ABA Staff Analysis: Overdraft Services Final Rule Summary

June 2010

This summary has been updated to reflect technical corrections and clarifications to the Regulation E final rule and the official staff commentary announced by the Board on May 28, 2010. Changes to the rule and commentary are noted in red text.

1. Introduction:

- Responding to consumer complaints about unexpected fees charged for debit card overdrafts, and particularly fees on multiple, small dollar debit card overdrafts, and to ensure that consumers are given a meaningful choice regarding debit card overdraft services, the Board amended Regulation E to require bank customers to opt-in before a bank may impose a fee for a debit card overdraft. The final rule was published in the Federal Register on November 17, 2009.1 In summary, the rule requires an opt-in by a consumer to permit an institution to charge an overdraft fee for “covered transactions” – ATM or one-time debit card transactions only—pursuant to an institution’s overdraft service.

- The rule defines “overdraft services” broadly as “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 (including a check or other item) when the consumer has insufficient or unavailable funds in the account.” [§ 205.17(a)]

  o Nonsufficient fund fees, which are charged when a payment is returned, are not covered.

  o The rule applies even if the bank pays overdrafts on an ad hoc basis and not under an automated program and even if the bank does not promote its service.

- Note: an “overdraft service” does not include the payment of an overdraft pursuant to:

  1. A line of credit, including transfers from a credit card account, a home equity line of credit, or an overdraft line of credit;

  2. A service that transfers funds from another account such as a savings account; or

  3. A line of credit or other credit secured by margin securities in brokerage accounts extended by SEC registered broker-dealers.

Thus these forms of overdraft protection are not subject to the opt-in, fee limit, or other requirements of the overdraft rule.

2. Compliance date:

- July 1, 2010 is the mandatory compliance date

3. Scope:


ABA staff analysis does not provide, nor is it intended to substitute for, professional legal advice.
• The opt-in requirement applies to both existing and new accounts.
  o For accounts opened prior to July 1, 2010 (i.e., existing accounts), the financial institution cannot assess any fee on or after August 15, 2010 unless the institution has obtained the consumer’s consent. [§ 205.17( c)(1)]
  o For accounts opened after July 1, 2010 (i.e., new accounts), the institution must obtain the consumer’s consent before assessing a fee. [§ 205.17( c)(2)]

• The rule applies to all accounts covered by Reg E, including payroll card accounts, to the extent overdraft fees may be imposed. The rule does not apply to business accounts.

• The rule applies only to overdraft fees or charges arising from “paying an ATM or a one-time debit card transaction.” [§ 205.17(b)(1)] The rule applies to:
  1. Any ATM withdrawal, including those at proprietary or foreign ATMs;
  2. All transactions originating at an ATM that overdraw a consumer’s account, not just withdrawals. For example, inter-account transfers, bill payments, and even postage stamp purchases that overdraw an account cannot be assessed a fee unless the customer has opted into the service;
  3. Any one-time debit transaction whether it is made at the point-of-sale, on-line, or by telephone

• The rule does not apply to other kinds of transactions that result in an overdraft charge, including:
  1. Recurring debit card transactions,
  2. Check transactions,
  3. ACH transactions, or
  4. Decoupled debit card transactions.²

• Finally, please note:
  1. The rule does not prohibit an institution from paying an overdraft for an ATM or a one-time debit card transaction if the customer has not opted-in. It only bars the institution from assessing a fee. In addition, the institution may of course debit the consumer’s account for the overdraft, provided it is permitted to do so by applicable state law. [Comment 17(b)-2]
  2. The rule does not require an institution to authorize or pay any overdrafts on an ATM or one-time debit card transaction, even if the consumer has affirmatively consented. [Comment 17(b)-3]

2. Safe Harbor:

² Decoupled debit cards are offered by institutions other than the account holding institution. Transactions for these cards originate as debit transactions that are paid by the card issuer. The card issuer then converts the transaction to an ACH and sends it to the account holding bank. Comment 17(b)-1.i clarifies that decoupled debit card transactions are excluded by clarifying that the rule applies to “ATM and one-time debit card transactions made with a debit card issued by or on behalf of the account-holding institution.” (emphasis added).

