

FEDERAL RESERVE SYSTEM

12 CFR Part 205

[Regulation E; Docket No. R-1343]

Electronic Fund Transfers

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final Rule.

SUMMARY: On November 17, 2009, the Board published a final rule amending Regulation E, which implements the Electronic Fund Transfer Act, and the official staff commentary to the regulation (Regulation E final rule). The Regulation E final rule limited the ability of financial institutions to assess overdraft fees for paying automated teller machine (ATM) and one-time debit card transactions that overdraw a consumer's account, unless the consumer affirmatively consents, or opts in, to the institution's payment of overdrafts for those transactions. The Board is amending Regulation E and the official staff commentary to clarify certain aspects of the Regulation E final rule.

DATES: This rule is effective **[insert date that is 30 days after publication in the Federal Register]**.

FOR FURTHER INFORMATION CONTACT: Dana E. Miller or Vivian W. Wong, Senior Attorneys, or Ky Tran-Trong, Counsel, Division of Consumer and Community Affairs, at (202) 452-3667 or (202) 452-2412, Board of Governors of the Federal Reserve System, 20th and C Streets, NW, Washington, DC 20551. For users of Telecommunications Device for the Deaf (TDD) only, contact (202) 263-4869.

SUPPLEMENTARY INFORMATION:

I. Background

In November 2009, the Board adopted a final rule under Regulation E, which implements the Electronic Fund Transfer Act (EFTA), limiting a financial institution's ability to assess fees for paying ATM and one-time debit card transactions pursuant to the institution's overdraft service without the consumer's affirmative consent. The rule was published in the **Federal Register** in November 2009 and has a mandatory compliance date of July 1, 2010. See 74 FR 59033 (November 17, 2009) (Regulation E final rule).

Since publication of the Regulation E final rule, institutions have requested clarification of particular aspects of the rule and further guidance regarding compliance with the rule. In addition, certain technical corrections are necessary. Accordingly, the Board proposed to amend Regulation E and the official staff commentary. See 75 FR 9120 (March 1, 2010).

The Board received approximately 90 comments on the proposal, including from financial institutions and their trade associations, as well as consumer groups. As described in Part III of this **SUPPLEMENTARY INFORMATION**, the final rule adopts the proposal largely as proposed, with additional commentary. Separately, the Board is also amending Regulation DD elsewhere in today's **Federal Register** to make certain clarifications and conforming amendments in light of provisions adopted in the Regulation E final rule.

II. Statutory Authority

The EFTA, 15 U.S.C. 1693 et seq., is implemented by the Board's Regulation E (12 CFR part 205). The purpose of the act and regulation is to provide a framework

establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer systems. An official staff commentary interprets the requirements of Regulation E (12 CFR part 205 (Supp. I)). In the **SUPPLEMENTARY INFORMATION** to the Regulation E final rule, the Board described its statutory authority and applied that authority to the requirements of the rule. For purposes of this rulemaking, the Board continues to rely on the description of its legal authority and analysis in the Regulation E final rule.

III. Section-by-Section Analysis

A. Section 205.17(a)—Definition

Section 205.17(a) of the Regulation E final rule defines the term “overdraft service” for purposes of § 205.17. In particular, § 205.17(a)(3) of the final rule explains that the term does not include payments of overdrafts pursuant to, among other things, credit exempt from Regulation Z pursuant to 12 CFR § 226.3(d), which is credit secured by margin securities in brokerage accounts extended by Securities and Exchange Commission or Commodity Futures Trading Commission-registered broker-dealers. Comment 17(a)-1 provided further guidance on this exception. However, comment 17(a)-1 inadvertently stated that “§ 205.17(a)(3) does not apply” to margin credit transactions. As adopted, this would mean that the exception to the definition of “overdraft service” in § 205.17(a)(3) does not apply to margin credit. The Board proposed to revise comment 17(a)-1 to eliminate the incorrect reference. The Board did not receive comment on this provision, which is adopted as proposed.

