

Subject: Regulation AA

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07/25/2008 05:19 PM

Re: Docket R-1314

I believe that the proposed new FTCA Regulations and TISA Regulations and their Section-by-Section Analyses raise a number of issues that should be considered before going forward with the proposal.

There appears to be some inconsistency between the proposed new FTCA Regulations and the proposed new TISA Regulations and their respective Section-by-Section Analyses as to whether the initial notice of the right to opt out of overdraft services must be given to existing account owners, or whether it is required only when new accounts are opened. Moreover, there appears to be some inconsistency and confusion in this regard within the proposed new TISA Regulations and their Section-by-Section Analysis themselves.

The Section-by-Section Analysis of proposed new FTCA Regulations Section __.32 states:
"Assessing overdraft fees before the consumer has been provided with notice and a reasonable opportunity to opt out of the institution's overdraft service appears to be an unfair act or practice under 15 U.S.C. 45(n) and the standards articulated by the FTC."

"Under...__.32(a)(1), institutions would be prohibited from assessing any fees on a consumer's account in connection with an overdraft service unless the consumer is given notice and a reasonable opportunity to opt out of the service, and the consumer does not opt out."

"The proposal would require notice of the opt-out to be provided both before the institution's assessment of any fee...and subsequently at least once during or for each periodic statement cycle in which any overdraft fee or charge is assessed...."

The Section-by-Section Analysis of proposed new TISA Regulations Section 230.10 (c) states:
"The Board anticipates that the requirement to provide notice before overdraft fees are assessed would apply only to accounts opened after the effective date of the final rule. Thus depository institutions would not be required to provide initial opt-out notices to existing customers. Nevertheless, the requirement to provide subsequent notice of the opt-out after the customer has overdrawn the account and fees have been assessed on the account would apply to all accounts after the effective date of the final rule, including those existing on the effective date of the rule."

Moreover, despite its Section-by-Section Analysis, there is nothing in the actual text of proposed new TISA Regulations Section 230.10(c) indicating that the initial notice of the right to opt out does not have to be given to existing account owners and is required only when new accounts are opened. The actual text of proposed new TISA Regulations Section 230.10(c) is as follows:

"Timing. As applicable, the...[notice of the right to opt out]...must be given:

"(1) Prior to the institution's imposition of any fee for paying a check or other item when there are insufficient funds in the consumer's account, provided that the consumer has a reasonable opportunity to exercise the opt-out right prior to the assessment of any fee for paying an overdraft; and

“(2) (i) On each periodic statement reflecting any fee(s) or charge(s) for the paying of an overdraft, in close proximity to the disclosures required by...230.11(a); or (ii) At least once per statement period on any notice sent promptly after the institution’s payment of an overdraft.”

Thus, (a) the proposed new FTCA Regulations make the assessment of an overdraft fee without prior notice of the right to opt out a prohibited unfair act or practice and requires both the initial notice and the subsequent notice, without distinction between existing accounts and new accounts; (b) the proposed new TISA Regulations Section-by-Section Analysis indicates that the initial notice does not have to be given to existing accounts and is required only when opening new accounts; and (c) there is nothing in the actual proposed new TISA Regulations text indicating that the initial notice does not have to be given to existing account owners and is required only when new accounts are opened. If the institution has to give notice to an existing account holder prior to the assessment of any fee and the account has insufficient funds; we violate Reg CC for a late return because we are waiting for the customer to opt out or not. So as not to violate Reg CC we elect to pay the check and the customer is upset and refuses to bring the account to a positive balance, overdraft fee withstanding. Or, the bank elects to return the check and the customer pays a much larger fee to a collection agency. The customer does not benefit under either scenario.

There does not appear to be anything in the proposed regulations indicating whether less than all the owners of a multi-owner account, such as a joint account, can opt out of overdraft services for the account. We believe that this needs to be addressed by the final regulations. Without this clarification an institution will be left to wonder if one owner of a multi-owner account opts out, but another does not, whether it can pay overdrafts written on the account.

The agencies have asked for comment on whether institutions should be required to provide a form with a check-box that consumers can mail in to opt out. I think the real question is how to get the customer to even read the notice.

Proposed TISA Regulations Section 230.10(c)(2) provides that the subsequent notice of the right to opt out must be given as follows:

“(i) On each periodic statement reflecting any fee(s) or charge(s) for paying an overdraft...”; or

“(ii) At least once per statement period on any notice sent promptly after the institution’s payment of an overdraft.”

Again, how do we get the customer to open their statements? Polls indicate that less than 25% customer actually balance (or even open) their statements.

Proposed new TISA Regulations Appendix B appears to provide safe harbors for its “model clauses” by stating that, “Institutions that modify the model clauses will be deemed in compliance as long as they do not delete required information or rearrange the format in a way that affects the substance or clarity of the disclosures.”

Proposed new TISA Regulations Appendix B-10 is entitled “Overdraft Services Opt-Out Notice Sample Form”. The words “Sample Form” in this title suggest that Appendix B-10 and its contents may not be “model clauses”, and thus may not provide safe harbors.

However, the Section-by-Section Analysis of proposed new TISA Regulations section 230.10 states that “Sample Form B-10 provides a model form institutions can use to satisfy their disclosure obligations under the proposed rule” (emphasis added), thus suggesting that Appendix B-10 may be intended to provide safe harbors. Again, seems the agencies are not communicating.

Conclusion

I believe that careful consideration should be given to these issues before the proposed new overdraft services regulations are enacted. This will be an expensive and needless process and will do little for financial institution customers. It will increase non-producing staff and those salaries will have to be passed on to someone-the customer.

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