

REGULATION E RECURRING PAYMENTS COALITION

Comments to Federal Reserve Board

November 19, 2004

VIA E-MAIL TO: regs.comments@federalreserve.gov

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

Re: Regulation E; Docket No. R-1210

Dear Ms. Johnson:

These comments are submitted on behalf of a coalition of companies and their trade associations that are very concerned with the effects of Regulation E on recurring payments initiated with credit and debit cards. The group, informally known as the Regulation E Recurring Payments Coalition (the "Coalition"), has met with and discussed these issues with the Staff of the Division of Consumer and Community Affairs on several occasions, and we very much appreciate that the Federal Reserve Board has addressed our concerns in its proposed revisions to its Official Staff Interpretations and related materials.

While the Coalition believes that the proposed revisions to Comments 10(b)-3 and 10(b)-7 will be very helpful in some situations, the Coalition still has some strong concerns that would not be eliminated by the proposed changes. Therefore, the Coalition submits these comments to encourage the Board to provide interpretations that will enable the greatest number of consumers to take advantage of recurring payment offers.

Background

The Coalition has been concerned about two major problems. First, that there has been no effective way for consumers who want to authorize recurring debits to do so on the telephone. This causes the second problem, namely, that payees, who must, therefore, take only credit cards for these transactions, have been unsure what is a "reasonable procedure" to avoid taking debit cards.

The Board's Proposed Changes

Comment 10(b)-3: Written Authorization for Preauthorized Transactions.

Ways to Enable Recurring Debits in Telephone Sales. The issue addressed in Comment 10(b)-3 is how to enable consumers to authorize recurring debit transactions on the telephone. Although Visa reports that over 50% of its card transactions are debit, and consumer requests for recurring card payment transactions have become commonplace for magazines, newspapers, telephone, cable, DSL, Internet and other subscriptions, there has been to date no effective way for a consumer to authorize a recurring debit card payment on a telephone sale.

The Board's Proposal Is Limited by the E-Sign Act. The current version of this Comment does not permit a seller to either (a) sign a written authorization with the consumer's oral consent or (b) treat a recording of the consumer's oral consent as a written authorization. In view of the Electronic Signatures in Global and National Commerce Act (the "E-Sign Act"), the Board has proposed to eliminate its pre-E-Sign Act interpretation that recorded authorizations never constitute "similar authentication" for recurring payments. However, the Board has stopped short of endorsing recordings because the Board believes its "authority to interpret the E-Sign Act is extremely limited." Moreover, the Board has proposed no alternative where recording is not feasible.

The Board Has the Authority to Endorse both Recordings and Oral Authorization with Written Confirmation. The Coalition respectfully submits that the Board has the authority to (a) remove its prohibition on the use of recordings, (b) endorse recordings as a legitimate means of obtaining a consumer's written consent, and (c) endorse the use of an oral authorization with a written confirmation as a "similar authentication."

The Board's Authority Is Not Limited by the E-Sign Act. The Board does not have to interpret the E-Sign Act to determine that a recording is a "similar authentication" under Regulation E. The E-Sign Act serves only as an outside limit on the ability of government to restrict the use of electronic means to signify agreement when a statute calls for a writing.¹ While E-Sign probably renders the current prohibition on the use of recordings inappropriate, E-Sign does not prevent the Board from expressly permitting a recording as a "similar authentication."

¹ A signature relating to a transaction affecting interstate commerce may not be denied legal effect because it is in electronic form; nor may a related contract be denied validity because an electronic signature was used in its formation. 15 U.S.C. § 7001. Section 7004 of E-Sign restricts the authority of government agencies to interpret E-Sign to make it more difficult or onerous to use electronic signatures. Nothing in E-Sign prevents a federal regulatory agency from using its statutory authority to determine that an action that might not constitute a signature under E-Sign nonetheless satisfies that agency's requirement for a signed writing.

Section 904 of the Electronic Fund Transfers Act (the “EFT Act”) gives the Board the unequivocal authority to determine that recordings constitute “similar authentication.” That section authorizes the Board to prescribe regulations to carry out the purposes of the EFT Act and in doing so to create such provisions as in the Board’s judgment are necessary or proper to effectuate the EFT Act’s purposes. Indeed, the Board relied on this broad authority in the 1990’s when it amended Regulation E to accommodate the Internet by permitting preauthorized electronic fund transfers to be authorized by a writing signed or “similarly authenticated” by the consumer.