B. Section 205.17(b)—Opt-In Requirement

17(b)(1), 17(b)(4) – General Rule and Scope of Opt-In; Notice and Opt-In Requirements

Section 205.17(b)(1) of the Regulation E final rule prohibits an account-holding financial institution from assessing a fee or charge on a consumer's account for paying an ATM or one-time debit card transaction that overdraws the account, unless the institution satisfies several requirements, including providing consumers notice and obtaining the consumer's affirmative consent to the overdraft service. Section 205.17(b)(4) provides an exception from the notice and opt-in requirements of § 205.17(b)(1) for institutions that have a policy and practice of declining ATM and one-time debit card transactions for which authorization is requested, when the institution has a reasonable belief that the consumer's account has insufficient funds at the time of the authorization request.

Since the issuance of the Regulation E final rule, questions have been raised as to whether the § 205.17(b)(4) exception would permit institutions with such a policy and practice to assess an overdraft fee without the consumer's affirmative consent if a transaction, authorized on the belief that there are sufficient funds, settles on insufficient funds. To clarify the intended scope of this provision, the Board proposed to amend §§ 205.17(b)(1), (b)(4), and the related commentary to explain that the fee prohibition in § 205.17(b)(1) applies to all institutions, and that § 205.17(b)(4) provides relief only from the requirements of §§ 205.17(b)(1)(i)-(iv), including the notice and opt-in requirements. The proposal thus clarified the Board's intent that institutions cannot assess a fee for the payment of ATM and one-time debit card overdrafts if the consumer does not opt in,

even if the institution has a policy and practice of declining ATM and one-time debit card transactions upon a reasonable belief that an account has insufficient funds.

Many industry commenters argued that the Board should interpret § 205.17(b)(4) to exempt institutions with a policy and practice of declining ATM and one-time debit card transactions upon a reasonable belief that an account has insufficient funds from the fee prohibition, as well as from the notice and opt-in requirements of the rule. These commenters argued that for those institutions without formal overdraft programs, overdrafts will occur only in circumstances outside the institution's control, and that consumers should retain the responsibility to balance their checking accounts. For example, an institution may authorize a one-time debit card transaction on the reasonable belief that there are sufficient funds in the account, but intervening transactions, such as checks, may reduce the available funds in the checking account before the transaction is presented for settlement, causing an overdraft. Thus, these commenters stated that § 205.17(b)(4) should be revised to permit such institutions to charge overdraft fees without the consumer's affirmative consent. Other industry commenters disagreed with the Board's position, but supported the Board's effort to clarify the scope of the provision. For further clarity, these commenters suggested revisions to the language of § 205.17(b)(4), or removal of that provision as superfluous. Consumer group commenters strongly supported the proposed clarification for the reasons expressed by the Board in its proposal.

The final rule does not provide any exceptions for allowing overdraft fees for ATM and one-time debit card transactions to be imposed without consumer consent. For clarity, however, the Board is deleting § 205.17(b)(4) and instead incorporating its

content into a revised comment to § 205.17(b)(1). For the reasons explained in the **SUPPLEMENTARY INFORMATION** to the Regulation E final rule, as well as the March 2010 proposed rule, the Board believes that adopting exceptions to the fee prohibition would undermine the consumer's ability to understand the institution's overdraft practices and to make an informed choice. 74 FR 59045; 75 FR 9121. Moreover, permitting fees on transactions that are authorized on sufficient funds but settle on insufficient funds would create a disincentive to resolve inefficiencies in payment systems and in processing procedures, which would not benefit consumers.

The final rule clarifies that the prohibition on assessing overdraft fees under § 205.17(b)(1) applies to all institutions, including those institutions that have a policy and practice of declining to authorize and pay any ATM or one-time debit card transactions when they have a reasonable belief at the time of the authorization request that the consumer does not have sufficient funds available to cover the transaction.¹ Section 205.17(b)(4) of the Regulation E final rule and the proposed amendments to that section in the March 2010 proposal were designed to clarify the obligations of institutions with such a policy and practice. However, because § 205.17(b)(1) contains a general prohibition on charging overdraft fees unless certain requirements are fulfilled, the Board concludes that it is unnecessary to include a separate section with respect to those institutions. Accordingly, the final rule deletes § 205.17(b)(4) and instead addresses this issue by adding a comment to § 205.17(b)(1). The placement of this provision in new comment 17(b)(1)-1.iv does not, however, alter the substance of the rule.

