

FEDERAL RESERVE SYSTEM

12 CFR 205

Regulation E; Docket No. R-1169

Electronic Fund Transfers

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Proposed Rule.

SUMMARY: The Board is proposing to amend Regulation E, which implements the Electronic Fund Transfers Act, and the staff commentary to the regulation. Regulation E would be revised to require disclosures to be “clear and conspicuous” and to define more specifically the standard to provide a more uniform standard among the Board’s regulations. The staff commentary would be revised to include examples of how to meet this standard. Similar proposed revisions to Regulations B, M, Z and DD appear elsewhere in today’s Federal Register. These revisions are intended to help ensure that consumers receive noticeable and understandable information that is required by law in connection with obtaining consumer financial products and services. In addition, consistency among the regulations should facilitate compliance by institutions.

DATES: Comments must be received on or before January 30, 2004.

ADDRESSES: Comments should refer to Docket No. R-1169 and should be mailed to Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, N.W., Washington, D.C. 20551. However, because paper mail in the Washington area and at the Board of Governors is subject to delay, please consider submitting your comments by e-mail to regs.comments@federalreserve.gov, or faxing them to the Office of the Secretary at (202) 452-3819 or 452-3102. Members of the public may inspect comments in Room MP-500 of the Martin Building between 9:00 a.m. and 5:00 p.m. on weekdays pursuant to § 261.12, except as provided in § 261.14, of the Board’s Rules Regarding Availability of Information, 12 CFR 261.12 and 261.14.

FOR FURTHER INFORMATION CONTACT: Daniel Lonergan, Counsel, and Ky Tran-Trong, Senior Attorney, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, at (202) 452-3667 or 452-2412; for users of Telecommunications Device for the Deaf (“TDD”) only, contact (202) 263-4869.

SUPPLEMENTARY INFORMATION:

I. Background

The purpose of the Electronic Fund Transfers Act (EFTA), 15 U.S.C. 1693 et seq., is to provide a basic framework for establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer (EFT) systems. The 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 program. 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 statements; limitations on consumer liability for unauthorized transfers; procedures for error resolution; and certain rights related to preauthorized EFTs. Further, the act and regulation prescribe restrictions on the unsolicited issuance of ATM cards and other access devices. The EFTA is implemented by the Board's Regulation E (12 CFR part 205). An Official Staff Commentary interprets the requirements of Regulation E (12 CFR part 205 (Supp. I)).

II. Proposed Revisions

Section 205.2—Definitions

2(n) Clear and Conspicuous

Section 905(a) of the EFTA requires that disclosures be provided to consumers in readily understandable language. See 15 U.S.C. 1693c(a). The EFTA also requires that certain information about EFTs be “clearly” set forth on periodic statements and receipts from an electronic terminal. See 15 U.S.C. 1693d(a) and (c). This standard is implemented as “clear and readily understandable” in Regulation E. See § 205.4(a)(1).

Consumer financial services and fair lending laws and the Board regulations that implement them contain similar but not identical standards for providing disclosures that consumers will notice and understand. Generally, disclosures must be “clear and conspicuous” under Regulations B (Equal Credit Opportunity), M (Consumer Leasing), Regulation P (Privacy of Consumer Financial Information), Z (Truth in Lending) and DD (Truth in Savings), and “clear and readily understandable” under Regulation E (Electronic Fund Transfers). In interpreting the “clear and conspicuous” standard, the staff commentaries to Regulations B, M and Z provide that disclosures must be “in a reasonably understandable” form; similarly, under Regulation DD disclosures must be in a format that allows consumers “to readily understand the terms of their account.” For purposes of the disclosures provided with credit card solicitations and applications, the commentary to Regulation Z provides more specifically that those disclosures must also be “readily noticeable to the consumer.” In contrast, the Board's Regulation P (Privacy of Consumer Financial Information) defines the “clear and conspicuous” standard to mean that a disclosure is “reasonably understandable and designed to call attention to the nature and significance of the information” in the disclosure. 12 CFR § 216.3(b)(1).

Regulation P also provides a series of examples of how to satisfy the standard. 12 CFR § 216.3(b)(2).

For the reasons set forth below and pursuant to its authority under sections 904(a) and 904(c) of the EFTA, the Board proposes to conform the general disclosure standard under Regulation E to “clear and conspicuous.” Further, to provide consistent guidance on the clear and conspicuous standard among its regulations, the Board is proposing to amend Regulation E by adding a definition for clear and conspicuous in § 205.2(n), consistent with the “clear and conspicuous” definition in Regulation P. The Board believes that the recently implemented standard in Regulation P (65 FR 35162, June 1, 2000), articulates with greater precision than the other regulations the concepts underlying the duty to provide disclosures that consumers will notice and understand. The staff commentary to Regulation E also would be revised to add comments 2(n)-1 and -2, consistent with Regulation P’s examples of how to meet the clear and conspicuous standard. Similar proposed revisions to Regulations B, M, Z and DD appear elsewhere in today’s Federal Register. These revisions are intended to help ensure that consumers receive noticeable and understandable information that is required by law in connection with obtaining consumer financial products and services. In addition, consistency among the regulations should facilitate compliance by institutions.

