



WILLIAM H. WALLACE
FIRST VICE PRESIDENT

FEDERAL RESERVE BANK
OF DALLAS

May 12, 1986

DALLAS, TEXAS 75222

Circular 86-45

TO: The Chief Executive Officer of all
member banks and others concerned in
the Eleventh Federal Reserve District

SUBJECT

**Final changes to the official staff commentary on Regulation E,
Electronic Fund Transfer**

DETAILS

Effective April 16, 1986, the Board of Governors of the Federal Reserve System adopted final revisions to the official staff commentary to Regulation E. The revisions to the official staff commentary relate to preauthorized electronic fund transfers for biweekly loan payments and to written authorizations for preauthorized debits. Proposed changes were published in our December 1985 Circular 85-155.

ATTACHMENTS

A Federal Register document is attached.

MORE INFORMATION

For further information, please contact John Rogers in this Bank's Legal Department at (214) 651-6228.

Sincerely yours,

A handwritten signature in cursive script that reads "William H. Wallace".

For additional copies of any circular please contact the Public Affairs Department at (214) 651-6289. Banks and others are encouraged to use the following incoming WATS numbers in contacting this Bank (800) 442-7140 (intrastate) and (800) 527-9200 (interstate).

FEDERAL RESERVE SYSTEM**12 CFR Part 205****[Reg. E; EFT-2]****Electronic Fund Transfers; Official Staff Commentary Update****AGENCY:** Board of Governors of the Federal Reserve System.**ACTION:** Final official staff interpretation.

SUMMARY: The Board is publishing revisions to the official staff commentary to Regulation E (Electronic Fund Transfers). The commentary applies and interprets the requirements of Regulation E and is a substitute for individual staff interpretations of the regulation. The revisions represent final action on proposed changes published for comment in December 1985.

EFFECTIVE DATE: April 16, 1986.

FOR FURTHER INFORMATION CONTACT: Gerald P. Hurst or John C. Wood, Senior Attorneys, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, Washington, D.C. 20551, (202) 452-3667 or (202) 452-2412, or Earnestine Hill or Dorothea Thompson, Telecommunication Device for the Deaf (TDD) at (202) 452-3544.

SUPPLEMENTARY INFORMATION: (1) *General.* The Electronic Fund Transfer Act (15 U.S.C. 1693 *et seq.*) governs any transfer of funds that is electronically initiated and that debits or credits a consumer's account. This statute is implemented by the Board's Regulation E (12 CFR Part 205). Effective September 24, 1981, an official staff commentary (EFT-2, Supp. II to 12 CFR Part 205) was published to interpret the regulation. The commentary is designed to provide guidance to financial institutions in applying the regulation to specific situations. The commentary is updated periodically to address significant questions that arise. There have been three updates so far: these were published on April 6, 1983 (48 FR 14880), October 18, 1984 (49 FR 40794), and April 3, 1985 (50 FR 13180). A proposed fourth update was published for comment on December 11, 1985 (50 FR 50794); this notice contains the final version.

(2) *Explanation of revisions.* Question 3-7.5 deals with the issue of whether

requiring payment by preauthorized electronic fund transfers (EFTs) as part of a biweekly mortgage program would violate the compulsory use prohibition in section 913(1) of the Electronic Fund Transfer Act (15 U.S.C. 1693k(1)). In response to comments on the proposed version, the final version emphasizes that the repayment plan in question would be optional, notes that the lower finance charge results from the frequency of the payments, and makes clear that the interpretation is not limited to mortgage loans.

Question 10-18.6 (designated question 10-81.75 in the proposal) clarifies the statutory and regulatory provisions requiring preauthorized EFTs to be "authorized by the consumer only in writing" (15 U.S.C. 1693e(a) and 12 CFR § 205.10(b)). The issue is whether this statutory and regulatory requirement is met by a payee signing a written authorization as the consumer's agent, based on the consumer's oral authorization of the preauthorized EFTs in a taped telephone conversation.

Existing question 10-18.5 addresses the question of telephone authorizations, and sanctions the procedure of sending the consumer a form to sign and return following a telephone conversation. Although this question can be viewed as already dealing with the issue at hand, a new question was proposed to make clear that the addition of a tape recording (with the payee signing a written authorization on behalf of the consumer) does not satisfy the requirement that preauthorized transfers be authorized "only in writing" by the consumer.

