



March 15, 2010

The New York City Department of Consumer Affairs'
Request for Official Staff Interpretation
Submitted to
The Board of Governors of the Federal Reserve System

Introduction

The New York City Department of Consumer Affairs ("Department" or "DCA") requests an official staff interpretation prohibiting Short Message Service ("SMS" or "text") messages as a means for providing notice and obtaining consent for enrollment in fee-based overdraft protection programs.

Choice is the cornerstone of these regulations. The final rule, promulgated last November, prohibits automatic enrollment in overdraft protection programs and requires that financial institutions give customers the choice of whether to enroll in these costly services. Text messaging is plainly an inappropriate method for the transmission of information concerning important legal rights or for obtaining informed and deliberate choice. We understand that several companies are starting to push the limits of the rules through aggressive marketing campaigns that seek to obtain consumer consent via text message.¹

The purposes of the regulation will be frustrated if the Board does not confirm unequivocally—and quickly—that the rules do not permit text messages to be used for the purpose of providing disclosures or obtaining consents.

A. The mandated opt-in notice cannot be provided by text message

Section 205.17(b)(1)(i) prohibits banks from imposing an overdraft fee for paying an ATM withdrawal or a one-time debit card transaction unless the bank provides the consumer with a written notice describing the bank's overdraft service and the consumer affirmatively opts-in to the overdraft service. Although the rule permits banks to provide the opt-in notice to consumers "electronically" with the consumer's consent, text messages are not permissible electronic communications for purposes of this rule because they cannot be retained by consumers for their records and they are not clear, complete and readily understandable.

1. Texted opt-in notices cannot be retained by consumers as required by Regulation E

Opt-in notices required by Section 205.17(b)(1)(i) must conform to Regulation E's general requirement that disclosures must be "in a form that the consumer may keep," pursuant to 12 CFR § 205.4(a)(1).² Text messages fail this requirement. Many text messages can be saved for a limited period of time only.³

¹ See Lieber, "Banks to pitch the wonders of overdraft," <http://bucks.blogs.nytimes.com/2010/01/26/10127/> (last visited Feb. 23, 2010). In addition to overdraft opt-in consulting, SoundBite also provides its services for debt collection firms, an industry DCA regulates and has observed to often engage in aggressive tactics. See SoundBite Collections, <http://www.soundbite.com/solutions/collections#> (last visited Feb. 19, 2010).

² Regulation E Overdraft Programs, 74 Fed. Reg. 59033, 59041 n.32 (Nov. 17, 2009).

³ See William Enck, Patrick Traynor, Patrick McDaniel & Thomas La Porta, *Exploiting Open Functionality in SMS-Capable Cellular Networks*, The Pennsylvania State University (November 2005), (accessed at <http://www.smsanalysis.org/smsanalysis.pdf>) (number of text messages phones can store is limited by memory constraints – the highest end phones in 2005 were typically only able to store 30 to 50 messages).

For example, Sprint's website states that, when a customer's text message inbox is full, "new messages will overwrite old messages on most Sprint phones."⁴ In addition, most phones have limited storage capacity.⁵ Although consumers conceivably could email the texts to themselves and print them out, Regulation E's language requires the communication to be sent in a form that can itself be kept; it does not permit a transmission that can be saved only if the consumer takes additional steps.⁶ Moreover, as very few consumers are likely to take the extraordinary steps necessary to preserve text messages, or may do so too late to preserve the message, construing Section 205.17(b)(1)(1) to allow texting of the opt-in notice not only would be contrary to the plain language of Regulation E, but to the broad consumer protection purposes of the Electronic Funds Transfer Act (EFTA) and this regulation.⁷ Finally, the requirement of Section 205.17(b)(1)(i) to provide opt-in notices "in a form that the consumer may keep" is in addition to the rule in Section 205.17(b)(1)(iv) that financial institutions also must provide confirmation of the consumer's consent. Because this is an additional requirement, financial institutions may not provide the Section 205.17(b)(1)(i) notice simply by providing it with the confirmation of election.⁸

2. Texted opt-in notices cannot be complete or clear

Section 205.17(b)(i) requires banks to provide notice to consumers "describing the institution's overdraft service." The notice must include all the information set forth in Section 205.17 (d) and must "be in a form substantially similar to Model Form A-9."⁹ The notice must not only include all the required information, but must conform to Regulation E's general requirement that disclosures must be clear and readily understandable.¹⁰

