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Via Email (regs.comments@federalreserve.gov) & Facsimile (202-452-3819)

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

Re: Regulation E, Docket No. R-1210

Dear Ms. Johnson:

We appreciate having the opportunity to comment on the Board's proposal to revise the official staff commentary on Regulation E. I am Gordon Smith and my responsibility is to manage Bank of the West's corporate compliance department. I write on behalf of Bank of the West in support of the proposed revision.

The Proposed Rule would amend the Commentary to clarify the current Regulation E requirements for notices posted on or at an Automated Teller Machine ("ATM"). More specifically, the Proposed Rule would clarify that if there are circumstances in which an ATM fee will not be imposed, ATM operators may disclose in the notice posted on or at the ATM that a fee "may" be imposed—rather than have the notice categorically state that a fee "will" be imposed when that might not literally be true. Bank of the West strongly supports the proposed clarification and applauds the Board's effort to assist ATM operators in understanding and complying with the ATM fee disclosure requirements of section 205.16(b)(1) of Regulation E.

Bank of the West believes that the Proposed Rule is fully consistent with section 904(d)(3)(A) and (B) of the Electronic Funds Transfer Act ("EFTA"), 15 U.S.C. § 1693 *et seq.*, which provides that an ATM operator, who charges a consumer for electronic fund transfer ("EFT") services, must provide notice to the consumer indicating "that a fee is imposed" for the service in a prominent and conspicuous location on or at the ATM and through an ATM on-screen disclosure accompanied by the fee amount.¹ Bank of the West

¹ 15 U.S.C. §§ 1693b(d)(3)(A) and (B).

believes that it is important to clarify that the current language of section 205.16(b)(1) of Regulation E should not be read to require a notice stating that a fee “will” be charged when such a statement might not literally be true. Such an interpretation ignores current ATM fee practices that may benefit consumers (namely, the practice of waiving fees for certain consumers or certain types of transactions).

The Current ATM Disclosure Scheme, As Clarified By The Proposed Rule, Adequately Informs Consumers of ATM Fees

Bank of the West believes that the current ATM disclosure scheme, as clarified by the Proposed Rule, adequately informs consumers of fees that will be imposed by ATM operators.

Section 205.16(b)(1) of Regulation E provides that “[a]n [ATM] operator that imposes a fee on a consumer for initiating an [EFT] or a balance inquiry shall . . . provide notice that a fee will be imposed for providing [EFT] services or a balance inquiry.”² This notice must be posted in a “prominent and conspicuous location,” either on or at the ATM, and serves as an alert to the consumer that a fee may be imposed.³ In addition, before the consumer is committed to paying such a fee, the ATM operator is required to provide notice of the fee and its amount, either on the ATM screen, or on paper.⁴ Only after the consumer is provided these required notices, and elects to continue with the transaction or balance inquiry, may the ATM operator impose a fee.⁵

The Proposed Rule would amend the Commentary to clarify that an ATM operator who imposes a fee for some, but not all, EFT services complies with section 205.16(b)(1) by posting a notice stating that a fee “may” be imposed. The proposed change will make the notice more accurate without decreasing the protection that consumers receive.

A consumer is protected from undisclosed fees: first, by receiving notice that the consumer may incur a fee for an EFT or balance inquiry; second, by receiving an on-screen or paper notice with the amount of the fee once it is confirmed that the consumer will, in fact, be charged a fee; and, third, by requiring that the consumer affirmatively elect to proceed with the transaction once the consumer has received the required notice. The Proposed Rule does

² 12 C.F.R. § 205.16(b)(1) (emphasis added).

³ *Id.* § 205.16(c)(1).

⁴ *Id.* § 205.16(c)(2).

⁵ *Id.* §§ 205.16(e)(1)-(2).

not decrease the notice received by the consumer, it simply gives the operator the option of making the notice more accurate.

The Proposed Rule Is Consistent with the History of the ATM Disclosure Requirement

In connection with the passage of the Gramm-Leach-Bliley Act (“GLBA”), Representative Marge Roukema, the sponsor of the ATM fee disclosure bill that was incorporated into the GLBA, publicly stated that “Federal Reserve regulations and industry rules already require that surcharges be disclosed. This bill simply puts existing practice into law. Since agency regulations and industry rules are subject to change, this sets a uniform standard that consumers will be able to count on.”⁶ At the time that the present requirement was enacted, many banks notified consumers (i) through signs on or at the ATM machine that a fee may be imposed and (ii) through an ATM on-screen disclosure that specified the amount of the fee, if any, that would apply to the particular transaction before the consumer elected to proceed. The proposed clarification of existing section 205.16(b)(1) of Regulation E is therefore consistent with the purpose of this part of the GLBA—namely, “putting existing practice into law.”

Bank of the West, like many ATM operators, does not universally charge consumers for EFT services. Thus, for Bank of the West, as for many others, the “will” language is inaccurate. Use of more accurate language—namely, that a fee may be imposed—is consistent with EFTA section 904(d)(3)(A) and will serve to alert consumers to the more consumer-specific on-screen disclosures provided after card insertion. The more detailed on-screen notice, which notifies consumers of the precise fee amount, if any, that they will be charged, ensures that a consumer receives truthful and adequate disclosure before he or she proceeds with an ATM transaction.

The current section 205.16(b)(1)-1 of the Commentary explains that an ATM operator may “specify the type of EFT for which a fee is imposed,” in lieu of providing a general blanket statement that a fee will be imposed. But ATM fee structures often are complex and are changed with some frequency. Therefore, it would not be practical or helpful to consumers to require a printed listing of every potential fee on or at the ATM. Such a requirement would result in a lengthy, detailed statement that consumers would be less likely to read than a short, simple statement and that would not add any practical value to a more general statement. Such a requirement also would be costly because the statement would have to be changed frequently.

⁶ Press Release, Office of Representative Marge Roukema, Banking Committee OKs Roukema ATM Fee Disclosure (Mar. 10, 1999) at <http://financialservices.house.gov/banking/31099rou.htm>.

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For example, Bank of the West, like many institutions, does not charge fees to accountholders of institutions that have contracts with Bank of the West waiving such ATM fees. At one time or another, Bank of the West has entered into such contracts with approximately 60 such institutions. The list of institutions with which Bank of the West has such contracts can change as often as monthly. Placing a physical list this long on ATMs, and then changing the lists as often as they change, would be difficult and costly and serve no purpose. The on-screen disclosure tells the user whether he or she will be charged for the transaction that he or she has in mind, and in time for the user to accept or reject the fee.

**The Final Rule Should Note That the Revision Is a Clarification And Not A Change In
ATM Fee Disclosure Requirements**

Finally, Bank of the West urges the Board to make clear in the supplemental information accompanying the final rule that the proposed revisions merely clarify the current ATM fee disclosure requirements. The failure to make such a clarification could lead to the revisions being viewed as only prospective in nature.

Very truly yours,

W. Gordon Smith
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Corporate Compliance