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Federal Reserve Board
Washington, D.C.

Re: Docket No. R-1210
Proposed Changes to Regulation E. section 205.16

This letter states a position in opposition to the Board's proposed new staff commentary to 205.16.

The most fundamental reason why the board should not go forward with the proposed change to the staff commentary is that the new commentary is manifestly contrary to the statute passed by Congress. While the EFTA was originally passed in the 1978, the portion of the law at issue in the proposed change to the commentary was part of a discrete amendment to the EFTA passed in 1999 and named the ATM REFORM ACT OF 1999 (hereafter sometimes referred to as the "REFORM ACT"). That amendment to the EFTA is clear and unambiguous. The Board exceeds it power and abuses its discretion by failing and refusing to require the staff commentary to be consistent with the explicit statutory mandate unambiguously expressed by Congress when it passed the REFORM ACT. It has been repeatedly stated by the courts that when the words of a statute are clear and unambiguous, the obligation of agencies in implementing regulations and courts in ruling on those regulations is to follow the law as passed by Congress. As the Supreme Court has stated, "[w]e have said time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Barnhart v. Signom Coal Co, Inc.* 534 U.S. 438 (2002).The Board certainly has the power to pass implementing regulations to the Act; it does not have the power to amend the act to conform with an intent not expressed in the Act.

The Supreme Court has also stated, time and again, that where statutory language is unambiguous, the obligation of the agencies and the courts in interpreting the law are to follow the law as written. But, courts and agencies are permitted to survey legislative history to determine whether there exists a latent ambiguity in the statute or to consider the history to determine if it reflects further on Congress's intent. In this case, the legislative history is entirely consistent with the language of the REFORM ACT and inconsistent and contrary to the Board's proposed new staff commentary. "[I]n surveying legislative history we have repeatedly stated that the authoritative sources for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those congressmen involved in drafting and studying the proposed legislation.' *Zuber v. Allen* 396 U.S. 168, 186, 90 S.Ct. 314, 324, 24 L.Ed.2d. 345." *Garcia v. United States* 469 U.S. 70 (1984). As we will show below,

the Legislative History is clear, consistent, and unambiguous that 205.16 as passed by the Board and the original contemporaneous staff commentary is consistent with the REFORM ACT and the proposed new staff commentary is inconsistent and contrary to the REFORM ACT.

The policy arguments that the several large financial institutions behind the rule change have made in support of what is effectively an amendment to the REFORM ACT are simply irrelevant because the REFORM ACT passed by Congress is clear and does not adopt those arguments. But the policy arguments are also false and inappropriate. If the Board were to amend the staff commentary in the manner suggested in the proposed new proposed commentary, the Board would encourage, if not require, the many (indeed most) ATM operators who now follow the law and who give the notice intended by Congress to change their notices so as to make them less clear and equivocal to the point of being meaningless. This is discussed in more detail below. But briefly what can be stated is that if the Board allows the financial institutions to simply post a sign that a fee "may be charged" for their services, the Board might as well go the full distance and abolish the requirements of the signs altogether.[1] Virtually ever consumer in the United States knows that banks "may charge" for use of their ATM machines. A sign that simply states that that the consumer "may be charged" has no value to the consumer and tells the consumer absolutely nothing he or she did not already know. Congress wisely mandated that the sign tell a consumer who is charged the fact of the charge, because such a sign provides useful information. Probably 99% or more of surcharges charged by ATM operators are for cash withdrawals and in not requiring that the signs inform consumers who are charged for cash withdrawals the fact of the charge that the new commentary goes most seriously astray from the statute.

THE STATUTORY LANGUAGE

The most fundamental and important reason why the new commentary should not be adopted is that it is manifestly contrary to the language of the REFORM ACT. The REFORM ACT uses simple language to express Congress's intent. It is not ambiguous at all and the Board has an obligation to implement the statute.

