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By PDF and by U.S. First Class Mail

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

Re: Regulation E-Docket Number R-1343

Dear Ms. Johnson:

This letter is submitted on behalf of Wells Fargo & Company and its banking affiliates, including Wells Fargo Bank, N.A., Wells Fargo Financial National Bank, and Wells Fargo Financial Bank (collectively, "Wells Fargo"),[1] in response to the proposed rule (the "Proposed Rule") issued by the Board of Governors of the Federal Reserve System (the "Board") to provide further clarification to the final rule[2] (the "Final Rule") issued by the Board on November 19, 2009, regarding overdraft services provided to consumers under Regulation E.[3]

Wells Fargo is a diversified financial services company with $1.3 trillion in assets, providing banking, insurance, investments, mortgage, and consumer financial services through more than 10,000 branch offices, over 12,000 automated teller machines ("ATM(s)"), and the Internet (wellsfargo.com) across North America and the international marketplace.

Wells Fargo appreciates the opportunity to comment and respectfully requests that the Board consider adopting the suggestions set forth herein.

I. Background to the Proposed Rule. On November 19, 2009, the Board published the Final Rule amending Regulation E. The Final Rule limits the ability of financial institutions to assess overdraft fees for paying ATM and one-time debit card transactions overdrawing a consumer's account, unless the consumer affirmatively consents, or opts in, to the institution's

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[1] Effective March 20, 2010, Wells Fargo Bank, N.A., is a successor-in-interest to Wachovia Bank, N.A., and Wachovia Bank Delaware, N.A.
[2] 74 Fed.Reg. 59003, November 17, 2009.

payment of overdrafts for those types of transactions. The Final Rule has a mandatory compliance date of July 1, 2010.[4] Under the Proposed Rule, the Board seeks to amend Regulation E and the official staff interpretations[5] thereto to clarify certain aspects of the Final Rule.

II. Wells Fargo's comments. Wells Fargo hereby submits the following in response to the Proposed Rule.

A. Consent and confirmation involving multiple accounts. While neither the Final Rule nor the Proposed Rule directly addresses this specific topic, we understand that the Board has opined through its officials that each affirmative written consent[6] secured by a financial institution using the model consent form A-9, Model Consent Form for Overdraft Services (§ 205.17)[7] (the "Model Form"), must be separately provided by a consumer for each of the consumer's accounts. In short, a written consent is limited to one account per consent. Implicit in this requirement is that the confirmation of the consent[8] sent by the financial institution must also be individually provided to a consumer.

We urge the Board to consider permitting multiple accounts per consent to facilitate the opt in process. While the Board may not have formally opined on this topic, we further urge the Board to permit a single confirmation to confirm a consumer's affirmative consent to multiple accounts. Additionally, we encourage the Board to consider providing an official staff interpretation to endorse these practices so that these points are clarified to all financial institutions. No apparent material policy consideration is advanced by requiring a separate consent and confirmation for each account. If a consumer writes multiple account numbers on a single Model Form, the intent of that consumer is clear: Those accounts are intended to be covered by the written consent. Additionally, as a practical matter, in instances where a consumer may maintain multiple accounts, the consumer may write multiple account numbers

[3] 12 C.F.R. Part 205.
[4] 74 Fed.Reg. p. 59033.
[5] Regulation E, Supplement I.
[6] Regulation E § 205.17(b)(1)(iii).
[7] Regulation E, Appendix A, Appendix A-9 Model Consent Form for Overdraft Services (§ 205.17).

even if the Model Form provided to the consumer by the financial institution has a space for just a single account number and even if the financial institution explicitly directs the consumer to provide one account number per Model Form. In such a situation, if the consent is not valid for *all* designated accounts, it cannot be valid for *any* of the designated accounts. Consequently, where multiple accounts are identified on a single form received from a consumer, if the institution is not permitted to accept the consumer's written statement as consent with respect to all designated accounts, the institution will be forced to reject the consumer's consent with respect to all of the accounts. Such a result would clearly be inconsistent with any reasonable understanding of the consumer's wishes.

