

THE FINANCIAL SERVICES ROUNDTABLE

Impacting Policy. Impacting People.



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March 31, 2010

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

Re: Dockets R-1315 and R-1343; Proposed Amendments to Regulation E and DD.

Dear Ms. Johnson:

The Roundtable¹ welcomes the opportunity to comment on recent proposals issued by the Board of Governors of the Federal Reserve System (“the Board”) to amend and clarify Regulation E (overdraft fees for ATM and one-time debit card transactions)² and Regulation DD (disclosure of overdraft fees and available balances).³

I. Section 205.17(b)(1)(iv) allows written confirmation of consent, or if the customer agrees, electronic confirmation.

The Roundtable requests clarification on the permissible methods that an institution can use to provide written confirmation to customers’ who opt-in to overdraft services. The final rule, 12 C.F.R. § 205.17(b)(1), requires institutions to provide consumers with confirmation of their “consent, in writing, or if the customer agrees, electronically,” (emphasis added) before any overdraft services may be extended.⁴ Thus, the regulation allows institutions to comply with the written notice of consent by providing the consumer a copy of the confirmation.

Specifically, the Roundtable requests that the Board clarify proposed comment 17(b)-7 to confirm that the financial institution may meet the written confirmation requirement by providing the customer with an electronic copy of their completed opt-in form, and affirmation of consent, in printable format.

The Board’s proposed modification of the Official Staff Interpretation of § 205.17(b)(1), uses language in proposed comment 17(b)-7 that implies that the institution must mail the written confirmation to the customer before it can extend the overdraft and assess

¹ The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance and investment products and services to the American consumer. Roundtable member companies provide fuel for America’s economic engine, accounting directly for \$84.7 trillion in managed assets, \$948 billion in revenue, and 2.3 million jobs.

² Electronic Funds Transfer Act, 75 Fed. Reg. 9120 (March 1, 2010) (to be codified at 12 CFR pt. 205).

³ Truth in Savings Act, 75 Fed. Reg. 9126 (March 1, 2010) (to be codified at 12 CFR pt. 230).

⁴ Electronic Funds Transfer Act, 74 Fed. Reg. 59033, 59052 (Nov. 17, 2009) (to be codified at 12 CFR pt. 205.17(b)(1)). The staff commentary on the final rules states: the “final rule permits the confirmation to be provided electronically, if the consumer agrees.”

overdraft fees, as opposed to charging the overdraft fees immediately after providing the consumer an electronic copy (in printable format) of the consumer's consent. Furthermore, revised comment 17(b)-9, omits any reference to the permissibility of satisfying the written notice requirement by providing the consumer with an electronic copy of their consent.

The proposed comment states that “[a]n institution may not assess any overdraft fees or charges on the consumer’s account until the institution has sent the written confirmation.”⁵ (emphasis added). The juxtaposition of the word “sent” with “written confirmation” implies that the notice must be mailed to the consumer, as opposed to, for electronic or even in-person delivery.

Consistent with § 205.17(b)(1), the Roundtable believes that if a consumer electronically “opts-in” and receives electronic confirmation of his or her choice in printable format, the financial institution should be able immediately to extend the overdraft and assess a fee. But the language in the amended comment seems to call into doubt the permissibility of this approach. We request that the Board clarify the language to indicate that: (1) if a consumer affirmatively consents, a financial institution may satisfy the written notice requirement by providing the consumer with an electronic copy of their confirmation; and (2) if consumer affirmatively consents, institutions may immediately extend overdraft funds and assess an overdraft fee after providing the customer a copy of their consent.

Moreover, in the case of written confirmations, financial institutions should be permitted to assess overdraft fees immediately following receipt of a consumer’s decision to opt-in (no matter the channel), as long as the financial institution “sends” written confirmation to the consumer no later than the end of the following business day. For example, if a consumer who has not opted-in is traveling, needs emergency cash, and is declined at their ATM because of a lack of available funds, the bank could provide an opportunity for the client to “opt-in” (generally, not for the specific transaction) at the ATM, withdraw the emergency funds. The confirmation could be provided to the customer at the ATM machine in an electronic copy printed by the machine, or the institution can mail the confirmation the next day. Allowing the confirmation to be sent after the transaction also benefits consumers who provide a general overdraft opt-in over the phone in order to avoid having a debit card purchase declined. In cases like this, where the consumer desires overdraft service and the bank provides it to them, it is not unreasonable for the bank to be able to assess an overdraft fee for the transaction. We believe a one-business day time frame for mailing written confirmations is reasonable.

