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BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1005

[Docket No. CFPB-2013-0006]

RIN 3170-AA36

Disclosures at Automated Teller Machines (Regulation E)

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Final rule.

SUMMARY: The Bureau of Consumer Financial Protection is amending Regulation E (Electronic Fund Transfers), which implements the Electronic Fund Transfer Act (EFTA), and the official interpretation to the regulation. In December 2012, Congress passed and the President signed legislation amending the EFTA to eliminate a requirement that a fee notice be posted on or at automated teller machines, leaving in place the requirement for a specific fee disclosure to appear on the screen of that machine or on paper issued from the machine. This final rule amends Regulation E to conform to the EFTA amendment.

DATE: This rule is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Joseph Devlin, Counsel, Office of Regulations, Bureau of Consumer Financial Protection, 1700 G Street, NW, Washington, D.C. 20552, at (202) 435-7700.

SUPPLEMENTARY INFORMATION:

I. Background

ATM Fees

Consumers using automated teller machines¹ (ATMs) not provided by their financial institution (foreign ATMs) to withdraw money or check balances will typically pay two fees for a single transaction. First, the operator of the foreign ATM (which may or may not be a financial institution) will usually impose a charge. A recent survey indicates that the average ATM charge imposed by foreign ATMs is \$2.40.² Second, the consumer's own financial institution also may impose a charge for using a foreign ATM. That charge averages \$1.40, according to the same survey. Thus, the average total charge for using a foreign ATM, combining the foreign ATM fee and the fee charged by the consumer's own financial institution, is \$3.80. The average foreign ATM charge has risen steadily since 2004, when the charge was less than \$1.50.

The Electronic Fund Transfer Act

Congress amended the Electronic Fund Transfer Act (EFTA) in 1999 to require ATM fee disclosures to be both (1) posted "in a prominent and conspicuous location on or at the [ATM]," and (2) provided on the screen or on a paper notice issued from the ATM. As amended, section 904(d)(3) of the EFTA stated that the on-screen notice had to include the specific amount of the fee the consumer would be charged by the foreign ATM operator, but the notice posted "on or at" the machine only had to disclose "the fact

¹ The new statutory amendment in Public Law Number 112-216 uses the term "automatic teller machine" in the title of the legislation, though the Electronic Fund Transfer Act and Regulation E use the term "automated teller machine." The Bureau considers the two terms to be synonymous.

² Claes Bell, *ATM fees march upward in 2011*, Bankrate.com (Sept. 26, 2011), <http://www.bankrate.com/finance/checking/atm-fees-march-upward-in-2011.aspx>. Fee information updated in 2012 is also available from Bankrate.com, but it is presented by metropolitan area, not as a nationwide average. See <http://www.bankrate.com/finance/checking/checking-account-fees.aspx>.

that a fee is imposed by such operator for providing the service.” Section 904(d)(3)(C) of the EFTA barred ATM operators from charging a fee if the disclosures did not occur.

The “on or at” notice usually involved a sticker placed on the machine by the ATM operator. The on-screen or paper notice was required to be given “after the transaction is initiated and before the consumer is irrevocably committed to completing the transaction.” The statute allowed operators five years to implement the technology needed to disclose on the screen. The statute did not, however, provide that once the five years elapsed operators could cease providing the separate notice “on or at” the machine.

In a private cause of action brought by a consumer for failure to provide the required notices, an ATM operator could be liable for actual damages, statutory damages for individual or class actions, and costs and attorney’s fees.³ However, in EFTA section 910(d), Congress also established a broad liability protection for the ATM operator if the ATM notice “on or at” the machine were damaged or removed from the machine by someone else.⁴ Thus, the statute provides that an operator is not liable if it posted the “on or at” notice and someone else removed or damaged it.⁵

Implementation of the 1999 Amendment

The Board of Governors of the Federal Reserve System (Board) issued regulations to implement the ATM disclosure requirements in 2001 as part of Regulation E, which implements EFTA. Those regulations, which the CFPB republished in 2011 after authority to implement Regulation E transferred to the Bureau, provide at

³ 15 U.S.C. 1693m(a); EFTA section 916.

