



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

RE: Docket No. R-1343
Docket No. R-1315

Dear Ms. Johnson:

This comment letter is submitted by the Consumer Bankers Association (“CBA”) in response to the Proposed Rules (“Proposals”) published in the *Federal Register* on March 1, 2010, by the Board of Governors of the Federal Reserve System (“Board”) relating to Regulations E and DD (collectively, the “Rules”). The Proposals seek to clarify and harmonize certain aspects of the Board’s final rules under Regulations E and DD, published in the *Federal Register* on November 17, 2009, and January 29, 2009, respectively. CBA is the recognized voice on retail banking issues in the nation’s capital. CBA’s member institutions are leaders in consumer financial services, including auto finance, home equity lending, card products, education loans, small business services, community development, investments, deposits and delivery. CBA was founded in 1919 to provide a progressive voice in the retail banking industry. CBA represents over 750 federally insured financial institutions that collectively hold more than 70% of all consumer credit, and approximately 75% of insured deposits, held by federally insured depository institutions in the United States. CBA appreciates the opportunity to share its views on the Proposals with the Board.

In General

CBA recognizes that the Board does not intend to reconsider substantive issues under the Rules. Although CBA does not necessarily agree with each provision in either of the Rules, we realize it is not appropriate to restate our comments from prior rulemakings in this letter. Our comments are therefore intended to discuss only those issues relevant to the Proposals.

Generally speaking, CBA believes that the Proposals include appropriate clarifications, many of them technical, to the Rules. Except as we discuss below, we do not believe that the Proposals make significant changes to the Rules or to their implementation. Rather, the Proposals generally provide helpful clarifications to issues that arise under the Rules and provide helpful guidance to our member institutions. CBA does have some specific comments, however, on a few portions of the Proposals. We also ask the Board to provide a few minor clarifications that we believe are consistent with the Board’s intent.

Regulation DD

“Total Overdraft Fees”

The Regulation DD Proposal indicates that the aggregate fee disclosure on the periodic statement must disclose the total dollar amount for all fees or charges imposed for paying overdrafts using the term “Total Overdraft Fees.” We believe this terminology is appropriate, and the Proposal would standardize its use among institutions. The Proposal indicates that the requirement to use the term “Total Overdraft Fees” would be effective 90 days after a final rule is published in the *Federal Register*. We ask the Board to provide those institutions that must make programming changes with additional time to come into compliance. These institutions are already attempting to come into compliance with a variety of new regulatory requirements, including the revisions to Regulation E pertaining to overdrafts by July 1, 2010, which is straining compliance resources. We believe institutions should have at least nine months after the final rule is published in the *Federal Register* to make the necessary programming changes to disclose “Total Overdraft Fees” on periodic statements.

Sweep Arrangements

The Board provides a proposed clarification to Regulation DD relating to retail sweep programs which CBA believes is helpful. We ask the Board to expand on this clarification, however, to ensure that it applies to similar arrangements. For example, some sweep arrangements are established at the consumer’s request to provide the consumer a higher rate of return through linked investment accounts offered by a brokerage or other investment institution. This may involve a financial product that links a transaction account at a depository institution to an investment account at the brokerage or investment institution. In these circumstances, if a consumer wishes to view the funds available in the transaction account, the consumer expects to view a single account balance, including funds that may be in the brokerage/investment account. The consumer does not view these funds to be “overdraft” funds. We ask the Board to provide appropriate clarification.

Regulation E

Section 205.17(b)(4)

Section 205.17(b)(4) states clearly that overdraft fee opt-in requirements do not apply to an institution that has a policy and practice of declining to authorize and pay any ATM or one-time debit transactions when the institution has a reasonable belief at the time of the authorization request that the consumer does not have sufficient funds available to covered the transaction. The plain language meaning of this provision is unambiguous, and CBA agrees that such institutions should be permitted to charge an overdraft fee in the unusual circumstance that a transaction authorized based on good funds ultimately settles into overdraft. This is an unavoidable risk to the institution that typically would be caused not by the debit card authorization, but by the subsequent event outside the control of the institution (*e.g.*, posting of a check) yet within the control of the consumer.

The Regulation E Proposal would “clarify” Section 205.17(b)(4) by amending it and the Official Staff Commentary to change its meaning entirely. Specifically, the Proposal “clarifies” that an institution that has the policy and practice described may not assess an overdraft fee absent providing notice and obtaining the consumer’s consent. Certainly, the Board would agree that this is not simply a clarification, but a complete change to the plain language meaning of the provision. Although CBA disagrees with the change, we suspect that any debate regarding the substance of this portion of the Proposal was settled when the revisions to Regulation E were issued. We will therefore respect the Board’s request to avoid a rehash of those settled issues.

If the Board adopts the revision to Section 205.17(b)(4) as proposed, however, we question the purpose of the revised provision. In effect, the proposed revision to Section 205.17(b)(4) appears to be a simple restatement of the rule, *i.e.*, that an institution may not charge an overdraft fee for a covered transaction unless it provides notice and receives an opt-in first. If this is the case, it may be more appropriate to delete the provision altogether to avoid potential ambiguities that may arise when institutions attempt to find meaning beyond a redundancy to the basic requirement of the regulation.

If the Board retains the revision, we ask that the Board amend the second sentence by adding “for paying ATM or one-time debit card transactions that overdraw the consumer’s account” at the end. This would clarify that the provision pertains only to those types of transactions governed under Section 205.17, and not overdrafts relating to checks, for example.

