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CFPB Compliance Bulletin 2015-06

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Subject: Requirements for Consumer Authorizations for Preauthorized Electronic Fund Transfers

A. Introduction

The CFPB is issuing this Compliance Bulletin to industry to remind entities of their obligations under the Electronic Fund Transfer Act (EFTA) and Regulation E when obtaining consumer authorizations for preauthorized electronic fund transfers (EFTs) from a consumer's account. The CFPB has observed that some entities may not fully comply with the requirements imposed by EFTA and Regulation E. Others may be uncertain of their obligations under EFTA and Regulation E, as well as the intersections between Regulation E and the Electronic Signatures in Global and National Commerce Act (E-Sign Act).¹ For instance, this Compliance Bulletin explains that oral recordings obtained over the phone may authorize preauthorized EFTs under Regulation E provided that these recordings also comply with the E-Sign Act. Further, this bulletin outlines entities' obligations to provide a copy of the terms of preauthorized EFT authorizations to consumers. This Compliance Bulletin summarizes the current law, highlights relevant supervisory findings, and articulates the CFPB's expectations for entities obtaining consumer authorizations for preauthorized EFTs to help them ensure their compliance with Federal consumer financial law.²

B. Background

The CFPB has supervisory authority over certain covered persons, including very large depository institutions, credit unions and their affiliates;³ certain nonbanks;⁴ and service providers.⁵

EFTA is intended to protect individual consumers engaging in EFTs and remittance transfers.⁶ EFTs are defined broadly and generally include any transfer of funds

¹ Although the CFPB's authority to interpret the E-Sign Act is limited, *see* 15 U.S.C. § 7001 et seq., this additional guidance based on current law will assist entities in complying with EFTA and Regulation E.

² This Compliance Bulletin specifically focuses on preauthorized EFTs *from* consumers' accounts as governed by 12 CFR § 1005.10(b)-(d). This document does not address transfers *to* consumers' accounts, which are governed by different rules.

³ 12 U.S.C. § 5515(a).

⁴ 12 U.S.C. § 5514.

⁵ 12 U.S.C. §§ 5514(e), 5515(d).

initiated through an electronic terminal, telephone, computer, or magnetic tape for the purpose of ordering, instructing, or authorizing a financial institution to debit or credit a consumer’s account.⁷ EFTA is implemented through Regulation E, which includes official interpretations.⁸ The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) generally transferred rulemaking authority under EFTA from the Board of Governors of the Federal Reserve System (“the Board”) to the CFPB.⁹ The CFPB is authorized, subject to certain exceptions, to enforce EFTA and Regulation E against any person subject to EFTA and Regulation E.¹⁰

Consumer Authorization Requirements for Preauthorized EFTs from a Consumer’s Account.

Entities must comply with EFTA and its implementing Regulation E when using preauthorized EFTs. Preauthorized EFTs refer to an “electronic fund transfer authorized in advance to recur at substantially regular intervals.”¹¹ During examinations, the CFPB has noted that many companies – including those engaging in mortgage servicing, student loan servicing, debt collection, and short-term, small-dollar lending – solicit authorizations from consumers for payment by preauthorized EFT.

Consumer Authorizations in Compliance with EFTA and Regulation E

EFTA and Regulation E establish requirements for entities that obtain consumer authorizations for preauthorized EFTs.¹² These requirements include specific rules related to consumer authorizations. Regulation E requires that preauthorized EFTs from a consumer’s account be authorized “only by a writing signed or similarly authenticated by the consumer.”¹³ A copy of the authorization must also be provided to the consumer.¹⁴

⁶ See generally 15 U.S.C. § 1693 et seq; see also 12 CFR § 1005.1(b) (“[EFTA] . . . establishes the basic rights, liabilities, and responsibilities of consumers who use electronic fund transfer and remittance transfer services and of financial institutions or other persons that offer these services. The primary objective of [EFTA and Regulation E] is the protection of individual consumers engaging in electronic fund transfers and remittance transfers.”).