Furthermore, regardless of whether the Board agrees with the proposal to permit multiple accounts to be covered by a single consent, we also urge the Board to permit corresponding confirmations thereof to be provided within a single confirmation. Whether the consent and confirmation cover a single account or two or more accounts, so long as those accounts are specifically and clearly identified and readily understandable by consumers,[9] consumers and financial institutions will benefit by the reduction in duplicative, voluminous records. Consumers and financial institutions will be able to look conveniently to a single record to refer to the granted consents and transmitted confirmations. Such a single record will facilitate recordkeeping by both financial institutions[10] and consumers. The clutter of multiple records may be cleverly avoided.

In the event the Board agrees that a consent provided by a consumer and its corresponding confirmation may contain multiple accounts, we suggest that this view be set forth in an official staff interpretation to Regulation E to provide authority for all financial institutions.

In the unfortunate event the Board confirms the informal requirement that the consent and its corresponding confirmation be limited to a single account, we recommend that such requirement be memorialized through an official staff interpretation to Regulation E so that it is

[8] Regulation E § 205.17(b)(1)(iv).
[9] Regulation E § 205.4(a)(1) requiring that disclosures under this part "...be clear and readily understandable...."
[10] Regulation E § 205.13(b).

clear to all financial institutions as well. While we do not agree with this requirement, by providing authority for this requirement through an official staff interpretation, all financial institutions will be alerted to it.

Further, even if the Board requires that the consent be limited to a single account, we seek clarification as to whether a consent containing multiple accounts provided by a consumer may be cured through the financial institution sending a separate confirmation[11] for each account. By providing separate confirmations for each account, the financial institution is making it abundantly clear to the consumer that specific, multiple accounts are subject to the originally provided consent. If the Board agrees to this method to cure a failure to satisfy the single consent per account requirement (in the event the Board makes this a requirement under the final rule to be amended under the Proposed Rule), we recommend again that this method be memorialized through an official staff interpretation thereto.

Amplifying the discussion above which centers on a paper-based consent, the ambiguity about the consent and confirmation process involving multiple accounts is highlighted when other channels of communication are at play, particularly if the Board adopts the requirement that a single consent and confirmation are required per consumer account.

By way of illustration, set forth below is an exploration of this issue, using such channels.

1. Telephone discussion or interactive voice response ("IVR"). May a consumer provide an affirmative consent to multiple accounts during a single telephone call or IVR session, provided each consent is separately secured by a financial institution? Just as a consumer may provide a consent to multiple accounts during a face-to-face session, we presume that a consumer may provide an affirmative consent to multiple accounts during a single telephone conversation or IVR session. Imagine an unhappy consumer asked to hang up a call and redial, as the financial institution is limited to one consent per telephone call or IVR session.

2. Internet consent. May a consumer provide an affirmative consent to multiple accounts on a single screen accessed by the consumer on a financial institution's Web site by means of the Internet? If the Board remains firm in its requirement that a single consent is necessary for each account, it is unclear to us as to the manner in which this requirement would apply on the Internet. We seek clarification as to whether a single screen may be used by a financial institution to permit a consumer to grant the consent to multiple accounts or whether a new, separate screen is necessary for each consent. We urge that the Board consider allowing a bank to provide a drop-down menu with the consumer's accounts where the consumer can simply click to select the accounts that are subject to the consent.

B. Consent and confirmation provided electronically. Under the Final Rule, a consumer may elect to receive a consent and confirmation electronically.[12] However, if the consent or confirmation is provided electronically, such as on an ATM screen, does a financial institution have an obligation to provide the consent and confirmation in a form that the consumer may keep, by printing the consent and confirmation?[13]

In the event the Board embraces the requirement that the consumer is entitled to a written consent and confirmation, even at an ATM, may a financial institution discharge this regulatory obligation by sending them through an email attachment?