The Board's content requirements for opt-in notices simply cannot be met by text messages. Given that the character count of Model Form A-9 is 2,342 characters, the required content cannot fit within the traditional 160 character text message, which in some cases, includes the sender's email address, the

⁴ Sprint – Manage Your Text Messages, http://support.sprint.com/support/article/Manage_your_text_messages/case-gb746811-20090622-123705?&INTNAV=SU:SP:MVT (last viewed Feb. 23, 2010). See also "Messages Can Be Forever," at <http://www.pcmag.com/article2/0,2817,1634503,00.asp> (last visited Feb. 18, 2010) (AT&T will store and forward messages for up to 72 hours, after which they are deleted, regardless of whether or not the message is delivered. Verizon stores messages on their servers for five days).

⁵ See Enck et al. *supra* note 3.

⁶ Attorneys have flagged retention issues as a basis for limiting their use of texting for attorney client communications. See, e.g., David Schnider, *What Lawyers Need to Know About Text Messaging*, 31 Los Angeles Lawyer 38 (Feb. 2009) ("Another consideration when communicating with clients by texting is that there is no printed record of the communication. When an attorney sends or receives an e-mail, it can be printed and filed. ... Because text messages are sent by wireless devices and do not go through firm computers, there is no convenient means to print them. On some devices it may be possible to forward messages to yourself as an e-mail, which may be printed. But otherwise, text messages are lost in the ether. So if a client is late to court, texting may be a good way to find out when he or she expects to arrive. But to alert a client that a statute of limitation is running, it is more prudent to use e-mail or regular mail, both of which leave a paper trail.")

⁷ Regulation E Overdraft Programs, 74 Fed. Reg. 59033, 59037 (Nov. 17, 2009) ("The final opt-in rule is intended to carry out the express purposes of the EFTA by: (a) Establishing notice requirements to help consumers better understand the cost of overdraft services for certain EFTs; and (b) providing consumers with a choice as to whether they want overdraft services for ATM and one-time debit card transactions in light of the costs associated with those services.") See also 15 U.S.C. 1693 (EFTA's declared purpose is "to provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer systems. The primary objective of this title, however, is the provision of individual consumer rights.")

⁸ EFTA's clear requirement in 12 C.F.R. § 205.4(a)(1) that *the disclosure itself* must be in a form the consumer keep, is not supplanted by 12 C.F.R. § 205.17(b)(iv), which requires the bank to provide the consumer with confirmation of the "consumer's consent in writing (or electronically, if the consumer ages)." The original disclosure describes the terms of overdraft service; the confirmation memorializes the choice. As the Board noted, "The Board believes that a written confirmation will help ensure that a consumer intended to opt into the overdraft service by providing the consumer with a written record of his or her choice." Regulation E Overdraft Programs, 74 Fed. Reg. at 59043.

⁹ Regulation E Overdraft Programs, 74 Fed. Reg. at 59047 (describing content and form of notice). See also Regulation E Overdraft Programs, 74 Fed. Reg. at 59040.

¹⁰ See Regulation E Overdraft Programs, 74 Fed. Reg. at 59041, n.32.



composed message and, if provided, the subject and callback number.¹¹ Any communication regarding the right to opt-in without all the required information would violate the regulation.

Further, overcoming the 160-character limit could only be accomplished by condensing, compressing, abbreviating widely or sending the notice in multiple texts, rendering the notice unintelligible and requiring the consumer to unscramble and decipher the texts.¹² Industry-written FAQs on text messages, like the following, amply justify a conclusion that a texted notice would not comply with Regulation's E comprehensibility requirements:

What does it mean when I see "1/2" on my screen?

"1/2" means you are reading the first message in a series of two messages. We label this as "1/2" to ensure you will read your text messages in the correct order.

Why are the text messages from [us] ... out of order when I go to read them?

We send messages back to you in the order they were intended to be read, and we will always clearly indicate which messages they are ("1/2" or "3/3," for example).

Unfortunately, depending on your mobile provider, messages sometimes get mixed up on the way to your phone.

My results were sent as multiple messages. Some messages arrived first. Why did it take so much longer for the others to arrive?

Depending on your mobile provider, it may take a while for messages to get delivered. If you receive one message, it means we've sent all the messages to you and you should receive them shortly. It may take a few minutes for you to receive them all. If after a few minutes you still haven't received all your messages, please let us know. If the problem persists, you may want to contact your mobile provider.

Why are my results sent as multiple messages?