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Because differentiation between one-time and recurring debit transactions requires financial institutions to rely on merchant coding of the transaction, the Board has adopted a new safe harbor in comment 17(b)-1.ii which provides, “A financial institution complies with the rule if it adapts its systems to identify debit card transactions as either one-time or recurring. If it does so, the financial institution may rely on the transaction’s coding by merchants, other institutions, and other third-parties…”

Note: To avail itself of the safe harbor, an institution must “adapt its systems to identify debit cards as either one-time or recurring.” ABA understands this to mean that an institution will need to modify its systems to ensure that merchant coding information is retained and passed through the system to the point where decisions to pay or refuse an ATM or one-time debit card transaction are made.

3. Fees Subject to the Rule:

- Any fee charged on an account pursuant to an overdraft service is subject to the rule, including, but not limited to per item, per occurrence, daily, sustained overdraft, or negative balance fees.

The Board has adopted new comment 17(b)-9 to address the treatment of “daily or sustained overdraft, negative balance, or sustained fees” (sustained overdraft fees). The new comment states that in some instances an institution may charge a sustained overdraft fee if a negative balance is attributable to “mixed” transactions—i.e., both check, ACH, or other recurring debit card transaction and ATM or one-time debit transactions—even for customers who have not opted in.

However, to be able to charge a sustained overdraft fee for mixed transactions, an institution must be operationally capable of determining whether the sustained negative balance is attributable solely to non-covered transactions.

- Accordingly, the Board requires an institution that wants to impose sustained overdraft fees for mixed transactions to adopt specific “deposit allocation” policies and practices enabling it to track whether a customer’s continuing negative balance is attributable solely to a check, ACH, or recurring debit transaction not subject to the overdraft fee prohibition for customers who have not opted in.

- The comment provides guidance on when the sustained overdraft fee may be assessed, clarifying that the date is determined by the date on which the non-covered transaction was paid into overdraft.

- The comment also provides an “alternative approach” for those institutions without a deposit allocation policy or otherwise not operationally equipped to determine what is causing the continuing negative balance. In this instance, the institution may not assess sustained overdraft fees when mixed transactions have caused a continuing overdraft in an account for which a customer has not opted in. [Comment 17(b)-9iii]

- Single monthly fees for the bank paying, overdrafts (at its discretion) without imposing an overdraft fee on a per item or per occurrence basis.

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Note: in the preamble the Board addresses a potential new fee—a fee charged for declining the transaction—warning that the imposition of “such fees could raise significant fairness issues under the FTC Act because the institution bears little, if any, risk or cost to decline authorization of an ATM or one-time debit card transaction.”

4. Notice Requirement:

- The notice must:
  - Be in writing or if the customer agrees, it can be given electronically [§ 205.17(b)(1)(i)];
  - Be segregated from “all other information,” including account opening disclosures [§ 205.17(b)(1)(i)];
  - Describe the institution’s overdraft service and the types of transactions for which a fee or charge for paying an overdraft may be imposed [§ 205.17(d)(1)];
  - State the dollar amount of any fees or charges that can be assessed. If the fee is determined on the basis of the number of times an account has been overdrawn, the amount of the overdraft, or other factors, the institution must disclose the maximum fee that can be imposed [§ 205.17(d)(2)];
    - The Board has adopted new comment 17(b)-8 to address the treatment of “tiered fees.” Tiered fees are overdraft fees based on the amount of a customer’s outstanding balance — for example, a $10.00 fee is assessed when a customer’s outstanding account is overdrawn by less than $20.00, and a $25.00 fee is charged if the account is overdrawn by $20.00 or more. The new comment states that if a customer’s negative balance is attributable to both covered (i.e., ATM and one-time debit transactions) and non-covered transactions (i.e., check, ACH, or recurring debit card transactions), the institution may assess a fee, and the bank is not required to differentiate between overdrafts caused by a covered or non-covered transaction when determining the fee that applies.
    - The Board’s rationale for permitting institutions to consider both covered and non-covered transactions when calculating the fee was its desire to encourage tiered fees which the Board believes often result in lower, more proportional overdraft charges.
  - State the maximum number of overdraft fees that may be assessed per day. If there is no limit, state that fact [§ 205.17(d)(3)];
  - Disclose the opt-in right, including how to exercise that right. [§ 205.17(d)(4)].
    - New comment 17(d)-3 states that an institution may tailor model form A-9 to the methods offered by the institution—for example, by omitting the tear-off portion of the form if it intends only to permit customers to opt-in by telephone or electronically.

