

FEDERAL RESERVE SYSTEM

12 CFR Part 205

[Regulation E; Docket No. R-1234]

Electronic Fund Transfers

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Proposed rule; official staff interpretation.

SUMMARY: The Board is publishing for comment a proposal to amend Regulation E, which implements the Electronic Fund Transfer Act (EFTA). The proposal would also revise the official staff commentary to the regulation. The commentary interprets the requirements of Regulation E to facilitate compliance primarily by financial institutions that offer electronic fund transfer services to consumers.

The proposed revisions would clarify the disclosure obligations of automated teller machine (ATM) operators with respect to fees imposed on a consumer for initiating an electronic fund transfer or a balance inquiry at an ATM. The Board is withdrawing previously proposed revisions to the Regulation E staff commentary that would have addressed this issue.

DATES: Comments must be received on or before October 7, 2005.

ADDRESSES: You may submit comments, identified by Docket No. R-1234, by any of the following methods:

- Agency Web Site: <http://www.federalreserve.gov>. Follow the instructions for submitting comments at <http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm>.
- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- E-mail: regs.comments@federalreserve.gov. Include docket number in the subject line of the message.
- FAX: 202/452-3819 or 202/452-3102.
- Mail: Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, N.W., Washington, DC 20551.

All public comments are available from the Board's web site at www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper in Room MP-500 of the Board's Martin Building (20th and C Streets, N.W.) between 9:00 a.m. and 5:00 p.m. on weekdays.

FOR FURTHER INFORMATION CONTACT: Ky Tran-Trong, Senior Attorney, or Daniel G. Lonergan, David A. Stein, Natalie E. Taylor or John C. Wood, Counsels, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, Washington, D.C. 20551, at (202) 452-2412 or (202) 452-3667. For users of Telecommunications Device for the Deaf (TDD) only, contact (202) 263-4869.

SUPPLEMENTARY INFORMATION:

I. Background

The Electronic Fund Transfer Act (EFTA or Act) (15 U.S.C. 1693 *et seq.*), enacted in 1978, establishes the rights, liabilities, and responsibilities of participants in electronic fund transfer (EFT) systems. The Board's Regulation E (12 CFR part 205) implements the EFTA. Examples of types of transfers covered by the Act and regulation include transfers initiated through an automated teller machine (ATM), point-of-sale (POS) terminal, automated clearinghouse (ACH), telephone bill-payment plan, or remote banking service. The Act and regulation require disclosure of terms and conditions of an EFT service; documentation of electronic transfers by means of terminal receipts and periodic account activity statements; limitations on consumer liability for unauthorized transfers; procedures for error resolution; and certain rights related to preauthorized EFTs.

The Official Staff Commentary (12 CFR part 205 (Supp. I)) is designed to facilitate compliance and provide protection from liability under sections 915 and 916 of the EFTA for financial institutions and persons subject to the Act. 15 U.S.C. 1593m(d)(1). The commentary is updated periodically, as necessary, to address significant questions that arise.

II. Summary of Proposed Revisions

Section 205.16 provides that an ATM operator that imposes a fee on a consumer for initiating an EFT or a balance inquiry must post notices at ATMs that a fee will be imposed. Section 205.16(b) would be revised to clarify the operation of the ATM signage rule when fees are not imposed by the ATM operator on all consumers. The revised language specifically clarifies the intent of the rule that ATM operators may provide a notice that a fee may be imposed if there are circumstances in which an ATM fee will not be charged for a particular transaction, such as where the card has been issued by a foreign bank or the card issuer has entered into a contractual relationship with the ATM operator regarding surcharges.

Section 205.16 does not require that any sign be posted if no fee is charged to the consumer by the ATM operator. The rule is intended to allow consumers to identify

immediately ATMs that generally charge a fee for use. It is not intended to represent a complete disclosure to the consumer regarding the fees associated with the particular type of transaction the consumer seeks to conduct. Rather, a more detailed disclosure of whether in fact a fee will be charged for the type of transaction contemplated by the consumer and the amount of the fee is required to be made either on the ATM screen or on an ATM receipt before the transaction is completed. See § 205.16(c).

III. Section-by-Section Analysis of the Proposed Revisions

Section 205.16 Disclosures at Automated Teller Machines

Under section 904(d) of the EFTA, as amended by the Gramm-Leach-Bliley Act of 1999 (GLB Act), an ATM operator that imposes a fee on any consumer for providing EFT services is required to provide notice of the fee to the consumer in a prominent and conspicuous location on or at the ATM on which the EFT is initiated.¹ An ATM operator is any person who operates an ATM at which consumers initiate an EFT or a balance inquiry, and that does not hold the account to or from which the transfer is made, or about which an inquiry is made. See EFTA

§ 904(d)(3)(D)(i); § 205.16(a). In addition to posting notice of the fee on or at the ATM, the ATM operator must also disclose that a fee will be imposed and the amount of the fee, either on the screen of the ATM or on a paper notice, before the consumer is committed to completing the transaction. These requirements are implemented in § 205.16 of Regulation E. See 66 FR 13409 (March 6, 2001).

