

BY ELECTRONIC DELIVERY

June 29, 2012

Monica Jackson
Office of the Executive Secretary
Bureau of Consumer Financial Protection
1700 G Street, N.W.
Washington, DC 20552

IN RE: Docket No. CFPB-2012-0007, Federal Register, Volume 77, Number 39 (Feb. 28, 2012), Impacts of Overdraft Programs on Consumers, Notice and Request for Information

Dear Ms. Jackson:

This comment letter is submitted on behalf of the Electronic Funds Transfer Association (EFTA) in response to the request for information recently issued by the Bureau of Consumer Financial Protection (the Bureau) on the impacts of overdraft programs on consumers and the rules regarding overdrafts implemented in Regulation E.¹

EFTA is the nation's leading non-profit, inter-industry trade association dedicated to the advancement of electronic payment systems and electronic commerce. EFTA's nearly 300 members represent a broad spectrum of perspectives that engender accurate and effective analysis of electronic payments and electronic commerce issues. Members include the nation's leading financial institutions, electronic payment networks, card associations, ATM owners and operators, information processors, equipment, card and software manufacturers and vendors, Internet service providers, telecommunications companies, state governments and federal agencies.

Regulation E prohibits financial institutions from charging fees for transactions that overdraw an account by use of a debit card at an ATM or point-of-sale (POS) unless the consumer is given notice and a reasonable opportunity to opt in to an overdraft service for these transactions. EFTA would like to respond to **question 10** on the Bureau's request for information and focus on the impact of allowing consumers to authorize an overdraft at an ATM or at the POS. (We will refer to the location of both types of transactions as "point of transaction" or POT.) Given the technical and operational challenges—and the substantial costs—for merchants, payment networks, banks, and customers explained below, EFTA believes that overdraft opt-in at POT is infeasible.

¹ 12 Code of Federal Regulations § 1005.17.

Merchants, POS Devices and ATMs

According to the World Bank's data, there are about 6.7 million POS terminals operating in the United States.² There are numerous technical and operational challenges in providing overdraft notification and allowing opt-in at the POS at each one of these terminals. The existing POS devices in the United States cover a broad technological spectrum, ranging from the state-of-the-art mobile Google Wallet to the time-tested VeriFone Tranz 330. However, they can be broadly divided into two categories.

The first category includes the modern devices with advanced hardware, software, and display screens, such as the ones used at large retailers (e.g., Wal-Mart, Kroger, and Best Buy). These devices can be programmed to allow a POS overdraft opt-in feature. However, implementing the change would involve logistical challenges. Not only would new software functions have to be developed for each device platform, the software would have to be upgraded on-site on millions of devices across the nation. This would be a substantial undertaking that can only be phased in over time and at significant cost.

The second category of POS terminals includes the legacy devices that work reliably but have limited hardware, software, and display capacity. These devices are often, but not always, used by small businesses that are unable to upgrade to the modern systems, either because of costs or technological limitations. The software on these devices can only be programmed in limited ways using predefined functions. For example, the VeriFone Tranz 330 terminal that is widely used across the U.S. comes with predefined firmware for processing debit cards. The terminal can be reprogrammed by entering a series of commands on the keypad for each device.³ The cost of programming these terminals one-by-one would make the implementation of overdraft opt-in at the POS prohibitively expensive. Moreover, the Tranz 330 has a single-line display that may be insufficient to display the overdraft message and the bank's overdraft fee. In short, to implement POS overdraft opt-in, millions of legacy devices may have to be replaced with modern devices, which may cost more than \$1,500 per unit.⁴ This cost burden would disproportionately fall on small businesses.

According to EFTA estimates, there are about 425,000 ATMs in the United States. Just like the POS devices, ATMs also fall into two categories: the complete e-banking ATMs used by large banks and the cash-dispensing ATMs, often installed in retail locations, including many small stores. The e-banking ATMs are connected to the bank's network and have significant hardware and software capacity to implement overdraft opt-in at the ATM. However, cash-

² The World Bank's data shows that there are 2,156 POS terminals per 100,000 people in the United States. Taking the U.S. population at 311,000,000, the total POS terminals can be estimated at 6,705,160. See <http://data.worldbank.org/>.