Each response you receive from [us] may vary in size because all text messages are limited to 160 characters. Sometimes we can't send all of your account information in one message because it exceeds the 160 character limit. In this case, we will send your account information over multiple messages — no more than five at a time.

Can I see all of the results in a single message?

You can narrow down your results by creating nicknames for each account on file. Please use these nicknames to cut down on the length of each resulting message.¹³

Finally, as the Board knows, unscrupulous businesses often avoid disclosure requirements by obscuring and burying information.¹⁴ Given the font size, screen size and text limitations inherent in texting and the

¹¹ See Verizon's general information on text messaging, <http://wirelessupport.verizon.com/faqs/TXT+messaging/faq.html?t=5&p=1558#item46> (last visited February 15, 2010).

¹² Financial institutions may use "commonly accepted or readily understandable abbreviations" in its disclosures, 12 C.F.R. § 205.4 (a) (1), but banks would be hard pressed to fit the required notice into a text message without resorting to using abbreviations not commonly known or using so many as to make the notice unreadable.

¹³ See "Chase Mobile via text frequently asked questions," https://www.chase.com/ccp/index.jsp?pg_name=ccpmapp/shared/assets/page/CMB_faq#what-is-chase-mobile (last visited Feb. 15, 2010) (guidance to consumers regarding "Chase Mobile via text," a service which allows consumers to access account information via text). Other banks issue similar guidance. See, e.g., Tri Counties Bank "Mobile Banking Frequently Asked Questions," <https://www.tcbk.com/personal/mobile-banking/mobile-banking-faq.aspx> (last visited February 18, 2010).

¹⁴ Accordingly, the Board and other regulators have identified ways in which information should be clearly and conspicuously disclosed to avoid deception and enhance consumer understanding. See, e.g., FTC Dot Com Disclosures <http://www.ftc.gov/bcp/edu/pubs/business/ecommerce/bus41.pdf> (last visited Feb. 23, 2010). See also Rules of the City of New York §5-06; Mayor's Office of Adult Education and Mayor's Office of Immigrant Affairs, "Easy-to-Read NYC, Guidelines for Clear and Effective Communication," <http://www.nyc.gov/html/oath/pdf/Easy-to-Read%20NYC.pdf> (last visited Feb. 23, 2010). In the instant context, Model Form A-9 contains highlighted information because The Board's consumer testing indicated that emphasizing certain language "substantially enhanced consumer understanding." See Regulation E Overdraft Programs, 74 Fed. Reg. 59033, 59048 (Nov. 17, 2009). In determining that text messages do not meet the clarity requirement, the Board may also be guided by

Board's goal "to prevent circumvention or evasion of the requirement to provide the consumer with meaningful choice regarding services," the Board should not allow banks to use texting to evade the requirements under this rule.¹⁵

3. Texted opt-in notices present other serious concerns

Texting the opt-in notice raises other serious concerns. Timely delivery of text messages is not guaranteed by most service providers.¹⁶ In fact, banks currently offering texting services warn that delivery is not guaranteed.¹⁷ Further, many consumers are likely to ignore or delete texts from the banks without reading. First, texts are rarely, if ever, used for the transmittal of disclosures concerning legal rights or obligations.¹⁸ Consumer protection agencies have repeatedly warned consumers about phishing scams—texts purportedly from banks to consumers about their accounts.¹⁹ Consumers would also likely bear the costs of these messages – an ironic and unintended consequence for regulations meant specifically to assist consumers to make money-saving choices.²⁰

B. The Regulations do not permit banks to elicit opt-ins by text message

A consumer's "affirmative consent" must be obtained before fees or charges may be assessed on the consumer's account for paying such overdrafts.²¹ Banks must give the consumer a "reasonable opportunity" to opt-in by providing, among other things "reasonable methods" by which to consent.²² The regulations intended to ensure that a consumer who opts-in is exercising a deliberate and informed choice.²³

1. Text messages are not a "reasonable method" by which to provide consumers with an opportunity to provide consent

In its commentary to Section 205.17(b)(iv), the Board lists four "reasonable methods" which banks could use to enable consumers to opt in: mail, telephone, electronic means and in person. With regard to each,

cases evaluating what constitutes a clear and conspicuous disclosure under other laws. *See, e.g., Cole v. U.S. Capital, Inc.*, No. 03-3331, 2004 U.S. App. LEXIS 24177, at *27 (7th Cir. Nov. 19, 2004 (in determining what constitutes "clear and conspicuous" for purposes of FCRA, which does not define the term, a federal appellate court looked to other statutes, including the UCC and TILA and considered the following factors: "the location of the notice within the document, the type size used within the notice as well as the type size in comparison to the rest of the document . . . whether the notice is set off in any other way – spacing, font style, all capitals, etc. . . there must be something about the way that the notice is presented in the document such that the consumer's attention will be drawn to it.").

