

The Huntington National Bank

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By e-mail to: regs.comments@federalreserve.gov

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

Attn: Docket Number R-1234

Re: Proposed Rule; Official Staff Interpretation—Regulation E
70 *Fed. Reg.* 49891 (August 25, 2005)

Dear Ms. Johnson:

This letter is submitted on behalf of The Huntington National Bank¹ in response to the above referenced Proposed Rule and Official Staff Interpretation (the “Proposed Rule”) under Regulation E published by the Board of Governors of the Federal Reserve System (the “Board”) with respect to notice requirements on or at automated teller machines (“ATMs”). We appreciate the opportunity to provide comments to the Board with respect to this Proposed Rule.

The Board is proposing alternative language for the notice on or at the ATM, namely, either that a fee (i) “will” be imposed or (ii) “may” be imposed for providing electronic fund transfers or a balance inquiry. The former (“will”) may be used “in all cases”,² but the latter (“may”) is only permitted to be used if there are circumstances under which some ATM users

¹ The Huntington National Bank (“Huntington Bank”) is a national bank and the principal subsidiary of Huntington Bancshares Incorporated, which is a \$33 billion regional bank holding company headquartered in Columbus, Ohio. Along with its affiliated companies, Huntington Bank has more than 139 years of serving the financial needs of its customers, and provides innovative retail and commercial financial products and services through more than 300 regional banking offices in Indiana, Kentucky, Michigan, Ohio and West Virginia. Huntington Bank also offers retail and commercial financial services online at huntington.com; through its technologically advanced, 24-hour telephone bank; and through its network of approximately 800 ATMs. Selected financial service activities are also conducted in other states including: dealer sales offices in Florida, Georgia, Tennessee, Pennsylvania and Arizona; private financial and capital markets group offices in Florida; and mortgage banking offices in Florida, Maryland and New Jersey. International banking services are made available through the headquarters office in Columbus and an office located in the Cayman Islands and an office located in Hong Kong.

² 70 *Fed. Reg.* 49891, 49892.

would not be charged a fee by the ATM owner. Thus, these alternatives as proposed by the Board are at least partially exclusive, rather than being interchangeable.

We support the Board's effort to provide more clarity about when "will" or "may" is permitted to be used in the notice on or at the ATM. We agree with the Board that an absolute requirement to use "will" in all cases is inappropriate considering the significant percentage of ATM users who are not charged a fee (see discussion below). We also agree, as far as it goes, with the Board permitting use of the word "may". However, we believe that the Board's proposed solution—allowing the use of "will" even if a fee is sometimes not imposed, but prohibiting the use of "may" if a fee is always imposed—does not provide the clearest solution and still leaves room for litigation over the technicalities of how close the underlying facts have to be to the chosen "will" or "may" terminology. The best solution for both ATM users and owners is to recognize that the sign on or at the ATM is only a general warning about the possibility of a fee, that such notice is provided in a context of additional and more precise disclosure (primarily the consumer-specific notice that will appear on the screen), and that ATM users are not generally aware that the notice is only required for non-customers, making the word "may" appropriate in all cases.

While the notice requirement is only applicable with respect to a fee charged by the ATM owner to non-customers (i.e., persons whose accounts are not held by the ATM owner), the average ATM user seeing the sign is not going to be aware of that limitation. If the sign says that a fee "will" be charged, the ATM owner's cardholders are likely to be confused if they have otherwise been told (for example, in other disclosures required by Regulation E or DD) that they will not be charged a fee to use their own bank's ATMs. Furthermore, there are generally several categories of non-customers for whom any particular ATM owner from time to time will not charge a fee to use its ATMs, for example, cardholders of banks located in foreign countries, cardholders of banks with whom the ATM owner has entered into agreements not to charge such banks' customers, cardholders under government electronic benefit transfer programs, or cardholders in special circumstances such as in the aftermath of natural disasters or civil disturbances. Even if the ATM owner's cardholders are excluded from consideration, our experience is that a significant percentage of ATM users are not assessed a fee, and including the ATM owner's cardholders means that a substantial majority of ATM users will not be charged a fee. Thus, an absolute requirement always to use the word "will" on the sign could be confusing and even misleading to ATM users in a majority of cases.

