

# **FEDERAL RESERVE SYSTEM**

## **12 CFR Part 205**

**[Regulation E; Docket No. R-1002]**

### **Electronic Fund Transfers**

**AGENCY:** Board of Governors of the Federal Reserve System.

**ACTION:** Interim rule with request for comments.

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**SUMMARY:** The Board is publishing an interim rule amending Regulation E, which implements the Electronic Fund Transfer Act (EFTA). The EFTA establishes certain rights, liabilities, and responsibilities of participants involved in electronic fund transfers (EFTs) to and from consumer asset accounts. Among other things, the act and regulation require disclosures about the terms and conditions of EFT services, account activity, error resolution, and authorizations or confirmations concerning EFTs. These disclosures must generally be provided in writing. In May 1996, the Board issued a proposed rule permitting financial institutions to satisfy the requirement that certain disclosures and other information be in writing by sending information electronically subject to certain requirements. The interim rule allows depository institutions or other entities subject to the act to deliver by electronic communication any of these disclosures and other information required by the act and regulation, as long as the consumer agrees to such delivery. For purposes of the regulation, an electronic communication is a message transmitted electronically that allows visual text to be displayed on equipment such as a modem-equipped computer. This interim rule permits financial institutions to begin implementing systems that allow for the electronic delivery of EFTA disclosures during consideration of similar proposals under other financial services and fair lending laws, appearing elsewhere in today's Federal Register.

**DATES:** Interim rule effective March 20, 1998; comments must be received by May 15, 1998.

**ADDRESSES:** Comments should refer to Docket No. R-1002, and may be mailed to William W. Wiles, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, N.W., Washington, DC 20551. Comments also may be delivered to Room B-2222 of the Eccles Building between 8:45 a.m. and 5:15 p.m. weekdays, or to the guard station in the Eccles Building courtyard on 20th Street, N.W. (between Constitution Avenue and C Street) at any time. Comments may be inspected in Room MP-500 of the Martin Building

between 9:00 a.m. and 5:00 p.m. weekdays, except as provided in 12 CFR 261.12 of the Board's Rules Regarding Availability of Information.

**FOR FURTHER INFORMATION CONTACT:** Michael Hentrel or Obrea Poindexter, Staff Attorneys, or John Wood, Senior Attorney, Division of Consumer and Community Affairs, at (202) 452-2412 or (202) 452-3667. For the hearing impaired only, Telecommunications Device for the Deaf (TDD), contact Diane Jenkins at (202) 452-3544.

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

The Electronic Fund Transfer Act (EFTA), 15 U.S.C. 1693 et seq., enacted in 1978, provides a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer (EFT) systems. The Board's Regulation E (12 CFR Part 205) implements the act. Types of transfers covered by the act and regulation include transfers initiated through an automated teller machine (ATM), point-of-sale terminal, automated clearinghouse, telephone bill-payment plan, or home banking program. The act and regulation contain rules that govern these and other EFTs. The rules prescribe restrictions on the unsolicited issuance of ATM cards and other access devices; disclosure of terms and conditions of an EFT service; documentation of EFTs 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.

Depository institutions, service providers, and other entities use electronic communication to offer a wide variety of financial services relating to checking and other consumer asset accounts including: account inquiries; transaction verifications; request and documentation of fund transfers between accounts; bill payment services; and full account management. Communicating electronically provides a fast, convenient, and less costly means of receiving and delivering information. In offering home banking and other financial services, depository institutions and others have asked whether they satisfy the requirements of the EFTA and Regulation E by providing or accepting information electronically. In connection with electronic commerce, some service providers would like to obtain the electronic equivalent of a written and signed authorization so that consumers' accounts can be debited on a recurring basis to pay for products or services.

In May 1996, the Board updated Regulation E and the staff commentary under the Board's Regulatory Planning and Review program, which requires regulations to be reviewed and updated periodically. (See 61 FR 19661, May 2, 1996.) During that process and in its review of regulations pursuant to section 303 of the Riegle Community Development and Regulatory Improvement Act of 1994 (12 U.S.C. 4803), the Board determined that the use of electronic communication to deliver information to consumers that is required by federal consumer financial

services and fair lending laws could effectively reduce compliance costs without adversely affecting consumer protections. Simultaneous with the issuance of Regulation E update, the Board issued a proposed rule permitting financial institutions to satisfy the EFTA requirement that certain disclosures and other information be in writing by sending information electronically in a format that allows the display of text messages in a clear and readily understandable form. The proposal also required that disclosures be provided in a form the consumer may retain, a requirement that an institution could satisfy by providing information that may be printed or downloaded. The proposed rule allowed consumers to request a paper copy of a disclosure for up to one year after its original delivery (61 FR 19696, May 2, 1996).