Additional information may accompany disclosures required under Regulation E. See § 205.4(b). Comment 2(n)-3 further clarifies that the “clear and conspicuous” standard does not prohibit adding other items to the federally required disclosures (such as contractual provisions or state-required disclosures); nor does it prohibit sending promotional material with the disclosures. Proposed comment 2(n)-3 would clarify, however, that the presence of other information may be a factor in determining whether the “clear and conspicuous” standard is met. Generally, segregating federally mandated disclosures from other information is more likely to satisfy the clear and conspicuous standard. A new comment 4(b)-1 would be added to cross reference guidance in proposed comment 2(n)-3.

The Board also proposes to adopt for Regulations B, E, M, Z and DD, guidance concerning type-sizes that are deemed to meet the “clear and conspicuous” standard and those that would likely be too small (this guidance currently applies only to credit card solicitations and applications under Regulation Z). See proposed comment 2(n)-2(ii).

The proposal does not add special format requirements to the regulation where none currently exist. Accordingly, even though the revisions clarify that type size can be one factor to consider in determining whether a disclosure is conspicuous, the proposal would not add a specific type-size requirement.

Section 205.4—General Disclosure Requirements; Jointly Offered Services

4(a)(1) Form of Disclosures

Under Section 905(a) of the EFTA, the terms and conditions of electronic fund transfers (EFTs) involving a consumer’s account must be disclosed in “readily

understandable” language. See 15 U.S.C. 1693c(a). The EFTA also requires that certain information about EFTs be “clearly” set forth on periodic statements and receipts from an electronic terminal. See 15 U.S.C. 1693d(a) and (c). These standards have been implemented as a general disclosure standard of “clear and readily understandable.” See § 205.4(a)(1). The Board proposes to revise that standard to “clear and conspicuous.”

Regarding the standard of “clear” disclosures, the Board believes there is not a significant distinction between the term “readily understandable” as currently contained in section 905(a) of the EFTA and § 205.4(a)(1) of Regulation E and the term “reasonably understandable” as found in the guidance on the “clear” standard in other consumer protection regulations and in proposed § 205.2(n), and with the proposed revision, no substantive difference is intended. Regarding the standard of “conspicuous” disclosures, the Board believes that disclosures provided under the EFTA, like those provided under the other consumer financial services laws administered by the Board, should not only be clear, but also conspicuous, that is, noticeable to consumers to be effective.

The Board is authorized to prescribe regulations that contain provisions that in the judgment of the Board are necessary or proper to effectuate the purposes of the EFTA. See 15 U.S.C. 1693b(a) and (c). Thus, the proposed revisions would ensure that consumers receive disclosures of the terms and conditions of EFTs involving their account in a form that allows them to effectively exercise their rights under the EFTA and Regulation E. The Board proposes to exercise its authority under sections 904(a) and 904(c) of the EFTA to amend § 205.4(a)(1) to provide that disclosures required under Regulation E must be “clear and conspicuous” and consistent with the standard contained in other consumer protection regulations. Comment 4(a)-1 would be revised to conform to the amended disclosure standard. Guidance regarding the “clear and conspicuous” standard for disclosures transmitted by electronic communication will be considered in the context of rulemakings dealing specifically with electronic delivery of disclosures.

III. Form of Comment Letters

Comment letters should refer to Docket No. R-1169 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.

IV. 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.

V. 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. The proposed amendments are not expected to have any significant impact on small entities. A final regulatory flexibility analysis will be conducted after consideration of comments received during the public comment period.

VI. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506; 5 CFR 1320 Appendix A.1), the Board reviewed the rule under the authority delegated to the Board by the Office of Management and Budget. 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.

The collection of information that is revised by this rulemaking is found in 12 CFR part 205. This collection is mandatory (15 U.S.C. 1693 *et seq.*) to evidence compliance with the requirements of Regulation E and the Electronic Fund Transfer Act (EFTA). The respondents and recordkeepers are financial institutions. Institutions are required to retain records for twenty-four months. Regulation E applies to all types of financial institutions, not just state member banks; however, under Paperwork Reduction Act regulations, the Federal Reserve accounts for the burden of paperwork associated with the regulation only for the financial institutions it regulates and that meet the criteria set forth in the regulation. Other agencies account for the paperwork burden on their respective constituencies under this regulation.