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The new comment also states that an institution may, but is not required, to provide a signature line or check box for a customer to use to indicate an opt-out decision.

- The notice may:
  - Describe alternative ways to cover overdrafts offered by the institution [§ 205.17(d)(5)]
    - New Comment 17(d)-5 states that if an institution offers both a line of credit and a service to transfer funds from one account to another, the opt-in notice must state that both alternatives are available.
    - If an institution only offers one alternative, the opt-in notice may only describe that alternative, and
    - if an institution does not offer any alternatives, it should omit the reference to alternative plans.
  - Indicate that the consumer also has the right to opt-in to or out of the payment of overdrafts under the institution’s overdraft service for other types of transactions such as checks, ACH transactions, or automatic bill payments [§ 205.17(d)(6)]

- The notice may not contain any information not specified or permitted by the rule. [§ 205.17(d)]

  Note: these requirements are intended to ensure that opt-in information is not buried within other documents or account opening disclosures.

  Also, because the disclosures need not be in writing, electronic opt-in disclosures need not comply with the E-SIGN Act, 15 USC §7001 et seq., but the notice is subject to Reg E’s general requirement that disclosures be clear and readily understandable and in a form the consumer can keep. 12 CFR §205.4(a)(1).

- The rule adopts a model form that institutions may use to satisfy the notice requirement. The model form is attached to this summary.

5. Reasonable Opportunity to Provide Affirmative Consent or Opt-in:

- Notice of the opt-in right must be provided, the consumer’s consent must be obtained, and written confirmation must be sent before fees or charges may be assessed.
  - New comment 17(d)-4 states that an institution may use “any reasonable method” to identify the account for which the consumer submits the opt-in notice, including adding a line for a printed name and account number or the institution may print a bar code or use another tracking method.

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Institutions are free to use a single opt-in form for multiple accounts; however, a separate opt-in choice must be made for each account, and the choices must be presented in a clear and readily understandable manner. A statement on the form that the customer's signature acts as an opt-in for all accounts is not permissible under the final rule.

An institution provides a reasonable opportunity to opt-in if it:

1. Provides a written form for a consumer to fill out and mail in [Comment 17(b)-4.i];
2. Provides a telephone number for the consumer to call (it need not be a toll-free number) [Comment 17(b)-4.ii];
3. Provides an electronic means—i.e., a form that can be accessed and processed on the website with a check box to provide consent and a button to click to affirm the assent [Comment 17(b)-4iii]; or

   Note: there is no requirement for institutions to direct consumers to a specific website address dedicated to effectuating the opt-in.
4. Provides a written form for a consumer to fill out and present at a branch [Comment 17(b)-4.iv].

   Note: an institution does not satisfy the affirmative consent requirement by including information about the overdraft service and a signature line or check box in the account disclosures provided with the signature card or account contract. The opt-in notice must stand alone.

An institution may require a consumer, as a necessary step to opening an account, to choose whether or not to opt-in. [Comment 17(b)-5]

For example, at account opening an institution could require the consumer to sign a signature line or check a box on an opt-in form. (The check box cannot be pre-filled.)

If the signature is not provided or the box is not checked, the institution must assume that the customer has not opted-in.

In addition, an institution could require a customer at account opening to choose between an account that does not permit the payment of ATM or one-time debit cards and one that does, provided that the other terms and conditions of the accounts are equal.

