

May 14, 2019

Via E-mail and Federal Express

Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552
Attn.: Kathleen L. Kraninger, Director

Re: Inclusion of Debit Cards within the Definition of "Payment Transfer"
Under the Payday, Vehicle Title, and Certain High-Cost Installment Loans Rule

Ladies and Gentlemen,

The Electronic Transactions Association (the "ETA") respectfully submits this letter to the Consumer Financial Protection Bureau (the "Bureau") in response to its Rule on Payday, Vehicle Title, and Certain High-Cost Installment Loans, codified at 12 C.F.R. Part 1041 (the "Rule"), and its proposed retention of the Rule's so called "payment provisions" contained at 12 C.F.R. §§ 1041.7-1041.9. See generally 84 Fed. Reg. 4252 (Feb. 14, 2019) (proposing to rescind certain "mandatory underwriting provisions" of the Rule while retaining the payment provisions); 84 Fed. Reg. 4298 (Feb. 14, 2019) (proposing to delay the compliance deadline with respect to same).

Background

The ETA is the leading trade association for the payments industry, representing over 500 companies worldwide involved in electronic transaction processing products and services. The purpose of ETA is to influence, monitor and shape the payments industry by providing leadership through education, advocacy and the exchange of information. ETAs membership spans the breadth of the payments industry to include independent sales organizations (ISOs), payments networks, financial institutions, transaction processors, mobile payments products and services, payments technologies, and software providers (ISV) and hardware suppliers.

ETA believes that the Rule's current treatment of consumer payments initiated by a prepaid card or a debit card linked to a deposit account (each, a "Debit Card") disadvantages both consumers and lenders by treating such payments as "payment transfers" subject to the requirements and prohibitions of the Rule's payment provisions. See 12 C.F.R. § 1041.8(a)(1)(i) (including all electronic fund transfers within the definition of "payment transfer"); Comment 8(a)(1)(i)(A) (clarifying that debit and prepaid card transactions are included within the definition of an electronic fund transfer). Accordingly, the ETA believes that the Bureau should remove Debit Card transactions from the Rule's payment provisions.

Debit Card Transactions

Since the advent of Debit Cards and increasingly in recent years, Debit Card transactions have become the dominant means of consumer payments, replacing checks, credit cards and even cash in day to day life. Like a credit card, Debit Cards generally utilize a plastic card or plate in

conjunction with an account number, but, unlike a credit card, a Debit Card is linked to the payor's deposit or prepaid account. To make a payment, the payor submits the card or account number to a payee who then initiates a transaction message. This message travels over the applicable Debit Card network to the Debit Card issuer or processor, which then checks the balance of the applicable deposit or prepaid account. If sufficient funds are available, the issuer or processor confirms the transaction by sending an authorization message to the payee, and the payment transaction proceeds. Critically, and unlike other forms of electronic payment, this process is instantaneous; either funds will be debited from the payor's account immediately upon approval or the payee will be immediately notified that funds were not available.

To receive compensation for processing Debit Card transactions, the payee's bank generally charges an "interchange fee" to the payor's bank for its role in processing the Debit Card transaction. This cost is passed on to the payee, and not the payor, via its bank and/or payment processor, with the potential addition of the costs of their services. Entities that comprise the ETA's membership generate profits in this manner and not by assessing fees on the payor, including especially any type of NSF fees.

The Rule

Given the above, the ETA is perplexed at the inclusion of Debit Cards within the Rule's definition of a "payment transfer." The Bureau has identified as an "unfair and abusive practice" attempts by covered lenders to make payment transfers "from consumers' accounts in connection with a covered loan after the lender's second consecutive attempts to withdraw payments from the accounts from which the prior attempts were made have failed due to a lack of sufficient funds . . ." 12 C.F.R. § 1041.7. In determining that such an action was "unfair and abusive," the Bureau relied almost exclusively on the fact that ACH and check transactions may trigger NSF fees or account closures by banks. See, e.g., 82 Fed. Reg. 54472, 54723 (Nov. 17, 2017) ("[T]hese payment practices increase the risk that the payment attempt will be made in a way that triggers fees on a consumer's account. Unsuccessful payment attempts typically trigger bank fees. According to deposit account agreements, banks charge an average NSF fee of approximately \$34 for returned ACH and check payments.") (emphasis added); id. at 54732 ("In sum, after having reviewed the comments, the Bureau concludes that the practice preliminarily identified in the proposal is unfair. It causes substantial injury to consumers because borrowers subjected to the practice incur repeated fees.") (emphasis added). Given this rationale, there is no credible basis for the Rule to apply to Debit Cards because, to the ETA's knowledge, no bank charges NSF fees on such transactions or terminates Debit Card accounts for customers that incur multiple declined transactions.

The Bureau's confusion on this issue may have resulted from the fact that it primarily relied on ACH data and did not undertake a comprehensive study as to the effects of Debit Card payments. See, e.g., id. at 54270 ("The Bureau's research with respect to payment practices focused on online payday and payday installment loans, where payment attempts generally occur through the ACH network and thus can be readily tracked at the account and lender level.") (emphasis added). Accordingly, the Bureau has not only applied the Rule to Debit Cards based on factually inaccurate conclusions (i.e., NSF fees are not charged on Debit Cards), but it has simultaneously failed to provide the requisite level of evidence (or any evidence) to support those conclusions. See, e.g., Safe Extensions, Inc. v. FAA, 509 F.3d 593, 604 (D.C. Cir. 2007) (agency determinations must be set aside if they are made in clear error or otherwise unsupported by substantial evidence).

