



Helping Credit Unions Serve Their Members

March 30, 2009

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

Re: Docket No. R-1343

VIA ELECTRONIC MAIL: regs.comments@federalreserve.gov

Dear Ms. Johnson,

The Michigan Credit Union League (MCUL) appreciates the opportunity to comment on the proposed amendments to Regulation E concerning overdraft fees. MCUL is a statewide trade association representing 96% of the 341 credit unions located in Michigan. This comment letter was drafted in response to input received from MCUL's member credit unions, and is written in accordance with presentation of the proposed rule.

General Statement

As part of the Joint Guidance issued in February 2005, the federal agencies¹ issued best practices, one of which was to disclose all of the services that an overdraft service would encompass. Specifically included in this Joint Guidance was the recommendation to include a disclosure of the list of services to which an overdraft service applied, as follows:

"The service may extend to check transactions as well as other transactions, such as withdrawals at automated teller machines (ATMs), transactions using debit cards, pre-authorized automatic debits from a consumer's account, telephone-initiated funds transfers, and on-line banking transactions."

Given that many financial institutions already provide a proper explanation of their respective overdraft services, MCUL believes the application of this rule should be limited to those financial institutions that are not currently providing adequate notice that their overdraft services also apply to ATM withdrawals and one-time debit card transactions. Singling out these transactions for all financial institutions would only serve to confuse consumers and impose a substantial compliance, financial and operation burden for these institutions; a financial burden that would likely be passed on to the consumer, resulting in higher costs for *all* consumers.

First Alternative Approach: Opt-Out Requirement

As stated above, MCUL's member credit unions do not support the proposal to require separate disclosures for ATM withdrawals and one-time debit card transactions, and for the same

¹ The Federal Reserve Board, the National Credit Union Administration, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation.

reasons, do not support requiring separate disclosures for recurring debt card and ACH transactions.

If this proposal is finalized, financial institutions that have not already disclosed that the overdraft services offered include ATM withdrawals and one-time debit card transactions should be granted at least eighteen (18) months in order to obtain adequate technology, education and training to make compliance with the new requirements possible.

Reasonable Opportunity for Opt-Out

MCUL supports making the toll-free telephone number optional for financial institutions, especially in light of the Federal Reserve Board's (Board) comment request on whether the regulation (or its staff commentary) should include additional examples of opt-out methods that would satisfy the requirement to provide a reasonable opportunity to opt out. The toll-free telephone number should not be treated any differently than any other reasonable means, and may not necessarily be the best alternative for consumers if other opportunities are provided. If this proposed rule is finalized, both MCUL and its member credit unions support the Board's willingness to include such examples, either in the regulation or its staff commentary.

Conditioning the Opt-Out

The proposal would prohibit financial institutions from conditioning a consumer's right to opt out of the institution's payment of ATM withdrawals and one-time debit card transactions on the consumer also opting out of the service with respect to checks, ACH transactions or other types of transactions (such as preauthorized EFTs).

MCUL member credit unions believe that such a separation would cause confusion for consumers. If an opt-out form is to be provided, this form should encompass all services, as opposed to one for ATM withdrawals and one-time debit card transactions from one with respect to checks, ACH transactions or other types of transactions. Although this is understandable from the perspective of existing account relationships where financial institutions may not have already adequately disclosed their overdraft services, separating the two transaction types for new account relationships would only serve to confuse consumers and place a further strain on financial institutions.

Perhaps another, more effective means of ensuring consumers are not discouraged from opting out of an institution's overdraft service for ATM withdrawals and one-time debit card transactions would be to permit consumers to select the bundle of services that best meets their individual needs. As one commenter stated to MCUL, "given the high number of competition for consumer accounts, it is unnecessary for [the] FRB to search for any means of ensuring that consumers are not discouraged from a partial opt-out. Financial institutions should be able to bundle products and services in a manner that is attractive to the market segments they wish to serve."²

Exceptions to Notice and Opt-Out Requirements

Comment was requested whether institutions should be required to segregate the opt-out notice from other account disclosures to help ensure that the notice would be seen by consumers.

² David Brandt, Chief Financial Officer, E&A Credit Union

MCUL's member credit unions oppose such a requirement, as such separation would not increase the visibility of the information for the consumer. Given the voluminous disclosures already provided to consumers, a separate document for an opt-out notice would merely serve to be an additional sheet of paper for consumers at an additional cost for financial institutions.

Comment was also requested as to whether the rule should permit institutions to include the opt-out notice on periodic statements in any cycle in which the consumer has been assessed an overdraft fee or charge, even if that fee or charge was not incurred in connection with an ATM withdrawal or a one-time debit card transaction. Alternatively, comment was requested regarding whether this notice should be provided on a periodic statement where no overdraft fees were incurred. MCUL and its members support providing financial institutions the option to decide whether to provide instructions on the reasonable means of opting-out (or opting-in) on the periodic statement.

Content and Format

While MCUL and its member credit unions support an initial notice and the outline of the content, one commenter noted that the language appears to be written from the slant that consumers should not want this service when, in fact, consumers may appreciate it because of the benefits that are outlined in the Background to the proposed rule (i.e., avoiding additional merchant fees and negative credit reporting information).