C. Modifications and additions to the Model Form. Regulation E provides that the notice required to be provided by a financial institution to secure a consumer's consent must be substantially similar to the Model Form.[14] While Regulation E permits certain modifications and additions to the Model Form,[15] the following modification and addition are not specifically addressed:[16]

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[11] Regulation E § 205.17(b)((1)(iv).
[12] Regulation E § 205.17(b)(1)(i) and (iv).
[13] See Regulation E § 205.4(a)(1) requiring generally that disclosures mandated under this part be in a form a consumer may keep.
[14] Regulation E § 205.17(d).
[15] Regulation E § 205.17(d)(6).
[16] While some of the responses solicited from the Board may appear transparent, we beg the Board's indulgence due to the prescriptive and restrictive language of Regulation E §§ 205.17(d) and 205.17(d)(6) and the plain language within the Model Form.

1. Distinction between authorization and payment. The Model Form provides the following:

> We do not authorize and pay overdrafts for the following types of transactions unless you ask us to (see below) (emphasis in original):

Regrettably, this statement is inherently misleading. A consumer may conclude reasonably that overdrafts will never occur in connection with an ATM or one-time debit card transaction, unless the consumer has opted into the overdraft service offered by a financial institution. This conclusion is plainly incorrect. A financial institution may be forced to create an overdraft in connection with such types of transactions even if the consumer has not opted in and nothing within the Final Rule would preclude the payment of such transactions by that financial institution.

For example, with regard to an authorized one-time debit card transaction where a financial institution in good faith believed a consumer had sufficient funds to cover that transaction at the time of the authorization, intervening transactions may reduce available funds in an account, causing the debit card transaction to settle against insufficient funds, notwithstanding the authorization against available funds. While the Final Rule would prohibit the assessment of an overdraft fee for that transaction, the overdraft would nevertheless post and the financial institution may be accountable to the merchant granted the original authorization. The concept of authorization vis-à-vis payment (or settlement) of debit card transactions is completely omitted from the Model Form. Indeed, the term "authorize" does not appear solely in the Model Form; the terms "authorize and pay" appear, as above, leading a consumer to believe that this authorization and payment process is a singular, seamless process.

This ambiguous flaw in the Model Form is such that we strongly urge the Board to cure it. While we could implement modifications or additions to the Model Form to mitigate this ambiguity, we would so implement at our peril due to the prescriptions and restrictions within the Final Rule detailed above. Due to such prescriptions and restrictions, we petition the Board

to change this language in the Model Form to "may not" or "might not" in lieu of "do not."[17] This serious ambiguity in the Model Form requires the Board to address it as a service to all financial institutions.

2. The opt out box. The Model Form has the following option provided to a consumer:

> ____ I do not want [Institution Name] to authorize and pay overdrafts on my ATM and everyday debit card transactions.

While we understand the Board has informally advised financial institutions that they may elect to strike this option from the Model Form, that modification is not expressly recognized under Regulation E or an accompanying official staff interpretation. We view the opt out box as confusing to a consumer as the Model Form itself stipulates that a consumer may authorize a financial institution to pay overdrafts on ATM and everyday debit card transactions by completing the Model Form and mailing it or presenting it to the financial institution. The inclusion of the opt out option within the Model Form is thus inconsistent with those instructions, leaving a consumer confused and a financial institution with the undesirable task of fielding incoming inquiries. Additionally, what if a consumer checks both options, the opt in and the opt out options?

We recognize that the Board may have intended that the opt out option afford a consumer a means to opt out subsequent to opting in; however, this meritorious goal is overshadowed by the confusion generated by this option.

We recommend that financial institutions be afforded an option to strike the opt out language within the Model Form and that this option be recognized in Regulation E § 205.17(d)(6) or in an official staff interpretation thereto.[18]

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[17] Note that a similar issue is surfaced under Regulation E § 205.17(d)(6) where the following is provided:

> After August 15, 2010, we will not authorize and pay overdrafts for the following types of transactions unless you ask us to (see below).

Due to the analysis above, we suggest superseding the phrase "will not" with "may not" or "might not."