After careful consideration of all comments received and further analysis of the statutory and regulatory language, the interpretation is being adopted essentially as proposed. (A phrase in the question and the final sentence in the answer have been deleted as unnecessary to the resolution of the issue.) The Electronic Fund Transfer Act makes distinctions between written and oral requirements, and in the case of preauthorized EFTs the Board believes that the position taken in question 10-18.6 reflects the plain meaning of the statutory language that authorization may be made by "the consumer *only* in writing" (emphasis added). Allowing payees to satisfy the requirement for a written authorization by signing an authorization on behalf of the consumer based upon a telephone conversation— even a tape recorded one—would in effect permit oral authorizations for preauthorized EFTs in contradiction of the language of the statute and regulation.

Although the term "writing" may be viewed as including a tape recording under other laws for some purposes—for example, some evidence rules include tape recordings as writings—the Board believes that, in the absence of an indication to the contrary in the statute or the legislative history, the phrase "only in writing" in the preauthorization of EFTs does not encompass the tape recording of a consumer's oral authorization. The Board believes that such an interpretation of the word "writing" would render the statutory and regulatory provisions meaningless by, in effect, allowing oral authorizations for preauthorized EFTs.

Some commenters expressed concern that the proposed interpretation would bar all authorizations of preauthorized EFTs by agents (including, for example, authorizations under power of attorney for incapacitated persons). The interpretation does not address agency questions generally; rather, it is limited to the question of a payee or a payee's agent acting under an oral authorization from the consumer.

Numerous commenters from the telemarketing industry believed that, if adopted, the proposed answer could make it impossible for telemarketing programs to arrange for payment by preauthorized EFTs. While the Board's position may require a change in procedure because a payee will have to obtain a written authorization from the consumer, the requirement could be satisfied, for example, by the telemarketer's sending the consumer a form to be signed and returned, as outlined in existing question 10-18.5.

Other commenters pointed out that the requirement for a written authorization means that there is a difference in the rules for preauthorizing EFTs and for authorizing credit card transactions. The divergent rules are based directly on the underlying statutes: the Truth in Lending Act, which governs credit card transactions, contains no limitation similar to that established by § 907 of the Electronic Fund Transfer Act. One reason for the variance in treatment may be the different nature of the accounts accessed. Electronic fund transfers involve a consumer asset account, such as a checking or savings account, in which withdrawals could have an immediate adverse impact on the consumer, by depleting the account of funds needed for housing or other living expenses, for example. Credit card transactions, on the other hand, involve a credit account and charges will first show up on a billing statement, so that

transactions do not have an immediate impact on the consumer.

List of Subjects in 12 CFR Part 205

Banks, banking; Consumer protection; Electronic fund transfers; Federal Reserve System; Penalties.

1. The authority citation for Part 205 continues to read as follows:

Authority: Pub. L. 95-630, 92 Stat. 3730 (15 U.S.C. 1693b).

2. *Text of revisions.* The revisions to the Official Staff Commentary on Regulation E (EFT-2, Supp. II to 12 CFR Part 205) read as follows:

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Section 205.3—Exemptions

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Q 3-7.5: *Compulsory use—biweekly loan programs.* A lender offers consumers the option of a mortgage or other loan involving biweekly payments. Use of this option results in a somewhat lower total finance charge than a plan involving monthly payments. An integral part of this option is a requirement that consumers make the biweekly payments by preauthorized electronic fund transfers. Does this requirement violate the act's prohibition against compulsory use of electronic fund transfers?

A: No, because the biweekly repayment plan is optional and because the lower finance charge resulting from the more frequent payments offers a cost-related incentive. (§ 205.3(d)(3), section 913)

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Section 205.10—Preauthorized Transfers

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Q 10-18.6: *Preauthorized debits—authorization by agent.* A telemarketing company (directly or through an agent) asks consumers to make the monthly payments for their purchases by preauthorized electronic fund transfers. If a consumer agrees, the company obtains the consumer's bank account number and completes a written authorization based on the telephone conversation (which the company records). The company signs the authorization as the consumer's agent and sends the consumer a written confirmation of the transaction. Does this procedure satisfy the requirement of the act and regulation that preauthorized EFTs may be authorized by the consumer only in writing?

A: No. The requirement that preauthorized EFTs may be authorized by the consumer only in writing cannot be met by a payee signing a written authorization on the consumer's behalf, with only an oral authorization from the consumer. The tape recording of the telephone conversation does not constitute an authorization by the consumer "in writing" for purposes of the requirement. (§ 205.10(b))

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Board of Governors of the Federal Reserve System, April 14, 1986.

William W. Wiles,
Secretary of the Board.

[FR Doc. 86-8713 Filed 4-18-86; 8:45 am]

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