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Recovering Reg. E Claims Amounts Paid Out

by Andy Zavoina, BOL Guru

[Guru BIOS](#)

Question: If someone has had unauthorized ATM transactions, has identified the person, and has filed charges against them, how do we make sure that we get re-paid for what we reimbursed our member?

Answer by Andy Zavoina:

You'll simply need to keep law enforcement and the consumer advised that you paid the claim and you are stepping into the shoes of the customer. If you are lucky enough to have funds repaid, they should come to you. If you collect 100%, any liability you may have imposed on the customer needs to be repaid to them.

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Reg. E Unauthorized Use & Had PIN

by Andy Zavoina and John Burnett, BOL Gurus

[Guru BIOS](#)

Question: A mother gives a son her ATM card and her PIN to use. The son and his wife steal the card a week later and over the weekend withdraw \$951.00 from the mother's account. The brother, who is not on the account calls to report the card lost and the card is placed on hot card status. The CSR is a neighbor and insist we give her money back immediately.

Does the bank have any basis for not returning the money when according to REG E it was reported within the time frame? Is there any way that we can use the fact that we were told that the mother had previously given the son her card and number? Where can I find more information concerning the liability of the bank in such cases?

Answer by Andy Zavoina:

While the claim need not be reported by your customer, and while it was reported in a timely manner, the consumer has fault. Reg. E provides that you have a security process in place, the PIN, and the consumer circumvented that. You need to have proof, such as their statement, that they provided this other party with the PIN. Doing so provides them virtual evergreen authority to use the card until your customer notifies you that they no longer have this authority. You would issue a new card at this point. You were not given this opportunity, so if you choose the consumer can absorb part of the loss. If there is a true theft of the card, and that may require some evidence since there was already "evergreen authority", you may end up paying for all but the deductible of this. The cite for the Official Staff Commentary addressing this is below. If the customer wasn't negligent with the card, they may not be liable.

Here is your cite for authorized/unauthorized use. §205.2(m) Unauthorized electronic fund transfer means an electronic fund transfer from a consumer's account initiated by a person other than the consumer without actual authority to initiate the transfer and from which the consumer receives no benefit. The term **does not include** an electronic fund transfer initiated:

(1) By a person who was furnished the access device to the consumer's account by the consumer, unless the consumer has notified the financial institution that transfers by that person are no longer authorized;

And the OSC cite addressing theft: 3. **An unauthorized EFT includes** a transfer initiated by a person who obtained the access device from the consumer through fraud or robbery.

Answer by John Burnett:

As Andy accurately points out, if the customer gave the card and PIN to her son (it sounds as if your bank's interview is set up to find this out, a point in your favor), future use of the card and PIN by the same person is not an unauthorized EFT.

A caution: Your bank might be tempted to "eat" this claim and go after the wayward son to recover your loss. Check with counsel before going down that path. If you were not legally required to accept the loss, it's possible you won't be able to recover from the thief under your state's laws.

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ATM Surcharge signs

by David Dickinson and John Burnett, BOL Gurus

[Guru BIOS](#)

Question: We have ATMs that surcharge non-customers \$2.00. Are we required to have a sign on the ATM advising of this? When using the ATM, these non-customers see that it will cost \$2.00 and may cancel the transaction and not be charged.

Answer by David Dickinson: §205.16 of Reg E requires that ATM operators that impose an ATM surcharge to:

1. Post a notice on the machine that a surcharge may be imposed, and
2. Inform the consumer, either through on-screen message or paper receipt, of the amount of the surcharge before the consumer is committed to completing the transaction (Opt-out).

Answer by John Burnett: David is correct. Note that the amount of the fee need not be included on the sign at or on the ATM, but it must be included in the notice (on screen or paper) that is given during the transaction "script" just before the customer gives a final OK or bails out of the transaction.

Not having the amount on the sign may seem anti-consumer. However, it permits an ATM owner with different surcharge levels to use common signage, and also allows changes to the surcharge without having to update all the signs.

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Expiration Date on ATM Card

by Jim Bedsole and John Burnett, BOL Gurus

[Guru BIOS](#)

Question: Are we required to put an expiration date on an ATM card?

Answer by Jim Bedsole: Not that I'm aware of. Many institutions do this however, as a matter of security and control.

Answer by John Burnett: Before making your decision, check the operating rules of the ATM

network(s) in which you participate. There may be a contractual requirement there.

If your ATM card is also a debit card with the Visa or MasterCard logo, those associations' rules require that there be an expiration date.

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Gross Negligence and ATM Disputes

Answered by: John Burnett , BOL Guru

Question: Does a financial institution have the right to deny an ATM Debit Card Dispute Claim and hold the customer totally responsible for monetary loss, if he's found to be grossly negligent in the safekeeping of his card?

Answer: The Electronic Funds Transfer Act (15 USC 1693 ff) and Regulation E (12 CFR 205) do not permit a bank to shift accountability for an unauthorized transfer back to the consumer on the grounds of customer negligence. The Official Staff Commentary to Regulation E expressly answers this question in its comment 6(b)-2.