[18] 74 Fed.Reg. p. 59042 would suggest this result by providing:

3. Tracking information. By way of illustration, at the bottom of the Model Form, a financial institution may elect to seek tracking information, such as the name and telephone number of the banker; the date; the branch office name or number; or other tracking information. Given the restrictive language of Regulation E § 205.17(d) and the limited modifications in Regulation E § 205.17(d)(6), we seek confirmation through changes to the latter or through an official staff interpretation that such tracking information may be gathered through the Model Form.

4. Executing the Model Form. The Model Form at the bottoms provides "Printed Name." We trust that a consumer may merely sign the consumer's name without compromising the legal effectiveness of a consent.[19] We further trust that a consumer may be asked to sign the Model Form by a financial institution.[20] An official staff interpretation to those effects would confirm that understanding.

5. Overdraft protection plans. Regulation E § 205.17(d)(5) provides that within the Model Form if a financial institution offers a line of credit subject to Regulation Z[21] "...to cover overdrafts, the institution must state that fact." (Emphasis supplied.) Inasmuch as the Model Form merely references a linked savings account as an example of an overdraft protection plan and inasmuch as a linked line of credit is not a permissible modification or addition to the Model Form under Regulation E § 205.17(d)(6), we trust that including the line of credit within the overdraft protection plan discussion within the Model Form is a permissible addition. A change to Regulation E § 206.17(d)(6) or an official staff interpretation thereto would be of assistance.

To facilitate consumer understanding, an institution may, but is not required, to provide a signature line or check box where the consumer can indicate that they decline to opt in. (Emphasis supplied.)

[19] The right of a financial institution to require a consumer to sign the Model Form appears to be confirmed at 74 Fed.Reg. page 59042 under the following:

The institution could require the consumer, at account opening, to sign or check a box on a form (consistent with comment 17(b)-6, discussed below) indicating whether or not the consumer affirmatively consents at account opening. (Emphasis supplied.)

[20] *Ibid.*

[21] 12 C.F.R. Part 226.

6. The consumer's preference in the Model Form. With regard to the Model Form, in addition to providing it as a standalone disclosure, we are considering providing it within a segregated location in a consumer account agreement provided to consumers at the time they open a new deposit account on and after July 1, 2010. For that purpose, we are entertaining striking the language below the dotted line at the bottom indicating a consumer's preference. We would only provide a telephone number or Web site after the question "What if I want [institution's name] to authorize and pay overdrafts on my ATM and everyday debit card transactions?," as follows:

> If you also want us to authorize and pay overdrafts on ATM and everyday debit card transactions, call [telephone number] or visit [Web site].

In sum, we are considering striking the options (below the dotted line) at the bottom of the Model Form because we do not wish to encourage a consumer to tear out the Model Form from the consumer account agreement and deliver or mail it to us. We want to treat the Model Form, as amended above, principally as a disclosure to consumers of our overdraft service. While the consumer will have available the entire Model Form at account opening (separately and along with the Model Form within the account agreement) to complete for us in the event the consumer wishes to opt in at account opening, we wish to be able to leverage the previous provisioning of the Model Form through the consumer account agreement when and if the consumer calls us later to grant consent over the telephone or the Internet.[22]

Under Regulation E, Supplement I-Official Staff Interpretations, Section 205.17-Requirements for Overdraft Services, 17(b) Opt-in Requirement, Comments 4(ii) and 4(iii), telephone and Web site options are set forth.[23] Accordingly, because a consumer would have

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[22]Even in an online session, we may elect to leverage the previous provisioning of the Model Form in writing through the account agreement when we secure an opt in through this channel.

[23]Under Regulation E, Supplement I-Official Staff Interpretations, Section 205.17-Requirements for Overdraft Services, 17(b) Opt-in Requirement, Comments 4(ii) and 4(iii), the telephone and Web site options to consent are set forth:

> 4. Reasonable opportunity to provide affirmative consent. A financial institution provides a consumer with a reasonable opportunity to provide affirmative consent when, among other things, it provides reasonable methods by which the consumer may affirmatively consent. A financial institution provides such reasonable methods, if-

been provided the Model Form in writing at account opening (in an amended format through the consumer account agreement), we trust we may rely on that prior provisioning of the Form when and if a consumer subsequently elects to opt in by telephone or online pursuant to the official staff interpretation cited above.[24] Through the consumer account agreement, we would have in writing provided the Model Form in advance to the consumer in satisfaction of Regulation E § 205.17(b)(1)(i).