³ See *TCL Terminal Control Language: Programmer's Manual*, VeriFone, August 1992, <http://www.epromfoundry.com/home/wp-content/plugins/download-monitor/download.php?id=42>.

⁴ For example, the top selling Elo E728542 POS Terminal retails for \$1,812. See <http://www.barcodesinc.com/elo/part-e728542.htm>.

dispensing ATMs are simply POS devices fixed to safe boxes. Updating their software would have the same technological and operational constraints and associated costs as the POS devices.

To sum up, the POT device industry has seen constant advancement, but these changes have a slow rate of penetration. For example, the contactless mobile-based payment technology underlying Google Wallet has been around for nearly 7 years, but only about 2% of the 6.7 million U.S. retailers have adopted it.⁵ In the coming years, banks may be able to allow customers to respond to a text message or a phone call to authorize an overdraft at the POT. However, we are far from seeing such technology in action, much less deployed nationally across the board. The existing POS devices and ATMs are not capable of an easy transition to allow POT overdraft opt-in.

Network Infrastructure

Debit card transactions are supported by a complex infrastructure that affords consumers and merchants a convenient, seamless and instantaneous experience. The payment networks connect consumers, merchants, payment processors, ATM owners and deployers, and banks. Based on the merchant's POS device and the consumer's choice, debit cards either use an EFT network for online PIN-based transactions, or the Visa or MasterCard network for offline signature-based debit card transactions.

The payment networks route information from the POT to the bank in a predefined format. Each of the networks (e.g., NYCE, Star, Pulse, Shazam, Presto, Interlink, Cirrus, etc.) has its own hardware and software infrastructure. If the networks are required to carry information about overdraft opt-in from the POT to the banks, the data communication protocols of each network would have to be changed. The change would need to be phased in over time and will result in substantial costs.

The payment debit networks authorize transactions at POT by reference to the account-holding banks or their processors. According to the Federal Reserve, 62 percent of debit card transactions are signature-based that use the Visa or MasterCard credit card authorization and settlement network.⁶ In a signature-based debit card transaction, the issuing bank gives a pre-authorization for the transaction at the POT and may put a hold on the funds pending settlement, but the funds are actually deducted from a demand deposit account one or two days after the transaction.⁷ If the transaction is more than the pre-authorized amount (e.g.,

⁵ Google Chairman Sees 33% of U.S. POS Terminals NFC Enabled In a Year, *Mobile Marketing and Technology*, June 22, 2011, <http://mobilemarketingandtechnology.com/2011/06/22/google-chairman-sees-33-of-u-s-pos-terminals-nfc-enabled-in-a-year/> (arguing that Google's projections are unrealistically optimistic).

⁶ *The 2010 Federal Reserve Payments Study*, April 2011, http://www.frbervices.org/files/communications/pdf/press/2010_payments_study.pdf.

⁷ Fumiko Hayashi, Richard J. Sullivan, and Stuart E. Weiner, *A Guide to the ATM and Debit Card Industry*, Federal Reserve Bank of Kansas City, <http://www.kc.frb.org/publicat/PSR/BksJournArticles/ATMpaper.pdf>. See also Fumiko Hayashi, Richard J. Sullivan, and Stuart E. Weiner, *A Guide to the ATM and Debit Card Industry: 2006*

the customer includes a tip after pre-authorization at a restaurant), the customer may incur an overdraft fee when the signature debit card transaction is posted after one or two days. If the transaction is less than the pre-authorized amount (e.g., the customer is pre-authorized for \$100 at a gas station but only pumps \$10), the customer may get overdraft warnings each time she uses the debit card until the signature-debit transaction posts one or two days later. In short, Visa and MasterCard would have to redesign their entire offline credit card processing infrastructure to implement overdraft authorization at the POT for signature-based debit cards.

Lastly, the major debit card payment networks now operate globally. If the networks are mandated to make changes based on U.S. regulations, they would risk incompatibilities and disruptions in interfacing with other global networks, banks and other partners. And even if the U.S. networks (and banks) provide POT overdraft opt-in, the POT devices in foreign countries cannot be required to include the feature.