The Board received approximately 110 comments on the proposal. The majority of comments were submitted by depository institutions and their trade associations. The commenters, including consumer representatives, generally supported the use of electronic communication to deliver information required by the EFTA and Regulation E. Many commenters suggested specific modifications and sought clarification on various aspects of the proposed rule; these comments are addressed below in the section-by-section discussion of the interim rule.

Based on a review of the comments and further analysis, the Board is publishing an interim rule that allows financial institutions to provide Regulation E disclosures electronically; such disclosures remain subject to applicable timing, format, and other requirements of the act and regulation. The interim rule will allow financial institutions to implement systems to provide EFTA information electronically while proposed rules are being considered to allow the electronic delivery of disclosures under other laws. The term "financial institution" is broadly defined in the EFTA to include persons that directly or indirectly hold accounts belonging to consumers or that issue an access device and agree to provide EFT services. In this notice, the term "financial institution" is used in that context.

The interim rule is similar to the proposed rule. The interim rule, however, does not require financial institutions to provide paper copies of disclosures to a consumer upon request if the consumer has agreed to receive disclosures electronically. The Board believes that most financial institutions will accommodate consumer requests for paper copies when feasible.

Elsewhere in today's Federal Register, the Board is publishing proposed rules similar to the interim rule under Regulation E to address electronic communication under Regulation B (Equal Credit Opportunity), Regulation DD (Truth in Savings), Regulation M (Consumer Leasing), and Regulation Z (Truth in Lending). Previously, the Board published amendments to the staff commentary to Regulation CC (Availability of Funds and Collection of Checks) allowing depository institutions to send notices electronically (62 FR 13801, March 18, 1997).

## **II. Regulatory Revisions**

The EFTA and Regulation E require a number of disclosures to be provided to consumers in writing. The requirement that disclosures be in writing has been presumed to require that institutions provide paper documents. However, under many laws that call for information to be in writing, information in electronic form is considered to be "written." Information produced, stored, or communicated by computer is also generally considered to be a writing, where visual text is involved.

Pursuant to its authority under sections 904(a) and (c) of the EFTA, the Board is issuing an interim rule amending Regulation E to permit financial institutions to use electronic communication where the regulation requires that information be provided in writing. The term "electronic communication" is limited to a communication in a form that can be displayed as visual text. An example is an electronic visual text message that is displayed on a screen (such as a consumer's computer monitor). Communication by telephone voicemail systems does not meet the definition of "electronic communication" for purposes of this amendment because it does not have the feature generally associated with a writing -- visual text.

#### Definition

Section 205.4(c)(1) defines electronic communication for purposes of Regulation E. The definition is generally the same as in the May 1996 proposed rule, except that editorial changes have been made in the interim rule to clarify and simplify the definition. The reference in the proposal to equipment "in the consumer's possession" has been deleted so as not to preclude application of the rule where, for example, a consumer uses a computer terminal in a public location such as a library or financial institution. The example of a screen phone has been deleted as unnecessary.

#### Agreements Between Financial Institutions and Consumers

Section 205.4(c)(2) permits financial institutions to send electronic disclosures if the consumer agrees. The interim rule simplifies the wording that was used in the proposed rule. Many commenters on the proposed rule requested that the Board clarify when an agreement between a financial institution and a consumer exists. More specifically, the commenters sought clarification that agreements may be established electronically. There may be various ways that a financial institution and a consumer could agree to the electronic delivery of disclosures and other information. Whether such an agreement exists between the parties is determined by applicable state law. The regulation does not preclude a financial institution and a consumer from entering into an agreement electronically, nor does it prescribe a formal mechanism for doing so. The Board does believe, however, that consumers should be clearly informed when they are consenting to the delivery of EFTA disclosures and other information electronically.

#### Requirement That Financial Institutions "Send" Electronic Disclosures to Consumers

The interim rule in § 205.4(c)(2), like the proposed rule, provides that disclosures may be "sent" to a consumer electronically. This is consistent with existing requirements in Regulation E, which generally specify that disclosures, documentation, and notices be "mailed," "delivered," or "provided." Many commenters on the proposed rule suggested that making electronic disclosures "available" to consumers should satisfy the requirement. Commenters believed that consumers would benefit from the ability to obtain information from the financial institution, at any time, if the disclosures are "available" at a specified location. Commenters suggested that, alternatively consumers might have to wait for the institution to send information to a specific location, for example, an e-mail address provided by the consumer.