⁴ 15 U.S.C. 1693h(d), as adopted by section 705 of the Gramm-Leach Bliley Act, Public Law 106-102 (1999).

⁵ The Conference Report reiterates this provision: “ATM operators are exempt from liability if properly placed notices on the machines are subsequently removed, damaged, or altered by anyone other than the ATM operator.” H.R. Rep. No. 106-434, at 178 (1999) (Conf. Rep.).

12 CFR 1005.16(c) that an ATM operator must “[p]ost in a prominent and conspicuous location on or at the automated teller machine a notice that” a fee will or may be imposed “for providing electronic fund transfer services or for a balance inquiry.” The regulation further implemented the statute by requiring an on-screen or paper notice that includes the amount of the fee and is provided before the consumer is committed to paying a fee.

Consistent with the statute prior to the December 2012 amendment necessitating this rule change, the regulation does not require that the “on or at” notice disclose the amount of the fee. Also, operators are allowed to disclose on or at the machine that a fee “may” be imposed—rather than “will” be imposed—if there are circumstances in which an ATM fee may not be charged. The Bureau believes that “on or at” notices generally use the word “may.”

The Official Interpretation to Regulation E, in supplement I to part 1005, includes Comment 16(b)-1, which explains the permissibility of the use of the word “may” in the “on or at” the machine disclosure, and makes clear that an ATM operator may specify the type of service for which a fee will or may apply.

In the Board’s initial rulemaking implementing the 1999 amendments to the EFTA, some commenters requested that the Board eliminate the “on or at” notice requirement. The Board, however, responded that it lacked the authority to do so: “Several commenters requested action outside the scope of the Board’s authority, such as deleting the statutory requirement to post a sign about fees at the ATM as unnecessary and burdensome or prohibiting ATM surcharges.” 66 FR 13409, 13410 (March 6, 2001).

The Bureau’s Streamlining Request for Information

In 2011, rule-writing authority over the EFTA was transferred to the Bureau of Consumer Financial Protection (Bureau) by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). Public Law 111-203, sec. 1061(b)(1), 124 Stat. 1376 (2010). Shortly after the transfer, the Bureau was made aware of long-standing concerns that the “on or at” notice requirement provides little or no benefit to consumers and is the subject of costly litigation alleging that the “on or at” notice was not properly posted. Pursuant to those concerns, the Bureau sought public comment on the advisability of removing this requirement in its Streamlining Inherited Regulations Request for Information (Streamlining RFI).⁶ Industry trade associations asked the Bureau to remove the requirement if it was within its authority to do so or, if not, to clarify publicly that it lacked such authority. Many individual banks and credit unions also asked the Bureau to remove the requirement. Many of the strongly negative comments about the requirement were from small entities, including many small ATM operators. An association of state bank regulators and an individual state banking division also favored removing the requirement.

Industry commenters argued that: (1) the requirement does not benefit consumers because almost all consumers know that a fee will be charged, and the on-screen disclosure provides sufficient notice of the fee and amount before the transaction takes place; (2) vigilant compliance with the provision adds to costs; (3) the litigation over the provision is costly and threatens the existence of some small operators, potentially reducing ATM availability for consumers; and (4) some of the “on or at” notices are removed in order to support litigation, and the provision providing liability protection is not sufficient because of evidentiary problems.

⁶ 76 FR 75825 (Dec. 5, 2011). This was one of many issues on which the RFI solicited comment.

In contrast, a joint letter of several leading consumer and community groups opposed removing the requirement. In addition, four national consumer groups wrote to Congress opposing legislation to remove the requirement. The consumer groups proposed instead that the Bureau clarify the statutory provision that gives ATM operators immunity from liability in certain cases. An attorney who has brought cases against banks wrote two comment letters to the Bureau in support of the requirement.

The consumer advocates argued that: (1) the Bureau has no authority to remove the requirement without Congressional action; (2) some consumers are unaware that a foreign ATM will charge a fee, and they will be less likely to forgo a transaction they have almost completed; (3) the “on or at” notice may be the only indication a consumer gets of the potential fee charged by the consumer’s own financial institution; and (4) ATM operators who are the subject of litigation have violated the law.