¹⁵ Regulation E Overdraft Programs, 74 Fed. Reg. at 59044.

¹⁶ *See, e.g.,* Verizon – TXT Messaging Questions & Answers, <http://support.vzw.com/faqs/TXT%20messaging/faq.html> (last visited Feb. 18, 2010) (Verizon Wireless notes in its text message FAQ that a consumer's mobile device's memory is full or if a message is not received within five days, the consumer may not receive the message). *See also* AT&T Messaging FAQs, <http://www.wireless.att.com/learn/messaging-internet/messaging/faq.jsp#general-text> (last visited Feb. 18, 2010) (AT&T Wireless notes that when a consumer's phone is off, text message delivery is retried for up to 72 hours).

¹⁷ *See, e.g.,* Free On-line Banking Alerts from Bank of America, http://www.bankofamerica.com/onlinebanking/index.cfm?template=receive_alerts (last visited Feb. 18, 2010) ("We neither guarantee the delivery nor the accuracy of the contents of any alert."). *See also* Citibank electronic Alerts Terms & Conditions, https://online.citibank.com/JRS/helpcenter/getHelpContent.do?dispFormat=popup&contentId=BankingAlertsTermsConditions&contentType=help_item&appId=JRSPRODSERV&screenId=ProdServDetail#BankingAlertsTermsConditions (last visited Feb. 18, 2010).

¹⁸ For example, the Mobile Marketing Association, an industry group, has stated, "The environment in which people interact with their mobile phone does not lend itself to detailed information search and delivery. Instead, mobile users seek quick and convenient access to information and services when they are out and about." *See* Mobile Advertising Overview (Jan. 2009), <http://www.mmaglobal.com/mobileadoverview.pdf> (last visited Feb. 23, 2010).

¹⁹ *See* FTC Consumer Alert, "Text Messages from Your Bank? Sounds 'Phishy'" (Oct. 2009), <http://www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt163.shtml> (last visited Feb. 18, 2010).

²⁰ *See* FTC, "Beyond Voice: Mapping the Mobile Marketplace" (April 2009), <http://www.ftc.gov/reports/mobilemarketplace/mobilemktgfinal.pdf> (last visited Feb. 18, 2010).

²¹ Regulation E Overdraft Rule, 12 C.F.R. § 205.17 (b) (2009).

²² *Id.* § 205.17 (b)(1)(ii); *see also* Regulation E Overdraft Programs, 74 Fed. Reg. 59033, 59045 (Nov. 17, 2009).

²³ *See* Regulation E Overdraft Programs, 74 Fed. Reg. at 59040.

the Board specifically describes a deliberate action the consumer would need to take to opt in.²⁴ For example, with regard to mail, the Board describes an acceptable method as providing a form to fill out and mail to affirmatively consent to the service.²⁵ Although Section 205.17(b)(iv) includes electronic means, text messages are not a reasonable method by which to obtain consent and are distinguishable from the methods listed.

Not all electronic media serve the purposes of the Board's rule. For an electronic medium to satisfy the final rule, it must allow for a "reasonable opportunity to provide affirmative consent."²⁶ A website can meet the reasonableness requirement because it allows a consumer to make a deliberate choice by separately checking a box or e-signing; a text message does not. A text message may be perfectly suitable as a medium for social communications. It might even be appropriate for a response to simple inquiries for which little information is required, for account-balance alerts or, perhaps, for an entry into a sweepstakes promotion. Text messaging was not designed, nor should it be used, for complicated legal or financial decisions that affect consumers' legal rights and responsibilities.²⁷ Affirmative responses are too quickly and too thoughtlessly made.²⁸ The Board's example of a reasonable medium for electronic consent was a website "where the consumer may *click on a check box* to provide consent *and confirm that choice by clicking on a button that affirms the consumer's consent.*"²⁹ The Board anticipated that the medium would allow for a deliberate selection and confirmation.

