



Credit Union National Association

cuna.org

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VIA E-MAIL: regs.comments@federalreserve.gov

March 31, 2010

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

Re: Docket Nos. R-1343 and 1315 – Proposed Clarifications to Regulations E and DD for Overdraft Protection Plans

Dear Ms. Johnson:

The Credit Union National Association (CUNA) appreciates the opportunity to comment on the Federal Reserve Board's (Board's) proposed clarifications with regard to Regulation E, the Electronic Fund Transfer Act, and Regulation DD, the Truth in Savings Act (TISA), as they apply to the assessment of overdraft fees. The Regulation E proposal would clarify a number of provisions with regard to the recent final rule that will prohibit fees for overdrafts in connection with automated teller machine (ATM) and one-time debit card transactions, unless the consumer agrees or "opts-in" to these fees. The Regulation DD proposal would clarify provisions with regard to the disclosure of overdraft and returned-payment fees. Regulation DD does not apply to credit unions, but TISA requires the National Credit Union Administration (NCUA) to issue substantially similar rules. CUNA represents approximately 90 percent of our nation's 7,900 state and federal credit unions, which serve approximately 93 million members.

Summary of CUNA's Comments

- CUNA is very concerned with the situations in which credit unions are not able to avoid paying certain ATM and one-time debit transactions but will not be able to charge a fee under these rules and proposed clarifications if they overdraw the account, unless the member opts-in. We strongly urge the Board to reconsider this position and to also become involved in industry efforts to address these situations.
- The Board should provide additional clarifications, beyond those addressed in this proposal, in response to the numerous questions that credit unions and



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others have raised. The most efficient means to address these issues is for the Board to publish and maintain a list of frequently asked questions (FAQs), similar to those that CUNA has compiled.

- For the disclosure of overdraft fees on periodic statements, credit unions and others should have the option to title these as “Total Overdraft Fees for Paid Items” instead of “Total Overdraft Fees,” which will further distinguish the paid overdraft items from items that are returned unpaid and that are also required to be disclosed.

Discussion

Proposed Regulation E Clarifications

The Regulation E clarifications address the new rule that will require a financial institution to obtain the consumers agreement or “opt-in” before assessing fees for overdrafts in connection with ATM and one-time debit card transactions. In the proposal, the Board has made it very clear that it will not reconsider the extent of the protections that are required under this rule, which will become effective as of July 1, 2010.

Although we certainly understand the need for protections with regard to overdraft plans, the recent Regulation E final rule has been very problematic for credit unions. The primary concern is for situations in which credit unions and others are not able to avoid paying certain ATM or one-time debit card transactions that overdraw a consumer’s account. This occurs in a number of situations, such as when intervening transactions reduce the account balance after the debit transaction is authorized, but before it is paid, and when merchants request authorization for a transaction in an amount less than the actual total of the purchase. In these situations, the Board has made it very clear in these proposed clarifications that a fee may not be assessed in these unavoidable situations.

However, a large number of credit unions batch their debit transactions during the business day, as opposed to processing them in real time, in order to achieve efficiency at the credit union and curtail costs. The result is that these unavoidable overdraft situations occur disproportionately on credit unions and other relatively small financial institutions. Our concern here is that this situation is not likely to change, primarily due to the significant expenses that would be incurred if these institutions covert to a real time system, costs that these institutions are especially unable to incur due to the current economic environment.

In essence, there are four parties involved in the typical debit card transaction, namely the merchant, the card network, the consumer, and the financial institution. Of all of these parties, it is only the financial institution that does not

have any ability whatsoever to ensure that an overdraft does not occur. Nonetheless, under these rules and proposed clarifications, the financial institution is the one and only party that must suffer the consequences by not being able to charge a reasonable fee to compensate for the service of providing funds to cover the overdraft, over which it had no control.

For these reasons, we strongly request a meeting with Board staff to discuss the possibility of a very limited exception in which a financial institution would be able to charge a reasonable fee in the situations described above when an overdraft occurs due to the rules and practices of other parties even if the consumer does not opt-in. To not provide such an exception will primarily affect smaller financial institutions, as opposed to larger institutions that use real time systems. It is ironic that the Board's rules and proposed clarifications in this area will not affect the larger banking institutions as many of them were the ones with abusive overdraft practices that were the genesis of the Board's Regulation E overdraft rules.

