mail requests that appear to originate from a financial institution, government agency, or other trusted entity) that have become more pronounced since 2001. The Board is proposing to eliminate certain aspects of the 2001

interim final rule, such as provisions regarding the availability and retention of electronic disclosures, as unnecessary in light of current industry practices.

Finally, the Board is proposing to delete, as unnecessary, certain provisions that restate or cross-reference the E-Sign Act's general rules regarding electronic disclosures (including the consumer consent provisions) and electronic signatures because the E-Sign Act is a self-effectuating statute. The Board is issuing the proposed rules pursuant to its authority under section 904 of the EFTA to prescribe rules to carry out the purposes of the Act. The proposed revisions to Regulation E and the official staff commentary are described more fully below in the Section-by-Section Analysis.

The Board solicits comment on all aspects of this proposal. Specifically, the Board seeks comment on the appropriateness of eliminating certain provisions contained in the 2001 interim final rule.

III. Section-by-Section Analysis

12 CFR Part 205 (Regulation E)

Section 205.4 General disclosure requirements; jointly offered services.

Section 205.4 contains the general disclosure requirements under Regulation E, including provisions relating to the form of disclosure. Section 205.4(a)(1) generally requires financial institutions to provide disclosures in writing and in a form that the consumer may keep. The Board proposes to revise § 205.4(a)(1) to clarify that institutions may provide disclosures to consumers in electronic form, subject to compliance with the consumer consent and other applicable provisions of the E-Sign Act. Some institutions may provide disclosures to consumers both in paper and electronic form and rely on the paper form of the disclosures to satisfy their compliance obligations. For those institutions, the duplicate electronic form of the disclosures may be provided to consumers without regard to the consumer consent or other provisions of the E-Sign Act because the electronic form of the disclosure is not used to satisfy the regulation's disclosure requirements.

Section 205.4(c) in the 2001 interim final rule refers to § 205.17, the section of the interim final rule setting forth general rules for electronic disclosures. Because the Board is proposing to delete § 205.17, as discussed further below, the Board also proposes to delete § 205.4(c). Sections 205.4(d) (multiple accounts and account holders) and (e) (services offered jointly) would be renumbered as §§ 205.4(c) and (d) respectively.

Section 205.17 Requirements for electronic communication.

Section 205.17 was added by the 2001 interim final rule to address the general requirements for electronic communications. The Board proposes to delete § 205.17

from Regulation E and the accompanying sections of the staff commentary, reserving that section for future use.

In the interim rule, § 205.17(a) defines the term "electronic communication" to mean a message transmitted electronically that can be displayed on equipment as visual text, such as a message displayed on a personal computer monitor screen. The deletion of § 205.17(a) would not change applicable legal requirements under the E-Sign Act.

Section 205.17(b) incorporates by reference the provisions of the E-Sign Act, such as the provision allowing disclosures to be provided in electronic form. The deletion of this provision would have no impact on the general applicability of the E-Sign Act to Regulation E disclosures. Section 205.17(e) was added in the 2001 interim final rule to clarify that persons, other than financial institutions, that are required to comply with the regulation may use electronic disclosures. The Board is proposing to delete this provision as unnecessary because the E-Sign Act is a self-effectuating statute and permits any person to use electronic records subject to the conditions set forth in the Act.

Sections 205.17(c) and (d) address specific timing and delivery requirements for electronic disclosures under Regulation E, such as the requirement to send disclosures to a consumer's e-mail address (or post the disclosures on a website and send a notice alerting the consumer to the disclosures). The Board no longer believes that these additional provisions are necessary or appropriate. Electronic disclosures have evolved since 2001, as industry and consumers have gained experience with them. Although many institutions offer e-mail alert notices to consumers in connection with online services, some consumers may choose not to receive notifications by e-mail and the Board sees no reason to require e-mail alert notices in all cases. In addition, the Board has reconsidered certain aspects of the interim final rules, such as sending disclosures by e-mail, in light of concerns about data security, identity theft, and phishing that have become more pronounced since 2001.

With regard to the requirement to attempt to redeliver returned electronic disclosures, as the commenters noted, institutions would be required to search their files for an additional e-mail address to use, and might be required to use a postal mail address for redelivery if no additional e-mail address was available. The Board believes that both requirements would likely be unduly burdensome. In addition, the concerns that have been raised about the requirement to use e-mail for the initial delivery of a disclosure or notice apply equally to the use of e-mail for an attempted redelivery.