It would also be both impractical and of little value to require a "will" disclosure followed by an all-inclusive list of exceptions. The list of exceptions would be subject to frequent change which would be impractical and expensive for the ATM owner to accomplish, assuming it could even be done on a timely basis, and would possibly be dependent on the geographic distribution of the owner's ATMs that could result in different signage depending on the location of the ATM. Furthermore, a "will" followed by a list of exceptions would be of little practical value to the ATM user, as it would require more detailed attention to be paid to the sign than the ATM user is likely to give. Why should the ATM user waste his/her time reading

such a sign when the user knows that all he/she has to do is insert his/her card into the machine and a precise disclosure will immediately appear?

Thus, the Board has taken the right approach by not requiring an absolute “will” disclosure in all cases, nor requiring “will” with a list of exceptions, and even permitting “will” to be used when there may be circumstances when a fee is not imposed. Our concerns with the Board’s proposal, however, are (i) that, notwithstanding the Board’s expressed intent that “will” may be used “in all cases”, as long as “will” and “may” are partially exclusive alternatives, the ATM owner is potentially still liable for a disclosure violation if a “will” or a “may” disclosure is too divergent from the underlying facts, with it being unclear how far is too far, and (ii) that the Board’s prohibition on using “may” if a fee is always charged to non-customers at a particular ATM may make it risky ever to use the word “may”, since for any given ATM the underlying facts may change from time to time, resulting in some periods of time when a fee is charged to all non-customers at that ATM. For example, a large bank may have an agreement with a small bank to allow that small bank’s cardholders in a particular local market to use the large bank’s ATMs without a surcharge because the small bank has few or no ATMs of its own. Such agreements come and go, and if that were the only category of non-charging non-customers for a particular set of ATMs, “may” could suddenly become wrong under the Proposed Rule. Even if the large bank also did not charge cardholders of foreign banks, would that still support the use of “may” at a small group of ATMs in a rural community that had few if any foreign visitors? The Board’s proposal leaves the ATM owner potentially exposed to these kinds of factual issues if the ATM owner uses “may”. Yet the ATM owner is likewise exposed to the possibility that a choice to use “will” would be too divergent from the underlying facts at any given point in time and thus create exposure on that side. While we appreciate that the Board is allowing the use of “will” even if there are circumstances in which a fee will not be charged, and that the Board is at least clarifying that there are circumstances under which the term “may” may be used, the Board’s proposal still leaves the ATM owner with the kind of risks discussed above that would be easy to eliminate altogether, with no adverse consequences to ATM users, if the Board would permit “may” to be used in all cases.

The solution is for the Board to recognize that “will” and “may” are essentially interchangeable in this context, and that the underlying statute permits the Board to authorize “may” to be used in all cases as the Board has already done for “will”. If either “will” or “may” can be used in all cases, there should be no room for a court to view “will” and “may” as at least partially exclusive alternatives and thus second-guessing the ATM owner’s choice of terminology in relation to the underlying facts. Furthermore, if “may” can be used in all cases, changes from time to time with respect to an ATM that may result in all non-customers being charged will not require the ATM owner to make changes to the sign if the owner has chosen to use “may”. Moreover, ATM users understand that banks waive the fee for their own customers, and since ATM users are not likely to be aware that the notice is only required for non-customers, the use of “may” could easily be understood by ATM users as accommodating the ATM owner’s cardholders, even if a fee is always charged at that ATM for non-customers. Thus, the use of “may” on the ATM sign will *always* be more understandable to ATM users than

the use of “will”, resulting in no adverse consequences to the ATM user if “may” is used in all cases.