Moreover, by stating that the institution could "provide a form" on its website, the Board anticipates that banks will provide a form to consumers, regardless of whether consent is electronic or in writing. As discussed earlier, text messages, with their character number, font, screen size and other limitations, are not an appropriate medium for this form. In addition, privacy and security concerns make text messaging particularly inappropriate for transmission of the consent. The consumer's mobile phone may not be a secure device by which to either receive or send bank related transmissions.³⁰

²⁴ *Id* at 59045.

²⁵ *Id* at 59055.

²⁶ 12 C.F.R. § 205.17 (b) (4) (emphasis added).

²⁷ Many articles have explored the social context and use of text messaging, focusing on the ability of text message users to write private messages even while engaged in conversation or other activities. *See, e.g.,* Nicole Santa Cruz, *Americans Have Gone Text Crazy*, Los Angeles Times, Dec. 16, 2009, available at <http://articles.latimes.com/2009/dec/16/nation/la-na-census-texting16-2009dec16>. ("Texting is convenient, fast and doesn't require full attention, said Tim Groeling, an associate professor of communication studies at UCLA."). A Direct Marketing Association survey found that "text messaging is by far the most often cited mobile marketing method — accounting for 70 percent of consumer mobile marketing responses — compared to a 41 percent response rate to surveys and a 30 percent response rate for e-mail offers." *See Mobile Marketing: Consumer Perspectives* summarized at <http://www.the-dma.org/cqi/dispanouncements?article=1114> (last visited Feb. 22, 2010). The very qualities that make texting a successful marketing method, popular among teens and appropriate for alerts, make texting wholly inappropriate as the medium by which to convey important information. Accordingly, as a Bar Association journal concluded, "As a practical matter, text messaging remains more a plaything for young adults than a powerful asset in the legal arsenal" Shnider, *Lawyers*, *supra* note 7, at 38.

²⁸ For example, a Nielsen study showed that more than half of mobile data subscribers (51%) who saw an ad responded to it by sending a text-message, clicking on it, or calling a specific number. *See* Walsh, Nielsen: Improved Recall, Comfort with Mobile Ads, <http://mmaglobal.com/research/nielsen-improved-recall-comfort-mobile-ads> (last visited Feb. 23, 2010).

²⁹ *See* Regulation E Overdraft Programs, 74 Fed. Reg. 59033, 59045 (Nov. 17, 2009) ("A financial institution provides a consumer with a reasonable opportunity to provide affirmative consent when, among other things, it provides reasonable methods by which the consumer may affirmatively consent. A financial institution provides such reasonable methods, if [it] provides an electronic means for the consumer to affirmatively consent. For example, the institution could provide a form that can be accessed and processed at its web site, where the consumer may click on a check box to provide consent and confirm that choice by clicking on a button that affirms the consumer's consent.")

³⁰ For example, regarding Citi Mobile SMS Banking, Citibank disclaims liability for "any errors or omissions in the information transmitted to your telecommunications equipment through Citi Mobile, including any inaccurate or incomplete content of a Citi Mobile text message or SMS; non-delivery, delayed delivery or the misdirected delivery of a Citi Mobile text message or SMS; any third party, whether authorized or not, obtaining information on your Account(s) disclosed in the Citi Mobile text message or SMS by



Finally, given the importance of the consent and the spirit and purpose of the regulation, the Board may appropriately conclude that texting is an unreasonable method *per se* for obtaining consent.

2. Obtaining consent by texting precludes informed consent

Garnering consent through methods that deprive consumers of the opportunity to exercise informed choice violates the regulation. For example, the Board determined that obtaining consent through a disclosure with a signature card that the consumer must sign when the consumer opens the account or by signature card with a pre-selected check box runs afoul of the regulation's requirement for "affirmative consent."³¹

Although a text message might elicit "consent," it cannot elicit informed consent, as the rules demand. The Board's expectation that consumers will be provided with an opportunity to make an informed choice is reflected in the Board's model form and the requirement that all notices must be "substantially similar" to the model form.³² Significantly, the model form embodies not only the consent election but also the notice.³³ Thus, consents must be given at the time when the required notice is provided. The rule that "the opt-in notice ... must be in a form substantially similar to [the model form]" shows that the Board does not expect financial institutions to deviate from the notice required for informed consent or the requirement of contemporaneous notice and consent.