Generally, the regulation requires the financial institution to deliver the information-- typically by mail--to an address designated by the consumer. For a paper communication, a financial institution generally would not satisfy that requirement by making disclosures "available," for example, at the financial institution's office (or other location). (The staff commentary to Regulation E does allow financial institutions to permit, but not require, consumers to pick up their periodic statements at the institution. See comment 9(b)-4 to § 205.9.) The Board believes that consumers receiving disclosures by electronic communication should have protections regarding delivery similar to those afforded consumers receiving paper disclosures. Simply posting information on an Internet site without some appropriate notice and instructions about how the consumer may obtain the required information would not satisfy the requirement. Therefore, the interim rule, like the proposal, requires that disclosures be sent (delivered or transmitted) to consumers, but allows the option contained in comment 9(b)-4.

The requirement to send or deliver disclosures to a consumer is satisfied when the institution ensures that the disclosures will be displayed in a timely manner. For example, under Regulation E, initial disclosures must be provided at the time a consumer signs up for an EFT service or before the first transaction. Assume that a consumer uses a personal computer to sign up for a EFT service and consents to the electronic delivery of the initial disclosures. If the disclosures automatically appear on the computer screen before the consumer commits to the service (in accordance with the format and any other requirements of the act and regulation), the institution has satisfied the requirement to send (or deliver or transmit) disclosures to the consumer.

As a practical matter, there may be little distinction between sending or delivering electronic disclosures and making them "available." Financial institutions have flexibility in how they may deliver electronic disclosures to consumers, including, but not limited to, the following examples. They may send disclosures to a consumer-designated electronic mail address or they may designate a location on a website where the consumer might enter a personal identification number or other identifier to access required information. In the scenario described above, assume that the consumer signs up for an EFT service, receives the initial disclosures at that time, and agrees to receive all EFTA disclosures electronically. Subsequent disclosures sent to a designated address or placed at a designated location (for example, periodic statements or change-in-terms notices) would generally satisfy the delivery requirements of § 205.4(c)(2).

Electronic communication remains subject to any timing or other applicable requirements under Regulation E. For example, a financial institution that sends a change-in-terms notice required by § 205.8 of Regulation E must satisfy the requirement to provide the notice to the consumer at least 21 days in advance of the change. The Board solicits comment on whether further guidance is needed on how to comply with the timing requirements when a notice is posted on an Internet website.

#### Requirement That Information Be "Clear and Readily Understandable"

Under the act and regulation, disclosures must be provided to consumers in a clear and readily understandable form. The proposed rule stated that disclosures provided by electronic communication are subject to this standard. Section 205.4(c)(2) of the interim rule retains this requirement, by cross referencing the current regulatory requirement.

Some commenters believed that the requirement would impose a compliance burden if financial institutions had to determine whether the consumer possesses the proper equipment to ensure that a disclosure provided electronically meets the standard. Some commenters expressed concern that the "clear and readily understandable" requirement, coupled with the screen phone example in the supplementary information to the proposed rule, implicitly disapproved of certain types of technologies. Further, some commenters objected to any consideration of the amount of text that may be viewed at any one time (or the screen size of a device) as a factor in determining whether the communication satisfies the requirement.

Under the interim rule, the "clear and readily understandable" requirement applies to electronic communication. The Board does not intend to discourage or encourage specific types of technologies. Regardless of the technology, however, the disclosures provided by electronic communication must meet the "clear and readily understandable" standard. While a financial institution is generally not required to ensure that the consumer has the equipment to read the disclosures, in some circumstances an institution would have the responsibility of making sure the proper equipment is in place. For example, if EFT services are offered through terminals in an institution's lobby, or through kiosks located in public or other places, the institution must ensure that the equipment meets the clear and readily understandable standard for EFTA disclosures that are being provided electronically.

#### Consumer Ability to Retain Disclosures

Under Regulation E, most disclosures must be provided in a form that the consumer may keep. Section 205.4(c)(2) of the interim rule, like the proposal, applies the same requirement to disclosures provided by electronic communication. Financial institutions satisfy the retention requirement if, for example, disclosures can be printed or downloaded by the consumer. Most commenters agreed with the Board's interpretation. Many commenters urged the Board to clarify that financial institutions are not obligated to monitor an individual consumer's ability to retain the information, or to ascertain whether the consumer has actually retained it.

