



The Voice of the Retail Banking Industry

November 3, 2015

Consumer Financial Protection Bureau
ATTN: PRA Office
1700 G Street NW
Washington, DC 20552

RE: OMB Control Number: 3170-XXXX, Docket No: CFPB-2015-0037 - Web-Based Quantitative Testing of Point of Sale/ATM (POS/ATM) Overdraft Disclosure Forms

Dear PRA Officer:

The Consumer Bankers Association (CBA)¹ writes in response to the Consumer Financial Protection Bureau's (Bureau) request for approval under the Paperwork Reduction Act (PRA) to conduct a national web-based survey of 8,000 individuals as part of the Bureau's study of overdraft protection services.² CBA appreciates the Bureau's consideration of the consumers experience with and understanding of overdraft services. We believe it is important to fully understand what consumers know about overdraft services and how they choose to use them to meet their liquidity needs. CBA strongly supports effective consumer protections and, specifically, the principles of customer choice, transparency and fairness in deposit account relationships. We appreciate the opportunity to share our suggestions and work with the Bureau in carrying out its mission.

The CFPB should withdraw its request until such time as it can produce a model survey on which the public can comment.

We reiterate here our concerns with the Bureau's approach to its request under PRA as stated in our September 30, 2015, joint-trade letter sent to David Silberman, Associate Director for Research, Markets, and Regulations.³ As asserted in the letter, CBA is concerned that the Bureau did not include in its submission to the Office of Management and Budget (OMB) a draft

¹ The Consumer Bankers Association is the only national financial trade group focused exclusively on retail banking and personal financial services—banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation for its members. CBA members include the nation's largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the total assets of depository institutions.

² Comment Request, Web-Based Quantitative Testing of Point of Sale/ATM (POS/ATM) Overdraft Disclosure Forms, 80 Fed. Reg. 53503 (Sept. 4, 2015).

³ See: <http://consumerbankers.com/cba-issues/comment-letters/joint-letter-bureau-re-survey-publication>

survey instrument on which the public could comment, despite OMB guidance requiring publication of the survey simultaneous with the Bureau's request for comment. In its request, the Bureau merely states the principle purpose of the survey without any indication to tone, length or any specifics commenters would need to make informed opinions. We believe the public is at a greatly disadvantaged position to submit substantive comments due to the lack of specific survey questions and we urge the Bureau to withdraw its current request until such time as it is able to produce a model survey.

Submitting a draft survey instrument as part of an information collection request is required by Federal guidelines implementing the PRA and increases the opportunity for important public feedback on the survey. Guidelines issued by the Administrator of OMB's Office of Information and Regulatory Affairs state that the "PRA requires that the agency publish a 60-day notice in the *Federal Register* to obtain public comment on the proposed collection, prior to submitting the information collection to OMB. *At the time this notice is published, agencies must have at least a draft survey instrument available for the public to review.*"⁴ Accordingly, the Bureau should not withhold the survey instrument until a later date.

The Bureau's decision to withhold publication of the survey undermines the PRA review process. If, as here, the Bureau provides only a generalized description of topics to be explored by survey questions and withholds publication of the draft survey instrument until after the first round of comments is received, the Bureau will limit the public's and OMB's ability to assist the Bureau in producing a survey that will yield information of sufficient quality for its intended purpose. As OMB notes in its guidance, the PRA review process is intended, in part, to ensure that "the proposed collection of information will result in information that will be collected, maintained, and used in a way consistent with the OMB and agency information quality guidelines, or they should not propose to collect the information."⁵ These Information Quality Guidelines, in turn, designate as "influential information" that which will have a "clear and substantial impact on important public policies or important private sector decisions."⁶ The Guidelines require that agencies hold information designated as influential "to a higher standard of reproducibility and transparency than information that is not defined as influential."⁷

The data to be collected from the proposed consumer survey will constitute "influential information" subject to these higher standards because the feedback it seeks on consumers' understanding of overdraft disclosure forms is likely to influence whether the Bureau issues regulations. Therefore, it is critical that the public be given an opportunity to comment on the design as well as the execution of the survey *and* that OMB be afforded the opportunity to

⁴ JOHN D. GRAHAM, ADMIN., OFFICE OF INFO. & REGULATORY AFFAIRS, OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, GUIDANCE ON AGENCY SURVEY & STATISTICAL INFO. COLLECTIONS 3 (Jan. 20, 2006) ("OMB MEMORANDUM"), *available at* https://www.whitehouse.gov/sites/default/files/omb/assets/omb/infoereg/pmc_survey_guidance_2006.pdf (second emphasis added).

⁵ OMB MEMORANDUM, *supra* note 2, at 14.

⁶ *Id.*

⁷ *Id.*

consider those comments as it reviews the PRA request. This can only be accomplished if the draft survey is made available to the public during the first comment period.⁸

When the Bureau is able to provide a complete sample survey, CBA makes the following initial recommendations.

Clarity of Terms – Overdraft services vs. Overdraft Protection

“Overdraft service” is a common industry term used to refer to pay-and-charge services. “Overdraft protection” is a common industry term used when referring to linked accounts. These terms are often used interchangeably and many community groups, regulators and legislators use them in a confusing manner. Neither of these terms includes situations such as where checks are returned for insufficient funds and a non-sufficient funds fee (NSF fee) is assessed. Returning checks and assessing NSF fees are critical safety and soundness tools that should not be conflated with overdraft services or overdraft programs.