⁷ See 15 U.S.C. § 1693a(7); 12 CFR § 1005.3(b).

⁸ See 12 CFR § 1005 et seq.

⁹ Dodd-Frank Act §§ 1002(12)(C), 1061, and 1084, 12 U.S.C. §§ 5481(12)(C), 5581, and 15 U.S.C. § 1693 et seq. Section 1029 of the Dodd-Frank Act generally excludes from this transfer of authority, subject to certain exceptions, any rule making authority over a motor vehicle dealer that is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both. The transfer of authority also did not include Section 920 of EFTA, which concerns debit card interchange fees charged to merchants. Section 920 of EFTA is implemented by Board regulations at 12 CFR part 235.

¹⁰ See EFTA § 918(a)(5), 15 U.S.C. § 1693o(a)(5); see also 12 U.S.C. §§ 5536, 5564.

¹¹ See 12 CFR § 1005.2(k).

¹² See 15 U.S.C. § 1693e; 12 CFR § 1005.10(b) and (d).

¹³ See 12 CFR § 1005.10(b).

¹⁴ See *id.*

Under EFTA and Regulation E, companies can obtain the required consumer authorizations for preauthorized EFTs in several ways. Consumer authorizations can be provided in paper form or electronically. The commentary to Regulation E explains that the rule “permits signed, written authorizations to be provided electronically,” and specifies that the “writing and signature requirements . . . are satisfied by complying with the [E-Sign Act] which defines electronic records and electronic signatures.”¹⁵ Regulation E does not prohibit companies from obtaining signed, written authorizations from consumers over the phone if the E-Sign Act requirements for electronic records and signatures are met.¹⁶ The E-Sign Act establishes that electronic signatures and electronic records are valid and enforceable if they meet certain criteria.¹⁷ An electronic signature is “an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.”¹⁸ An electronic record is “a contract or other record created, generated, sent, communicated, received, or stored by electronic means.”¹⁹

In at least one examination, Supervision has concluded that one or more entities did not violate EFTA or Regulation E merely because they obtained by telephone consumer authorizations that were signed or similarly authenticated by the consumer orally.²⁰ Regulation E may be satisfied if a consumer authorizes preauthorized EFTs by entering a code into their telephone keypad,²¹ or, Supervision concluded, the company records and retains²² the consumer’s oral authorization, provided in both cases the consumer intends to sign the record as required by the E-Sign Act.

In addition, any recording of telephone conversations with consumers should be conducted in accordance with applicable State laws. Whether an authorization is provided in paper form or electronically, to comply with Regulation E, the

¹⁵ 12 CFR part 1005, Supp. I, comment 10(b)-5. The E-Sign Act establishes that electronic signatures and electronic records are valid and enforceable if they meet certain criteria. *See* 15 U.S.C. § 7001(a)(1). An electronic signature is “an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.” 15 U.S.C. § 7006(5). An electronic record is “a contract or other record created, generated, sent, communicated, received, or stored by electronic means.” *Id.* § 7006(4).

¹⁶ In 2006, the Board explained that if certain types of tape-recorded authorizations constituted a written and signed (or similarly authenticated) authorization under the E-Sign Act, then the authorization would satisfy Regulation E requirements as well. 71 Fed. Reg. 1638, 1650 (Jan. 10, 2006).

¹⁷ *See* 15 U.S.C. § 7001(a)(1).

¹⁸ 15 U.S.C. § 7006(5).

¹⁹ *Id.* § 7006(4).

²⁰ While Section 7001(c)(1) of the E-Sign Act restricts the use of oral recordings as electronic records “where a statute, regulation or other rule of law requires that information . . . be provided or made available to a consumer in writing,” that rule does not apply when obtaining a consumer’s authorization for preauthorized EFTs because Regulation E does not specify that entities must provide a writing to consumers when obtaining the authorization. *See* 12 CFR § 1005.10(b).