15 U.S.C. 1693b (d) (3) (B) (i) states:

(3) Fee disclosures at automated teller machines

(***A***) In general

The regulations prescribed under paragraph (1) **shall require**

[1] Of course, as the Board noted in rejecting requests to delete the sign requirement when the regulations went into effect in 2001, dispensing with the requirement of the signs at the ATM would be manifestly contrary to the statute. Making the signs meaningless, as the proposed staff commentary would do, is no less manifestly contrary to the statute because it does indirectly what the Board could not do directly.

any automated teller machine operator who imposes *a* fee **on any consumer** for providing host transfer services to **such consumer** to provide notice in accordance with subparagraph (B) to the consumer (at the time the service is provided) of -

(i) **the fact that *a* fee is imposed** by such operator for providing the service; and

(ii) the amount of any such fee.

First, it is impossible to mistake Congress's command that the regulations the Board prescribes "**shall require"** any automated teller operator who imposes a fee **on <u>any</u> consumer** to post a notice **to <u>such</u> consumer** on or at the ATM machine[2] "**of the fact that a fee is imposed** by such operator." (emp. added). As can be readily ascertained by reading the actual language of the statute quoted verbatim immediately prior to this paragraph, every word in this paragraph that is emphasized is used in the REFORM ACT itself and is crucial to implementation of the Reform Act.

There is simply nothing ambiguous about the statutory language. The regulations shall require any ATM operator who imposes a fee on **any** consumer to post a notice **to such consumer** of the fact of the fee that is imposed **on that consumer.** There is nothing in the statute that permits the Board to allow an ATM operator who imposes a fee on the consumer who is using the machine to not tell that consumer of **the fact that a fee is imposed** upon him. There is nothing in the language of the statute that allows the Board to permit an ATM operator to fail to tell the consumer on whom a fee is imposed the "fact that a fee is imposed" upon him because other consumers do not have a fee imposed or there are other transactions for which a fee is not imposed.

At the very same time that Congress added the above provisions and in the same amendment to the EFTA, Congress added 15 USC 1693(a)(10) which prescribed what consumers were to be told by financial institutions when the consumer opened an account at a financial institution. In 15 USC 1693c(a)(10) Congress stated that the financial institutions were required to give "a notice to the consumer that a fee **may** be imposed by (a)(10)(a) an automated teller machine operator (as defined in section 1693b(d)(3)(D)(i) of this title)…" (emp. added). It is a cardinal rule of statutory construction that

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[2] When the Board first passed regulations implementing the ATM Reform Act of 1999, banks asked the Board to delete the requirement of the notice posted on or at the ATM machine. The Board rejected that request out of hand as inconsistent with the law. The requested changes here are similarly inconsistent with the law.

where a legislature uses one term in one section of a law and uses a different term in a different section of the same act, that the difference was intended. "Where different terms appear in two adjoining subdivisions of the same statute, " 'the inference is compelling that [different meanings were] intended.' " Miranda v. National Emergency Services, (1995) 35 Cal.App.4th 894, 900; *Beach v. Ocwen Federal Bank* 523 U.S. 410, 418. Here the two different terms are used in the exact same discrete amendment to the EFTA. If the inference is "compelling" when the two different terms are used in adjoining subdivisions, it can only be more "compelling" when the two different terms are used in a discrete amendment to a larger law and are placed right next to each other in the text of the amendment. In addition, the amendment placed them in two adjoining subdivisions of the same act. This rule of statutory construction can only give greater emphasis to the Board's duty to implement the law Congress passed according to its plain language and not some perceived intent not expressed in the language of the statute.

The "primary objective" of the EFTA is "the provision of individual consumer rights." 15 USC 1693(b). The REFORM ACT requires that the notices required by the REFORM ACT give notice to each individual consumer who is in fact charged a surcharge of the fact of the surcharge. The Board's regulations must provide for the same notice and the proposed new staff commentary fails to do so.