The December 2012 Statutory Amendment

While the Bureau was considering this issue, legislation amending the relevant provision of the EFTA passed Congress and was signed into law on December 20, 2012 (December 2012 Legislation). Public Law 112-216. The legislation amends only the specific provision, at EFTA section 904(d)(3)(B), addressing the ATM fee disclosures, deleting the “on or at” requirement and some obsolete transitional language. The on-screen or paper disclosure requirement remains unchanged.

II. Legal Authority

The Bureau is issuing this final rule pursuant to its authority under EFTA and the Dodd-Frank Act. Effective July 21, 2011, section 1061 of the Dodd-Frank Act transferred to the Bureau the “consumer financial protection functions” previously vested

in certain other Federal agencies. The term “consumer financial protection functions” is defined to include “all authority to prescribe rules or issue orders or guidelines pursuant to any Federal consumer financial law, including performing appropriate functions to promulgate and review such rules, orders, and guidelines.”⁷ EFTA is a Federal consumer financial law.⁸ Accordingly, effective July 21, 2011, except with respect to persons excluded from the Bureau’s rulemaking authority by section 1029 of the Dodd-Frank Act, the authority of the Board to issue regulations pursuant to EFTA transferred to the Bureau.

EFTA, as amended by the Dodd-Frank Act, authorizes the Bureau to “prescribe rules to carry out the purposes of [EFTA].” Public Law 111-203, sec. 1084(3); 15 U.S.C. 1693b(a). Section 904(d)(3)⁹ of EFTA, as amended by Dodd-Frank Act section 1084(1), requires those rules to mandate specific fee disclosures at ATMs.

III. Summary of the Final Rule

The December 2012 Legislation deletes from the EFTA the requirement that a fee notice be posted “on or at” an ATM. The Bureau, therefore, is issuing a final rule conforming Regulation E to the statutory amendment eliminating this requirement. Section 1005.16 of Regulation E is now amended by deleting the language requiring that disclosure. ATM operators will now only have to provide the on-screen or paper disclosure, which includes the amount of the fee to be charged and is provided before the consumer is committed to the transaction.

⁷ Public Law 111-203, sec. 1061(a)(1) (2010). Effective on the designated transfer date, the Bureau was also granted “all powers and duties” vested in each of the Federal agencies, relating to the consumer financial protection functions, on the day before the designated transfer date. *Id.* sec. 1061(b).

⁸ Public Law 111-203, sec. 1002(14) (defining “Federal consumer financial law” to include the “enumerated consumer laws”); *id.* Sec. 1002(12) (defining “enumerated consumer laws” to include EFTA).

⁹ 15 U.S.C. 1693(d)(3).

In addition to the deletion of the rule language requiring the “on or at” the machine disclosure, the Bureau is deleting Official Comment 16(b)(1)-1, which interpreted that requirement in regard to the permissible use of the word “may” in the disclosure, as well as the use of more specific language in making the “on or at” the machine disclosure. Because the requirement to which the comment pertains has been eliminated, there is no longer a need for this interpretation.

IV. Section 1022(b)(2) of the Dodd-Frank Act

In developing the final rule, the Bureau has considered potential benefits, costs, and impacts,¹⁰ and has consulted or offered to consult with the prudential regulators and the Federal Trade Commission, including regarding consistency with any prudential, market, or systemic objectives administered by such agencies.

The final rule deletes a requirement that an ATM operator post a notice on or at an ATM machine informing consumers that a fee will or may be charged for use of the machine. Because this final rule merely conforms a regulation to a mandatory statutory amendment, and does not involve any exercise of agency discretion, the Bureau does not believe that the rule itself will have any benefits, costs, or impacts beyond those caused by the statute. In addition, the Bureau does not expect the final rule to cause a reduction in consumer access to credit. However, for informational purposes, the following

¹⁰ Specifically, section 1022(b)(2)(A) calls for the Bureau to consider the potential benefits and costs of a regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services; the impact on depository institutions and credit unions with \$10 billion or less in total assets as described in section 1026 of the Act; and the impact on consumers in rural areas. The manner and extent to which the provisions of section 1022(b)(2) apply to a rule of this kind are unclear. Nevertheless, to inform this rulemaking more fully, the Bureau performed the described analyses and consultations.

discussion considers the benefits, costs, and impacts of the statutory amendment being implemented.

