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NAFCU's COMPLIANCE MONITOR

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ATM Fee Disclosures

The passage of Dodd-Frank and the creation and start-up of the Consumer Financial Protection Bureau (CFPB) have brought consumer laws and protections to the front page of newspapers. Unfortunately, another area that has resulted in front page news stories is lawsuits surrounding disclosures at Automated Teller Machines (ATMs). Financial institutions have been sued around the country for improper disclosure of potential ATM fees. The ATM fee disclosure cases carry a unique twist as any consumer that uses the credit union's ATM could be a potential plaintiff in a lawsuit (or part of a broader class action lawsuit).

Confusing Regulatory Text

Part of the confusion in this area stems from the sloppy regulatory language in Regulation E. [Section 205.16 of Regulation E](#) contains the disclosure requirements for ATMs. Section 205.16(b) provides the general disclosure requirement but Section 205.16(c) details the specific disclosures that must be provided. In other words, Section 205.16(c) tells credit unions how to comply with the requirements in 205.16(b).

Notice Required in Two Places

Section 205.16(c) requires disclosures both on the ATM machine itself and on the ATM screen or on a paper notice. Both of these disclosures must be provided prior to a consumer conducting a transaction for which a fee will be charged. A disclosure in only one place is not sufficient.

Disclosure on the ATM Machine

Section 205.16(c)(1) requires a disclosure on the ATM machine itself:

“(1) *On the machine.* Post in a prominent and conspicuous location on or at the automated teller machine a notice that:

(i) A fee will be imposed for providing electronic fund transfer services or for a balance inquiry; or

(ii) A fee may be imposed for providing electronic fund transfer services or for a balance inquiry, but the notice in this paragraph

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Worth Noting



By Steve Van Beek

Tracking Proposed and Finalized Rules. The Federal Register provides the option for any interested party to “subscribe” to a particular regulator’s rulemakings. This subscription will ensure you are updated (via e-mail or RSS feed) each time the selected regulator publishes an item in the Federal Register. The Consumer Financial Protection Bureau’s page is [here](#). NCUA’s page is [here](#). Look for the “Subscribe” button on the right-hand side of the page. Be sure to look for a confirmation e-mail – which must be responded to prior to the updates beginning. Additional details are available [at this blog post](#).

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(c)(1)(ii) may be substituted for the notice in paragraph (c)(1)(i) only if there are circumstances under which a fee will not be imposed for such services; and”

If the credit union only charges a fee for some transactions, it can use a disclosure that states a fee “may” be charged. For example, if the credit union charges fees to non-members for cash withdrawals but does not charge fees to non-members for balance inquiries – the credit union can use the “may” language in its disclosure. If the credit union charges a fee for all non-member transactions, the disclosure must indicate that a fee “will” be charged.

Note: Regulation E does not require the actual amount of the fee to be disclosed on the ATM itself. If the credit union does disclose a fee amount, it should be sure the fee is accurate because an inaccurate fee amount (i.e., disclosing a \$2.00 fee when the credit union charges \$2.50) could also present a litigation risk to the credit union. There is the potential for a state law to require the disclosure of a fee amount on the ATM itself, so be sure to review your state law. It is unlikely that a state disclosure requirement would be preempted for Federal Credit Unions.

Disclosure on ATM Screen or Paper Notice

In addition to the disclosure on the ATM itself, Section 205.16(c)(2) requires the credit union to provide notice of the fee either on the ATM screen or on a paper notice prior to the fee being charged:

“(2) *Screen or paper notice.* Provide the notice required by paragraphs (b)(1) and (b)(2) of this section either by showing it on the screen of the automated teller machine or by providing it on paper, before the consumer is committed to paying a fee.”

The requirement in 205.16(c)(2) cross-references the general requirements in Section 205.16(b)(1) and (b)(2):

“(b) *General.* An automated teller machine operator that imposes a fee on a consumer for initiating an electronic fund transfer or a balance inquiry shall:

(1) Provide notice that a fee will be imposed for providing electronic fund transfer services or a balance inquiry; and

(2) Disclose the amount of the fee.”