We are nevertheless concerned about the striking of the options (below the dotted line) in the Model Form because it is not expressly a permissible change under Regulation E § 205.17(d)(6). The prescriptive content of this provision causes us to pause. We are left with the question as to whether the Model Form, as amended in the fashion described above, is *substantially similar* to the mandated form.[25] That is the question we wish to posit with the Board.

If the Board is of the view that the change to the Model Form as detailed above is permissible, a staff interpretation to that effect would be instructive. If the Board is of the view that the change above is not permissible, a staff interpretation to that effect would also provide guidance to us as well.

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i. *By mail.* The institution provides a form for the consumer to fill out and mail to affirmatively consent to the service.

ii. *By telephone.* The institution provides a readily-available telephone line that consumers may call to provide affirmative consent.

iii. *By electronic means.* The institution provides an electronic means for the consumer to affirmatively consent. For example, the institution could provide a form that can be accessed and processed at its Web site, where the consumer may click on a check box to provide consent and confirm that choice by clicking on a button that affirms the consumer's consent.

iv. In person. The institution provides a form for the consumer to complete and present at a branch or office to affirmatively consent to the service. (Emphasis supplied.)

[24] We may in this connection have some assurance that the consumer will have the Model Form available during the course of a telephone call, as the telephone number thereon would be a unique number associated with the Form.

[25] Regulation E § 205.17(d). We do note that under Regulation E § 205.17(d)(6), we may modify the Model Form "...to provide a means for the consumer to exercise this [opt in] choice...." Thus, arguable the change to the Model Form noted above would be a permissible change.

D. Disclosure obligations under Regulation DD when a consumer's consent is obtained orally, by telephone. Under the Final Rule, as one option available to a financial institution to provide a consumer with a reasonable opportunity to grant affirmative consent, a financial institution may afford the consumer an opportunity to give it orally, by telephone.[26] In connection with providing that opportunity through a telephone, we note that the Board in the Proposed Rule[27] cautions financial institutions about providing additional materials promoting the payment of overdrafts and thereby triggering the disclosure requirements under Regulation DD § 230.11(b).[28]

With respect to the foregoing, we would like to posit the following in seeking further clarification about footnote number four, at 75 Fed.Reg. page 9122.

A financial institution mails the Model Form and additional information to consumers to inform them of the new requirement under Regulation E mandating that financial institutions secure the affirmative consent of a consumer prior to assessing an overdraft fee for overdrafts created through ATM or one-time debit card transactions, effective July 1, 2010. A financial institution thereafter (a) fields an incoming telephone call from a consumer inquiring about the opt in process or (b) originates an outgoing service call intending to confirm the receipt by a consumer of, and to answer questions from a consumer about, the mailing.

The fielding of a telephone call from the consumer merely inquiring about the opt in process would not appear to trigger the additional disclosure requirements under Regulation DD § 230.11(b)(1).[29] Moreover, the mere provisioning of the Model Form itself to a consumer would not appear to trigger such additional disclosure requirement.[30]

Nevertheless, regardless of whether the call is incoming or outgoing, let us posit that during the course of speaking with the consumer telephonically, the conversation evolves into a

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[26] See footnote 23, *supra.*
[27] 75 Fed.Reg. p. 9122, footnote 4.
[28] 12 C.F.R. Part 230.
[29] Regulation DD § 230.11(b)(2)(ii).
[30] Regulation DD § 230.11(b)(2)(xii).

conversation in which information is communicated that in a different context might be viewed as an "advertisement promoting the payment of overdrafts" for purposes of Regulation DD § 205.11(b).[31] In the event the communication with a consumer during the course of such telephone conversation is deemed such an advertisement, must a financial institution disclose all the information set forth in Regulation DD § 230.11(b)(1)(i)-(iv)[32] despite having provided some of this same information previously in the Model Form sent to the consumer? We would read footnote number four[33] and Regulation DD § 230.11(b)(1) to mandate that a financial institution must disclose anew all the information set forth in Regulation DD § 230.11(b)(1)(i)-(iv) despite having provided some of this same information previously in the Model Form sent to the consumer. This additional disclosure requirement may not be satisfied by reference to, or incorporation of, the previously provided Model Form. This disclosure requirement would appear to stand on its own.