²¹ 12 CFR part 1005, Supp. I, comment 10(b)-5 (“Examples of electronic signatures include, but are not limited to, digital signature and security codes.”).

²² Regulation E generally imposes a two-year record retention requirement on persons subject to EFTA. *See* 12 CFR § 1005.13(b).

authorization must be readily identifiable as such to the consumer and the terms of the preauthorized EFTs must be clear and readily understandable to the consumer.²³ The authorization process should evidence the consumer's identity and assent to the authorization.²⁴

Providing a Copy of the Authorization to the Consumer

Regulation E requires persons that obtain authorizations for preauthorized EFTs to provide a copy of the terms of the authorization to the consumer.²⁵ The copy of the terms of the authorization must be provided in paper form or electronically.²⁶ Two of the most significant terms of an authorization are the timing and amount of the recurring transfers from the consumer's account.²⁷

In at least one examination, CFPB examiners observed that one or more companies provided consumers a notice of terms for preauthorized EFTs from a consumer's account. Supervision determined that these notices of terms did not satisfy Regulation E, because the notices did not disclose important authorization terms such as the recurring nature of the preauthorized EFTs, or the amount and timing of all the payments to which the consumer agreed.

As an alternative to providing a copy of the authorization after its execution, a company can comply with the Regulation E requirement to provide the consumer a copy of the authorization by using a confirmation form. For instance, a company may provide a consumer with two copies of a preauthorization form, and ask the consumer to sign and return one and to retain the second copy.²⁸ However, a company does not satisfy Regulation E by only making a copy of the authorization available upon request in lieu of providing the copy.²⁹

C. CFPB Expectations

The CFPB expects all entities obtaining consumer authorizations for preauthorized EFTs to know and comply with the requirements under 12 CFR 1005.10(b) that entities obtain appropriate consumer authorizations before initiating preauthorized EFTs and provide a copy of that authorization to consumers. When practical, the

²³ 12 CFR part 1005, Supp. I, comment 10(b)-6.

²⁴ 12 CFR part 1005, Supp. I, comment 10(b)-5.

²⁵ 12 CFR § 1005.10(b); 12 CFR part 1005, Supp. I, comment 10(b)-5.

²⁶ See 12 CFR part 1005, Supp. I, comment 10(b)-5.

²⁷ Cf. 12 CFR § 1005.2(k) ("'Preauthorized electronic fund transfer' means an electronic fund transfer authorized in advance to recur at substantially regular intervals."); *id.* 1005.10(d) ("When a preauthorized electronic fund transfer from the consumer's account will vary in amount from the previous transfer under the same authorization or from the preauthorized amount, the designated payee or the financial institution shall send the consumer written notice of the amount and date of the transfer at least 10 days before the scheduled date of transfer.").

²⁸ See 12 CFR part 1005, Supp. I, comment 10(b)-4.

²⁹ See 12 CFR § 1005.10(b) ("The person that obtains the authorization *shall provide* a copy to the consumer.") (emphasis added).

CFPB encourages entities obtaining consumer authorizations for preauthorized EFTs to provide the copy of the authorization to the consumer before the first preauthorized EFT is initiated.

If the CFPB determines that an entity has engaged in acts or practices that violate EFTA and Regulation E, or any other Federal consumer financial law, it will take appropriate supervisory or enforcement action to address the violations and seek all appropriate corrective measures, including remediation of harm to consumers and assessment of civil money penalties.

D. Regulatory Requirements

This Compliance Bulletin summarizes existing requirements under the law and findings the Bureau has made in the course of exercising its supervisory authority, and is a non-binding general statement of policy articulating considerations relevant to the CFPB's exercise of its supervisory and enforcement authority. It is therefore exempt from the notice and comment rulemaking requirements under the Administrative Procedure Act pursuant to 5 U.S.C. 553(b).

Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis. 5 U.S.C. 603(a), 604(a).

The CFPB has determined that this Compliance Bulletin does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring OMB approval under the Paperwork Reduction Act, 44 U.S.C. 3501, et seq.