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Cardholder Liability for Negligence

by Andy Zavoina, BOL Guru

[Guru BIOS](#)

Question: If a customer supplies card number, name, address, PIN, CVV values and expiration date via an email to someone who asks for it, and then that person creates a card and uses it to withdraw funds from an ATM, does the cardholder have any liability due to negligence? If not, given today's fraud environment is light year's beyond what was envisioned when Reg E was enacted, should the regulations be updated to define some standard of cardholder liability for negligence?

Answer: It would be important to know why the customer provided this information. It would seem it would be to have that data used, but not abused.

That said, providing such detailed information may be interpreted as analogous to providing the access device and allowing its use for one or more transaction(s). In these instances I would invoke 2(m)2 of the OSC 205.2.

12 CFR §205.2 Authority. If a consumer furnishes an access device and grants authority to make transfers to a person (such as a family member or co-worker) who exceeds the authority given, the consumer is fully liable for the transfers unless the consumer has notified the financial institution that transfers by that person are no longer authorized.

Does Reg. E need changes, that depends on if you are the bank (who is reported to be producing record earnings) or the customer. Some years ago there was an attempt to increase liability to \$500 for customers who had PINs on their cards. Seen as anti-consumer, it was defeated.

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Ticking Clock on Reg E Claims

by John Burnett, BOL Guru

[Guru BIOS](#)

Question: Please clarify when the clock starts ticking on the 10 day rule under Reg E for a

provisional credit. I have heard that for an ATM transaction it begins upon first notification from customer (phone call, etc.); however, I have heard that for signature-based transactions it begins upon receiving a written statement from the customer. Is this correct?

Answer: The clock starts ticking from the day on which the customer first notifies the bank of the claim, regardless of its type, provided it fits one of the seven types of errors listed in [§205.11\(a\)\(1\)](#).

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Withholding Provisional Credit

by Andy Zavoina and John Burnett, BOL Gurus

[Guru BIOS](#)

Question: If you have a customer who says they had fraud transactions at an ATM yet they still have their card, can you withhold provisional credit? Who would be liable to pay the customer back?

Answer by Andy Zavoina: The bank would have to pay them back if the customer didn't do the transaction, authorize it or benefit from it. The fact that they didn't lose their card is not sufficient to deny a claim. It may be a contributing layer, however. Look too at the pattern of the customer and the withdrawal(s) they claim were not authorized. Did anyone else have access to their card, where was the customer when the withdrawal(s) took place (even in the same state for instance), film, etc? Review OCC AL 2001-9 for excellent guidance on this topic, no matter who your primary regulator is.

Provisional credit can be withheld only if you requested a written statement of the claim and didn't receive it within 10 business days.

Answer by John Burnett: We need to remember that even if we only issue one card with the cardholder's number and PIN, there are schemes that are able to record the card number and PIN through technology and/or observation, allowing a crook to create bogus duplicates of the card to be used elsewhere.

The pattern of transactions that is alleged to be fraudulent, when compared with the customer's known pattern prior to those transactions, is probably the most telling evidence. As Andy suggests, the mere presence of the card in the cardholder's continuing possession is only one piece of this complicated puzzle.

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Our ATM, Foreign Card, Who Handles Claim?

by Andy Zavoina and David Dickinson, BOL Gurus

Question: If a customer accesses our ATM with a foreign ATM card and does not receive their cash we refer them to the banking institution that issued them the card to file an EFT claim. Is this procedure covered by Reg E?

Answer by Andy Zavoina:

It isn't a Reg. E issue on your part, in my opinion. But they received a Reg. E disclosure from their card issuer, the depository bank, which told them to notify that bank when there is a dispute.

While you will be involved in the resolution process, you do not initiate it. That bank could have a policy to automatically pay small claims instead of conducting a costly investigation. They may discuss it with the customer and determine that another card did the transaction. There are many

possibilities. But they start with the depository bank.

Answer by David Dickinson:

Andy is right. I like to say that Reg E states "take care of YOUR customer." Don't send to another bank or back to the merchant.

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ATM Cut Off Time

by Andy Zavoina, John Burnett and Mary Beth Guard, BOL Gurus

Question: We are currently reviewing our disclosures for ARTA Deposit. We normally balance our ATMs between the hours of 11:00 am and 2:00 pm. Under Reg CC is there anything that states that an ATM cutoff time cannot be before 12:00 noon? When we fill in 11:00 am on the disclosure a warning comes up telling us to check regulations for correct times. I can't find acceptable ATM balancing times anywhere. Any information you can help me with would be great.

Answer by Andy Zavoina:

[BIO AND CONTACT INFO](#)

[229.19](#) OSC 6.a. states, "For receipt of deposits at ATMs, contractual branches, or other off-premise facilities, such as night depositories or lock boxes, the depository bank may establish a cutoff hour of 12:00 noon or later...." So the time requirement is one thing.

Disclosure of the cutoff time is another. In that same cite, further into the paragraph it states, "The choice of cutoff hour must be reflected in the bank's internal procedures, and the bank must inform its customers of the cutoff hour upon request." Upon request doesn't mean it has to be in your disclosure.