Instead, the Bureau offered cursory and easily refutable support for its inclusion of Debit Cards within the Rule's payment provisions. For example, despite admitting that "failed debt card transactions may not trigger NSF fees," it argues that "some of them do trigger overdraft fees." 82 Fed. Reg. 54472, 54747. But the Bureau's support for this conclusion is perfunctory at best and might be more appropriately characterized as an afterthought.¹ Moreover, as the Bureau well knows, an overdraft feature on a Debit Card must be authorized by the consumer pursuant to the Bureau's own rules. See 12 C.F.R. § 1005.17.² Put another way, the Bureau has addressed this very issue through a previous rulemaking. Indeed, changes to Regulation E have eliminated the Bureau's concern that "borrowers do not understand the material risks, costs, or conditions" at play, because any consumer that incurs overdraft fees must, pursuant to Regulation E, affirmatively request such a feature. Id. at 54747. Additionally, reduction of overdraft fees on honored transactions is not the purpose of the payment provisions; nowhere in the Rule does the Bureau attempt to impose any limits at all on honored payments that create overdrafts.

And while the ETA does not presuppose specific expertise with respect to the consumer small dollar loan industry, the Bureau's additional justification—that consumers may be harmed by covered lenders that impose NSF fees—strikes us as equally underdeveloped. See id. Surely the Bureau could address such a concern with a lighter touch. For example, the Rule might exclude Debit Card transactions unless a covered lender charged such a fee. Happily, a better-targeted rule of this type would eliminate the Bureau's concern of imposing too many burdens on covered lenders as each lender could balance the costs of compliance with the revenue benefit of NSF fees on declined Debit Card payments. Id.³ (Such a treatment would also be notably similar to the Rule's exclusion for certain deposit advance products offered by financial institutions, which is unavailable if the financial institution charges a fee for overdraft items.)

¹ Without clearly identifying the payment method at issue, the Bureau noted that 73% of borrowers for whom a third payment presentment is made incur an NSF fee while only 8% incur an overdraft fee. 82 Fed. Reg. 54472, 54734 (emphasis added). It is otherwise not entirely clear what study the Bureau used to form the basis that incurring overdraft fees sufficiently demonstrated the need to include Debit Card transactions within the purview of the Rule. See, e.g., id. at 54747 (noting that "while failed debt card transactions may not trigger NSF fees, some of them do trigger overdraft fees, even after two failed attempts, as our study showed") (emphasis added); CFPB, Online Payday Loan Payments (April 2016) (referencing the term "debit card" only four times (three of which are in the same footnote) in a 24 page report).

² For reasons not apparent to the ETA, the Bureau acknowledges, but does not describe in further detail, this fact in its rulemaking. See 82 Fed. Reg. 54472, FN 942 (overdraft fees cannot be charged on Debit Cards transactions when a borrower does not opt in). Indeed, the Bureau's own studies indicate that, since this modification to Regulation E, only approximately 14.3% of consumers opt-in to overdraft features. See CONSUMER FINANCIAL PROTECTION BUREAU, DATA POINT: CHECKING ACCOUNT OVERDRAFT 9 (July 2014).

³ The ETA additionally understands that many laws under which Covered Borrowers operate do not, in any event, explicitly authorize or otherwise prohibit such fees.

Even if Debit Card payments causing account overdrafts and related fees were commonplace on covered loans, the Bureau has nevertheless failed its legal obligation to establish that it is "unfair" or "abusive" for a lender to initiate Debit Card payments at the risk of such fees. Consumers benefit greatly by Debit Card payments for a number of reasons and, accordingly, any injury from Debit Card payments on covered loans is "outweighed by countervailing benefits to consumers or to competition" and thus cannot be "unfair." 12 U.S.C. § 5531(c), (d). By the same token, unfettered use of Debit Card payments on covered loans cannot be "abusive" because it does not take "unreasonable" advantage of the consumer (much less the consumer's lack of understanding, inability to protect his or her interests or reasonable reliance on the lender to act in the consumer's interest). 12 U.S.C. § 5531(d).

Consumer benefits of Debit Card payments on covered loans include the following: (1) they do not result in NSF fees or account closure when an account is overdrawn; (2) they supplant the need or use of other payment methods (e.g., checks or ACHs) that do lead to NSF fees; (3) they result in faster payments and lower late charges; (4) they eliminate or reduce the need for both the consumer and covered lender to carry cash, thereby promoting safety for both; (5) they provide consumers with an array of chargeback protections in the event of unauthorized use or fraud; and (6) they allow immediate awareness of the disposition of the transaction and thus promote earlier discussions of available options by lender and borrower.

For these reasons, the ETA believes that the Rule should encourage Debit Card payments by excluding them from the payment provisions (as opposed to including such transactions with alternative payment methods for which the Bureau's data supports the potential for consumer harm). It is our experience that consumer demand for Debit Card payments is high, their benefits self-evident and the opportunity for consumer harm essentially nonexistent. Were the Bureau to allow covered lenders that process Debit Card payments to avoid the Rule in its entirety, we believe that the vast majority, if not all, covered lenders would offer Debit Card transactions as a primary payment option. This would mean that the Bureau could not only eliminate or sharply reduce the primary harm it has identified in creating the payment provisions, *i.e.*, NSF fees, but that it could do so without the need for burdensome regulation.

Consumer Financial Protection Bureau
May 14, 2019
Page 5

On behalf of the ETA, we thank the Bureau for the opportunity to comment on the Rule, and we would be delighted to discuss the ETA's experience and knowledge of Debit Card payments further with the Bureau. Please feel free to contact me with any questions you may have.

Sincerely,

A handwritten signature in black ink that reads "Scott E. Talbot". The signature is written in a cursive style with a large initial "S" and a distinct "E" before the last name.

Scott Talbot
Senior Vice President of Government Affairs
Electronic Transactions Association