MCUL and its member credit unions do not support the requirement to provide a short-form notice each time an overdraft fee is assessed, as adequate notice would already have been provided in the initial notice and on periodic statements. Additionally, consumers are generally provided with alternative ways to avoid overdraft fees, such as transfers from other accounts or lines of credit. Requiring this notice would not only be a financial burden to financial institutions, but would result in information overload for consumers. No other regulation places this level of a burden on financial institutions.

Continuing Right to Opt Out and Time to Implement Opt-Out

Under the proposed rule, institutions would be required to comply with a consumer's opt-out request "as soon as reasonably practicable after the institution receives it." Because an overdraft could be authorized (and a fee assessed) between the time an institution receives a request and the time it is acted upon, the Board should clearly define what is considered to be "reasonably practicable." The perceived fault would then be placed upon the financial institution for assessing a fee, rather than the consumer, who should be the one to bear the ultimate responsibility for knowing his/her account balance and the consequences of account mismanagement.

Duration of Opt-Out

Comment was requested on whether consumers should be permitted to revoke prior opt-out elections orally, by telephone or in person. MCUL believes that financial institutions should be granted the flexibility to provide consumers with the ability to opt out, including an electronic means through a financial institution's Internet website.

First Alternative Approach: Opt-In Requirement

The proposed rule would provide an opt-in program solely for the payment of ATM withdrawals and one-time debit card transactions. MCUL and its member credit unions believe that such a scheme would not only cause confusion on the part of the consumer, but would become an operational nightmare for financial institutions. If the goal is to make the process more uniform across all financial institutions, providing an opt-in option for some, with an opt-out option for others would not result in greater clarity for consumers, especially if the opt-in related solely to ATM withdrawals and one-time debit card transactions.

The opt-in language as proposed portrays the overdraft service in such a way as to appear that consumers are harmed by the payment of overdrafts, when in fact, many consumers appreciate the product. It also portrays financial institutions in a predatory light, by requesting whether there are “any other, more effective means of ensuring that consumers are not effectively compelled to opt in to an institution’s overdraft service for ATM withdrawals and one-time debit card transactions.”

Consumers who fail to adequately manage their own accounts should not be portrayed as victims, with the financial institutions portrayed as the victimizers. Financial institutions have provided a product to reduce the negative effects of payments that result in overdrawn accounts, which has resulted in a cost savings for consumers. Perhaps the real issue is the returned payment fees assessed by merchants that created the need for overdraft payment services.

Timing

Under the proposal, if an existing 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 onetime debit card transaction pursuant to the institution’s overdraft service (except for fees permitted under an exception). MCUL believes that, if finalized in its current form, consumers who fail to read the segregated disclosures within this 60-day period, or who don’t seek clarification regarding their confusion could be adversely affected from a denial of an overdraft payment.

Additionally, the proposed rule on its face would appear to be in the consumer’s best interest to not opt in because the financial institution could pay the overdraft but would be prohibited from assessing a fee. Not only would this result in a financial institution’s decision to close accounts, but the costs of administering accounts with negative balances without the ability to recoup the costs through fees (which are less than merchant return fees) would be passed on to the rest of the consumers who manage their accounts responsibly. The negative information that would then be reported by a financial institution to a credit reporting agency would then impair a consumer’s ability to open a new account at another financial institution.

Although under the opt-in program, financial institutions would not be required to provide additional disclosures each time a fee is assessed, the resulting harm to consumers would likely place the burden back on financial institutions to provide additional disclosures before the 60-day period ends.

MCUL believes that the opt-in option with a specific time frame is not as practical as an opt-out that may be exercised at any time.

Debit Holds

MCUL members feel the provision regarding debit holds as written would create an administrative nightmare, as financial institutions have far less control over this issue than merchants. Merchant transactions may not be processed for days after authorization. Institutions that elect to release holds after two hours in order to take advantage of the Safe Harbor provisions will be at risk of honoring overdraft items, without being compensated for the risk. MCUL members feel that, for many institutions, evaluating the impact of debit holds on every overdraft fee assessed would be an unreasonable burden.

Conclusion

In general, MCUL's member credit unions do not support separating overdraft service opt-out requirements for ATM withdrawals and one-time debit card transactions, nor do they support an opt-in specifically for these types of transactions. Given the current flexibility provided within the payment processing system, our members feel that selecting certain transaction types over others would lead to greater confusion on the part of consumers, as it is likely they would not understand which transactions qualify for the overdraft service and which do not. The rationale of making the process uniform across all financial institutions would not serve to alleviate this confusion.

Additionally, our members feel that this proposal, if finalized, would create an additional financial and compliance burden on financial institutions. Consumers should be accountable for knowing their account balances at any given time, and should not rely on financial institutions to make them aware via the authorization process.

MCUL appreciates the opportunity to provide comment on this proposed rule.

Sincerely,

Veronica Madsen
Counsel
MCUL/CUcorp