II. The Board’s interpretation of the final rules on Daily or Sustained Overdraft, etc. assumes institutions have technology capable of determining the posting order of charges; the time frame for mandatory compliance should be extended to allow institutions to implement compliant payment systems.

In light of recent clarifications and the overall technological difficulties involved in compliance with the amendments, we respectfully request the Board to extend the mandatory compliance

⁵ Proposed comment 17(b)-7, 75 Fed. Reg. at 9122.

date by 120 days. Our member companies are actively working on their payment and information systems to achieve compliance. The final clarification and guidance on Regulations E and DD will not be published until April; financial institutions will have less than three months to develop new software to process payments and fees, test the software, correct any flaws revealed in the test, implement the software, and train individuals to use the software.⁶

In addition to our request for an extension of time, we also request additional clarification on the Board's proposed comment 17(b)-9 (Daily or Sustained Overdraft, Negative Balance, or Similar Fee or Charge). Comment 17(b)-9 exposes the mounting technical challenges institutions must solve in order to remain in compliance with the proposed amendments to Regulation E and DD.

Example ii(b) of 17(b)-9 assumes that a posting order policy exists for deposits received by the financial institution. In the example, the customer had not opted-in to an overdraft service, and the negative account balance was attributed to both a check and a one-time debit card transaction. The interpretation explains that because the negative balance was caused, in part, by a check, the institution may assess a daily or sustained overdraft fee.

However, guidance is needed with regard to subsequent payments that post to the deposit account. It is clear that an institution may assess a daily or sustained overdraft fee if the institution allocates the payment to the debit card transaction. (This assumes that the deposit was sufficient to cure the entire negative balance resulting from the debit card transaction). It would follow that the institution would not be permitted to assess the daily/sustained overdraft fee if the institution allocates the payment to the check transaction. However, the Comment fails to address the situation where the institution does not have a posting order policy (i.e. when the payment is allocated to the customer's entire negative balance, rather than a specific transaction). If an institution lacking a posting order policy is prevented from charging any overdraft fees because it cannot distinguish between a one-time debit-card or check transaction, we respectfully request an extension of the mandatory compliance date, because additional system development and testing will be necessary to develop a system capable of compliance. We believe this further supports our request that the Board extend the compliance date due to the unforeseen challenges or unintended consequences that may arise.

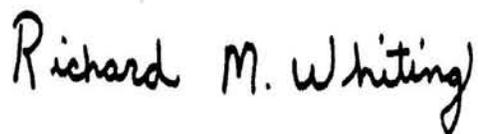
Conclusion

The Roundtable appreciates the opportunity to comment on the proposed amendments and clarification. We request clarification of: (1) comments 17(b)-7 (compliance through electronic confirmation); 17(b)-9 (charging daily or sustained overdraft fees, etc. when institutions lack a

⁶ Recent clarifications to comment 17(b)-8 (outstanding negative balance) highlights the challenges involved in designing and implementing compliant software. The NPRM explains that if a customer, who has not opted-in to overdraft fees, overdraws his or her account by \$20 after a debit card transaction, and the bank's subsequent payment of a \$10 check increases the negative balance owing to \$30, then the institution must base any overdraft fees solely on an outstanding negative balance of \$10, the amount of the check. To be compliant with this rule, financial institutions must develop, test, and implement software that can (1) distinguish between a one-time debit card transaction and a recurring debit card transaction; and (2) when multiple items cause an overdraft, identify the items subject to fees; and (3) calculate the appropriate overdraft fee that excludes one-time debit card transactions and ATM transactions.

dedicated posting policy); (2) modification of the written-confirmation guidelines; and (3) 120 day extension of the mandatory compliance date. If you have questions or comments on these matters, please contact Brian Tate (202) 589-2417 or me.

Sincerely,

A handwritten signature in black ink that reads "Richard M. Whiting". The signature is written in a cursive style with a large initial 'R' and a distinct 'M'.

Richard Whiting
Executive Director