Accordingly, the Coalition requests that the Board amend Comment 10(b)-3 to expressly permit recordings in lieu of written signatures, so that payees who are able to record and store conversations will have a safe harbor when offering this mechanism to consumers who want to authorize recurring debits on the telephone.

Consumers Need a Broader Solution. Even if the Board expressly sanctions recordings, this will still not give consumers the ability to authorize recurring debits with the vast majority of telephone merchants who are unable to implement sophisticated recording and retrieval systems. The Coalition urges the Board to interpret Regulation E to give debit cardholders a feasible way to authorize recurring transactions on the telephone with all sellers. Otherwise, millions of consumers who are not able to obtain credit cards will be denied the convenience and savings available to more affluent consumers who are able to choose recurring payments on the telephone.

The Coalition respectfully suggests that in today’s wired world consumers will be better served and equally well protected if the Board interprets Section 10(b) of Regulation E to permit a payee in a telephone offer to act on an oral authorization from a consumer who wants to use a debit card for recurring payments, provided that the payee sends a clear and conspicuous, written confirmation with appropriate Regulation E disclosures to the consumer’s debit card address prior to the first recurring payment, and provides the consumer with a method to contact the payee and easily cancel the transaction.

The Board Has the Authority to Implement the Broader Solution. The Coalition believes the Board has the authority to implement this solution. Section 907 of the EFT Act requires that a preauthorized electronic fund transfer from a consumer’s account be authorized by the consumer in writing with a copy provided to the consumer. In the 1990’s, the Board set the precedent for interpreting § 907 in an expansive manner that recognized the evolving use of the Internet for authorizing recurring mortgage payments and the like, by amending Regulation E to permit a written authorization to be “signed or similarly authenticated.”

Clearly the Board has broad authority under the EFT Act to interpret the act and Regulation E to preserve and promote the act’s intent. Congress specifically instructed the Board to prescribe regulations that provide for the continuing evolution of banking services and supporting technology, to consider the costs and benefits to consumers, financial institutions and others, and to consider the effects any rule would have on the availability of EFT services to consumers and particularly low-income consumers. Moreover, Congress expressly authorized

the Board to create adjustments and exceptions if the Board believes they are necessary or proper to effectuate the purposes of the EFT Act.

Today the Board can recognize and enable the explosive use of debit cards in telephone sales while preserving the Congressional intent to protect consumer's from unauthorized transactions. If the payee sends the consumer a written copy of his recurring debit authorization, with an invitation for the consumer to cancel the transaction if he did not intend to authorize recurring debits, the statute's "writing" and "copy" requirements may be deemed satisfied.

Consumers Would Be Protected Under the Broader Solution. The Federal Trade Commission, which has the primary responsibility to protect consumers in telemarketing transactions, permits oral authorizations for all debit card authorizations.² The FTC reserves its recording requirement for "novel" payment systems that consumers do not understand. In explaining its final Telemarketing Sales Rule in 2003, the FTC said:

the Commission believes that the burden of requiring express verifiable authorization is justified in limited circumstances; namely when consumers are unaware that they may be billed via a particular method, when that method lacks legal protection against unlimited unauthorized charges, and when the method fails to provide dispute resolution rights.³

Consumers who choose to use debit cards for recurring transactions today understand that their accounts will be debited, and they are protected by Regulation E's strong dispute resolution rights. Accordingly, the process proposed by the Coalition will protect consumers from unauthorized transactions and will enable more consumers (especially those without the ability to obtain credit cards) to more fully participate in electronic commerce.

For these reasons, the Coalition respectfully suggests that the Board interpret § 205.10(b) of Regulation E to permit a payee in a telephone offer to act on an oral authorization from a consumer who wants to use a debit card for recurring payments, provided that the payee sends a clear and conspicuous, written confirmation with appropriate Regulation E disclosures to the consumer's debit card address prior to the first recurring payment, and provides the consumer with a method to contact the payee and easily cancel the transaction.

² In the case of unconventional payment products, the FTC's Telemarketing Sales Rule requires express oral authorization which is audio-recorded and made available to the consumer, for both single and recurring payments. When a debit card is used, however, the Commission decided that no audio recording is required because consumers understand that their accounts will be debited in accordance with the sale, and they are protected by the EFT Act and Regulation E. The Commission also noted MasterCard and Visa's "zero liability" rules for unauthorized transactions.