The REFORM ACT does not apply to consumers of the ATM Operator. Indeed, no notice at the ATM machine, either on the screen or at the machine, is required to be given to consumers who are directly or indirectly customers of the ATM Operator. (15 USC 1693b(D)(3)(D)(i)(I) and (II). The proposed staff commentary allows a notice that is contrary to the statute because persons not subject to the statute (customers of the ATM Operator) are not charged. (It is almost impossible to locate an ATM sign that does not identify the ATM Operator's customers as being exempt from the surcharge. Of the ten largest financial institutions in the United States, every single one of them, usually in large print, utilizes signs that state the fees are not charged to their own customers. To permit an ATM operator to state that the fee "may be charged" because it own customers are not charged when every other US Cardholder is charged is simply absurd). To argue that such a regulation is consistent with the statute is specious.

The Board is obligated to follow the law Congress wrote and no justification for what Congress prescribes is necessary. However, as will be noted in further detail below, many if not most, ATM Operators presently utilize language that fully complies with the REFORM ACT, informs consumers of exemptions to the surcharges, and are clear, concise, easily read and unambiguous. The change proposed to the commentary would allow those financial institutions that unreasonably chose to ignore the REFORM ACT to continue to use non compliant signs when there is no legitimate purpose or need for such signs.

LEGISLATIVE HISTORY

The courts and the Board can test whether there is latent ambiguity in a statute by reviewing the legislative history of an Act. In this case, the legislative history is as clear as the Act itself. Time after time, in every instance where the intent and meaning of the

Act is explained to the Congress or its committees, the Congress and its committees are told that the amendment requires an ATM operator who imposes a fee on any consumer to inform that consumer, by two notices, of the fact that a fee will be imposed for the services for which the fee is imposed on that consumer.

SUBTITLE H--ATM FEE REFORM

Section 171. Short title

Section 171 designates subtitle H as the `ATM Fee Reform Act of 1999'.

Section 172. Electronic fund transfer fee disclosures at any host ATM
Section 172 amends the Electronic Funds Transfer Act (EFTA) by requiring certain disclosures regarding automated teller machine (ATM) surcharge fees. The disclosures are required only with respect to surcharges imposed by ATM operators on noncustomers, not fees that the consumer's own bank may charge. **ATM operators** assessing surcharges are **required** to (1) post a sign on the ATM machine **stating that a fee will be charged**; and (2) post a notice on the screen (or on a paper notice issued by the machine) that a fee will be charged and the amount of such fee after the transaction is initiated and before the consumer is irrevocably committed to completing the transaction. No surcharge fee may be charged unless the required disclosures are made and the consumer elects to proceed with the transactions after receiving the notice.

(Committee Report 2 of 100 - House Rpt.106-074 - Part 3 - FINANCIAL SERVICES ACT OF 1999)

Each and every committee report to either the relevant house committees or the senate committees or to the floor of either house, time and again, repeat that the signs are **required** to state **that a fee will be charged** on the notice that is posted on or at the machine in a prominent and conspicuous location in addition to the notice posted on the screen itself.

The House Conference Report, issued on November 2, 1999, 10 days before the ATM REFORM ACT passed the Congress, and distributed to each member of the House of Representatives, states that the notice **must state that a fee will be charged.**

The Senate Banking Committee, Statement of Managers, Summary of Major Provisions, released Monday November 1, 1999 (11 days before the REFORM ACT was enacts by the Congress) stated:

“Subtitle A--ATM Fee Reform

“ *Senate Position:* The Senate bill at Title VII **requires** automated teller machine (``ATM'') operators who impose a fee for use of an ATM by a **noncustomer to post a notice on the machine** and on the screen **that a fee will be charged** and the amount of the fee. This notice must be posted before the consumer is irrevocably committed to completing the transaction. A paper notice issued from the machine may be used in lieu of a posting to the screen. No surcharge may be imposed unless the notices are made and

the consumer elects to proceed with the transaction. A notice is required when ATM cards are issued that surcharges may be imposed by other parties when transactions are initiated from ATMs not operated by the card issuer. ATM operators are exempt from liability if properly placed notices on the machines are subsequently removed, damaged, or altered by anyone other than the ATM operator.