This cross-reference requires the disclosure on the ATM screen (or a paper notice prior to the fee being charged) to include the specific “will” language about the transaction and disclose the actual amount of the fee that will be charged. This makes sense because the consumer selected a particular transaction and the disclosure needs to be specific as to whether that particular transaction will be charged a fee and, if so, the amount of the fee. The consumer then will have the ability to either cancel the transaction or proceed and incur the fee.

NCUA Board Meeting. The NCUA Board met in a rare August meeting. NCUA announced a 25 basis point 2011 assessment for the Corporate Stabilization Fund. According to NCUA, it will distribute invoices with the 2011 assessment due by September 27. Credit unions should expense the assessment in September and report the full expense on their September 30 Call Reports. Additional information about the August Board meeting can be found in NCUA’s [Board Action Bulletin](#).

Cordray Hearing. On September 6, 2011, the Senate Banking Committee will hold a [nomination hearing](#) for Richard Cordray – the nominee for Director of the Consumer Financial Protection Bureau. The hearing may provide insights into Cordray’s priorities if he is later confirmed for the Director post. Remember, forty-four Republican Senators have pledged to block any nominee to the Director position unless changes are made to the CFPB.

Regulatory Review. NCUA annually reviews one-third of its regulations. NCUA solicits comments on its existing regulations and requests suggestions to relieve credit unions’ regulatory burden. NAFCU submitted a comment letter that highlights areas where NCUA’s recent actions have unnecessarily hampered credit union’s ability to operate. The [NAFCU letter](#) discusses Reg Flex, MBLs, CUSO, TDRs, among other issues.

Ex Parte Communications. The CFPB’s General Counsel, Leonard Kennedy, [recently blogged](#) about the CFPB’s policy on ex parte

NAFCU has a [resource page](#) of useful websites for compliance research?

Most credit unions provide this notice on the ATM screen itself because of the impractical nature of the paper notice. The paper notice would need to be provided prior to the member being charged a fee for the transaction. A disclosure on the receipt would not suffice as it would be a disclosure after the member was charged a fee.

CFPB Responsible for Regulation E

Beginning on July 21, 2011, the CFPB has regulatory authority over Regulation E. It will be interesting to see if the CFPB provides any additional guidance to financial institutions to clarify the disclosure requirements of [Section 205.16](#). The lawsuits being filed against financial institutions allege that consumers are harmed by either the lack of disclosure or inaccurate disclosures. The CFPB now has the power to clarify the requirements so that credit unions do not need an “army of lawyers” to analyze and comply with the ATM fee disclosure requirements. Whether the CFPB will take steps to clarify the regulations in order to ultimately help consumers remains to be seen.

Conclusion

One of the reasons disclosures on ATMs have been in the news recently is because they can be viewed by any person – member, nonmember, plaintiff’s attorney, auditors, examiners and others. This prominence brings with it additional compliance and legal risk for credit unions. Be sure to review your current disclosures and document the credit union’s efforts – for example, it might be a good idea to photograph the “on the ATM disclosure” to ensure the credit union has a defense if the disclosure is removed.

- Steve Van Beek
Director of Regulatory Compliance

communications. These ex parte communications include written or oral communication from an outside party to the CFPB in an attempt to influence a rulemaking procedure. The policy kicks in after the CFPB proposes a regulation and would not cover discussions prior to a proposal. The full policy can be found [here](#). The CFPB will summarize and publish ex parte communications in an effort to provide additional transparency to the rulemaking process.

NCUA LOL on CUSOs. NCUA recently issued a legal opinion letter discussing a CUSO’s ability to buy a building and lease space to a Federal Credit Union. The letter, NCUA Legal Opinion Letter [11-0642](#), is very detailed and fact specific so be sure to view the [full letter](#).

NCUA LOL on MBLs. NCUA also issued Legal Opinion Letter [11-0734](#) which discusses loans to professional musicians to purchase musical instruments. NCUA emphasized that the IRS treatment of a loan is not the proper test for whether a loan is a member business loan (MBL) and that “[i]t is the loan’s actual purpose and amount, absent any applicable exemptions, that determine whether the loan is an MBL.” In the [letter](#), the musical instruments were for the musician’s trade and used for business purposes and because the aggregate of the loans exceeded \$50,000, the loans were MBLs.

September 14 Webcast

Fannie Mae Portfolio Tools for Credit Unions

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