Opt-in by any one joint account owner is an opt-in for the account. Similarly, revocation of an opt-in by one account owner is a revocation for the account. [§ 205.17(e)]

6. Written Confirmation Required:

   The rule requires institutions to provide a consumer with written (or if the customer agrees, electronic) confirmation of the decision to opt-in before an overdraft charge may be assessed. This confirmation must include a statement explaining the customer's right to revoke consent. [§ 205.17(b)(1)(iv)]

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• Confirmation may be accomplished by:
  
  1. Delivering to the customer with a copy of the completed opt-in form; or
  
  2. Mailing the completed opt-in form or a letter or notice to the customer acknowledging that the customer has opted-in. [Comment 17(b)-7]

• Revised comment 17(b)-7 clarifies that an institution may not assess an overdraft fee until the institution has mailed or delivered to the customer a copy of the customer's completed opt-in notice or a letter or notice acknowledging the customer's decision to opt-in. This confirmation requirement is to ensure that consumers understand the choice they have made. However, the Board expressly recognizes that consumers may not choose to opt in until the service is needed, and it does not require receipt of the confirmation by the customer before an institution may impose a fee.

  • Note, however: The Board expressly states its concern about possible circumvention of the fee prohibition by institutions that might pay a transaction into overdraft before the confirmation has been sent and then wait to assess a fee. As a result, new comment 17(b)-7 states that fees may be assessed only on transactions paid on or after the confirmation has been mailed or delivered.

  • Note also: Addressing concerns about operational and litigation risk related to tracking compliance with the opt-in requirements, in its supplementary materials, the Board states that an institution that adopts and follows reasonable procedures designed to ensure the written confirmation is mailed or delivered before the fees are assessed “complies with the rule even if on rare occasion, notwithstanding such procedures, it assesses a fee before the confirmation is mailed or delivered.”

• The consumer has the right to opt-in, or revoke the opt-in, at any time, and the revocation must be implemented by the institution as soon as reasonably practical. [§ 205.17(f)]

  Note: If a consumer revokes the opt-in, a bank does not have to waive or refund any overdraft fees charged prior to the bank’s implementation of the revocation request, assuming it is effected as soon as reasonably practical. [Comment 17-f]

7. Imposing Conditions on Opt-in Prohibited:

• The rule prohibits institutions from conditioning the payment of overdrafts for checks, ACH transactions, or recurring debit card transactions on the consumer affirmatively consenting to the institution’s payment of overdrafts for ATM and one-time debit card transactions. [§ 205.17(b)(2)(a)(i)]

  o Some institutions have asked whether they can adopt a simple “all or nothing” approach to their overdraft program – one in which a customer is asked to opt-in to the payment of all overdrafts, whether caused by check, ACH, recurring debit transaction, ATM transaction, or one-time debit card transaction. This is not permitted by the rule.

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Similarly, the rule bars an institution from requiring a customer to opt-in to the payment of ATM and one-time debit card transactions in order to ensure the payment of recurring debit card transactions.

- The rule prohibits an institution from varying account terms, conditions, or features for consumers who do not opt in. [§ 205.17(b)(3)] This is to stop institutions from trying to compel customers to opt-in by offering an account with less favorable terms for those that do not opt in. Comment 17(b)(3)-1 provides a non-exhaustive list of terms and conditions that cannot be varied:
  - Interest rates paid
  - Fees assessed
  - Type of ATM or debit card provided to the customer (i.e., PIN only to those that do not opt-in; PIN and signature functionality to others)
  - Minimum balance requirements
  - Account features such as on-line bill pay

Note: Section 205.17(b)(3) does not prohibit banks from offering deposit accounts with limited features (i.e., checking accounts that comply with state basic banking laws or accounts designed for consumers whose credit or checking account history makes them ineligible for full-service accounts) provided that the customer who does not opt-in is not required to open such an account.

Also, to the extent that a limited feature account permits a customer to overdraw the account via an ATM or one-time debit card transaction, the customer must be provided the opportunity to opt-in before overdraft fees may be assessed.

- The rule also requires an institution to apply the same criteria for deciding when to pay overdrafts for non-covered transactions (checks, ACH transactions, and recurring debit card transactions) whether or not the consumer has affirmatively consented to the institution’s overdraft service for ATM and one-time debit card transactions. [205.17(b)(2)(ii)]

Note: Institutions may want to consider adding language to overdraft program policies and procedures that clearly states that when deciding whether to pay overdrafts for checks, ACH transactions, or other non-covered transactions, the institution will not take into consideration whether the consumer has affirmatively consented to the institution’s overdraft service for ATM and one-time debit card transactions.