The Regulation E final rule (and in a slightly revised iteration, the March 2010 proposed rule) also included language in § 205.17(b)(4), and related comment 17(b)(4)-1,

¹ The Board is also adopting conforming revisions to § 205.17(b)(1).

explaining the application of § 205.17(b)(4) to accounts on an account type-by-account type basis. These provisions were designed to provide guidance where institutions may follow different practices for different types of accounts. A few commenters suggested that the Board revise or delete these provisions as unnecessary because, if a financial institution does not charge overdraft fees on a given account for ATM or one-time debit card transactions, there should be no obligation to comply with the requirements of § 205.17(b)(1)(i)-(iv). The Board agrees, and for simplicity has deleted the language and accompanying comment.

17(b)(1)(iv) –Confirmation

Section 205.17(b)(1)(iv) states that an institution must provide the consumer a confirmation of his or her opt-in choice in writing, or electronically if the consumer agrees, before charging overdraft fees. The confirmation helps ensure that a consumer intended to opt into an institution's overdraft service, particularly where a consumer has opted in by telephone, by providing the consumer with a record of that choice. Some institutions have asked whether the confirmation required by § 205.17(b)(1)(iv) must be provided to the consumer before the institution may assess overdraft fees.

The Board proposed to revise comment 17(b)-7 to clarify that an institution may not assess any overdraft fees or charges on the consumer's account until the institution has sent the written confirmation. To address concerns about operational and litigation risks related to tracking compliance with the confirmation requirement, the proposed comment also stated that an institution complies with § 205.17(b)(1)(iv) if it has adopted reasonable procedures designed to ensure that the written confirmation is sent before fees are assessed.

Consumer group commenters argued that fees should not be charged until five business days after the institution sends the customer the written confirmation. This time frame, they argued, would provide sufficient time for a consumer to receive the confirmation and to affirm his or her choice. Industry commenters argued that institutions should be permitted to charge fees as soon as the consumer has provided consent and before the written confirmation is provided to the consumer. These commenters also stated that the rule should permit the written confirmation to be provided promptly or by the end of the business day following the consumer's opt-in. The Board is adopting the comment substantially as proposed, with revisions designed to prevent evasion of the confirmation requirement.

The rule does not require receipt of the confirmation by the consumer before an institution may impose a fee because a consumer may not opt into an institution's overdraft service until the time the service is needed. Requiring receipt of the confirmation would delay the consumer's access to overdraft funds. By contrast, permitting fees to be charged once the confirmation is provided allows institutions to pay the transaction with minimal delay to the consumer, in accordance with the consumer's direction. At the same time, if fees cannot be charged until the confirmation has been provided, institutions would be incented to mail or deliver the written confirmation promptly. This would alert consumers to their choice quickly and enable them to revoke their choice if they did not intend to opt in. The requirement to provide the confirmation before charging overdraft fees thus balances the objective of ensuring that consumers understand their choice with the objective of providing consumers access to overdraft services expeditiously when requested.

Some industry commenters argued that consumers may have an emergency during non-bank hours, and need immediate access to funds. Such instances would presumably be rare. Moreover, the rule does not prohibit institutions from paying the overdraft, so long as an overdraft fee is not charged.

Several commenters asked the Board to clarify what is meant by “sent” when a confirmation notice is provided in person (for instance, at a branch). In response, the final comment has been revised to indicate that the confirmation notice must be “mailed or delivered” (for example, by handing the consumer the confirmation in a branch). In addition, a few commenters suggested that the Board revise the comment, which references a written confirmation, to recognize that the confirmation may also be provided electronically if the consumer agrees, consistent with § 205.17(b)(1)(iv). The final comment has been revised by eliminating the references to “written confirmation” and replacing them with the more generic term “confirmation.”

The Board has also received questions as to whether the confirmation, as well as the opt-in notice required by § 205.17(b)(1)(i), may be provided orally. As specified in the Regulation E final rule, these disclosures must be provided in writing, or electronically if the consumer agrees, before the institution assesses any overdraft fees for ATM and one-time debit card transactions that overdraw the consumer’s account. Further, § 205.4(a) of Regulation E generally requires disclosures to be clear and readily understandable, and in a form the consumer may keep. Oral disclosures would not comply with the requirements of §§ 205.17(b)(1)(i) or (b)(1)(iv).