If the Board agrees with this construction, we urge that the Board provide a record of this agreement through an official staff interpretation to Regulation DD § 230.11(b)(1) for the benefit of all financial institutions.

E. Obtaining a consumer's consent and providing the confirmation by telephone. Regulation E § 205.17(b)(1) requires that the Model Form and the confirmation be provided in writing; alternatively, a financial institution may provide the Form and the confirmation "electronically," if the consumer agrees. Nevertheless, neither the regulation nor the official

[31] Regulation DD §§ 230.2(b)(2) and 230.11(b)(1).

[32] Under Regulation DD § 230.11(b)(1), any advertisement promoting the payment of overdrafts must disclose in a clear and conspicuous manner the following:

(i) The fee or fees for the payment of each overdraft;

(ii) The categories of transactions for which a fee for paying an overdraft may be imposed;

(iii) The time period by which the consumer must repay or cover any overdraft; and

(iv) The circumstances under which the institution will not pay an overdraft.

[33] 75 Fed.Reg. p. 9122, footnote four.

staff interpretations thereto clearly describe the manner in which the Model Form and confirmation may be provided electronically.[34]

In connection with clarification of the affirmative consent and confirmation process under review in the Proposed Rule, we are therefore seeking a clarification on the use of a telephone in obtaining a consumer's consent and providing the confirmation "electronically," provided the consumer agrees.

Under Regulation E § 205.17(b)(1), the four conditions to satisfy the opt in requirement are detailed as follows:

> (b) Opt-in requirement. (1) General. Except as provided under paragraphs (b)(4) and (c) of this section, a financial institution holding a consumer's account shall not assess a fee or charge on a consumer's account for paying an ATM or one-time debit card transaction pursuant to the institution's overdraft service, unless the institution:
> (i) Provides the consumer with a notice in writing, or if the consumer agrees, electronically, segregated from all other information, describing the institution's overdraft service;
> (ii) Provides a reasonable opportunity for the consumer to affirmatively consent, or opt in, to the service for ATM and one-time debit card transactions;
> (iii) Obtains the consumer's affirmative consent, or opt-in, to the institution's payment of ATM or one-time debit card transactions; and
> (iv) Provides the consumer with confirmation of the consumer's consent in writing, or if the consumer agrees, electronically, which includes a statement informing the consumer of the right to revoke such consent.

Accordingly, in order to satisfy the opt in requirement under the foregoing subsection (b), the financial institution must satisfy all four of the conditions enumerated. The first condition is providing the Model Form describing the institution's overdraft service; the second condition is providing the consumer with a reasonable opportunity to affirmatively consent to the service for ATM and one-time debit card transactions; the third condition is obtaining the consumer's affirmative consent; and the fourth condition is providing the consumer with confirmation of the consumer's consent, including a statement informing the consumer of the right to revoke such consent.

[34] Only an online process involving a Web site is mentioned under Regulation E, Supplement I-Official Staff Interpretations, § 205.17-Requirements for Overdraft Services, 17(b) Opt-in Requirement, Comment 4(iii).

As highlighted above, in lieu of securing a consumer's affirmative consent by providing the Model Form and the confirmation of consent in writing to the consumer, Regulation E appears to contemplate securing the consumer's affirmative consent by providing the Form and the confirmation of consent electronically, including possibly delivery of the notice and the confirmation by telephone. Under Regulation E, Supplement I-Official Staff Interpretations, Section 205.17-Requirements for Overdraft Services, 17(b) Opt-in Requirement, Comment 4(ii), the telephone option to secure the consent is clearly set forth.[35]