The Bureau believes that the benefits of the “on or at” notice requirement for consumers were likely more significant when it was adopted than they are today. The Bureau understands that when the requirement was enacted in 1999, ATMs did not always disclose fees on-screen. That is presumably why the statute allowed the industry five years to come into compliance with the on-screen requirement. Thus, for several years, the “on or at” notice might be the only fee disclosure a consumer would receive at the ATM.

Now, however, the Bureau believes that awareness that foreign ATMs charge a fee is already widespread, and thus the “on or at” notice provides little benefit to consumers with respect to foreign ATM fees.¹¹ Moreover, the “on or at” notice contains much less useful information about the foreign ATM fee than the on-screen disclosure. The “on or at” notice does not tell the consumer the amount of the fee or whether or not a fee will be charged—it usually only states that a fee “may” be charged. For these reasons, the Bureau considers the consumer benefit from the requirement being eliminated to be minimal.

In contrast, the Bureau considers the on-screen disclosure of the foreign fee amount and the screen’s prompt requiring the consumer to agree to the fee to be a more

¹¹ The Bureau found only one study of awareness, which is over a decade old. A 2000 consumer survey commissioned by an ATM network (PULSE) found that 86 percent of consumers surveyed said they were adequately informed of charges they sometimes pay to withdraw cash from ATMs. The PULSE network, Pulsations (May 2000). Moreover, 96 percent of consumers who said they paid a surcharge in the last 14 days reported feeling that ATM fee disclosures were sufficient. The Bureau believes this survey has limited value since respondents may have felt disclosures were adequate but have been ignorant of the fees. Moreover, it is possible that consumers claimed awareness in part because they had read the notice “on or at” the ATM. However, the Bureau believes that whatever the level of awareness of foreign institution fees, the level will not drop significantly when the notice on or at the ATM is removed. The on-screen disclosure is clear and pointed and requires the consumer affirmatively to accept the fee before proceeding.

effective means of disclosure. Although the consumer must begin the transaction before receiving this disclosure, the disclosure must occur before the transaction is completed, and the consumer then has the necessary price information before purchasing the service. The Bureau understands that fees at foreign ATMs have been increasing, so a disclosure of the specific price before purchase appears to be the most effective way to empower consumers in regard to this type of transaction. This consumer benefit will continue undisturbed when the “on or at” the machine disclosure is eliminated.

In regard to a consumer’s *own* financial institution charging a fee for using a foreign ATM, neither the regulation nor the statute currently requires the ATM operator to disclose the potential existence or amount of that fee, of which the foreign ATM operator has no knowledge. Rather, the consumer’s financial institution is required to disclose the fee when the account is opened and on a monthly statement when the fee is charged.¹² Also, the ongoing nature of consumers’ relationships with their own financial institutions should help to discipline fee pricing better than a disclosure given as part of the one-off transactions that often occur with foreign ATMs. Accordingly, the ATM fee charged by consumers’ own financial institutions for use of foreign ATMs appears to be less potentially harmful for consumers in the first place, and the disclosure that is being eliminated provided minimal consumer benefit in regard to it.

The compliance burden of the disclosure being eliminated appears not to have been very large. Costs included purchase of stickers or other disclosure means, personnel costs for placing and replacing stickers or other disclosure means, and monitoring whether or not the disclosures remained present and undamaged. Because the machines

¹² 12 CFR 1005.7(b)(5), 12 CFR 1005.9(b)(3).

would need to be serviced and stocked regularly, it is likely that little extra travel or work time was needed. However, there was some burden, which is now being eliminated.

The statutory amendment and this conforming final rule have no unique impact on insured depository institutions or insured credit unions with \$10 billion or less in assets as described in section 1026 of the Dodd-Frank Act, nor does the amendment or this rule have a unique impact on rural consumers.