Several large institutions have asked whether it is permissible under § 205.16 to provide notice on the ATM that a fee “may be” charged for providing EFT services, because many ATM operators, in particular those owned or operated by banks, apply ATM surcharges to some categories of their ATM users, but not others. For example, an ATM operator might not charge a fee to cardholders of foreign banks, cardholders whose card issuer has entered into a special contractual relationship with the ATM operator with respect to surcharges, and persons who carry cards that are issued under electronic benefit transfer governmental programs. (While many financial institutions do not impose ATM surcharges on their own cardholders, they are not ATM operators with respect to those cardholders for purposes of § 205.16 because the institutions hold the cardholders’ accounts.) Also, an ATM operator might charge a fee for cash withdrawals, but not for balance inquiries. As a result, a disclosure on the ATM that a fee “will” be imposed in all instances could be overly broad with respect to consumers who would not be assessed a fee for usage of the ATM.

In September 2004, as part of an update to Regulation E, the Board proposed to revise comment 205.16(b)(1)-1 to clarify that ATM operators may disclose on the ATM signage that a fee may be imposed or may specify the type of EFTs or consumers for which a fee is imposed, if there are circumstances in which an ATM surcharge will not be charged for a particular transaction. See 69 FR 55996, 56005 (September 17, 2004). The Board’s proposal

¹ Pub. L. No. 106-102, § 702, 113 Stat. 1338, 1463-64 (1999).

acknowledged that a strict requirement to post a notice that a fee will be imposed in all instances could result in an inaccurate disclosure of the ATM operators' surcharge practices and is not mandated by the current language in § 205.16.

Industry commenters overwhelmingly agreed with the Board's proposal, stating that the proposed staff commentary was consistent with sections 904(d)(3)(A) and (B) of the EFTA, and would help ATM operators more accurately disclose their surcharging practices. Industry commenters cited a press release issued by the original act's sponsor, Rep. Marge Roukema, stating that the act "simply puts existing practice into law."² According to these commenters, the common practice of many banks at the time of the ATM surcharge amendments was to state that a fee may be imposed.

Consumer groups believed that a general statement on ATM signage that a fee "may" be imposed could significantly weaken consumer notice, and that the current staff commentary permitting ATM operators to specify the type of EFTs for which a fee is imposed provides sufficient flexibility to address concerns about overbroad ATM signage disclosures. A consumer rights attorney stated that a disclosure that an ATM fee "may" be imposed is too general to be useful, and further asserted that the Congress intended that ATM signs must state that a fee will be charged whenever there is a possibility that a surcharge will be imposed on any consumer. This commenter believed that section 904(d) of the EFTA did not provide a basis for ATM operators to avoid providing notice on ATM signage to consumers to whom a fee would be imposed even if some consumers would not have a fee imposed or if there are other transactions for which a fee would not be imposed. The commenter also challenged industry commenters' characterizations regarding common industry practice at the time the amendments were adopted, stating that existing practice of many ATM operators at the time was to post signs on the machines stating that a fee will be imposed for cash withdrawals.

The Board continues to believe that a literal interpretation of the current rule could lead to overly broad disclosures of an ATM operator's surcharge practices where some consumers would not be assessed a fee for usage of the ATM, and that a reasonable interpretation of the statute and regulation would allow ATM operators to provide an alternative disclosure that a fee "may" be imposed to avoid potential consumer confusion. Upon further analysis and after consideration of the comments received, however, the Board believes it would be appropriate to make this clarification in the regulation rather than in the commentary. Therefore, the Board is withdrawing its proposed commentary revisions addressing this issue and is instead proposing to exercise its authority under § 904(a) of the EFTA to amend both the regulation and the commentary. A re-proposal allows the Board to elicit additional comments to better understand ATM disclosure practices, both at the time of the passage of the GLB Act and currently.

As proposed, § 205.16(b) would be revised to explicitly clarify that ATM operators may disclose in all cases that a fee will be imposed, or in the alternative, disclose that a fee may be imposed on consumers initiating an EFT or a balance inquiry if there are circumstances under which some consumers would not be charged for such services. Before an ATM operator may

² Banking Committee OKs Roukema ATM Fee Disclosure (March 10, 1999), <http://financialservices.house.gov/banking/31099rou.htm>.

impose an ATM fee on a consumer for initiating an electronic fund transfer or a balance inquiry, the ATM operator must provide to the consumer notice, either on-screen or via paper receipt, that an ATM fee will be imposed and the amount of the fee, and the consumer must elect to continue the transaction or inquiry after receiving such notice. See § 205.16(e). Comment 16(b)(1)-1 would be revised to reflect the proposed rule, and to clarify that ATM operators that impose an ATM surcharge in all cases must provide notice on the ATM signage that a fee will be charged.

