

BURR ALERT

Consumer Financial Protection Bureau Amends Regulation E and Regulation Z

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In late March, the Consumer Financial Protection Bureau ("CFPB") issued final rules amending Regulation E, 12 C.F.R. § 1005.16, which implements the Electronic Fund Transfer Act, 15 U.S.C. § 1693 *et seq.* ("EFTA"), and Regulation Z, 12 C.F.R. § 1026.52(a), which implements the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* ("TILA").

The amendment to Regulation E implements a recent amendment to EFTA, which eliminated the requirement that a fee notice be posted on or at an automated teller machine ("ATM"). The amendment to Regulation Z refines the implementation of section 127(n)(l) of the Credit Card Accountability Responsibility and Disclosure Act of 2009 ("CARD Act") by providing that section 127(n)(l)'s 25 percent fee cap on credit card fees applies only to fees charged during the first year after the date of account opening. Each of these amendments are discussed in detail below.

THE REGULATION E AMENDMENT

When consumers use an ATM not operated by their financial institution, they often pay two fees for a single transaction: a fee to the ATM operator, and a fee to their financial institution. In 1999, Congress amended EFTA to require that ATM fees be disclosed in (1) a notice posted conspicuously "on or at" the ATM, such as in a sticker placed on the machine, and (2) an on-screen or paper notice before the consumer is irrevocably committed to completing the transaction. While the posted notice was only required to disclose the *fact* that the ATM operator was charging a fee, the on-screen or paper notice was required to disclose the *amount* of such fee. The amendment allowed ATM operators five years to implement the on-screen or paper notice requirement.

In 2001, the Board of Governors of the Federal Reserve System (the "Board of Governors") had issued Regulation E to implement the EFTA's ATM disclosure requirements. Consistent with the statute, the regulation required that an ATM operator post a notice "on or at" the ATM and provide an on-screen or paper notice disclosing the amount of the fee. Commenters to the Board of Governors' rulemaking efforts had requested that the "on or at" requirement be eliminated. However, the Board of Governors had responded that it lacked authority to do so, given that the "on or at" requirement was a statutory mandate.

The CFPB republished Regulation E after Congress transferred EFTA rulemaking authority to it in 2011 through passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). As with the Board of Governors' 2001 rulemaking, many industry commenters advocated for removal of the "on or at" requirement. Industry advocates contended that the

requirement provided no benefit because (1) most consumers are aware of fees and (2) the on-screen disclosure provided sufficient notice of a fee. Thus, they argued, the requirement imposed unnecessary litigation and compliance costs upon ATM operators. Consumer advocates disagreed about consumer awareness, and further argued that the CFPB lacked authority to remove the requirement because it was mandated by statute.

While the CFPB was still considering comments, Congress passed legislation, which was signed into law on December 20, 2012, amending section 904(d)(3)(B) of the EFTA to remove the "on or at" requirement. Pursuant to the EFTA amendment, the CFPB issued a final rule on March 26, 2013 amending Regulation E to eliminate the "on or at" requirement. Under Regulation E as amended, ATM operators need only provide an on-screen or paper notice, prior to consummation of the transaction, disclosing the amount of the fee to be charged. The CFPB also deleted Official Comment 16(b)(1)-I, which interpreted the "on or at" language, given that the requirement itself has been removed. The final rule became effective on March 26, 2013.

THE REGULATION Z AMENDMENT

In 2009, Congress amended TILA through passage of the Credit Card Accountability Responsibility and Disclosure Act of 2009 ("CARD Act"), which added section 127(n)(1) to TILA. Section 127(n)(1) states that "[i]f the terms of a credit card account under an open end consumer credit plan require the payment of any fees (other than any late fee, over-the-limit fee, or fee for a payment returned for insufficient funds) by the consumer in the first year during which the account is opened in an aggregate amount in excess of 25 percent of the total amount of credit authorized under the account when the account is opened," then "no payment of any fees (other than any late fee, over-the-limit fee, or fee for a payment returned for insufficient funds) may be made from the credit made available under the terms of the account." 15 U.S.C. 1637(n)(1).

Implementing section 127(n)(1), the Board of Governors issued a final rule on January 12, 2010, which limited the amount of fees a credit card issuer may charge to "25 percent of the credit limit in effect when the account is opened." 12 C.F.R. § 226.52(a). However, on April 8, 2011, the Board of Governors issued another final rule amending § 226.52(a) to apply to fees charged prior to account opening. According to the Board of Governors, credit card issuers were circumventing the intent of the regulation by charging fees prior to account opening that, when combined with first-year fees, exceeding 25 percent of the total amount of credit authorized.

Soon thereafter, a credit card issuer challenged the amendment to § 226.52(a) in federal court, arguing that the Board of Governors exceeded its authority by bringing pre-opening fees within the ambit of the regulation. The court granted the issuer's motion for a preliminary injunction, forestalling the amendment from becoming effective. The day after the lawsuit was filed, TILA rulemaking power was transferred to the CFPB via the Dodd-Frank Act.

In an effort to resolve the credit card issuer's lawsuit, and the ambiguity that it created with respect to Regulation Z, the CFPB issued a proposed rule on April 12, 2012 amending Regulation Z and its Official Interpretations to provide that the 25 percent limit applies only to the first year after account opening. Opponents of the proposed rule argued that the amendment would leave

consumers without sufficient protections. Proponents noted that the proposed rule would more accurately implement the CARD Act and resolve the pending litigation.

While noting that it understood the concerns raised by commenters, the CFPB ultimately issued a final rule amending Regulation Z. The CFPB stated, however, that it would continue to monitor the credit card industry to determine if additional consumer protections are needed with respect to fees.

REFERENCES

1. *Disclosures at Automated Teller Machines (Regulation E)*, FEDERALREGISTER.GOV, <https://www.federalregister.gov/articles/2013/03/26/2013-06861/disclosures-at-automated-teller-machines-regulation-e> (last visited Apr. 8, 2013).
2. *Truth in Lending (Regulation Z)*, FEDERALREGISTER.GOV, <https://www.federalregister.gov/articles/2013/03/28/2013-07066/truth-in-lending-regulation-z> (last visited Apr. 8, 2013).
3. Electronic Fund Transfer Act, 15 U.S.C. § 1693 *et seq.* ("EFTA").
4. Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* ("TILA").
5. Regulation E, 12 C.F.R. § 1005.16.
6. Regulation Z, 12 C.F.R. § 1026.52(a).

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