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April 11, 2005

By Hand Delivery

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

Re: Docket No. R-1210: Regulation E – Electronic Funds Transfers

Dear Ms. Johnson:

We are writing on behalf of certain leading U.S. retailers (the “Retailers”) to submit comments with respect to the amendments proposed¹ by the Federal Reserve Board (“Board”) to 12 C.F.R. Part 205 (“Regulation E”), which implements the Electronic Funds Transfer Act (“EFTA”), 15 U.S.C. § 1693, *et seq.*, and to the Official Staff Commentary (“the Commentary”) to Regulation E.

The Retailers support the Board’s proposed revisions to the section of the Commentary interpreting 12 C.F.R. § 205.10, which sets forth the rules governing preauthorized electronic fund transfers from a consumer’s account. In particular, the Retailers commend the Board for its proposals to: (1) withdraw its existing interpretation that a tape recording of a telephone conversation with a consumer would not constitute a written authorization for purposes of Regulation E; and (2) clarify that procedures reasonably adapted to avoid error with respect to the authorization requirement necessarily will vary with circumstances and, further, that asking a consumer to specify whether the card to be used for the transaction is a debit or credit card is a reasonable procedure. Each of these revisions would offer critically important guidance to the many organizations that today must obtain authorization for recurring payments,

¹ 69 Fed. Reg. 55996 *et seq.* (Sept. 17, 2004) (the “Proposal”). While these comments are submitted after the formal November 19, 2004 deadline established by the Board with respect to comments on the Proposal, it is our understanding that the Board recently has accepted other comments and is prepared to receive additional comments that are responsive to these most recent letters.

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and would give consumers and businesses much-needed transactional flexibility. At the same time, the Proposal is carefully calibrated to protect the public from unscrupulous and deceptive practices.

A. Withdrawal of the Prohibition on Taped Oral Authorization

Section 205.10 of Regulation E provides that preauthorized electronic fund transfers from a consumer's account may be authorized only by a writing that is signed or similarly authenticated by a consumer.² The Commentary presently states that:

*The requirement that preauthorized EFTs be authorized by the consumer "only by a writing" cannot be met by a payee's signing a written authorization on the consumer's behalf with only an oral authorization from the consumer. A tape recording of a telephone conversation with a consumer who agrees to preauthorized debits also does not constitute written authorization for purposes of this provision.*³

The Proposal would delete the last sentence of the foregoing Comment in light of the Electronic Signatures in Economic and Global Commerce Act of 2000 ("E-Sign"), 15 U.S.C. § 7001 *et seq.* As the Board explained in its Proposal, Comment 10(b)-3 predates the enactment of E-Sign, which provides generally that electronic records and signatures satisfy any legal requirements for traditional written records and signatures.⁴ The E-Sign Act defines "electronic records" and "electronic signatures" broadly — including with the potential to encompass tape and other electronic recordings. In these circumstances, the Board proposed that "[i]f, under the E-Sign Act, a tape recorded authorization, or certain types of tape recorded authorizations, were properly determined by the person obtaining the authorization to constitute a written and signed (or similarly authenticated) authorization, then the authorization would satisfy the Regulation E requirements."⁵

The Retailers strongly support these proposed modifications. As the Board is aware, nearly half of all consumer card transactions are now executed using debit cards. More than ever before, consumers are evidencing a strong desire to use their debit cards — with the concomitant convenience of electronic fund withdrawals from their accounts to establish

² 12 C.F.R. § 205.10(b).

³ Comment 10(b)-3 (emphasis added).

⁴ 69 Fed. Reg. at 55996, 56003; 15 U.S.C. § 7001(a).

⁵ 69 Fed. Reg. at 56003.

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preauthorized transfers; moreover, consumers increasingly seek to accomplish this over the internet or by telephone, without the delays, cost and inconvenience of written correspondence or in-person meetings. Likewise, in order to remain competitive, companies must be permitted to offer consumers these options – just as they are now permitted to obtain express verifiable authorization for free-to-pay conversions pursuant to the Telemarketing Sales Rule.⁶ Enabling law-abiding companies properly to determine, in accordance with E-Sign, that a particular tape recorded authorization constitutes written and signed authorization under Regulation E would benefit plainly benefit both consumers and legitimate businesses.