Comment is solicited on the current disclosure practices of ATM operators that impose surcharges on some, but not all, consumers. Under what types of circumstances might an ATM operator not impose a surcharge for providing electronic transfer services or responding to balance inquiries? If surcharges are not imposed on all consumers, how do ATM operators disclose their surcharge practices? What adverse impact on consumers, if any, might result from a disclosure that states that an ATM surcharge will be imposed when the operator's practice is not to impose a surcharge on certain consumers? Conversely, what adverse impact on consumers who are charged an ATM fee, if any, might result if ATM signage states that a fee may be imposed? In addition, comment is solicited on disclosure practices of ATM operators with respect to surcharges at the time the GLB Act was passed.

IV. Form of Comment Letters

Comment letters should refer to Docket No. R-1234 and, when possible, should use a standard typeface with a font size of 10 or 12; this will enable the Board to convert text submitted in paper form to machine-readable form through electronic scanning, and will facilitate automated retrieval of comments for review. Comments may be mailed electronically to regs.comments@federalreserve.gov.

V. Solicitation of Comments Regarding the Use of "Plain Language"

Section 722 of the Gramm-Leach-Bliley Act of 1999 requires the Board to use "plain language" in all proposed and final rules published after January 1, 2000. The Board invites comments on whether the proposed rules are clearly stated and effectively organized, and how the Board might make the proposed text easier to understand.

VI. Initial Regulatory Flexibility Analysis

In accordance with section 3(a) of the Regulatory Flexibility Act, the Board has reviewed the proposed amendments to Regulation E. A final regulatory flexibility analysis will be conducted after consideration of comments received during the public comment period.

1. Statement of the objectives of the proposal. The Board is proposing revisions to Regulation E to allow ATM operators flexibility to disclose that ATM surcharges will or may be imposed on consumers initiating an EFT or a balance inquiry when there are circumstances under which such surcharges will not be charged.

The EFTA was enacted to provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer systems. The primary objective

of the EFTA is the provision of individual consumer rights. 15 U.S.C. 1693. The EFTA and Regulation E require disclosure of terms and conditions of an EFT service; documentation of electronic transfers by means of terminal receipts and periodic statements; limitations on consumer liability for unauthorized transfers; procedures for error resolution; and certain rights related to preauthorized EFTs. The Act and regulation also prescribe restrictions on the unsolicited issuance of ATM cards and other access devices. The EFTA authorizes the Board to prescribe regulations to carry out the purpose and provisions of the statute. 15 U.S.C. 1693b(a). The Act expressly states that the Board's regulations may contain "such classifications, differentiations, or other provisions, . . . as, in the judgment of the Board, are necessary or proper to carry out the purposes of [the Act], to prevent circumvention or evasion [of the act], or to facilitate compliance [with the Act]." 15 U.S.C. 1693b(c). The Act also states that "[i]f electronic fund transfer services are made available to consumers by a person other than a financial institution holding a consumer's account, the Board shall by regulation assure that the disclosures, protections, responsibilities, and remedies created by [the Act] are made applicable to such persons and services." 15 U.S.C. 1693b(d). The Board believes that the proposed revisions to Regulation E discussed above are within the Congress' broad grant of authority to the Board to adopt provisions that carry out the purposes of the statute.

2. Small entities affected by the proposal. The number of small entities affected by this proposal is unknown. ATM operators that do not impose ATM surcharges in all instances would be permitted to disclose that surcharges may be disclosed on signage appearing on ATMs. ATM operators that choose to make the proposed alternative disclosure may have to revise their signs on their ATMs.

3. Other federal rules. The Board believes no federal rules duplicate, overlap, or conflict with the proposed revisions to Regulation E.

4. Significant alternatives to the proposed revisions. The Board welcomes comment on any significant alternatives that would minimize the impact of the proposed rule on small entities.

VII. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3506; 5 CFR 1320 Appendix A.1), the Board reviewed the proposed rule under the authority delegated to the Board by the Office of Management and Budget (OMB). The proposed rule contains requirements subject to the PRA. The collection of information that is required by this proposed rule is found in 12 CFR 205.16(c) and in Appendix A. The Federal Reserve may not conduct or sponsor, and an organization is not required to respond to, this information collection unless it displays a currently valid OMB control number. The OMB control number is 7100-0200. This information is required to obtain a benefit for consumers and is mandatory (15 U.S.C. 1693 et seq.). The respondents/recordkeepers are for-profit financial institutions, including small businesses. Institutions are required to retain records for 24 months.