Although under Regulation E § 205.17(b)(1)(i) and (b)(1)(iv) a financial institution may provide the Model Form electronically, if a consumer agrees, and a financial institution may provide a consumer with a reasonable opportunity to grant consent electronically, if a consumer agrees, Comment 4(ii) identified above appears to confirm that a telephone is a channel for providing a consumer with a reasonable opportunity to grant a consumer's affirmative consent separate and distinct from an electronic channel under Comment 4(iii). Given this apparent ambiguity, we are seeking clarification that telephone delivery orally of the Model Form during the process of telephonically providing a reasonable opportunity to consent is *not* permissible under Regulation E § 205.17(b). While comment 4(ii) acknowledges that a financial institution may secure a consumer's consent by telephone, the securing of that consent is the extent to which a telephone may be used by a financial institution. The financial institution may not provision the Model Form itself by telephone in the course of a conversation securing that consent. The financial institution must have previously provisioned the Model Form to the consumer in writing, or, if the consumer agrees electronically (but not telephonically).

While the Board has made it abundantly clear that requirements for a consumer's opt in detailed in Regulation E § 205.17 are not subject to the ESIGN Act and therefore are not subject to the limitations regarding the requirements of an "electronic record"[36] thereunder, we nevertheless are of the view that a financial institution is unable to provide orally the Model Form during the course of a telephone call with a consumer, even if it could secure the

[35] See footnote 23, *supra*.
[36] 74 Fed.Reg. p. 59041, footnote 32.

consumer's consent during the course of such call. The financial institution must provide the Model Form in a hardcopy form or, if a consumer agrees, electronically, but such electronic option does not include reading the content of that Form to the consumer during that call.

In summary, for the reasons set forth above, we are seeking clarification that a financial institution may not read the entire Model Form, or a substantially similar form, and provide a confirmation, over the telephone in order to secure a consumer's affirmative consent under Regulation E § 205.17(b). An official staff interpretation to that effect under this subsection (b) would provide plain direction to financial institutions.

F. Segregated or separate Model Form. In the Final Rule, in connection with provisioning the Model Form to a consumer, the Board in a footnote confirms that a financial institution may provide other information about its overdraft services and other overdraft protection plans in a *separate* document.[37] This requirement that a financial institution provide the Model Form in a separate document is repeated in a footnote to the Proposed Rule.[38]

However, in reading the Final Rule itself, in connection with provisioning the Model Form to a consumer Regulation E § 205.17(b)(i) merely provides that a financial institution must provide a notice, the Model Form, "...segregated from all other information...."[39] (Emphasis supplied.) No official staff interpretation to the Final Rule elaborates on this requirement.

Thus, a financial institutions seeking in good faith to satisfy the requirement under Regulation E § 205.17(b)((1)(i) of providing the Model Form with other information regarding its overdraft service and other overdraft protection plans face an ambiguity: Must that institution provide the Model Form as a separate and distinct document or may it provide the Model Form

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[37] 74 Fed.Reg. p. 59047, footnote 39 specifically providing as follows:
Institutions may provide other information about their overdraft services and other overdraft protections plans in a separate document. (Emphasis supplied.)

[38] 75 Fed.Reg. p. 9122, footnote 4, providing in part as follows:
Some institutions have asked whether they may provide supplemental materials with the opt-in notices that describe their overdraft services. In footnote 39 to the Regulation E final rule, the Board explained that institutions may provide consumers other information about their overdraft services and other overdraft protection plans in a separate document outside of the opt-in notice. (Emphasis supplied.)

[39] 74 Fed.Reg. p. 59052, setting forth Regulation E § 205.17(b), see *supra* at page 8.

within other information, so long as that Model Form is segregated? That segregation, for example, may be effected through borders encircling the Model Form or other methods to highlight the Form. However, given the footnotes in both the Final Rule and the Proposed Rule reciting the explicit requirement that the Model Form be separately provided, merely segregating the Form may not satisfy Regulation E § 205.17(b)(1)(i), notwithstanding its plain language.

