



March 30, 2010

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

**Re: Docket No. R-1343**

Dear Ms. Johnson,

The Michigan Credit Union League (MCUL) appreciates the opportunity to comment on the proposed clarification to Regulation E concerning overdraft fees for ATM and one-time debit card transactions. MCUL is a statewide trade association representing 95% of the 331 credit unions located in Michigan. This comment letter was drafted in response to input received from MCUL's member credit unions.

### **General Statement**

While the Board stated that the purpose of the proposed rules was to clarify and facilitate compliance with the final rule, not to reconsider the need for – or the extent of – the protections that the rule affords consumers, MCUL strongly urges the Board to reconsider this position and examine the multitude of issues addressed by commenters regarding the consequences of the final rule scheduled to take effect on July 1, 2010 (Regulation E Final Rule).

### **Discussion**

#### Opt-In Requirement

The Regulation E Final Rule sets forth the general rule prohibiting an account-holding financial institution from assessing a fee or charge on a consumer's account held at the institution for paying an ATM or one-time debit card transaction pursuant to the institution's overdraft service, unless the institution satisfies several requirements, including providing consumers notice and obtaining the consumer's affirmative consent to the overdraft service.

The rule created an exception from the notice and opt-in requirements for institutions that have a policy and practice of declining ATM and one-time debit card transactions for which authorization is requested, when the institution has a reasonable belief that the consumer's account has insufficient funds at the time of the authorization request.

To clarify the scope of this provision, the proposed rule would explain that the fee prohibition applies to *all* institutions, and that the exception provides relief only from the notice and opt-in requirements (when no overdraft fees are assessed).

The proposed clarification has the effect of requiring financial institutions without an overdraft program to comply with the same requirements as those that do. Financial institutions with this type of policy would be required to provide an opt-in for a program that does not even exist. Because not all overdrafts can be avoided, the opt-in will essentially be an opt-in to allow an institution to charge a fee. This will result in higher fees across the board for all (mostly responsible) consumers. MCUL does not understand how this is a consumer-friendly result.

Furthermore, in response to the Regulation E final rule, many commenters noted that there are times when an overdraft cannot be avoided, such as when intervening transactions reduce the account balance after the debit transaction is authorized (but before it is paid). The unfortunate response from the Board was:

"The Board recognizes that financial institutions and consumers have imperfect information as to the balance in the account at the time of the transaction. Financial institutions face operational limitations in processing transactions, and in tracking the consumer's actual balance, because transactions may not be processed in real-time. Similarly, even if a consumer checked his or her balance prior to a transaction, the balance may not be updated, so the consumer may inadvertently overdraw his or her account on the belief funds are available. On balance, the Board believes financial institutions are in a better position to mitigate the information gap by developing improved processing and updating systems, as they have in recent years, and as the Board expects they will continue to do over time."

MCUL believes that the Board is correct in stating financial institutions face operational limitations in processing transactions and in tracking a consumer's actual balance. However, even with the best technology, the consumer will remain in the best position to know his/her actual account balance through the use of the check register. When properly utilized, the available balance will always be known to the consumer.

Financial institutions are thus left with the following two choices: (1) incur the exorbitant expense to convert to a more real-time system (which, as stated above, would not completely solve the problem); and/or (2) increase fees for other services for the majority of consumers who manage their accounts responsibly, in order to defray the costs of administering negative accounts. MCUL does not see how either of these options is consumer-friendly.

The Board's response to this argument in the Regulation E Final Rule was:

"To the extent institutions adjust their pricing policies to respond to the potential loss of income from overdraft fees, some consumers may experience increases in certain upfront costs as a result of the final opt-in rule... In addition, some consumers will continue to be able to avoid monthly maintenance or other account fees as a result of meeting minimum balance requirements or having other product relationships with the bank."

With all due respect, the fee increases will unfortunately not be just "upfront," but lasting and widespread. MCUL agrees with the Board's statement that some consumers will continue to avoid monthly maintenance fees by meeting minimum balance requirements. *All* consumers could avoid these fees, as well as overdraft fees, through proper account management. However, the fee increases will be felt in other areas than just minimum balance fees; may be

unavoidable; and will impact all consumers, not just those that do not keep track of their account balances.

#### Written Confirmation

The Regulation E final rule requires institutions to provide consumers a written confirmation of their respective opt-in choices before charging overdraft fees. The proposed rule would clarify that an institution may not assess any overdraft fees or charges on the consumer's account until the institution has sent the written confirmation.

As many commenters noted in the original proposal, consumers may need immediate access to funds before an opt-in is provided. To address this issue, MCUL believes financial institutions should be able to obtain an opt-in at an ATM or POS on a transaction-by-transaction basis, similar to current §205.16 regarding fees for electronic fund transfer services or for balance inquiries. This way, consumers would be given the choice whether to authorize a given transaction that may overdraw their respective accounts, and would have immediate access to funds that may be needed in an emergency situation without the unnecessary delay.

The Board stated in the Regulation E Final Rule that "it does not believe that it is technologically feasible to provide real-time opt-ins at many locations at this time, particularly at non-proprietary ATMs and merchant POS terminals." MCUL does not understand why the Board does not believe it is technologically feasible for a real-time opt-in, but it *is* technologically feasible for financial institutions to know account balances of all consumers in real time, at all times.

MCUL does not believe that it would be necessary for non-proprietary ATMs or merchant POS terminals to understand that a given transaction *would* overdraw a consumer's account. MCUL believes this could be addressed with a disclosure that the transaction requested *could* overdraw a consumer's account – with a consent option similar to that required for a non-proprietary ATM fee for processing a transaction.

#### **Conclusion**

As the consequences of the Regulation E Final Rule are realized, MCUL strongly urges the Board to reconsider its position not to examine the multitude of issues addressed by commenters. While the issue of overdraft fees is concerning, MCUL urges the Board to consider more workable solutions that will not negatively impact financial institutions which will, in turn, negatively impact all consumers.

MCUL appreciates the opportunity to provide comment on this proposed rule.

Sincerely,

Veronica Madsen  
Director of Compliance & General Counsel  
MCUL & Affiliates