V. Administrative Procedure Act

Under the Administrative Procedure Act (APA), notice and opportunity for public comment are not required if the Bureau finds that notice and public comment are impracticable, unnecessary, or contrary to the public interest. 5 U.S.C. 553(b)(B).

Pursuant to this final rule, 12 CFR 1005.16 is amended to conform to a statutory change. The Bureau finds there is good cause under APA section 553 to issue this amendment to Regulation E as a final rule without advance notice and public comment because “notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”

Because the December 2012 Legislation mandates the elimination of the “on or at” the machine disclosure requirement, notice-and-comment procedures on this rule are unnecessary. Any delay in conforming the regulation to Congress’s mandate as a result of such procedures would perpetuate inconsistency and confusion contrary to the public interest. Moreover, the Bureau is already informed as to the major concerns of stakeholders in this issue through the public comments received in response to the Streamlining RFI. For these reasons, the Bureau has determined that publishing a notice

of proposed rulemaking and providing opportunity for public comment are unnecessary and contrary to the public interest. The Bureau adopts the amendment in final form.

Further, under section 553(d) of the APA, the required publication or service of a substantive rule must be made not less than 30 days before its effective date except for certain instances, including when a substantive rule grants or recognizes an exemption or relieves a restriction. 5 U.S.C. 553(d). As this rule relieves a disclosure requirement and restriction on charging ATM fees, and is therefore a substantive rule that relieves requirements and restrictions, the Bureau is publishing this final rule less than 30 days before its effective date. As it is in the public interest to make the regulation conform to the statute as soon as possible, the Bureau is making the final rule effective immediately upon publication in the **Federal Register**.

VI. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) does not apply to a rulemaking where general notice of proposed rulemaking is not required. 5 U.S.C. 603 and 604. As noted previously, the Bureau has determined that it is unnecessary to publish a general notice of proposed rulemaking for this final rule. Accordingly the RFA's requirements relating to an initial and final regulatory flexibility analysis do not apply.

VII. Paperwork Reduction Act

According to the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.*, and notwithstanding any other provisions of law, the Bureau may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a valid Office of Management and Budget (OMB) control number. The collection of information related to this final rule has been previously reviewed and

approved by the Office of Management and Budget (OMB) in accordance with the PRA, 44 U.S.C. 3507(d), and assigned OMB Control Number 3170-0014 (Expiration Date 03/31/15). The Bureau determined that this final rule would not impose any new recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would constitute collections of information requiring approval under the PRA. This final rule revises a third-party disclosure requirement currently approved under the aforementioned OMB control number by eliminating the requirement that ATMs have an “on or at” notice posted disclosing that a consumer will or may be charged a fee. The Bureau has filed a no material non-substantive change request with OMB requesting that this third-party disclosure requirement be moved from OMB control number 3170-0014.

List of Subjects in 12 CFR Part 1005

Consumer protection, Electronic funds transfers, Reporting and recordkeeping requirements, Automated teller machines.

Authority and Issuance

For the reasons set forth above, the Bureau is amending Regulation E, 12 CFR part 1005, as set forth below:

PART 1005 – ELECTRONIC FUND TRANSFERS (REGULATION E)

1. The authority citation for Part 1005 continues to read as follows:

Authority: 12 U.S.C. 5512, 5581; 15 U.S.C. 1693b.

2. Amend § 1005.16 by revising paragraphs (b) through (d) to read as follows:

§ 1005.16 Disclosures at 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 must provide a notice that a fee will be imposed for providing electronic fund transfer services or a balance inquiry that discloses the amount of the fee.

(c) *Notice requirement.* An automated teller machine operator must provide the notice required by paragraph (b) 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.

(d) *Imposition of fee.* An automated teller machine operator may impose a fee on a consumer for initiating an electronic fund transfer or a balance inquiry only if:

(1) The consumer is provided the notice required under paragraph (c) of this section, and

(2) The consumer elects to continue the transaction or inquiry after receiving such notice.

Supplement I to Part 1005 [Amended]

3. In Supplement I to Part 1005, remove Section 1005.16.

Dated: March 20, 2013.

Richard Cordray,

Director, Bureau of Consumer Financial Protection.

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