Under the proposed rule, the Board would not require institutions to maintain disclosures posted on a web site for at least 90 days as provided in the 2001 interim final rule for several reasons. First, based on a review of industry practices, it appears that many institutions maintain disclosures posted on an Internet web site for several months, and, in a number of cases, for more than a year. For example, it appears that institutions that offer online periodic statements to consumers typically make those statements available without charge for six months or longer in electronic form. This practice has developed even though Regulation E does not currently require institutions to maintain

disclosures for any specific period of time. Second, the Board believes that an appropriate time period consumers may want electronic disclosures to be available may vary depending upon the type of disclosure, and is reluctant to establish specific time periods depending on the disclosures. Nevertheless, while the Board is not proposing to require disclosures to be maintained on an Internet web site for any specific time period, the general requirements of Regulation E continue to apply to electronic disclosures, such as the requirement to provide disclosures to consumers at certain specified times and in a form that the consumer may keep. Although these general requirements apply to electronic disclosures, the Board does not believe that the 90-day time period set out in § 205.17(c) of the 2001 interim final rule is needed to ensure that institutions satisfy these requirements when they provide electronic disclosures. The Board, however, will monitor institutions' electronic disclosure practices with regard to the ability of consumers to retain Regulation E disclosures and will consider further regulatory action if it appears necessary.

The official staff commentary to § 205.17 of the interim final rule provides guidance on the provisions set forth in § 205.17 such as delivery of disclosures or alert notices by e-mail, redelivery if disclosures or a notice is returned undelivered, and retention of disclosures on a web site for 90 days. As noted above, because the Board is proposing to delete § 205.17 of the regulation, the Board also proposes to delete the accompanying provisions of the official staff commentary.

IV. Solicitation of Comments Regarding the Use of "Plain Language"

Section 722 of the Gramm-Leach-Bliley Act of 1999 requires the Board to use "plain language" in all proposed and final rules published after January 1, 2000. The Board invites comments on whether the proposed rules are clearly stated and effectively organized, and how the Board might make the proposed text easier to understand.

V. Initial Regulatory Flexibility Analysis

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) (RFA) generally requires an agency to perform an assessment of the impact a rule is expected to have on small entities.

However, under section 605(b) of the RFA, 5 U.S.C. 605(b), the regulatory flexibility analysis otherwise required under section 604 of the RFA is not required if an agency certifies, along with a statement providing the factual basis for such certification, that the rule will not have a significant economic impact on a substantial number of small entities. Based on its analysis and for the reasons stated below, the Board believes that this proposed rule will not have a significant economic impact on a substantial number of small entities. A final regulatory flexibility analysis will be conducted after consideration of comments received during the public comment period.

1. Statement of the objectives of the proposal. The Board is proposing revisions to Regulation E to withdraw the 2001 interim final rule on electronic communication.

The Board is also proposing to clarify that Regulation E disclosures may be provided to consumers in electronic form in accordance with the consumer consent and other applicable provisions of the E-Sign Act.

The EFTA was enacted to provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer (EFT) systems. The primary purpose of the act is the provision of individual consumer rights. 15 U.S.C. 1593. The EFTA authorizes the Board to prescribe regulations to carry out the purposes of the statute. 15 U.S.C. 1693b. The Act expressly states that the Board's regulations may contain "such classifications, differentiations, or other provisions, . . . as, in the judgment of the Board, are necessary or proper to carry out the purposes of [the Act], to prevent circumvention or evasion [of the act], or to facilitate compliance [with the Act]." 15 U.S.C. 1693b(c). The Board believes that the revisions to Regulation E discussed above are within the Congress' broad grant of authority to the Board to adopt provisions that carry out the purposes of the statute.

2. Small entities affected by the proposal. The proposed revisions would delete provisions of Regulation E that are not in effect on a mandatory basis and, accordingly, the proposed revisions would not change the legal requirements applicable to any financial institutions, regardless of their size. Therefore, the proposed revisions would not have a significant economic impact on small entities. The number of small entities affected by this proposal is unknown.

3. Other federal rules. The Board believes no federal rules duplicate, overlap, or conflict with the proposed revisions to Regulation E.

4. Significant alternatives to the proposed revisions. The Board solicits comment on any significant alternatives that may provide additional ways to reduce regulatory burden associated with this proposed rule.

VII. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Ch. 3506; 5 CFR 1320 Appendix A.1), the Board reviewed the rule under the authority delegated to the Board by the Office of Management and Budget (OMB). The collection of information that is required by this proposed rule is found in 12 CFR 205. The Federal Reserve may not conduct or sponsor, and an organization is not required to respond to, this information collection unless it displays a currently valid OMB control number. The OMB control number is 7100-0200.