House Position: Same.

Conference Substitute: The House receded to the Senate with an amendment. "

In private lobbying before the Board, the large financial institutions who are the impetus for the proposed new staff commentary informed the Board that "[i]t is notable that the sponsor of the ATM fee disclosure bill that was incorporated into the [ATM REFORM ACT OF 1999] stated formally and publicly that it was her intent to protect consumers by locking in the then existing industry practices. Chairwoman of the House Banking Committee Financial Institutions Subcommittee and sponsor of the ATM disclosure bill, Marge Roukema, stated her intent to put existing practice into law. (Brief of Morrison and Foerster, p. 9[3]) But which existing practice the Congresswoman was referring in the statement cited by the brief is unclear because many, if not most, ATM Operators then and today had signs on the machines that stated that a fee will be imposed for cash withdrawals. More importantly, Morrison & Foerster on behalf of the large financial institutions behind the proposed new staff commentary do not cite the context or give attribution to the statement from which they quote, and for good reason. Because the very same statement that they selectively quote for the general point stated above specifically states the following:

"Roukema's bill includes the following provisions:

1 ATM operators would be required to post a sign on the cash machine indicating that **a surcharge will be imposed**. The amount of the surcharge would be

[3] The Board staff has refused to produce information that identifies the large financial institutions on whose behalf the Morrison & Forester brief was submitted. The staff has produced part of the brief in response to an FOIA request, albeit in an untimely fashion. Both the refusal to produce all requested information and the untimely manner in which the information was produced have inhibited my ability to comment on the Board's proposal. An appeal of the Board's FOIA decision is pending. What can be stated for certain based on the information obtained, is that the process by which the Board issued the so-called revised commentary was profoundly flawed. Several large financial institutions, involved in a lawsuit challenging their ATM surcharge practices, had numerous private, and apparently still secret, consultations with the Board's staff lobbying the Board to retroactively change its regulations so as to allow the institutions to claim that their practices were in compliance with the regulations when they clearly are not. The Board's staff made no attempt whatever to contact the consumers who were suing the financial institutions to learn the basis for their claims. Instead, the staff simply adopted wholesale language that the financial institutions believe will help them defeat the consumer's claims. While the "primary objective" of the statute is "the provision of individual consumer rights" (15 USC 1693(b)) the only objective of the Board's process was to protect financial institutions from consumers who asserted their rights.

specified as part of the machine's on-screen display. Only the surcharge imposed by the machine in use — not fees from the consumer's own bank — would be required to be disclosed. (Emp. Added.)"

Press Release of Congresswoman Marge Rouekema, March 10, 1999

Thus, the legislative history does not reveal a latent ambiguity in the statute. To the contrary, repeatedly, consistently and without exception, the history shows that members of Congress were told that the statute and the regulations would require ATM operators to post a notice on or at the machine, in addition to the screen notice, that would inform any consumer upon whom a surcharge was to be imposed of the fact that a surcharge will be imposed.

THE ORIGINAL STAFF COMMENTARY AND REGULATIONS

The new staff commentary does not clarify the original regulation or the original staff commentary. It represents a 180 degree change in the staff commentary. Pretending that the new commentary is a clarifying change damages the Board's credibility. Due to information revealed by FOIA requests, one learns that the large financial institutions who are behind the proposed change in the commentary asked the Board to call the revised commentary a "clarification" because they wanted to enhance their position in litigation challenging their clear failure to follow section 205.16 and the fact they ignored the staff commentary to that regulation. Those institutions have apparently pushed the Board's staff to make the clearly disingenuous claim that the new commentary is a clarification. The original staff commentary specifically contemplated the possibility that an ATM operator might charge for some services and not others. For example it posited the possibility that a fee would be charged for a cash withdrawal but not a balance inquiry. The original staff commentary, consistent with the ATM REFORM ACT, stated that in such a situation the ATM operator could either "provide a general statement that a fee will be imposed for providing EFT services or may specify the type of EFT for which a fee is imposed." In other words, where the fee is charged in some instances and not others, the ATM operator was permitted to either be specific as to when the fee is charged, or generally state that fees are charged. The full text of the accurate, contemporaneous staff commentary is as follows:

"Section 205.16--Disclosures at Automated Teller Machines
16(b) General
Paragraph 16(b)(1) 1.