In the final rule, the Board indicated that the financial services industry must work together to resolve the problems associated with these types of overdraft transactions, which would include financial institutions, service providers, card payment networks, and merchants. CUNA has started the process of exploring ways in which these problems may be resolved. However, as noted above, it has become apparent that the interests of the parties involved are not aligned, which means these problems may not be resolved or resolved as quickly as the Board has envisioned.

For the reasons outlined above, we believe it is critical that the Board participate in any industry effort that attempts to resolve these problems. This would include organizing meetings with all the concerned parties, as well as be willing to consider future changes to this rule if these efforts are unsuccessful. CUNA would be pleased to assist the Board in these efforts.

Our other primary concern with these rules is the lack clarity with a number of provisions in this final rule. Although the proposal would provide certain clarifications on a number of issues, there are many more issues that are not addressed that also need clarification. Here is just a very small sample of other issues credit unions have raised:

- That minimum balance fees triggered by debit or ATM transactions should not be covered under the final rule since they do not specifically involve overdrafts.
- Credit unions that do not have formal overdraft programs should be provided flexibility to adapt the model form, as they believe necessary, in order to meet their needs and to ensure that consumers understand the new requirements.
- Whether it is appropriate to provide financial incentives to consumers to opt-in to overdraft programs, which some large banks are now offering.

- For ATM transactions that will create an overdraft, credit unions should be able to obtain an opt-in, provide the required confirmation during that same ATM transaction, and be able to assess the fee at that time. We also believe such an approach should also apply to debit card transactions, to the extent that the technology can accommodate such a process, either now or in the future.
- For those who opt-in to the overdraft program, credit unions should be able to structure the program as they see fit, within other existing regulatory requirements and guidance.

We certainly appreciate the time that Board staff has expended in responding to CUNA and credit unions on a number of issues in this area, including participating in a CUNA audio conference call and speaking at our recent Government Affairs Conference. However, we encourage the Board to provide more information that will help credit unions and others comply with these new requirements that will address not only the above issues but also the numerous other questions that credit unions have raised with both CUNA and the Board.

The most efficient means to achieve this result, and to reduce the number of individual inquiries, is for the Board to compile a list of FAQs. The Department of Housing and Urban Development compiled such a list for the recent changes to the Real Estate Settlement and Procedures Act rules, which credit unions have found to be very useful in their efforts to comply with these complicated rules. We also believe the creation of a list of FAQs should be adopted by the Board for all the significant, complex rules the Board has issued in recent years, such as those that amend Regulation Z, the Truth in Lending Act.

As a result of the numerous questions CUNA has received in response to the final Regulation E rule, we have also adopted the approach of developing FAQs as a means to address these questions in the most expeditious manner. Please use the link below to review these FAQs, which further indicate the extent of the questions we have received from credit unions:

http://www.cuna.org/compliance/member/download/eguide_eft_faqoverview.pdf

Proposed Regulation DD Clarifications

In 2009, both the Fed and NCUA amended Regulation DD to require all financial institutions to disclose on the periodic statement the fees charged for overdraft services and the fees charged for returning items unpaid, both for the statement period and for the year-to-date. The rule also provides a model form that may be used to comply with these disclosure requirements.

The proposal would clarify that the term “Total Overdraft Fees” must be used on the period statement when describing the total amount of fees imposed for

believe credit unions and others should have the flexibility to use the term “Total Overdraft Fees for Paid Items” instead of “Total Overdraft Fees.” This alternative terminology will further enhance the distinction between fees that are assessed for paid items, such as the per-item charge for overdraft transactions, and items that are returned unpaid, which are also required to be disclosed under these rules.

Again, we realize the Board’s TISA rules do not directly apply to credit unions. However, NCUA will likely allow similar flexibility for the TISA rules that apply to credit unions after the Board makes this change.

Thank you for the opportunity to comment on the proposed clarifications to Regulations E and DD. If you have questions about our comments, please contact Senior Vice President and Deputy General Counsel Mary Dunn or me at (202) 638-5777.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeffrey P. Bloch". The signature is fluid and cursive, with a long horizontal stroke at the end.

Jeffrey P. Bloch
Senior Assistant General Counsel