Section 904 of the Electronic Fund Transfer Act (EFTA) (15 USC § 1693b) authorizes the Board to issue regulations to carry out the purposes of the Act. This information collection is mandatory. Since the Federal Reserve does not collect any information, no issue of confidentiality normally arises. However, the information, if made available to the Federal Reserve, may be protected from disclosure under exemptions (b)(4), (6), and (8) of the Freedom of Information Act (5 U.S.C. § 552 (b)(4),

(6), and (8)). The disclosures required by the rule and information about error allegations and their resolution are confidential between the institution and the consumer.

The EFTA and Regulation E are designed to ensure adequate disclosure of basic terms, costs, and rights relating to electronic fund transfer (EFT) services provided to consumers. Institutions offering EFT services must disclose to consumers certain information, including: initial and updated EFT terms, transaction information, periodic statements of activity, the consumer's potential liability for unauthorized transfers, and error resolution rights and procedures. These disclosures are triggered by certain events specified in the EFTA and Regulation E. Institutions are required to retain evidence of compliance for not less than two years from the date that disclosures are required to be made or action is required to be taken; however, the regulation does not specify the types of records that must be retained. To ease institutions' burden and cost of complying with the disclosure requirements of Regulation E (particularly for small entities), the Federal Reserve publishes model forms and disclosure clauses. Regulation E applies to all financial institutions and merchants and payees that engage in ECK transactions. The Board has determined that no new requirements or revisions to existing requirements are contained in this proposed rule.

Comments are invited on: a. whether the collection of information is necessary for the proper performance of the Federal Reserve's functions; including whether the information has practical utility; b. the accuracy of the Federal Reserve's estimate of the burden of the information collection, including the cost of compliance; c. ways to enhance the quality, utility, and clarity of the information to be collected; and d. ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology. Comments on the collections of information should be sent to Secretary, Board of Governors of the Federal Reserve System, Washington, DC 20551, with copies of such comments to be sent to the Office of Management and Budget, Paperwork Reduction Project (7100-0202), Washington, DC 20503.

List of Subjects in 12 CFR Part 205

Consumer protection, Electronic fund transfers, Federal Reserve System, Reporting and recordkeeping requirements.

Text of Proposed Revisions

Certain conventions have been used to highlight the proposed changes to Regulation E. New language is shown inside bold-faced arrows, while language that would be removed is set off with bold-faced brackets.

For the reasons set forth in the preamble, the Board proposed to amend Regulation E, 12 CFR part 205, as set forth below:

PART 205 – ELECTRONIC FUND TRANSFERS (REGULATION E)

1. The authority citation for part 205 continues to read as follows:

Authority: 15 U.S.C. 1693b.

2. Section 205.4 would be amended by revising paragraph (a)(1), removing paragraph (c), and redesignating paragraph (d) as paragraph (c), and paragraph (e) as paragraph (d), respectively, as follows:

§ 205.4 General disclosure requirements; jointly offered services.

(a)(1) Form of disclosures. Disclosures required under this part shall be clear and readily understandable, in writing, and in a form the consumer may keep. ►The disclosures required by this part may be provided to the consumer in electronic form, subject to compliance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act)(15 U.S.C. § 7001 et seq.).◄ A financial institution may use commonly accepted or readily understandable abbreviations in complying with the disclosure requirements of this part.

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[(c) Electronic communication. For rules governing the electronic delivery of disclosures, including the definition of electronic communication, see § 205.17.**]**

[(d)**]**►(c)◄ Multiple accounts and account holders—(1) Multiple accounts. A financial institution may combine the required disclosures into a single statement for a consumer who holds more than one account at the institution.

(2) Multiple account holders. For joint accounts held by two or more consumers, a financial institution need provide only one set of required disclosures and may provide them to any of the account holders.

[(e)**]**►(d)◄ Services offered jointly. Financial institutions that provide electronic fund transfer services jointly may contract among themselves to comply with the requirements that this part imposes on any or all of them. An institution need make only the disclosures required by §§ 205.7 and 205.8 that are within its knowledge and within the purview of its relationship with the consumer for whom it holds an account.

3. Section 205.17 would be removed and reserved.

4. In Supplement I to Part 205, § 205.17 would be removed and reserved.

By order of the Board of Governors of the Federal Reserve System, April 20, 2007.

Jennifer J. Johnson (signed)
Jennifer J. Johnson,
Secretary of the Board