The Board's expectation of informed consent is also manifest in its discussion of real-time opt-ins. The Board determined that banks cannot obtain consent for overdraft coverage at ATM and debit card terminals in real time, focusing on the feasibility providing information to consumers with ATM and debit terminal technology.³⁴ We note, however, that in concluding that real-time opt-in was not possible, the Board did not distinguish between real-time opt-in for overdraft programs generally and real-time decisions about overdraft fees for specific transactions. Providing real time opt-ins about specific transactions is no different than banks' current practice of disclosing usage fees at ATMs; they are simple to provide, present banks with no technological challenges and are easily understood by consumers. In contrast, provision of information about overdrafts generally is akin to providing general account information and not appropriately provided at an ATM and debit terminal. Accordingly, as noted in our formal comments last March, we believe that it is appropriate, at an ATM or debit terminal, to require financial institutions to provide consumers with basic disclosures about the maximum fee that would result and the choice whether to incur the fee and proceed or to decline the fee and cancel the transaction.³⁵

accessing your cellular phone or mobile telecommunications equipment or systems". See Citi Mobile SMS Banking Terms & Conditions, http://citibank.com.ph/global_docs/microsite/citimobile/sms-tac.htm (last visited Feb. 23, 2010).

See also Rutgers Researchers Show New Security Threat Against 'Smart Phone' Users (Feb. 22, 2010), http://news.rutgers.edu/medrel/news-releases/2010/02/rutgers-researchers-20100222/medrel_generic_content_type_view (last visited Feb. 24, 2010) (New research shows that smart phones lack sufficient security mechanisms to prevent new types of hacking attacks on operating systems that can lead to theft of personal information. This can be done "via text message.").

³¹ See Regulation E Overdraft Programs, 74 Fed. Reg. at 59045. The Board rejected requiring banks to provide a toll-free number for consumers to call to opt-in, noting that with the opt-in system, banks "have an incentive to make it easy for consumers to opt in."

³² See Regulation E Overdraft Programs, 74 Fed. Reg. at 59047.

³³ See Regulation E Overdraft Programs, 74 Fed. Reg. at 59054, A-9 Model Consent Form for Overdraft Services (§ 205.17).

³⁴ See Regulation E Overdraft Programs, 74 Fed. Reg. at 59049 ("However, consumers who make decisions in real-time may not be provided all essential information necessary to make informed decisions about whether to incur a fee by proceeding with a transaction that overdraws their accounts. The Board does not believe that it is technologically feasible to provide real-time opt-ins at many locations at this time, particularly at non-proprietary ATMs and merchant POS terminals. Thus, the Board is not addressing real-time notices in the final rule. The Board will continue to monitor developments in real-time notice capability and assess whether such notice would enhance consumer protection.").

³⁵ We agree with the Board's judgment regarding the necessity of informed choice and the conclusion that *account-level* opt-ins may not be obtained at an ATM or debit terminal. However, as long as this choice would only be applicable to the single transaction in question. See New York City Department of Consumer Affairs, Comments to Docket No. R-1343, Regulation E, Submitted to the Federal Reserve Board of Governors (March 30, 2009), http://www.nyc.gov/html/dca/downloads/pdf/dca_comments_r1343e.pdf (last visited Feb. 22, 2010).

The Board's focus on the information accompanying consent in the real-time context compels a conclusion that consent cannot be obtained by text:

A real-time opt-in may provide relief to consumers who may need access to funds in an emergency when they have no alternative forms of payments available and where technology makes a real-time opt-in feasible. However, consumers ... *may not be provided all essential information necessary to make informed decisions* about whether to incur a fee by proceeding with a transaction that overdraws their accounts. (emphasis added).³⁶

C. Banks cannot obtain consents through texting or means that would violate the new Regulation E prior to the compliance date of the new rules

The rules clearly do not permit, and the Board did not intend for, banks to use these months prior to the effective date as open season for soliciting consumers through methods that violate the notice and opt-in requirements. Despite significant industry opposition, the opt-in rules are applicable to both new and existing accounts.³⁷ As the Board observed, particularly given the low annual account attrition rate, "application of the opt-in rule only to new consumers would mean that a significant number of consumers would not receive the protections provided by an opt-in."³⁸ Thus, consumers with accounts existing prior to July 1, 2010 cannot be assessed overdraft fees after August 15, 2010 unless they were provided with the requisite notice and reasonable method by which to opt-in in.³⁹