Just as importantly, the Proposal as written would diminish neither the wide array of existing consumer protections nor the broad enforcement authority of the federal bank regulatory agencies and the Federal Trade Commission. All practices designed to manipulate or mislead consumers would remain unlawful, and easily prosecuted, notwithstanding the modifications to Regulation E and the Commentary. For example, companies that fail to disclose material terms of a transaction, obtain consent by deceptive or confusing means, rely on ambiguous consumer statements as authorization, falsify authorizations, or undertake other deceptive or unfair practices prohibited by federal law, would have no refuge whatsoever under Regulation E or E-Sign.

Consequently, any attempt to predefine or artificially limit the already quite modest revisions contemplated by the Proposal are unnecessary; moreover, such constraints would have a significant and negative impact on both consumers and industry. Specifically:

- First, there is no need for the Board to clarify that an entity must comply fully with E-Sign if it relies upon that Act in connection with obtaining a consumer's authorization. The careful solution that the Board has proposed – that an authorization would comply with Regulation E if it were properly determined by the entity obtaining it to constitute a written and signed (or similarly authenticated) authorization – would accomplish the same purpose while giving entities the flexibility required to obtain authorizations in accordance with the most efficient practices possible. By putting the onus on the particular entity to determine compliance, the Board has ensured that law-abiding companies will take the necessary steps to ensure that these authorizations comply with E-Sign and Regulation E, while entities that wish to disregard applicable law will be prosecuted. Moreover, for the Board to restate the obvious — namely, that an entity must comply fully with a law that applies to the entity — risks creating questions and doubt whenever the Board fails to do so in its rulemakings and regulations.

⁶ 16 C.F.R. § 310.4(a)(6).

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- Second, for the reasons just stated, it is unnecessary to clarify that entities relying on E-Sign to obtain authorization must also comply with other provisions of the EFTA, Regulation E, and the Commentary — for example, the requirement that a clear and conspicuous copy of the authorization be provided to the consumer. Moreover, such “clarifications” risk unintended consequences, including promoting confusion among law-abiding entities as to whether they can rely on the most effective and efficient lawful means for complying with these other provisions — as E-Sign itself suggests — or whether the “clarification” carries with an implication only certain (but not all) lawful means are available to obtain authorization under Regulation E.
- Third, it is redundant — and therefore unnecessary — to clarify that the authorization must evidence a consumer’s full consent to the transaction. It is plain from the Proposal that in order to satisfy Regulation E, an authorization must be properly determined by an entity to constitute a written and signed authorization under E-Sign. For the Board to promulgate additional language and requirements that govern the minutiae of precisely how an entity demonstrates the full context or material terms of the transaction, or that expressly prohibit silence or ambiguous comments as consent, is needless, confusing, and counterproductive. Thus, it is highly unlikely that the Board will have anticipated all possible future circumstances and permutations involving such authorizations, and the Board accordingly would be unduly constraining entities within an already well-defined legal context. Moreover, such additional language would be superfluous in light of the broad authority of the federal bank regulatory agencies to pursue enforcement actions against financial institutions, as well as the Federal Trade Commission’s sweeping authority to prosecute unfair and deceptive trade practices under the Federal Trade Commission Act.

In sum, the Proposal dictates that if an authorization is properly determined to comply with E-Sign, it complies with Regulation E. If not, then the authorization is invalid. It is difficult to obtain much greater clarity than this, but it certainly is possible to sow confusion and impose artificial and unnecessary constraints through an attempt to micromanage the authorization process. The Retailers urge the Board to proceed with the original Proposal as drafted in this regard.

B. Bona Fide Error

Comment 10(b)-7 addresses authorizations for recurring payments that are obtained by telephone or online. Recognizing that (i) consumers may be unaware whether they are using a credit or debit card, (ii) consumers likely are unfamiliar with the differing authorization requirements governing the use of credit and debit cards as payment for preauthorized transfers, and (iii) merchants cannot readily distinguish between credit and debit cards, the Board has provided a safe harbor for bona fide errors in handling preauthorizations. Comment 10(b)-7 states that a failure to obtain written authorization for recurring payments on a

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debit card does not violate Regulation E “if the failure to obtain written authorization was not intentional and resulted from a bona fide error, and if the payee maintains procedures reasonably adapted to avoid such error.” One common such error occurs where the consumer has indicated that he or she is using a credit card for a recurring payment – for which authorization may be obtained by telephone – but is in fact using a debit card.