Upon further analysis, the Board is concerned about possible circumvention of the fee prohibition. The proposed comment stated that the institution may not assess

overdraft fees until the confirmation is sent, but it did not expressly tie the mailing or delivery of the confirmation to the payment of the transaction. Therefore, the proposal might arguably be read to permit institutions to pay a transaction into overdraft before the confirmation is sent and simply wait to assess a fee on an account until after the confirmation is sent. As discussed below, final comment 17(b)-7 has been revised to clarify that fees or charges may generally be assessed only on transactions paid after the confirmation has been mailed or delivered. An interpretation tying the confirmation with the payment of transactions is consistent with comment 17(c)-2, adopted in the Regulation E final rule, which clarified that institutions may only assess overdraft fees on transactions paid after obtaining the consumer's affirmative consent.²

The Board recognizes the operational and litigation risks related to compliance with the confirmation requirement. Final comment 17(b)-7 therefore provides that an institution complies with the confirmation requirement if it has adopted reasonable procedures designed to ensure that overdraft fees are assessed only in connection with transactions paid after the confirmation has been mailed or delivered to the consumer. Thus, an institution that adopts and follows such procedures complies with the rule even if on rare occasion, notwithstanding such procedures, it assesses a fee before the confirmation is mailed or delivered. For example, an institution complies with the rule if a computer error results in the confirmation being mailed after an overdraft fee is assessed.

² For ease of reference, a cross-reference to comment 17(b)-7 has been added to comment 17(c)-2.

Comment 17(b)-8 — Outstanding negative balance

While many institutions charge the same per-item overdraft fee regardless of the amount of the consumer's negative balance, some institutions impose tiered fees based on the amount of the consumer's outstanding negative balance at the end of the day. For example, an institution may impose a \$10 per-item overdraft fee if the consumer's account is overdrawn by less than \$20, and a \$25 per-item overdraft fee if the account is overdrawn by \$20 or more. Questions have been raised as to how overdraft fees may be assessed in these circumstances if a consumer has not opted into the payment of ATM and one-time debit card transactions, but if overdrafts may be paid and fees assessed for other types of transactions, such as checks and ACH.

Proposed comment 17(b)-8 addressed how institutions may impose tiered fees based on the amount of the consumer's outstanding negative balance if a consumer has not opted into the payment of ATM or one-time debit card overdrafts. In such circumstances, the proposal stated that the fee or charge must be based on the amount of the negative balance attributable solely to check, ACH, or other types of transactions not subject to the fee prohibition. An industry commenter observed that the proposed treatment of tiered fees under the comment was inconsistent with the treatment of flat per-item overdraft fees (that is, fees that do not vary from transaction to transaction) under the rule. For example, if a consumer who has not opted in has a beginning balance of \$10, and the institution pays a \$30 point-of-sale transaction and a \$20 check, resulting in a negative balance of \$40, an institution would be permitted to charge a flat per-item fee on the check transaction without regard to the point-of-sale transaction. Under

proposed comment 17(b)-8, however, the institution would be required to disregard the \$30 point-of-sale transaction in determining the applicable fee tier.

The commenter also argued that the treatment of tiered fees under proposed comment 17(b)-8 differed from the treatment of daily or sustained, negative balance, or other similar fees or charges under proposed comment 17(b)-9. Thus, the commenter argued that proposed comment 17(b)-8 should be revised, consistent with the treatment of flat per-item overdraft fees and sustained overdraft fees under comment 17(b)-9. By contrast, consumer group commenters argued that comment 17(b)-9 should instead be modeled after proposed comment 17(b)-8, such that sustained overdraft fees could only be charged if the negative balance was attributable solely to a type of transaction not subject to the opt-in right.