The requirements or procedures for electronic delivery are similar to the paper delivery requirements, where the financial institution generally must mail or otherwise deliver the communication to the consumer but need not otherwise ensure that the consumer reads or retains it. Thus, financial institutions are generally not required to monitor a consumer's ability to retain the information, nor to take steps to find out whether the consumer has in fact retained it. The Board anticipates that, where appropriate, a financial institution will inform consumers of any special technical specifications for receiving or retaining information before or at the time a consumer agrees to receive information electronically.

Similar to the "clear and readily understandable" standard discussed above, in circumstances where the financial institution (or a network in which the institution is a member) controls the equipment to be used for an EFT service -- such as ATMs or kiosks in public or other places -- the institution does have the responsibility of ensuring retainability. Provided that the delivery requirements are satisfied -- for example, that disclosures appear on a screen -- methods for fulfilling this retention requirement could include, for example, printers incorporated into terminals or a screen message offering to transmit the disclosure that appears on the screen to the consumer's electronic mail or post office address.

#### Consumer's Ability to Request a Paper Copy of an Electronic Disclosure

The proposed rule would have required a financial institution to provide, upon request, a paper copy of any disclosure sent by electronic communication. The consumer could obtain a paper copy for up to one year after the disclosure was sent electronically. Many of the commenters did not object to the paper copy requirement, although most recommended that the Board establish a shorter time period for providing a copy. Some commenters believed that the requirement could diminish their ability to establish electronic accounts and eliminate the potential cost savings of electronic communication.

The interim rule does not require financial institutions to provide a paper copy upon request. In some instances, however, consumers who receive disclosures by electronic communication could experience computer or printer malfunctions. They may be using public electronic terminals that do not have a print or download capability, or they may otherwise need a paper copy of a disclosure on occasion. The Board expects that financial institutions will accommodate a consumer's request for a paper copy, or that they will redeliver disclosures electronically, to the extent that it is feasible to do so.

#### Paper Confirmation of Electronic Communications

Under the act and regulation, consumers must provide certain information to financial institutions, and institutions have the option of requiring that it be in writing. Regulation E provides that a consumer may stop payment of a preauthorized EFT or allege an error by notifying the institution orally or in writing, and that the institution may require written confirmation of an oral stop-payment order or notice of error.

In the supplementary information to the May 1996 proposed rule, the Board stated its belief that (as in the case of an oral communication) if the consumer sends an electronic communication to the financial institution, the institution could require paper confirmation from the consumer (particularly since the consumer was entitled to a paper copy upon request under the proposed rule). The Board requested comment on whether and how the regulation should address this point.

Some financial institutions commented that in accepting electronic communication from a consumer, they may need to require paper confirmations for their own and the consumer's protection. Many commenters stated that there will be situations in which it is important for financial institutions to have the ability to require paper confirmations (for example, because it may be more secure). These commenters requested that the Board allow financial institutions to request paper confirmations for certain communications.

Under the interim rule, financial institutions may request paper confirmations in cases where they can currently require written confirmation -- electronic and oral stop-payment notices, and electronic and oral notices of error. The financial institution, however, must clearly identify to the consumer the information subject to paper confirmation and must provide the address where written confirmation must be sent.

Consumers preserve their rights under the act and regulation when they send notices of error electronically. If the consumer notifies the financial institution of an alleged error, the financial institution must begin its investigation promptly upon receiving the electronic notice. The financial institution may not delay its investigation until it has received a paper confirmation. This requirement is the same as the requirement for written confirmation following an oral error notice (see comment 11(c)-2 of the staff commentary).

#### Consumer Signatures and Similar Authentication

Section 205.10(b) requires that preauthorized EFTs be authorized only by a writing signed or similarly authenticated by the consumer. The phrase "or similarly authenticated" was added in the 1996 review of Regulation E. The Board indicated in the Federal Register notice accompanying the amendment that the authentication method should provide the same assurance as a signature in a paper-based system, and cited security codes and digital signatures as examples of authentication devices that might meet the requirements of § 205.10(b). Since the 1996 amendment, the Board has received requests for further guidance on electronic authentication methods. The Board is interested in learning about other ways in which authentication in an electronic environment might take the place of the consumer's signature.

