



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

RE: Electronic Fund Transfer Act Proposed Rules, 74 Fed. Reg. 5214 (January 29, 2009)
Docket No. R-1343

Dear Ms. Johnson:

Appleseed appreciates the opportunity to comment on the proposed rule issued by the Board of Governors of the Federal Reserve System amending Regulation E which implements the Electronic Fund Transfer Act. Appleseed strongly supports many of the proposed amendments as they are consistent with our efforts to improve transparency and consumer protections associated with financial services. Appleseed remains committed to improving consumer understanding of complicated financial products through the use of fair exchange principles that promote transparency in financial service products benefiting both consumers (through increased cost-savings) and businesses (through increased confidence and enhanced market share).

Appleseed is a nonprofit network of 16 public interest justice Centers in the United States and Mexico. Appleseed and its Centers are dedicated to building a society where opportunities are genuine, access to the law is universal and equal and government advances the public interest. Although complexity in financial services and the financial service system generally is an issue across all income levels, complexity produces more negative consequences to those individuals at the lower end of the earning spectrum – the working poor and the newly unemployed. Appleseed is concerned that many financial transactions have hidden costs and fees leaving even the most well-intentioned consumer confused and without the necessary information to adequately comparison shop and conduct his or her financial affairs. In today's troubled economic climate it is essential that consumers be afforded every opportunity to fully understand and evaluate financial service products before entering into potentially complex transactions with long-term consequences.

Appleseed bases its comments and recommendations on extensive work with financial institutions, regulatory agencies and community stakeholders to assess strategies for improving transparency in the financial services industry. It is our strong desire to ensure access to fairly priced and reliable financial services provided in a transparent fashion to individuals of all socio-economic levels in the United States.

Proposed Amendments to Regulation E – Generally

Appleseed strongly supports the Board’s attempt to amend Regulation E in a manner that will allow consumers to make informed choices regarding financial transactions and the associated costs and Appleseed also supports the Board’s bifurcated approach (which distinguishes treatment of checks and recurring ACH transactions from ATM transactions and non-recurring debits). As discussed at length in the proposed rule, consumers are often enrolled in such overdraft services automatically without their request or consent. As a result, consumers are often ill-informed regarding the costs associated with such services and therefore are unable to make a thoughtful and considered choice regarding whether such overdraft services adequately meet their financial needs. This presents particular problems when an overdraft is triggered by a small dollar amount transaction. For example, a \$34.00 overdraft charge for a minor purchase (e.g. less than \$20.00)¹ is an extreme price to pay for an inadvertent overdraft. In effect, the overdraft “protection” afforded by financial institutions amounts to an extremely high-cost credit card with no required disclosures as to the total cost.

Although we acknowledge that consumers may benefit when their financial institution provides overdraft services for check transactions and recurring electronic fund transfers (EFTs), we see little benefit in extending such services to typically small-dollar ATM withdrawals and debit card transactions without the consumer’s understanding of costs and informed consent. Therefore, Appleseed strongly supports the proposed amendments to Regulation E as they will improve consumer understanding of such services and assist consumers in making appropriate and responsible financial choices.

1. Alternative 1 – Proposed §205.17 (Opt-Out)

Alternative 1 would require financial institutions to provide consumers with notice of the right to opt-out of an institution’s overdraft service for ATM withdrawals and one-time debit card transactions. Under this approach, the opt-out notice would generally be given at account

¹ Eric Halperin, Lisa James, and Peter Smith. *Debit Card Danger: Banks offer little warning and few choices as customers pay a high price for debit card overdrafts*, Center for Responsible Lending (January 2007). Available at <http://www.responsiblelending.org/pdfs/Debit-Card-Danger-reprot.pdf>.

opening (or any time before any overdraft fees are assessed) and subsequently for each periodic statement cycle in which the institution assesses a fee or charge to the consumer's account for paying an overdraft.

Appleseed believes that requiring financial institutions to provide consumers with a complete explanation of the overdraft process and associated fees along with an opportunity to decline overdraft services is a far better alternative than the current practice of many financial institutions whereby small-dollar overdraft transactions are honored and then the account holder is charged a fee which often exceeds a transaction's value. Nevertheless, Appleseed urges adoption of Alternative 2.

The reason Appleseed urges adoption of Alternative 2 is that our experience suggests that a choice is essentially made for a consumer when presented as an opt-out. Research cited in the proposal also suggest this is true. See 74 Fed. Reg. 5212, 5225 at footnote 35 (Jan. 29, 2009). Comments from the banking industry also suggest the industry research supports the position that opt-outs do not provide a meaningful choice because consumers generally take no action and thus are stuck with the default rule whether or not it is in their best interest. For example, in 2001, Donald G. Oglivie of the American Bankers Association discussed why bankers favored an opt-out approach to information sharing. He indicated support for opt-out because consumers simply won't respond thus allowing banks to essentially 'choose' for the consumer. A requirement that consumers affirmatively opt-in to a service shifts control to the consumer. Mr. Oglivie noted that "[b]ankers estimate that as many as nine of every 10 people would never respond [to an opt-in]". National Center for Policy Analysis, No. 360 (April 27, 2001). Therefore, in the case of overdraft services, most consumers would not opt-in, thereby eliminating a steady stream of fee income for the bank. Accordingly, we strongly advocate the approach that educates and informs the consumer regarding the terms of a financial service product and requires the consumer's written consent to participate. We believe such an approach furthers the goal of transparency in the financial services industry and improves overall financial literacy.