³ Federal Register, Vol. 68, No. 19, at 4607 (January 29, 2003).

Comment 10(b)-7: Bona Fide Error.

Enthusiastic Coalition Support. The Coalition generally supports the changes to the Board's bona fide error comments. In particular, we believe it is very helpful for the Board to point out that "procedures reasonably adapted to avoid error will depend on the circumstances" and that "the payee may rely on the consumer's assertion [that he tendered a credit card or did not tender a debit card] without seeking further information about the type of card."

We also appreciate the related discussion material in which you clarify that a merchant has no obligation to obtain and use BIN tables or to check card numbers already on file against BIN tables. We entirely agree that "besides increasing merchant expense, unwinding the transaction might not be a result sought by the consumer...." In fact, we believe it would rarely be the result the consumer desires.

Asking "Debit or Credit" Will Lead to Confusion. Despite our general agreement, we are concerned about the specific language you recommend to ensure that a reasonable procedure has been employed. Your proposed Comment 10(b)-7 says that in general a reasonable procedure is to request the consumer to specify whether the card to be used is a debit card or a credit card, using those terms.

Our experience indicates that the overwhelming majority of cardholders understand what a credit card is and will provide a credit card when it is specifically requested. For those consumers who may be confused as to whether a card with a MasterCard or Visa brand mark is a credit or debit card, the resulting dialogue with a telemarketing representative, who is not a payments expert, is likely to engender more confusion. Accordingly, we would like to be able to advise telemarketers to clearly ask for a credit card number and then follow that request with a confirming inquiry, such as "Is this your credit card number?"

We read the proposed revisions to Comment 10(b)-7 to mean that a payee who follows this procedure could rely on the consumer's assertion without asking if the card is a debit card. We hope that the final version of this Comment will make this clear.

Consumer Interaction Should Be Limited to Telephone Sales. Moreover, we would like clarification that the concept of interaction with the consumer regarding the type of card the consumer is offering is relevant only in a telemarketing context (as indicated in your Section-by-Section Analysis at page 17). Merchants who solicit only credit cards for recurring transactions in writing, online should not be encouraged to follow their written request for a credit card with a subsequent inquiry as to whether the consumer has given a credit card number or a debit card number. Such a written question would be confusing when the payment form explicitly asks for a credit card. We believe that explicitly asking for a credit card number and an expiration date in writing would be a procedure reasonably adapted to avoid error in these circumstances.

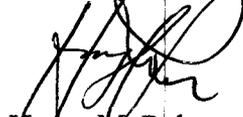
The Coalition Makes Two Requests. For the reasons discussed, the Coalition respectfully requests that the Board modify proposed Comment 10(b)-7 in the following two ways: (a) to indicate that it is reasonable for a telemarketer to ask a consumer to confirm that the card tendered in response to a request for a credit card is indeed a credit card, in lieu of asking if it is a debit card, and (b) to indicate that no confirmation of the type of card being tendered is necessary when a payee asks for a credit card in writing, such as online.

In all other respects, the Coalition enthusiastically supports the Board's proposal to clarify its bona fide error commentary.

Conclusion

The Coalition appreciates this opportunity to comment on the Board's proposals regarding recurring transactions, and the time and effort the Staff has already devoted to understanding and addressing our concerns in this area. We hope you will feel free to contact us through Henry Polmer (202-861-6215), Gregory Feder (202-263-3289), or Jeffery Taft (202-263-3293) if you have any questions about our comments.

Respectfully submitted,



Henry M. Polmer
Piper Rudnick LLP
1200 Nineteenth Street, NW
Washington, DC 20036
(202) 861-6215

On behalf of:
Regulation E Recurring Payments Coalition

See Exhibit A for Coalition Members

EXHIBIT A

REGULATION E RECURRING PAYMENTS COALITION MEMBERS

Magazine Publishers of America
Newspaper Association of America
Direct Marketing Association
Advance/Newhouse Communications
Time Warner Cable
America Online, Inc.
The Conde' Nast Publications, Inc.
Fairchild Publications, Inc.
The Golf Digest Companies
Time Inc.
The Herald Company