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## Overdraft Protection – Regulation E Opt In

In 2009, the Federal Reserve announced a new final rule amending Regulation E. This rule limits the ability of a financial institution to assess an overdraft fee for paying certain overdrafts unless the consumer affirmatively consents, or opts in, to the institution's payment of overdrafts for these transactions.

Alert Date:	January 29, 2010
Status:	Effective January 19, 2010; Mandatory July 1, 2010 for new accounts and August 15, 2010 for certain existing accounts
Links:	<a href="#">Federal Reserve - Regulation E Final Rule Model Opt-In Notice</a>

The Federal Reserve (FRB) is adopting a final rule under Regulation E to assist consumers in understanding how overdraft services provided by their financial institutions operate. The rule gives consumers the opportunity to limit the overdraft costs associated with ATM and one-time debit card transactions, where such services do not meet their needs.

The final rule requires financial institutions to provide consumers with the right to opt in, or affirmatively consent, to the institution's discretionary overdraft service for ATM and one-time debit card transactions. Under the final rule, notice of the opt-in right must be provided, and the consumer's affirmative consent obtained, before fees or charges may be assessed on the consumer's account for paying such overdrafts. The final rule becomes mandatory on July 1, 2010. However, an extended mandatory compliance date of August 15, 2010 is provided for accounts opened prior to July 1, 2010.

### When does the opt-in apply?

The opt-in requirement applies to all consumers, including existing and new accounts. If a customer has multiple accounts, the customer must be allowed to opt in for each account. However, the opt-in requirement does not apply to overdrafts that are paid through a sweep of funds from another deposit account or an overdraft line of credit. Further, the opt-in requirement only applies to ATM and one-time debit card transactions. It does not apply to other transactions, such as check transactions and recurring debit card transactions.

### What is required?

A financial institution must provide the consumer a reasonable opportunity to affirmatively consent to the institution's overdraft service for ATM withdrawals and one-time debit card transactions.

- First, the institution must provide the customer with an opt-in notice that conforms to the model notice provided by the FRB.
- Once the consumer opts in, the institution must provide the consumer with confirmation of their consent in writing, or if the consumer agrees, electronically. The rule permits an institution to comply with the confirmation requirement, for example, by providing a copy of a consumer's completed opt-in form or by sending a letter or other document to the consumer acknowledging that the consumer has elected to opt into the institution's service. The rule also requires the written confirmation to include a statement informing the consumer of the right to revoke consent.
- Only after the opt-in notice is provided, the customer opts in, and the confirmation is sent will an institution be allowed to charge a fee for subsequent ATM and one-time debit card transactions that overdraw an account.

Once a consumer has opted in, he or she may revoke the opt in at any time.

### When is the opt-in notice not required?

The final rule includes an exception to the notice and opt-in requirements only. **This is not an exception to the prohibition against charging a fee. An institution may NEVER charge a fee related to the payment of an overdraft initiated by an ATM or one-time debit card transaction UNLESS the notice and confirmation requirements described above are met and the customer affirmatively consents to the fee.**

The exception states that the notice and opt-in requirements do not apply to an institution that has a policy and practice of declining to authorize and pay ATM or one-time debit card transactions when the institution has a reasonable belief at the time of the authorization request that the consumer does not have sufficient funds available to cover the transaction. Institutions may apply this exception on an account-by-account basis.

### **What other limits apply?**

- The final rule prohibits financial institutions from conditioning the payment of overdrafts for checks, ACH transactions, or other types of transactions on the consumer also affirmatively consenting to the institution's payment of overdrafts for ATM and one-time debit card transactions.
- For consumers who do not affirmatively consent to the institution's overdraft service for ATM and one-time debit card transactions, the final rule requires institutions to provide those consumers with the same account terms, conditions, and features that they provide to consumers who do affirmatively consent, except for the overdraft service for ATM and one-time debit card transactions.
- The FRB acknowledges receiving a few comments suggesting the possibility that institutions may create new fees for declining ATM or one-time debit card transactions. While the final rule does not address declined transaction fees, the FRB notes that 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.
- There has been some discussion regarding the charging of an "NSF fee" versus an "overdraft fee." FRB representatives have indicated that any fee charged in connection with the payment or return of an overdraft initiated as an ATM or one-time debit card transaction will be a violation of the regulation unless the opt in rules have been followed and the customer has opted in, regardless what the institution calls the fee.

### **Recommendations for Next Steps**

1. Determine whether the institution intends to charge a fee for ATM and one-time debit card transactions that overdraw a customer's account, or if it will simply waive the fee. If it plans to waive the fee in all cases where a covered transaction may overdraw a consumer account, then the opt-in notice need not be provided.
2. Send the opt-in notice to existing customers.
3. Add the opt-in notice to account opening disclosures by July 1, 2010 for new customers.
4. Implement procedures and provide training for handling opt-ins, providing opt-in confirmations, and only applying an overdraft fee where allowable.
5. Ensure that account terms and conditions, as well as decisions whether to pay other items into overdraft, do not result in customers being treated differently based on whether they opt-in for ATM and one-time debit card transactions.