Banks and Item Processing

It is infeasible for any bank to say definitively at the POT that the transaction is going to overdraft an account. An overdraft transaction depends on the bank's posting order. Many financial institutions process transactions, including debit card transactions, in a batch at the end of the day. Even assuming that all banks have moved to a "neutral" posting order, other objective and subjective factors can affect whether an account becomes overdrawn or not. For example, deposits may be received and the availability of an overdraft line of credit may change during the day, which may result in items being paid or refused, notwithstanding what may have happened at the POT. Whatever order a bank uses for batch processing, the bank cannot determine at the POT whether the account is going to overdraft when the processing takes place at the end of the day. At best, the bank can say that the account *may* overdraw based on the available balance at the time of the transaction, resulting in an undesirable experience for the consumer. In many cases, a customer would be needlessly instructed that the account may overdraw when that is not the case. In some circumstances, a customer would not be given the overdraft warning, but the account would overdraw at the end of the day because of a check debited from the account. Either way, it would be misleading to consumers for banks to provide overdraft notice at the POT.

Presentment differences between large and small financial institutions complicate matters further. While most community banks and credit unions use batch processing, some large banks receive presentment of their items on an almost continuous basis. While no bank can process all transactions in real time (e.g., when systems are being maintained and banks use stand-in processing based on available balances that may no longer be accurate), the large banks will process transactions faster and provide more precise overdraft warnings as compared to the community banks and credit unions that often use slower third-party

Update, Federal Reserve Bank of Kansas City,
<http://www.kc.frb.org/publicat/psr/BksJournArticles/ATMDebitupdate.pdf>.

processing services. To catch up, the community banks and credit unions will have to make infrastructure investments that they cannot afford.

Transaction Efficiency

The processing time per customer in any retail or ATM transaction is a critical performance factor for all of the participants in debit card transactions – whether it is the consumer who wants to quickly finish a purchase at a retail store or grab some cash from an ATM and catch a plane; the network or payment processor whose on-time performance is one of the cornerstones of its success; the bank whose processing costs are dependent on usage; or the merchant whose productivity is tied to moving customers through the transaction as quickly as possible. When consumers – who have already chosen to opt into overdraft service—have to pause to decide whether to pay the overdraft fee or use another form of payment or cancel the transaction, or when retailers have to open more checkout lanes and hire more staff, or when bank, payment processor and network costs increase, the burden is felt by everyone in the system.

Consumer Privacy

Overdraft opt-in at the POT also raises serious privacy concerns for consumers, especially at POS locations, and will significantly change the consumer experience for the worse. If a customer with a cart full of groceries is given the overdraft warning in a checkout lane, the customer would be embarrassed before the cashier and the other customers in the line. When the cashier asks for another form of payment, the customer would have to scramble for cash or another debit or credit card. The customer may even feel the pressure to leave the store without the groceries. In any event, the state of the customer’s personal finances would be on public display.

Since the amendments to Regulation E in 2009,⁸ consumers have opted in to overdraft protection programs in large numbers not only to be able to overdraft, but also to avoid the embarrassing encounters at the POT when they overdraft. They prefer to pre-authorize a nominal overdraft fee rather than suffer the indignity of appearing “broke” in public. An overdraft opt-in mandate at the POT that ignores consumer preferences would be paternalistic. Instead of protecting consumers, the overdraft warning at the POT would have the effect of distressing them.

Conclusion

Based on the negative effect on consumer experience and the substantial costs to merchants, networks, and financial institutions, allowing the consumer to opt in to overdraft at the POT is not realistic. Doing so would perhaps lead to the pursuit of more expensive financial options outside of traditional banking services such as payday loans. The Bureau should allow

⁸ 12 Code of Federal Regulations § 1005.17.

the industry to develop technological solutions that are responsive to demonstrated consumer needs and represent an appropriate balance between consumer protection and practical considerations.

On behalf of the members of the Electronic Funds Transfer Association, we appreciate the opportunity to comment on overdraft practices and the feasibility of implementing real time opt-in at POT. We would be pleased to answer any additional questions you wish to address.

Sincerely,

A handwritten signature in black ink, appearing to read "Kurt Helwig". The signature is fluid and cursive, with the first name "Kurt" being more prominent and the last name "Helwig" following in a similar style.

Kurt Helwig
President and CEO