Frankly, we see no policy advanced in subjecting financial institutions to the requirement that the Model Form be provisioned separately. So long as the Model Form is "...clear and readily understandable...,"[40] a financial institution should be able to provide the Model Form in a brochure, for instance, so long as the Form is segregated by a border or other means highlighting it. Through an official staff interpretation, we strongly urge the Board to clarify this inconsistency between the footnotes 39 and 4 in the information accompanying the Final Rule and the Proposed Rule with the language in the Final Rule itself.

G. Same account terms, conditions, and features. Under the Final Rule, a financial institution must provide to consumers not affirmatively consenting to the institution's overdraft services for ATM and one-time debit card transactions the same account terms, conditions, and features that it provides to consumers affirmatively consenting, except for the overdraft service for ATM and one-time debit card transactions.[41] In this connection, we understand that the Board through its staff counsel has informally taken the position that a financial institution may not provide a direct monetary inducement to a consumer to opt in. For example, according to staff counsel, a financial institution may not provide a $5.00 payment to a consumer as an inducement to prompt the consumer to opt in to the institution's overdraft service for ATM and one-time debit card transactions.

While we do not agree with this analysis, if this is the position of the Board, we urge that the Board so provide through an official staff interpretation to announce this position publicly.

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[40] Regulation E § 205.4(a)(1).
[41] Regulation E § 205.17(b)(3).

Further, we are wondering if the Board would take a similar position as to the following: As an inducement to elect an overdraft service may a financial institution consistent with the Final Rule elect to waive for a specific period of time (such as until January 1, 2011) the overdraft fee as to those consumers opting in to that institution's overdraft service? We would contend that in this instance the financial institution is providing to consumers not affirmatively opting in to a financial institution's overdraft service for ATM and one-time debit card transactions the same account terms, conditions, and features as the institution is providing to consumers affirmatively opting in to such service in that the former consumers are not subject to overdraft fees. The waiver of the overdraft fee for a specified period subsequent to a consumer opting in to a financial institution's overdraft service is not a differing account term, condition, or feature vis-à-vis a consumer not opting in to the institution's overdraft service.

Again, if the Board agrees with the analysis above, we urge that the Board so provide through an official staff interpretation to confirm publicly.

III. Conclusion. We urge the Board to consider the adoption of the proposals set forth in this letter to provide further clarification and assistance to financial institutions seeking to satisfy the requirements under the Final Rule. Further, because the anticipated changes or clarifications under the Proposed Rule may materially impact compliance and implementation strategies financial institutions may have adopted in good faith reliance on the Final Rule as originally issued by the Board, we urge that financial institutions be afforded a reasonable period (such as six months) to comply with and implement changes to the Final Rule which may be issued by the Board under the Proposed Rule.

Because we understand that officials of the Board have previously announced informally that each consent (and, presumably, each confirmation) must relate solely to a single account, many financial institutions are building opt in processes based on that announcement. Further, the requirement of a single consent per account becomes more challenging to satisfy when a telephone or Internet channel is involved. We urge the Board to reject this announcement through amendment to Regulation E or its accompanying official staff interpretations.

Moreover, due to the imperative and restrictive language within Regulation E regarding the form and content of the Model Form, further clarification sought herein would be of assistance to financial institutions. Related to that subject, in the event a consumer's consent or confirmation is provided electronically, clarification on whether a financial institution must provide an opportunity to the consumer to receive the consent or confirmation in a form the consumer may keep would be helpful. Further, because many financial institutions may field calls from consumers concerning their overdraft services or reach out to consumers through outgoing telephone calls to promote their overdraft services, a clarification on the disclosure obligations such institutions may bear under Regulation DD § 230.11(b)(1) would be extremely helpful.

In addition, direction on the manner in which a financial institution may secure by telephone the affirmative consent from a consumer using the Model Form would be highly instructive, as we maintain that topic is far from clear. Further, we seek direction on whether the Model Form may be provided by a financial institution with other information regarding a financial institutions' overdraft services or overdraft protections plans so long as that Form is segregated. A separate document is not necessary.

We express our appreciation to the Board for this opportunity to comment on the Proposed Rule.

Sincerely,

Ted Teruo Kitada
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