Daily/Sustained Overdraft Fees

The Proposal clarifies that Regulation E does not prohibit an institution from charging daily or sustained overdraft fees if a negative balance is attributable in whole or in part to a transaction other than a one-time debit or ATM transaction. We believe this clarification is consistent with the requirements of Regulation E, and we urge its adoption. CBA is concerned, however, that the Board’s proposed method for determining whether an overdraft balance consists of a “non-covered” transaction will impose significant systems burdens on institutions and provide consumers with relatively little benefit. Specifically, once a consumer has overdrawn an account based in whole or in part on a check, ACH, or similar transaction, we believe the institution should be permitted to assess daily or sustained overdraft fees until the account is brought to a zero (or greater) balance. It is not reasonable to expect an institution to manage a real-time accounting of the sources of the overdraft balance based on when subsequent transactions (debits or credits) are posted, including based on the institution’s posting order. Not only would it be extremely difficult to create and implement such a system, it would be very difficult to explain to a consumer and provide no meaningful choice-benefit to the consumer.

It is important to note that this provision comes into play only if the overdraft exists because there is at least one non-covered transaction that, by itself, would have caused the account to overdraft. The debit overdrafts, by themselves, would not trigger the sustained or daily overdraft fees. In other words, the consumer has engaged in overdrafts through multiple channels and is presenting significantly increased risks to the bank. The bank should be permitted to charge a daily/sustained overdraft in this circumstance, even if under some

hypothetical allocation formulas future credits to the account are sufficient to eliminate the portion of the overdraft attributable to the non-covered transaction(s). We are not suggesting that the institution should be permitted to charge for the debit overdrafts absent the consumer's opt-in. Rather, we simply do not think an institution should be expected to develop and implement complex allocation formulas to determine whether it can charge a sustained or daily overdraft fee once the consumer has engaged in a pattern and practice of overdrawing the account.

If the Board retains this portion of the Proposal, we ask the Board to provide an effective date of January 1, 2011, with respect to the requirement embodied in this clarification. CBA believes that institutions may not have understood the revisions to Regulation E to mean what the Board is currently proposing.¹ The systems changes to conform to the Proposal would be significant, and institutions would likely need several months to comply.

Model Form

Section 205.17(d) provides that an institution must use an opt-in form that is "substantially similar" to Model Form A-9. The Model Form includes a provision where the consumer would indicate that the consumer does *not* opt-in with respect to overdraft coverage. CBA recognizes that such a provision may be useful if the bank is offering various overdraft options beyond those required by law, or if the bank is asking the consumer to opt in or out as part of opening the account. The provision is not necessary, however, in other circumstances. We ask the Board to indicate in the Commentary that an institution may omit the provision, when appropriate, and still comply with "substantially similar" requirement.

In fact, we also ask the Board to indicate in the Commentary that a bank complies with the "substantially similar" requirement if it deletes the dotted line at the bottom of the Model Form and the information below it if the bank is not providing a method for the consumer to provide a completed, written consent form. For example, if the institution is accepting consents only through the telephone or electronically, such information would be unnecessary and confusing to consumers. CBA believes this is likely the Board's intent, but we ask for clarification.

CBA also requests clarification in the Commentary that an institution could include additional information on the form for internal recordkeeping or similar purposes and still meet the "substantially similar" requirement. For example, the bottom (or top) of the form could have a line where the teller taking the form must write his or her initials and record the date the form was received. This is the type of modifications to the form that we believe should, and would, be permissible, but we ask the Board to provide explicit guidance on this point.

Providing Confirmation of Telephone Opt-In

CBA requests that the Board allow an institution flexibility with respect to the receipt of opt-in requests via the telephone. Specifically, if a consumer opts in to overdraft coverage over the telephone after having received oral overdraft disclosures as part of the request, the

¹ It appears that the Board realizes that the point was not clear under Regulation E, hence the proposed clarification.

institution should be permitted to provide the overdraft disclosures described in Section 205.17(b)(1)(i) and a confirmation notice to the consumer in writing within 10 business days after the consumer opts in.² Such flexibility would allow the consumer to opt in without the institution first having to determine whether the consumer previously received the initial overdraft disclosures in writing or electronically. Furthermore, it gives the consumer the flexibility to opt in over the telephone and have the institution effectuate the consumer's choice on relatively short notice (*e.g.*, if the consumer needs to have an overdraft transaction approved due to an emergency or similar situation) without having to wait for the institution to send additional materials in the mail.

Multiple Accounts

We ask the Board to clarify in the Commentary that a bank may provide a single overdraft notice to a consumer and obtain a single opt-in from a consumer to cover multiple accounts, such as if the consumer clearly indicates the account numbers to which the consent applies. We believe that this would be permitted by the plain language of the regulation, and it would appear to be the most efficient and intuitive way for a consumer to opt in for multiple accounts. So long as the consumer clearly indicates that the consent to overdraft coverage is for multiple accounts, and those accounts are clearly identified, we do not believe the consumer should be required to provide several individual consents.

Technical Revision

Proposed Comment 205.17(b)-9.ii appears to be missing the word "institution" between "the" and "allocates" in (d).

Conclusion

CBA appreciates the opportunity to comment on the Proposals. We generally believe that they represent appropriate clarifications to the Rules. We do ask the Board to consider our comments on the few matters we raise above, and to adopt final rules accordingly. Please do not hesitate to contact me if CBA may provide any further assistance on this matter.

Sincerely,



Steven I. Zeisel
Senior Counsel

² This would be consistent with the provision in Regulation DD permitting account opening disclosures to be mailed or delivered within 10 business days after the account is opened if the consumer is not present at the institution at the time the account is opened.