Specific notices. An ATM operator that imposes a fee for a specific type of transaction such as a cash withdrawal, but not a balance inquiry, may provide a general statement that a fee will be imposed for providing EFT services or may specify the type of EFT for which a fee is imposed. " (12 CFR 205.17, p. 143).

The regulation passed contemporaneously with the 1999 legislation, clearly stated that an ATM Operator who imposes a fee "on a consumer… **shall** (1)Provide notice that a **fee will be imposed**…" (12 CFR

205.16(b)(1); emp. added).

The new commentary, in direct contradiction to the original commentary, can be read to allow an ATM Operator who imposes a fee on a consumer to give a general statement that a fee may be imposed for providing electronic fund transfers because fees are not imposed in all instances.

The contemporaneous staff commentary and regulation 205.16 follow the statute. The proposed new staff commentary does not. The contemporaneous original staff commentary is consistent with the statute and flat inconsistent with the proposed revision.

THE NEW PROPOSED COMMENTARY IS BAD PUBLIC POLICY

The policy arguments that the large financial institutions have made in support of what is effectively an illegal regulatory amendment to the REFORM ACT are simply irrelevant because the REFORM ACT passed by Congress is clear and does not adopt those arguments. Such arguments are properly only addressed to the Congress. But the policy arguments are also false and inappropriate. If the Board were to amend the staff commentary in the manner suggested in the proposed new commentary, the Board would encourage, if not require, the many (indeed most) ATM Operators who now follow the law and who give the notice intended by Congress to change their notices so as to make them less clear and equivocal to the point of being meaningless. In addition, the new staff commentary would allow and encourage ATM operators to require consumers in every instance to wait until after they wait on line to use the ATM, wade through advertisements for the ATM Operator's services, wade through other paid advertisements placed on the ATM screen by the ATM operator, and wade through solicitations for additional services at the ATM, before learning whether a fee will be imposed upon them.

For just one example, Wells Fargo Bank, one of the large financial institutions seeking the change proposed in the staff commentary, presently advertises on the ATM screen various products before informing consumers of the fact of the fee. If the consumer eventually refuses to pay the surcharge, they then view yet additional advertisements for Wells Fargo services before their ATM card is returned. In addition, a consumer who uses an ATM owned by Wells Fargo is immediately solicited on the ATM screen by Wells Fargo with yet another ATM product. Wells Fargo makes a completely unsolicited offer to allow the consumer to check his balance at his own bank. Indeed, the unsolicited offer comes with the deceptive claim that Wells Fargo does not charge the consumer for checking their balance. The claim is deceptive because Wells Fargo does almost certainly receive an interchange fee when the consumer checks his balance. The consumer is almost always charged a fee by his or her own institution which allows Wells Fargo to receive the interchange fee. Thus, even before learning whether a surcharge would be imposed upon him for a cash withdrawal, a consumer is offered another product that almost invariably costs the consumer $1.00 and often more. And the consumer is not even told that he or she will be charged for the additional product. Other banks, including CitiBank, also offer consumers additional products before allowing a cash withdrawal. Moreover, there is nothing to prevent the length and amount of advertisements or solicitations for services on the ATM screen to increase significantly and the consumer

still would not know the fact that they are going to be charged with a fee until after being forced to wade through all of the advertisements and solicitations.