Moreover, anticipating bank efforts to lure consumers into overdraft services before the rules go into effect, the Board also constrained banks from obtaining opt-ins unless they comply with all the regulation's requirements, including the notice and affirmative opt-in requirements.⁴⁰ And, whether they try to elicit consumers' opt-ins before or after the rule's effective date, Section 205.17(d) allows banks no latitude in the notice provided to consumers regarding overdraft services: they can only provide the information specified in the rule. In notices to consumers sent before the rule's effective date, banks may include information about overdraft services available prior to the August 15, 2010, but must alert consumers that "After August 15, 2010, we will not authorize and pay overdrafts for the following types of transactions unless you ask us to (see below)."⁴¹ Banks cannot make the additional information concerning current overdraft services more prominent than any of the required language; the Board's significant consumer research demonstrated that "...emphasizing certain language as shown in Model Form A-9 substantially enhanced consumer understanding, and the Board is concerned that *any additional information provided* not diminish that understanding."⁴²

As discussed earlier, banks cannot elicit consent unless it is informed and deliberate. Thus, banks cannot use texting to elicit consents. Further, texting consumers until they capitulate, sending consumers misleading solicitations, or otherwise engaging in marketing tactics that are misleading would not only

³⁶ See Regulation E Overdraft Programs, 74 Fed. Reg. 59033, 59049 (Nov. 17, 2009).

³⁷ See *id.* at 59046.

³⁸ *Id.* at 59038.

³⁹ See *id.* at 59046.

⁴⁰ *Id.* Indeed, banks are bombarding consumers with solicitations to lure them to opt into overdraft. Chase, for example, is warning consumers that "Your debit card may not work the same way anymore...unless we hear from you." and Bank of America warns consumers of the consequences of opting out of overdraft coverage, claiming, "We value your business and the opportunity to help you manage your finances."

⁴¹ Regulation E Overdraft Rule, 12 C.F.R. § 205.17 (d) (6) (Nov. 17, 2009).

⁴² See Regulation E Overdraft Programs, 74 Fed. Reg. 59033, 59047 (Nov. 17, 2009).

violate the letter and spirit of these regulations, but federal, state and local deceptive practices acts, as well. We also note that marketers and banks that engage in text message campaigns to cajole and manipulate consumers to yield to overdraft services may be subject to prosecution under the Telephone Consumer Protection Act of 1991 ("TCPA") and the corresponding Federal Communications Commission (FCC) rules, respectively.⁴³ The TCPA and the FCC rules generally bar marketers and banks from sending text messages to any number on the national Do-Not-Call List⁴⁴ or using an automatic dial phone system to send texts to phone devices unless they have obtained prior consent.

D. The Board should confirm that banks cannot transmit the required notice electronically without a consumer's specific authorization

Section 205.17 (b)(i) requires banks to provide the opt-in notice to consumers in writing, unless a consumer expressly authorizes the bank to send it electronically. The requirement appropriately reflects the Board's recognition that electronic communication may not be the best form of communication for all consumers.⁴⁵ By giving consumers the choice of medium by which to receive the notice, the Board seeks to ensure that consumers obtain the information through a means that facilitates informed choice.

Given the importance of the mandated notice, the Board should confirm that a consumer's general consent to receive notices or disclosures electronically does not satisfy the rule.⁴⁶ This would prevent banks from relying on any existing all-purpose consents or eliciting new ones.⁴⁷ In this vein, the Board should also make clear that consumers need not opt out of existing agreements to receive electronic communications to prevent receiving this notice electronically.⁴⁸

The Board should also clarify that the consent to receive notice electronically must authorize the specific electronic means the consumer is authorizing.⁴⁹ Banks offering consumers the opportunity to receive account information and reminders themselves distinguish between types of electronic communication in their offerings, thus acknowledging that different forms of electronic communication fit different consumer needs.⁵⁰ A consumer may agree to receive email alerts of account balances, but may well prefer to receive a notice of critical rights by traditional mail.

⁴³ 47 U.S.C. § 227 *et seq.* (marketers are subject to the TCPA); 47 C.F.R. § 64.1200 *et seq.* (TCPA applicable to banks under FCC rules). The FCC has noted that the TCPA encompasses both "voice calls and text calls to wireless numbers." See FCC Order 03-153 ¶ 165; see also *Satterfield v. Simon & Shuster*, 569 F.3d 946, 951(9th Cir. 2009) (a text message can constitute a call and thus, be subject to the TCPA).

⁴⁴ The FCC rules currently permit banks to call consumers with whom the bank has an established business relationship. <http://www.fcc.gov/cgb/consumerfacts/tcpa.html> (last visited on Feb. 22, 2010).

⁴⁵ See Regulation E Overdraft Programs, 74 Fed. Reg. at 59042.