2. Alternative 2 – Proposed §205.17 (Opt-In)

Appleseed strongly supports the adoption of Alternative 2 requiring consumers to affirmatively consent to a financial institution's overdraft service for ATM withdrawals and one-time debit card transactions. We are in general agreement with the Board's comments regarding the benefits of an opt-in approach. Specifically, requiring consumers to consent to a financial institution's overdraft services will force consumers to think about the necessity of such services and make an informed choice regarding the merits of such services before incurring significant fees for what are generally small-dollar transactions.

i. Proposed §205.17(b)(1) – General Rule

Pursuant to proposed §205.17(b)(1), a financial institution would be required to provide notice to the consumer regarding the terms of the institution's overdraft services and obtain the written consent of the consumer regarding the use of such services. We believe the use of a detailed notice, segregated from other disclosures, will assist in educating consumers regarding the terms and use of an institution's overdraft services. We also believe that financial institutions would be motivated to provide clear explanations as to any benefits of overdraft services.

It is our experience that when complex financial disclosures are buried within other account related documentation, consumers are more likely to overlook the information and fail to adequately understand the implications of a particular service or product. However, when consumers have adequate information they are better able to determine whether a particular financial service or product meets their specific needs. It is this analysis that is crucial to improving financial literacy among all consumers regardless of economic status.

ii. Proposed §205.17(b)(2) – Conditioning payment of other overdrafts on consumer's affirmative consent

The Board specifically sought comments on whether a financial institution may impose conditions on the consumer's consent to the financial institution's payment of overdrafts. For example, the Board notes that a financial institution may tie the ability of a consumer to have overdrafts paid for check or ACH transactions to the consumer consenting to the payment of overdraft charges for ATM withdrawals and debit card transactions. Appleseed opposes the imposition of such conditions on the ability of a consumer to affirmatively consent to the payment of ATM and debit card transactions. As the Board correctly notes, such conditions would effectively compel a consumer to consent to a financial institution's overdraft services rather than offer them a clear financial choice as we believe should be the goal of the Board. We are in agreement with the Board that many consumers declining overdraft services for ATM and debit card transactions would nevertheless consent to such services for check and recurring ACH transactions because checks and recurring ACH transactions tend to be significant creditors (e.g. the holder of the customer's mortgage or utility providers) so long as the costs and benefits are clearly explained to consumers. Allowing financial institutions to condition the payment of overdrafts for checks on the consent of the consumer for payment of other types of transactions circumvents the purpose of the proposed rule and eliminates any real or meaningful choice for the consumer.

iii. Proposed §205.17(b)(3) – Implementation of Opt-In

Appleseed also strongly opposes allowing financial institutions to implement the opt-in alternative by imposing onerous conditions on the accounts of those consumers who decline the financial institution's overdraft services. We are specifically concerned with the option of allowing financial institutions to offer different account types, with different terms and conditions, to consumers based on whether the consumer affirmatively consents to the

institution's overdraft services. First, we are concerned that consumers may lack adequate information to effectively compare the differences between accounts with the terms of an institution's overdraft services and therefore be precluded from making an informed decision regarding the services that best meet their financial needs. Second, the degree of variance between account types could again effectively compel the consumer to consent to overdraft services negating the reason for the consent requirement in the first place.

At present, the proposed staff commentary provides that account terms may not be varied in such a way that they "would compel a reasonable consumer to opt-in to the institution's overdraft service." The accompanying example states that a financial institution may not refuse to provide ATM or debit card services altogether should a consumer choose not to provide consent. The commentary does not address additional variations in account terms and conditions such as: interest rates, fees for checks or other account related products, ATM fees, or account fees. While we do not expect that every conceivable option would be addressed, we believe that the final rule must stress that a significant difference in rates or fees could be the basis for a reasonable consumer to feel compelled to opt-in.

Ultimately, if the final rule is to be meaningful, consumers must have a real choice. This requires transparency in fees and costs so that individuals across all communities and socio-economic levels can make an informed choice.

iv. Proposed §205.17(b)(5) – Exceptions to the fee prohibition

We have reservations regarding the Board's proposal with respect to the exceptions to the general fee prohibition. We understand this provision to allow a financial institution to charge an overdraft fee notwithstanding the fact that the consumer has not provided written consent. We are extremely concerned that allowing financial institutions to assess overdraft fees upon a "reasonable belief" that a consumer has sufficient funds creates a strong incentive for a financial institution to clear transactions in such a way so as to maximize potential fee income. For example, we believe some financial institutions have cleared large-dollar amount transactions first thereby overdrawing a consumer's account so that as small-dollar amount transactions post to the account, overdraft fees mount. Financial institutions could also delay posting deposits to again maximize the potential for overdraft fees. If this exception is adopted, we strongly urge the Board to require financial institutions to clearly disclose to consumers the methods by which they clear ATM and debit-card transactions on the model notice regardless of which option is adopted.

v. Proposed §205.19 – Debit Holds

Finally, Appleseed supports the proposed amendment addressing the issue of overdrafts that would not have occurred but for a debit hold. The proposed amendment directly addresses the inherent unfairness in penalizing a consumer for an overdraft that hasn't yet actually occurred and, in fact, may not occur if the transaction amount is less than the hold amount.

In conclusion, the proposed amendments to Regulation E benefit everyone by increasing transparency in the financial services industry and educating consumers regarding financial services products. We thank you for the opportunity to comment on the proposed rule.

Sincerely,



Betsy Cavendish
Executive Director, Appleseed



Ray Boshara
Vice President for Domestic Policy Programs;
Director, Asset Building Program, New America Foundation