As described in Regulation E, “The term ‘overdraft service’ means a service under which a financial institution assesses a fee or charge on a *consumer’s* account held by the institution for paying a transaction when the consumer has insufficient or unavailable funds in the account.”⁹ The regulation identifies three types of services that are not considered “overdraft services,” including transfers from a line of credit, such as a credit card account, home equity line of credit, or an overdraft line of credit; transfers from another account held by the consumer, such as a savings account; or a line of credit or other transaction exempt from the Federal Reserve Board’s Regulation Z.¹⁰

Accordingly, CBA urges the Bureau to carefully define what products and/or services any potential survey will cover in order to ensure respondents are not confusing products and services and the terms that apply to them.

Clarity of Disclosures vs. Clarity of Process

It is unclear if from the Bureau’s OMB request whether the focus of the survey will be on clarity of the disclosures provided to consumers during the account opening process or clarity of the opt-in process as established under Regulation E.¹¹ As the Bureau well knows, the processes are not mutually inclusive.

⁸ OMB requires that the draft survey instrument be published simultaneous with the first notice seeking comment in order to provide that agency with a full range of viewpoints on the draft survey instrument when determining whether to approve the requesting agency’s information collection request. If the Bureau does not publish the survey prior to the closing of the first comment period, OMB will not receive the benefit of the public’s comment on the survey instrument itself; OMB will have only the Bureau’s views on the survey instrument. Undoubtedly, this result would impair OMB’s decision-making process regarding the Bureau’s information collection request.

⁹ 12 C.F.R. § 1005.17(a)

¹⁰ 12 C.F.R. § 226.3(d)

¹¹ 12 C.F.R. § 1005.17(b)

As for disclosures, included in Appendix A to Regulation E is a sample notice - Model Form A-9.¹² Regulation E maintains that a notice of an institution provides to a consumer must be “substantially similar” to Model Form A-9 and include the following elements:

- A brief description of the overdraft protection service and types of transactions for which a fee or charge for paying an overdraft may be imposed;
- The dollar amount of any fees or charges assessed for payment of covered overdraft, including any daily or other overdraft fees. If the amount of the fee is based upon the number of times the consumer has overdrawn the account, the amount of the overdraft, or other factors, then the institution must disclose the maximum fee that may be imposed;
- The maximum number of overdraft fees or charges that may be assessed per day, or if there is no such limit, that fact;
- Disclosure of the consumer’s opt-in right, including an explanation of the right to affirmatively consent to the overdraft service and the methods the consumer may utilize to consent; and
- Disclosure of alternative plans for covering overdrafts, such as a line of credit or transfer of funds from another account of the consumer held at the institution to cover overdrafts. If these are offered, the institution must state that fact. Additional alternatives for paying overdrafts may also be included at the institution’s option.

For Regulation E opt-in, an institution that holds a consumer's account is prohibited from assessing any fee or charge on a consumer's account for paying an ATM or a one-time debit card transaction as part of the institution's overdraft service, unless:

- The consumer is provided with a notice in writing, (or if the consumer agrees, electronically) segregated from all other information, explaining the institution's overdraft service;
- The consumer is given a reasonable opportunity to affirmatively consent (opt in);
- The consumer affirmatively consents (opts in) to the service; and
- The institution provides the consumer with confirmation of the consumer's consent in writing (or if the consumer agrees, electronically), which includes a statement informing the consumer of the right to revoke such consent.

The opt-in requirement applies to any ATM transaction at any location and any one-time debit card transaction. The opt-in requirement applies to all accounts covered by Regulation E, including payroll card accounts. The final rule does not apply to check transactions, recurring debits, or ACH transactions.

We urge the Bureau to clearly present and examine these issues separately as to not cause confusion to the subject being presented. A clearer and separate understanding of each will help fine tune any considerations.

Consumer Sampling

¹² 12 C.F.R. § 1005, Appendix A

As stated in the OMB request, the Bureau plans to conduct a national survey of 8,000 individuals as part of its study. However, instead of randomly selecting 8,000 consumers, the Bureau intends to “oversample” respondents who are more likely to have experience with overdraft fees.

CBA would recommend the Bureau limit its survey to a randomly selected consumer population in order to obtain a more accurate representation of consumer experience with overdraft services. While it is understandable that the Bureau would want to survey consumers more likely to have the propensity to utilize overdraft services, the oversampling of consumer segments with adverse overdraft histories introduces a danger that survey results from these consumer segments will contain negative information about overdraft service programs based on animus or personal embarrassment rather than actual experience. Oversampling consumers that have paid fees would ignore those consumers that fully understand and affirmatively opt-in to overdraft services but do not incur overdraft fees.

Conclusion

CBA believes a high-quality consumer survey we help inform the debate about how U.S. consumers use and understand overdraft surveys. However, any survey conducted will need to be conducted in a transparent manner and the Bureau will need to follow proper order under current law. Accordingly, we respectfully request the Bureau withdraw its current request until such time as it is able to produce a model survey.

Sincerely,

A handwritten signature in dark ink, appearing to read "D. Pommerehn", with a long horizontal flourish extending to the right.

David Pommerehn
VP & Senior Counsel
Consumer Bankers Association