You may also want to verify any state laws restricting the time or disclosure of ATM deposits.

Answer by John Burnett:

[BIO AND CONTACT INFO](#)

With many ATM systems, the time a bank balances the ATM may be totally independent of the "cutoff" time. Reg. CC requires that any deposit I make at your on-premise ATM be considered accepted on the same date I made it if before the cutoff time, which may not be before noon.

If your bank balances the machines in the morning, but anything the depositor does before, say, 6 p.m., is reflected in that day's activity on the depositor's account, your cutoff time is 6 p.m., and balancing has nothing to do with it (some machines that don't accept deposits might not get settled daily).

But if the machine accepts deposits and they are not posted until removed from the machine and verified, you'll need to make sure deposits are removed AFTER twelve on each business day.

Answer by Mary Beth Guard:

[BIO AND CONTACT INFO](#)

It would be a problem under Reg CC to set a cutoff time for deposits at ATMs that is prior to 12:00 noon.

[Reg CC says, in Section 229.19:](#)

- (a) When funds are considered deposited. For the purposes of this subpart--
- (1) Funds deposited at a staffed facility, ATM, or contractual branch are considered deposited when they are received at the staffed facility, ATM, or contractual branch;
 - (2) Funds mailed to the depository bank are considered deposited on the day they are received by the depository bank;

(3) Funds deposited to a night depository, lock box, or similar facility are considered deposited on the day on which the deposit is removed from such facility and is available for processing by the depository bank;

(4) Funds deposited at an ATM that is not on, or within 50 feet of, the premises of the depository bank are considered deposited on the day the funds are removed from the ATM, if funds normally are removed from the ATM not more than two times each week; and

(5) Funds may be considered deposited on the next banking day, in the case of funds that are deposited--

(i) On a day that is not a banking day for the depository bank; or

(ii) After a cutoff hour set by the depository bank for the receipt of deposits of 2:00 p.m. or later, or, for the receipt of deposits at ATMs, contractual branches, or off-premise facilities, of 12:00 noon or later.

Your ARTA software was correctly attempting to steer you away from a violation!

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Sample Letter To Restrict ATM Card Usage

by Andy Zavoina, BOL Guru

[BIO AND CONTACT INFO](#)

Question: If an ATM/debit card holder is handling their account badly we restrict their card usage. I am looking for a sample letter to send to our ATM cardholders to notify them of our actions. Do you have any suggestions where I could find one? Are there any other documents we need to complete for our records?

Answer: Because you will be restricting the use of the access device, 205.8(a) will require advance notice (21 days) before your restrictions can take place.

Crafting a letter to this effect, stating why, should not be too difficult. I don't know of any templates available.

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Reg E & Non-customers Reporting Lost ATM Cards

Answer by Andy Zavoina, BOL Guru

[BIO AND CONTACT INFO](#)

Question: Does Reg E address how banks should handle non-customers reporting lost ATM cards? For example, a customer leaves his card at a merchant and the merchant calls the bank to report it.

Answer: Notice on behalf of a customer may come to the bank from a 3rd party acting on their behalf. The bank has a right to verify this, per Reg. E (OSC (b)(6)(5)2). This is generally associated with a claim though, not a lost card.

Still, it would reduce the risks the if the bank temporarily disabled the card and contacted the customer to verify the situation.

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ATM Reg CC Disclosure

Answer by John Burnett, BOL Guru

[BIO AND CONTACT INFO](#)

Question: Do all of our bank's depository ATM's have to have a disclosure for funds availability

even if funds deposited by customers are available the next day?

Answer: Yes, but the disclosure can appear on the screen that sits there waiting for the customer to complete the envelope and drop it in the machine.

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Must Privacy Notice Be Posted On ATMs?

Answer by Andy Zavoina and Mary Beth Guard, BOL Gurus

Question: If a financial institution's privacy notice states that they do not disclose any nonpublic personal information except as authorized by law, do they have to place that disclosure at their ATMs?

Answer by Andy Zavoina:

[BIO AND CONTACT INFO](#)

Privacy notices are delivered when the relationship is established and annually thereafter. Constant reminders are not required and the use of an ATM does not denote a continuing relationship. That said, [216.9](#) does indicate that delivery via an ATM may be sufficient delivery in some instances.

This opinion may not be my employer's and should not be considered legal advice.

Answer by Mary Beth Guard:

[BIO AND CONTACT INFO](#)

In the instance you described, a privacy notice need not be given at an ATM.

The provision Andy refers to in the privacy rule is to be used in a situation where a financial institution that operates an ATM will be collecting and sharing information on noncustomers outside the permissible exceptions. In that type of situation, the institution would have to provide its privacy notice, along with a right to opt out, to the noncustomer, prior to sharing the noncustomer's nonpublic personal information with nonaffiliated third parties outside the exceptions. Providing the privacy notice at the ATM is one method for giving the notice.

Obviously, this is an extremely rare scenario. Most institutions don't even share information about their CUSTOMERS -- much less noncustomers with whom they do business.

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