#### Current Need for Safeguards Concerning the Electronic Delivery of Disclosures

Today, most consumers receive federal disclosures in paper form. As electronic commerce and electronic banking increase and technological advances take place, obtaining disclosures by electronic communication will likely become more commonplace. Currently,



however, the use of electronic communication in the delivery of financial services is still evolving. Thus, it is difficult to fully predict the extent to which additional safeguards, if any, may be needed to ensure that consumers receive the same protections that exist for disclosures in paper form. The Board expects that depository institutions and other institutions subject to the EFTA and Regulation E will provide sufficient details about the delivery of disclosures. The Board plans to closely monitor the development of electronic delivery of EFTA disclosures and other information, and will address compliance or other issues that may arise as appropriate.

### **III. Form of Comment Letters**

Comment letters should refer to Docket No. R-1002 and, when possible, should use a standard typeface with a type size of 10 or 12 characters per inch. This will enable the Board to convert the text to machine-readable form through electronic scanning, and will facilitate automated retrieval of comments for review. Also, if accompanied by an original document in paper form, comments may be submitted on 3 ½ inch or 5 1/4 inch computer diskettes in any IBM-compatible DOS-based format.

### **IV. Regulatory Flexibility Analysis**

In accordance with section 3(a) of the Regulatory Flexibility Act and section 904(a)(2) of the EFTA, the Board's Office of the Secretary has reviewed the interim amendments to Regulation E. Overall, the interim amendments are not expected to have any significant impact on small entities. The interim rule would relieve compliance burden by giving financial institutions flexibility in providing disclosures. A final regulatory flexibility analysis will be conducted after consideration of comments received during the public comment period.

### **V. Paperwork Reduction Act**

In accordance with section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Ch. 35; 5 CFR 1320 Appendix A.1), the Board reviewed the interim rule under the authority delegated to the Board by the Office of Management and Budget.

The collection of information requirements in this interim regulation are found in 12 CFR Part 205. This information would be mandatory to ensure adequate disclosure of basic terms, costs, and rights relating to services affecting consumers using certain home-banking services and consumers receiving certain disclosures by electronic communication. The respondents/recordkeepers are for-profit financial institutions, including small businesses. This regulation applies to all types of depository institutions, not just state member banks. However, under Paperwork Reduction Act regulations, the Federal Reserve accounts for the burden of the paperwork associated with the regulation only for state member banks. Other agencies account for the paperwork burden on their respective constituencies under this regulation.

The Federal Reserve has no data on which to estimate the burden the regulatory amendments would impose on state member banks. However, since the amendments provide an alternative method for delivering disclosures and notices, it is anticipated that the requirements would not be burdensome. The use of electronic communication would likely reduce the paperwork burden of financial institutions. Institutions would be able to use electronic communication to provide disclosures and other information rather than having to print and mail the information in paper form.

The Federal Reserve requests comments from institutions, especially state member banks, that will help to estimate the number and burden of the various disclosures that would be made in the first year this interim regulation is effective. Comments are invited on: (a) the cost of compliance; (b) ways to enhance the quality, utility, and clarity of the information to be disclosed; and (c) ways to minimize the burden of disclosure on respondents, including through the use of automated disclosure techniques or other forms of information technology. 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 Mary M. McLaughlin, Federal Reserve Board Clearance Officer, Division of Research and Statistics, Mail Stop 97, Board of Governors of the Federal Reserve System, Washington, DC 20551.

### **List of Subjects in 12 CFR Part 205**

Banks, banking, Consumer protection, Electronic fund transfers, Reporting and record keeping requirements.

Pursuant to the authority granted in sections 904(a) and (c) of the Electronic Fund Transfer Act, 15 U.S.C. 1693b(a) and (c), and for the reasons set forth in the preamble, the Board amends 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. 1693-1693r.

2. Section 205.4 is amended by adding paragraph (c) to read as follows:

#### **§ 205.4 General disclosure requirements; jointly offered services.**

\* \* \* \* \*

(c) Electronic communication. -- (1) Definition. For purposes of this regulation, the term electronic communication means a message transmitted electronically between a consumer and a

financial institution in a format that allows visual text to be displayed on equipment such as a personal computer monitor.

(2) Electronic communication between financial institution and consumer. A financial institution and a consumer may agree to send by electronic communication any information required by this regulation to be in writing. Information sent by electronic communication to a consumer must comply with § 205.4(a) and the applicable timing and other requirements contained in the regulation.

By order of the Board of Governors of the Federal Reserve System, March 12, 1998.

\_\_\_\_\_(Signed)\_\_\_\_\_  
William W. Wiles,  
Secretary of the Board.