⁴⁶ We are aware that, because the Board's final rule permits electronic delivery of notice if the consumer agrees to it, the consent requirements of the E-Commerce Act governing the consumer's agreement to receive notice electronically do not apply. However, the Board should not permit banks to ignore or skirt the spirit or purpose of Regulation E simply because the E-Commerce Act does not apply. See Regulation E Overdraft Programs, 74 Fed. Reg. at 59041 n.32.

⁴⁷ It appears that most electronic consents specifically—and narrowly—authorize email disclosures, making it particularly appropriate for the Board to require banks to require specific consent to authorize text messages.

⁴⁸ See, e.g., Chase "Online Consumer Practices,"

https://www.chase.com/ccp/index.jsp?pg_name=ccpmapp/privacy_security/protection/page/online_consumer_practices#using (last visited Feb. 13, 2010). Chase, for example, advises consumers, "If you no longer wish to receive e-mail offers or solicitations from Chase, you may unsubscribe by following the instructions in the original e-mail you received. The instructions are generally located at the bottom of the e-mail."

⁴⁹ Such specification is particularly necessary if the Board determines that texting is a permissible means of electronic communication.

⁵⁰ See, e.g., Citi "E-mail & Wireless Alerts," <https://online.citibank.com/US/JRS/pands/detail.do?ID=WAlerts> (last visited Feb. 19, 2010). See also Chase Account Alerts,

https://www.chase.com/ccp/index.jsp?pg_name=ccpmapp/shared/marketing/page/Account_Alerts&WT.ac=ad_alerts&WT.mc_id=g409&WT.pn_sku=alts&jp_aid=ad_alerts&jp_mep=hmpg_tile_ka&jp_avt=35709&jp_cnv=secure/Alerts/showsubscribealertsconfirmatio.n.aspx (last visited Feb. 19, 2010).



Finally, banks should not be permitted to obtain consent to provide the required notice electronically in another electronic communication which the consumer authorized, or to use an authorized electronic communication to provide a link to a form to consent to receipt of the notice. Such uses of authorized electronic communications are susceptible to the same abuses the Board identified and is prohibiting by requiring the notice and opt-in to be segregated from other account information.⁵¹

Given the importance of the opt-in notice and the potential for abuse, we also recommend that the Board provide a model authorization to receive the consent electronically as it has done with the mandated notice itself.

Conclusion

As the Board recognized in its overdraft rules, fairness and transparency must become the watchwords of a stable financial services marketplace. Despite the rules, and all too predictably, banks have launched aggressive marketing campaigns to lure consumers to opt into overdraft services. Proactively issuing appropriate guidance will send a strong message that attempts to undermine consumer protection efforts no longer will be tolerated.

⁵¹ See Regulation E Overdraft Programs, 74 Fed. Reg. 59033, 59041 (Nov. 17, 2009).



Jonathan Mintz
Commissioner

March 15, 2010

The Honorable Ben Bernanke
Chairman
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, D.C. 20551

Dear Chairman Bernanke:

I commend the Board's recent changes to Regulation E, which give bank customers the choice whether or not to enroll in fee-based overdraft protection. The City of New York sees firsthand how these hidden fees have surprised consumers, eroded household incomes and driven frustrated consumers to use costly fringe financial services.

I write today to urge you to issue an official staff interpretation to address a serious threat to the Board's final rules prohibiting automatic enrollment in overdraft protection programs. We understand that several companies are starting to push the limits of the rules through marketing strategies that utilize text messaging to obtain the affirmative consents required to enroll customers in overdraft programs.

The Board should prohibit the use of text messages to provide notice and obtain consent. In adopting the rules, the Board expressly sought "to prevent circumvention or evasion of the requirement to provide the consumer with meaningful choice regarding services." The use of text messaging to educate consumers about important legal rights or to obtain informed and deliberate choice concerning potentially costly banking services flouts both the rules and their purpose.

I am enclosing a memorandum setting forth the basis for the requested interpretation. The rules recognize that fairness and transparency must become the watchwords of a stable financial services marketplace. Proactively issuing appropriate guidance will send a strong message that attempts to undermine consumer protection efforts no longer will be tolerated.

I will continue to monitor the tactics used to solicit New York City consumers, and I will alert you to any other communications that may violate the Board's rules. Please do not hesitate to call on the City of New York for further information or any assistance you may need. I look forward to your interpretation of the rules regarding the use of text messages. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to be "J. Mintz", written over the word "Jonathan Mintz".

Jonathan Mintz