All depository institutions, of which there are approximately 19,300, potentially are affected by this collection of information because all depository institutions are potential ATM

operators subject to Regulation E and are required to provide notice to consumers of an ATM surcharge, and thus are respondents for purposes of the PRA. However, the extent to which this collection of information affects a particular depository institution depends on the number of ATMs an institution operates.

The proposed revision is not expected to significantly increase the ongoing annual burden of Regulation E; rather this would be a one-time burden increase for those institutions that, although not required, decide to revise their ATM signage disclosures. For purposes of the PRA, the Federal Reserve estimates that it would take depository institutions, on average, 8 hours (one business day) to revise and update ATM signage; therefore, the Federal Reserve estimates that the total annual burden for all depository institutions for this requirement would be 154,400 hours. With respect to the 1,289 Federal Reserve-regulated institutions which must comply with Regulation E, it is estimated that the total annual burden for this requirement would be 10,312 hours.

The preceding estimate represents an average across all respondents and reflect variations between institutions based on their size, complexity, and practices. The other federal agencies are responsible for estimating and reporting to OMB the total paperwork burden for the institutions for which they have administrative enforcement authority. They may, but are not required to, use the Federal Reserve's burden estimates.

Because the records would be maintained at state member banks and the notices are not provided to the Federal Reserve, no issue of confidentiality arises under the Freedom of Information Act.

Comments are invited on: a. whether the proposed collection of information is necessary for the proper performance of the Federal Reserve's functions; including whether the information has practical utility; b. the accuracy of the Federal Reserve's estimate of the burden of the proposed information collection, including the cost of compliance; c. ways to enhance the quality, utility, and clarity of the information to be collected; and d. ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology. Comments on the collection of information should be sent to Michelle Long, Federal Reserve Board Clearance Officer, Division of Research and Statistics, Mail Stop 41, Board of Governors of the Federal Reserve System, Washington, DC 20551, with copies of such comments sent to the Office of Management and Budget, Paperwork Reduction Project (7100-0200), Washington, DC 20503.

Text of Proposed Revisions

Certain conventions have been used to highlight the proposed changes to the text of the regulation and staff commentary. New language is shown inside bold-faced arrows, while language that would be deleted is set off with bold-faced brackets. Comments are numbered to comply with **Federal Register** publication rules.

List of Subjects in 12 CFR Part 205

Consumer protection, Electronic fund transfers, Federal Reserve System, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Board proposes to amend 12 CFR part 205 and the Official Staff Commentary, as follows:

PART 205 – ELECTRONIC FUND TRANSFERS (REGULATION E)

1. The authority citation for part 205 would continue to read as follows:

Authority: 15 U.S.C. 1693b.

2. Section 205.16 would be amended by republishing paragraph (b) and revising paragraph (c)(1) as follows:

§ 205.16 Disclosures on Automated Teller Machines

* * * * *

(b) General. An automated teller machine operator that imposes a fee on a consumer for initiating an electronic fund transfer or a balance inquiry shall –

(1) provide notice that a fee will be imposed for providing electronic fund transfer services or a balance inquiry; and

(2) disclose the amount of the fee.

(c) Notice requirement. An automated teller machine operator must comply with the following:

(1) On the machine. Post [the notice required by paragraph (b)(1) of this section] in a prominent and conspicuous location on or at the automated teller machine ► a notice that:

(i) A fee will be imposed for providing electronic fund transfer services or a balance inquiry; or

(ii) A fee may be imposed for providing electronic fund transfer services or a balance inquiry, but this notice may be substituted only if there are circumstances under which a fee will not be imposed for such services ◀; and

(2) Screen or paper notice. Provide the notice required by paragraphs (b)(1) and (b)(2) of this section either by showing it on the screen of the automated teller machine or by providing it on paper, before the consumer is committed to paying a fee.

2. In Supplement I to Part 205, under Section 205.16 – Disclosures at Automated Teller Machines, under 16(b) General, under Paragraph 16(b)(1), paragraph 1. would be revised.

SUPPLEMENT I TO PART 205 – OFFICIAL STAFF INTERPRETATIONS

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Section 205.16 – Disclosures on Automated Teller Machines

1. Specific notices. An ATM operator that imposes a fee for a specific type of transaction -- such as for a cash withdrawal, but not for a balance inquiry, or for some cash withdrawals (such as where the card was issued by a foreign bank or by a card issuer that has entered into a special contractual relationship with the ATM operator regarding surcharges), but not for others -- may provide a general [statement] notice on or at the ATM machine that a fee will or may be imposed for providing EFT services or may specify the type of EFT for which a fee is imposed. If, however, a fee will be imposed in all instances, the notice must state that a fee will be imposed.

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By order of the Board of Governors of the Federal Reserve System, August 19, 2005.

Robert deV. Frierson (signed)
Robert deV. Frierson
Deputy Secretary of the Board