8. Exceptions to the Notice and Opt-in Requirements:

- Generally, there are no exceptions. For example, there is no exception allowing overdraft fees to be charged for payment of a one-time debit transaction that overdraws a consumer’s account where authorization was not requested by the merchant. Nor are exceptions permitted if a deposited check is returned unpaid causing an overdraft. However, a return deposit check may be imposed.

- Responding to confusion over section 205.17(b)(4) which addressed the applicability of the rule to institutions with a policy and practice of declining ATM and one-time

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debit card overdrafts, the Board has deleted section 205.17(b)(4) and has incorporated its content into a revised comment 17(b)(1)-iv. Thus, the Board has clarified that the prohibition on assessing overdraft fees applies to all institutions, including those without a formal overdraft program that decline ATM and one-time debit card transactions when the institution has a reasonable belief at the time of authorization that the consumer does not have sufficient funds available to cover the transaction. These institutions, however, need not comply with the notice and opt-in requirements of section 205.17(b)(1), but they are prohibited from charging a fee for so-called “inadvertent” overdrafts – ATM and one-time debit card transactions authorized and paid when a customer had sufficient funds but that later settle into overdraft. [See revised comment 17(b)(1)-iv]

9. The Marketing of Opt-Ins

- In the supplementary materials to the May 28, 2010 clarification, the Board addressed questions about how institutions may communicate with customers about their opt in choices. The Board:
  - Reminded institutions that although they may provide consumers with information about their overdraft services and overdraft protection plans in a separate document outside of the opt-in notice, if these additional materials promote the payment of overdrafts under Regulation DD, they may be subject to additional disclosure requirements under 12 CFR §230.11(b).
  - Reminded institutions that it is concerned about the marketing of overdraft services and will monitor the marketing practices used.
  - Reminded institutions that the 2005 Joint Guidance on Overdraft Protection Programs, where not superseded by subsequent regulatory changes to Regulation E, contains relevant and important guidance on the marketing and operation of program features.

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A-9 Model Consent Form for Overdraft Services (§ 205.17)

What You Need to Know about Overdrafts and Overdraft Fees

An overdraft occurs when you do not have enough money in your account to cover a transaction, but we pay it anyway. We can cover your overdrafts in two different ways:

1. We have standard overdraft practices that come with your account.
2. We also offer overdraft protection plans, such as a link to a savings account, which may be less expensive than our standard overdraft practices. To learn more, ask us about these plans.

This notice explains our standard overdraft practices.

➤ What are the standard overdraft practices that come with my account?

We do authorize and pay overdrafts for the following types of transactions:

- Checks and other transactions made using your checking account number
- Automatic bill payments

We do not authorize and pay overdrafts for the following types of transactions unless you ask us to (see below):

- ATM transactions
- Everyday debit card transactions

We pay overdrafts at our discretion, which means we do not guarantee that we will always authorize and pay any type of transaction.

If we do not authorize and pay an overdraft, your transaction will be declined.

➤ What fees will I be charged if [Institution Name] pays my overdraft?

Under our standard overdraft practices:

- We will charge you a fee of up to $30 each time we pay an overdraft.
- Also, if your account is overdrawn for 5 or more consecutive business days, we will charge an additional $5 per day.
- There is no limit on the total fees we can charge you for overdrawning your account.

➤ What if I want [Institution Name] to authorize and pay overdrafts on my ATM and everyday debit card transactions?

If you also want us to authorize and pay overdrafts on ATM and everyday debit card transactions, call [telephone number], visit [Web site], or complete the form below and [present it at a branch][mail it to:]

____ I do not want [Institution Name] to authorize and pay overdrafts on my ATM and everyday debit card transactions.

____ I want [Institution Name] to authorize and pay overdrafts on my ATM and everyday debit card transactions.

Printed Name: __________________________

Date: _________________________________

[Account Number]: _______________________