The proposed revisions would require disclosures to be provided “clearly and conspicuously.” The proposed revisions would provide financial institutions with a more uniform definition for “clear and conspicuous” disclosures and provide examples of how to satisfy the clear and conspicuous standard. While the proposal would amend Regulation E and the staff commentary, it is expected that these revisions would not increase the paperwork burden of financial institutions. With respect to state member banks, it is estimated that there are 1,289 respondents and recordkeepers. Current annual burden is estimated to be 48,868 hours.

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 on the collection of information should be sent to the Office of Management and Budget, Paperwork Reduction Project (7100-0200), Washington, DC 20503, with copies of such comments sent to Cynthia Ayouch, Federal Reserve Board Clearance Officer, Division of Research and Statistics, Mail Stop 41, Board of Governors of the Federal Reserve System, Washington, DC 20551.

Text of Proposed Revisions

Certain conventions have been used to highlight the proposed revisions. New language is shown inside bold-faced arrows while language that would be deleted is set off with bold-faced brackets.

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 Regulation E, 12 CFR part 205, as set forth below:

PART 205—ELECTRONIC FUND TRANSFERS (REGULATION E)

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

Authority: 15 U.S.C. 1693 et seq.

2. Section 205.2 is amended by adding a new paragraph (n) to read as follows:

§ 205.2 Definitions

For purposes of this part, the following definitions apply:

* * * * *

▶ (n) Clear and conspicuous means that a disclosure is reasonably understandable and designed to call attention to the nature and significance of the information in the disclosure. ◀

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3. Section 205.4 is amended by revising paragraph (a)(1) to read as follows:

§ 205.4 General disclosure requirements; jointly offered services

(a)(1) Form of disclosures. Disclosures required under this part shall be [clear and readily understandable] ▶ clear and conspicuous ◀, in writing, and in a form the consumer may keep. A financial institution may use commonly accepted or [readily understandable] ▶ clear and conspicuous ◀ abbreviations in complying with the disclosure requirements of this part.

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4. In Supplement I to Part 205:

- a. Under Section 205.2—Definitions, a new paragraph title (n) Clear and conspicuous is added, and new paragraphs (n) 1. through (n) 3. are added.
- b. Under Section 205.4—General Disclosure Requirements; Jointly Offered Services, under 4(a) Form of Disclosures, paragraph 1. is revised.
- c. Under Section 205.4—General Disclosure Requirements; Jointly Offered Services, a new paragraph title (b) Additional information; disclosures required by other laws is added, and a new paragraph 1. is added.

SUPPLEMENT I TO PART 205—OFFICIAL STAFF INTERPRETATIONS

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Section 205.2—Definitions

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► 2(n) Clear and conspicuous

1. Reasonably understandable. Examples of disclosures that are reasonably understandable include disclosures that:
- i. Present the information in the disclosure in clear, concise sentences, paragraphs, and sections;
 - ii. Use short explanatory sentences or bullet lists whenever possible;
 - iii. Use definite, concrete, everyday words and active voice whenever possible;
 - iv. Avoid multiple negatives;
 - v. Avoid legal and highly technical business terminology whenever possible; and
 - vi. Avoid explanations that are imprecise and readily subject to different interpretations.
2. Designed to call attention. Examples of disclosures that are designed to call attention to the nature and significance of the information include disclosures that:
- i. Use a plain-language heading to call attention to the disclosure;
 - ii. Use a typeface and type size that are easy to read. Disclosures in 12-point type generally meet this standard. Disclosures printed in less than 12-point type do not automatically violate the standard; however, disclosures in less than 8-point type would likely be too small to satisfy the standard;
 - iii. Provide wide margins and ample line spacing;

iv. Use boldface or italics for key words; and

v. In a document that combines disclosures with other information, use distinctive type size, style, and graphic devices, such as shading or sidebars, to call attention to the disclosures.

3. Other information. Except as otherwise provided, the clear and conspicuous standard does not prohibit adding to the required disclosures such items as contractual provisions, explanations of contract terms, state disclosures, and translations; or sending promotional material with the required disclosures. However, the presence of this other information may be a factor in determining whether the clear and conspicuous standard is met. ◀

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Section 205.4—General Disclosure Requirements; Jointly Offered Services

4(a) Form of Disclosures

1. General. ▶ See § 205.2(n) and accompanying comments. ◀ [Although no particular rules govern type size, number of pages, or the relative conspicuousness of various terms,] The disclosures must be in a [clear and readily understandable] ▶ clear and conspicuous ◀ written form that the consumer may retain. Numbers or codes ▶ are permissible ◀ [are considered readily understandable] if explained elsewhere on the disclosure form.

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▶ 4(b) Additional information; disclosures required by other laws

1. Clear and conspicuous. See comment 2(n)-3. ◀

By order of the Board of Governors of the Federal Reserve System, November 25, 2003.

Jennifer J. Johnson (signed)

Jennifer J. Johnson,
Secretary of the Board