The following large ATM operators are but a very few of the ATM operators that have signs the language of which comply with the statute, comply with the regulations, and provide clear notice to each consumer protected by the ATM REFORM ACT of the fact that such consumer will be charged a fee:

1. Cardtronics (probably the largest ATM Operator in the United States);
2. CitiBank
3. JPMorgan Chase
4. Bank of America (see discussion immediately below)

Bank of America complies with the statute in the New York metropolitan area and the Northeast where it recently established a presence, but in other areas of the country uses signs that state that people "may be charged" for a cash withdrawal. Obviously, Bank of America can comply with the statute and give clear notice of the surcharge, because its newer signs do in fact comply. Why would the Board want to encourage Bank of America to return to equivocal and deceptive signs when it has recently chosen to utilize signs that state that Bank of America "will charge" U.S. cardholders a fee for cash withdrawals? The institutions noted above alone have more than 50,000 ATMS. They have all found it possible to comply with the law's requirement that they inform non-customers of "the fact of the fee" for cash withdrawals. In addition, virtually every single ATM found in small grocers, retail outlets etc. state that fee "will be charged" or "is charged" for cash withdrawals.

The new commentary will encourage the many financial institutions that do comply with the regulations and the statute to modify their signs give notice in the vague, ambiguous, unclear manner permitted by the new commentary. . Such vague, equivocal, meaningless signs are in no way necessary.

Virtually every financial institution in the United States already posts on its sign that its own customers are not charged. Since the signs virtually universally inform the ATM operator's own customers that the fees do not apply to them, no reasonable person could argue that it is difficult to comply with the law because operators need to inform their own customers that the fee does not apply to them. In addition, virtually every single ATM operator in the United States already states that its notice only applies to United States cardholders.[4] At a minimum, it is impossible to argue that it would be difficult or unclear to post those exemptions to the surcharge on the posted signs, because such exemptions are almost invariably posted already. If one removes those two categories of

[4] Besides being **virtually universally** stated on ATM, signs that the notice only applies to US Cardholders, one could hardly imagine a justification for failing to inform non-customer US Cardholders of a fee applied to every one of them, because people from other countries are not charged. In those circumstances where even international cardholders are charged, there would be no need to state the notice is limited to US cardholders.

exemption from the signs (and as noted the law does not even apply to the ATM operator' own customers), the percentage of consumers who are exempted from surcharges for cash withdrawals by ATM operators in the United States is probably around one in ten thousand persons and may even be far less than that.

A few ATM operators exempt cardholders of other financial institutions with whom the operator has an agreement providing for the exemption. In those circumstances, which are but a small fraction of the total of consumers who use an ATM, most ATM Operators already prominently display the exemption on the ATM. For example, many Co-Op affiliated institutions have combined to exempt each other's members from surcharges. Those ATM operators already post signs, often large, stating that the machine is surcharge free to Co-op members. For those few ATM operators that exempt customers of other financial institutions, they can easily state the exemption on their signs. The EFTA already requires every financial institution to send an annual written notice describing charges made for electronic host services. (15 U.S.C. 1693c(a)(7)). An institution that has an agreement with an ATM operator could inform its customers, in the notice already required by law, that they will be exempt from surcharges at machines own or operated by the ATM operator. The ATM operator could simply state in its notice that the fee does not apply to consumers who have been notified in writing by their own institution that they are exempt from the fee. With that one additional sentence, even where such exemptions exist, statements that a fee will be applied for cash withdrawals would be completely accurate to virtually every single resident of the United States. (Many variations of the statement are possible. For example, the sign could state that "unless your bank has an agreement with us to exempt you from the surcharge" you will be charged…")

Indeed, at most ATM machines, a non-customer of the ATM operator who is a United States cardholder has a far batter chance of winning the grand prize of a state lottery than of being exempted from the surcharge. At most ATM machines in the United States, a non-customer who is a U.S. cardholder has less than a 1 in one hundred thousand chance, or no chance whatever, of being exempted from the surcharge. Yet, the proposed new staff commentary would allow an ATM Operator to state that a fee "may be charged" if fees are not charged for other services

Presumeably, even under the new commentary, where the sign specifies a type of transaction for which fees are charged and lists the persons exempt (i.e. cardholders of the financial institution and international cardholders) the sign would have to say a fee will be imposed unless more than an inconsequential fraction of the users would be exempted. Although not entirely clear, it can't be the Board's intent to allow the sign to say that a fee "may be charged" for a specific service if the fee is charged to over 99% of the persons to whom the sign is directed.