We believe it is appropriate to interpret the statute to permit a “may” alternative in the notice on or at the ATM as the Board is doing in the Proposed Rule, particularly because the statute also requires a notice specific to the ATM user that must appear on the screen or on paper before the user is committed to pay a fee. In other words, it appears to be a reasonable interpretation of the statute to conclude that the notice on or at the ATM was intended by Congress only to be a general warning to the ATM user that a fee may be imposed, and that the more specific notice required on the screen or on paper before the user is committed to pay a fee will provide the precise disclosure of whether or not a fee is applicable to that particular user, as well as the amount of the fee. Because the notice on or at the ATM is only a general warning, it is not required to be, nor is it understood by ATM users to be intended to be, a precise disclosure about whether or not a fee is imposed. ATM users know how the process works. Even if they read the sign, they are experienced enough to know that neither “will” nor “may” are likely to be precisely accurate for their circumstances, and they know that putting the card in the machine will give them the details they need before they are committed to paying a fee.

But the Board is going further than necessary when it also conditions the use of “may” on a requirement that there always be circumstances under which a fee will not be imposed on a user of the ATM (other than the ATM owner’s own cardholders). This condition, together with the partially exclusive alternative of allowing the use of “will” even though a fee will not always be charged, leaves the industry subject to continued litigation risk over how much of the underlying facts going one way or the other should dictate a use of “may” or “will”. It would create a more certain result if the Board were to cut through the legal semantics over “will” and “may” by recognizing that in this context the terms “will” and “may” are essentially interchangeable.

This conclusion is also consistent with the context in which the 1999 ATM surcharge amendments in the underlying statute were proposed and enacted. As the Board notes in the preamble to the Proposed Rule, the sponsor of these amendments, Rep. Marge Roukema, stated that it was her intent to protect consumers by statutorily requiring then-existing industry practice:

This legislation will protect consumers while imposing no additional burden on ATM operators. . . . 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.³

Several years before enactment of these amendments, ATM network rules generally required both a notice on or at the ATM, as well as a disclosure on the screen, and this was at a time when Regulation E required either one disclosure or the other, but not both. While we have not

³ See press release at <http://financialservices.house.gov/banking/31099rou.htm> (Mar. 10, 1999).

conducted detailed research on the pre-1999 use of “may” or “will” on ATM signs, and while we understand that industry practice may not have been entirely uniform throughout the country, it is at least clear from information of which we are aware that it was not uncommon for ATM signs in the pre-1999 period to use the word “may”.⁴ It is thus not unreasonable to conclude that the use of “may”, or for that matter the use of “may” or “will” as essentially being interchangeable, was part of the pre-1999 industry practice that was intended to be codified into the ATM surcharge amendments.

Thus, we recommend that the Board consider revising §205.16(c)(1) of the regulation and comment 16(b)(1)-1 to read as follows:

(1) On the machine. Post in a prominent and conspicuous location on or at the automated teller machine a notice that a fee will or may be imposed for providing electronic fund transfer services or a balance inquiry.

* * *

1. Specific notices. An ATM operator that imposes a fee for a specific type of transaction may provide a general notice on or at the ATM machine that a fee will or may be imposed for providing EFT services or a balance inquiry. The notice may use either the term “will” or the term “may” whether or not a fee will be imposed in all instances. As another option, the notice may specify the type or types of services for which a fee is imposed, and may use either “will” or “may” to describe the imposition of such fee in connection with the specified service, whether or not the fee will be imposed in all instances in connection with the specified service.

Thank you for the opportunity to provide these comments.

Very truly yours,



Daniel W. Morton
Senior Vice President & Senior Counsel

⁴ In fact, the Board’s preamble cites to commenters, who responded to the Board’s prior proposed ATM fee disclosure revision to the Official Staff Commentary that is being replaced by the Proposed Rule, as indicating that it was common practice of many banks at the time of the ATM surcharge amendments to state that a fee “may” be imposed. 70 *Fed. Reg.*, at 49892.