The Board’s Proposal would now amend the foregoing safe harbor to make clear that “procedures reasonably adapted to avoid such error will vary with the circumstances” and that “asking the consumer to specify whether the card to be used for the authorization is a debit card or is a credit card, using those terms, is a reasonable procedure.”⁷ The Board’s Proposal also notes that “reasonable procedures should include interaction with the consumer specifically designed to elicit information about whether a debit card is involved.”⁸ Consequently, the Board has made clear that payees generally are expected to engage consumers in a dialogue as to what manner of card the consumer is using – but at the same time has recognized that, given the volume and breadth of debit card transactions, no single set of procedures or terminology realistically could be applied to all possible circumstances.

The Retailers endorse these modifications and believe that they significantly clarify the safe harbor for bona fide errors. In particular, these changes provide useful guidance to entities that obtain authorizations without attempting to micromanage the specific means by which they do so. Because the Proposal specifically recommends eliciting information from the consumer as to the type of card being utilized, it also protects consumers from unscrupulous entities that might seek to abuse both the safe harbor and customers.

Additional requirements or clarifications beyond the foregoing, however, would be unnecessary and unduly burdensome. Specifically:

- First, the Board should not expressly require entities to inquire whether a consumer is using a credit or debit card in all circumstances. Functionally, the clarifications the Board has proposed would have the same effect – entities would engage a particular consumer in a dialogue as to the nature of his or her card. Transforming this safe harbor into a requirement, however, would have a significant and negative impact on commerce: entities that otherwise have reasonable procedures adapted to legitimate circumstances. For example, a retailer could reasonably conclude that a consumer who affirmatively states that he or she wishes to make recurring payments with his or her “credit card” need not be asked again whether the particular card is a debit or a credit card. Such a consumer, who has specifically asked to pay by “credit card” and

⁷ 69 Fed. Reg. at 56003.

⁸ *Id.*

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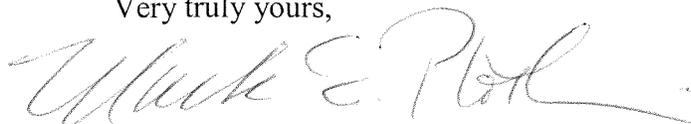
has provided his or her “credit card number” will surely be annoyed, frustrated and confused by a subsequent series of questions designed to determine — notwithstanding the consumer’s representations — whether the credit card is in fact a credit card, and not a debit card. Such a requirement would go well beyond the already clear “reasonable procedures” that the Board has proposed, and would instead unnecessarily mandate an extraordinary level of specificity for a regulation such as Regulation E.

- Second, it would be counterproductive and unnecessary to state that in some circumstances, reasonable procedures should also include a consideration of additional information, including repeated customer complaints about unauthorized debits. The phrase “procedures reasonably adapted to avoid such error” speaks for itself. Suggesting that entities should consider “additional information in some circumstances” (or similar language) would muddy an otherwise clear standard for compliance. Entities would have virtually no guidance as to what other information they should consider and under which circumstances, thereby requiring scores of legitimate and otherwise compliant entities to take unnecessary and costly steps as protection against potential liability. Of course, an entity that receives repeated complaints about unauthorized recurring debits may need to revisit whether its procedures are indeed reasonable. But there are myriad other possible sources for such complaints too – including consumer error as to the nature of the card provided – that have absolutely nothing to do with the reasonableness of the entity’s procedures, and plainly should not require an investigation of those procedures. The Board’s reasonableness standard leaves that determination where it belongs – in the hands of the payees – while still protecting consumers and retaining broad discretion for regulators to prosecute violators.

* * *

The Retailers and we appreciate the opportunity to comment on the Board’s Proposal. We look forward to working with the Board to refine Regulation E to keep pace with changes in law and technology while continuing to offer strong protection to consumers.

Very truly yours,



Mark E. Plotkin

Timothy L. Jucovy