If the Board is going to permit the staff commentary to violate the law as passed by Congress, at an irreducible minimum, the Board should revise the commentary to state that where a fee is imposed for a specific transaction (i.e. a cash withdrawal) and it is entirely practical to state the exemptions from the fee on the notice (i.e the operator's

own customers and international cardholders as is the almost invariable practice today) the notice must state the fact of the surcharge unless a meaningful number of people are exempted from the surcharge in addition to the stated exemptions. In addition, the Board could require that the notice in such circumstances state that a fee will be charged for the transaction described above and may be charged for other transactions. For example,

"FEE NOTICE

FEE NOTICE TO U.S. CARDHOLDERS

BANK X cardholders will not pay the following fees:

Bank X charges a fee for cash withdrawals at this ATM. In addition, Bank X may charge a fee for other transactions at this ATM. Our fees are in addition to any fees that may be charged by your own financial institutions."

This fee notice is virtually identical to the fee notice used at most ATMS today. It complies with the law, at least as to the overwhelming majority of transactions (cash withdrawals) performed at foreign ATMS. Unless a meaningful percentage of non-customers who are US cardholders are exempted from the surcharge, there is no justification in failing to require this sign especially for cash withdrawals.

For example, Citibank uses the following sign:

"Fee Notice

Citibank, the operator of this ATM, will charge US cardholders using a card not issued by Citibank a fee of $1.50 for cash withdrawals performed at this ATM. This fee is in addition to any fees charged by your financial institution and will be added to the transaction amount automatically deducted from your account. If you have any questions regarding this additional charge or would like information about opening an account with Citibank, please call us toll-free at 1-877-839-7931."

(Citibank then places its logo under the above language).

Even after making clear that the fee only applies to US cardholders that are not customers of Citibank, the bank has room to and does add additional language soliciting business. This sign, or slight variations, are very common and used at most ATMS today.

This notice states that a fee is charged to US cardholders not customers of the bank. It complies with 205.16. In fact, it gives more information than that required by the statute and has room for what is effectively a request for the consumer's business. With slight variations, every one of the five ATM operators listed above, and virtually every single small grocer, retailer etc. use such a sign. It clearly states that the fee is charged only to US cardholders who are not customers of the bank. With that statement, the sign is accurate to far more than 99% of the persons using the machine. It is imperative that the

Board not permit ATM operators who charge 99% of US cardholders who are not their customers to state that a fee "may be charged" which informs consumers of absolutely nothing instead of informing consumers that a fee is charged or will be charged which is completely accurate to 99 out of 100 consumers or more. (The threshold should really be at about 95%).

With the new staff commentary, the overwhelming majority of ATM operators who comply with the law and tell consumers the fact that he or she will in fact be charged for a cash withdrawal could change their signs to the worthless, completely uninformative statement that a fee "may be charged" for EFT services. Such a change would be contrary to the statute, and would render the sign useless.

The large financial institutions that lobbied for the proposed change have submitted a brief that is misleading and inaccurate. Since I did not even get a chance to look at the brief until November 9, 2004 (48 days after the FOIA request was submitted and only ten days before the comment period closed) I am unable to refute all of the inaccuracies. But the most important point of all is that Congress passed a law that requires the ATM operator to post a notice to each consumer who is charged a fee of the fact of that fee. The law does not apply to direct and indirect customers of the operator. The original regulation and commentary are faithful to the law; the new proposed commentary is not. It is only secondary that the statute and the original regulations and commentary rightly require a meaningful notice on the sign and the new proposed commentary permits a meaningless, useless, uninformative sign that serves no purpose.

Very truly yours,

DANIEL BERKO