Upon further analysis, the Board believes that proposed comment 17(b)-8, if adopted, could result in unfavorable consequences for consumers. Section 205.17(b)(1) does not prohibit institutions from charging flat per-item overdraft fees on checks, ACH, and other types of transactions not subject to the fee prohibition when a negative balance is attributable in part to such transactions, and in part to ATM or one-time debit card transactions. However, if a consumer does not opt in and an institution charges tiered fees, proposed comment 17(b)-8 would require the institution to program its systems to disregard any ATM or debit card transaction that creates in part a negative balance for purposes of determining the appropriate fee tier. There are significant operational costs associated with disregarding amounts overdrawn by ATM and one-time debit card transactions under the proposed approach to tiered fees. Therefore, institutions may decide to charge a flat per-item fee rather than a tiered fee. Elimination of tiered-fee

structures could result in higher overall costs to consumers.³ Under a tiered-fee approach that is based on the total amount overdrawn, consumers who overdraw their account by a small amount are typically assessed a reduced fee, or fees may be waived altogether. For example, in a tiered-fee structure, an \$8 overdraft may result in a lower-tier \$5 or \$10 fee—or no fee at all—instead of a flat \$25 or \$30 per-item fee. In many cases, the lower-tier fee is more proportional to the amount overdrawn than the flat per-item fee, which may substantially exceed the amount overdrawn. In such cases, consumers benefit from the lower costs associated with lower-tier fees.

Therefore, final comment 17(b)-8 has been revised for consistency with the treatment of flat per-item fees under the rule. Comment 17(b)-8 states that if a fee or charge is based on the amount of the outstanding negative balance, the rule prohibits the assessment of any such fee if the negative balance is solely attributable to an ATM or one-time debit card transaction, unless the consumer has opted into the institution's overdraft service for ATM or one-time debit card transactions. However, the comment explains that the rule does not prohibit an institution from assessing such a fee if the negative balance is attributable in whole or in part to a check, ACH, or other type of transaction not subject to the fee prohibition in § 205.17(b)(1).

Comment 17(b)-9—Daily or sustained overdraft, negative balance, or similar fees or charges

Some institutions assess daily or sustained overdraft, negative balance, or similar fees or charges when a consumer has overdrawn an account and has not repaid the amount overdrawn within a specified period of time. For example, if a consumer

³ Because § 205.17(b)(3) prohibits variations in account terms, any increases in overdraft fees resulting from the elimination of a tiered-fee structure would also apply to consumers who have opted in.

overdraws his or her account by \$30, the institution may assess an overdraft fee of \$20. If the consumer does not repay the resulting negative \$50 balance by the fifth day, the institution may assess an additional \$20 sustained overdraft fee.

In certain circumstances, as discussed above, an ATM or one-time debit card transaction may overdraw a consumer's account, even if the consumer has not opted into the payment of such overdrafts. The proposal addressed whether the prohibition in § 205.17(b)(1) against assessing overdraft fees on ATM and one-time debit card transactions where the consumer has not opted in applies to fees for daily or sustained overdrafts or negative balances.

A consumer who has not opted into the payment of ATM and one-time debit card overdrafts may sometimes overdraw his or her account as a consequence of the payment both of these transactions and of check, ACH, or other types of transactions not subject to the fee prohibition in § 205.17(b)(1). The proposal also addressed whether a daily or sustained overdraft, negative balance, or similar fee or charge may be assessed if an account is overdrawn based in part on an ATM or one-time debit card transaction and in part to a check, ACH, or other type of transaction not subject to the fee prohibition.

Proposed comment 17(b)-9 explained that for consumers who do not opt into the payment of ATM and one-time debit card overdrafts, where a negative balance is attributable solely to an ATM or one-time debit card transaction, the rule prohibits the assessment of such sustained overdraft fees. However, where the consumer's negative balance is attributable in part to a check, ACH, or other type of transaction not subject to the fee prohibition in § 205.17(b)(1), and in part to an ATM or one-time debit card transaction, the proposed comment explained that an institution is not prohibited from

assessing a daily or sustained overdraft, negative balance, or similar fee or charge, even if the consumer has not opted in. The proposed comment included three examples illustrating how fees may be applied when a negative balance is attributable in part to a check, ACH, or other type of transaction not subject to the fee prohibition. These examples were based on certain assumptions, including assumptions regarding the posting order of debits from the account and the allocation of subsequent deposits to those debits.

Consumer group commenters objected to the proposed comment, arguing that sustained overdraft and negative balance fees should be prohibited unless the negative balance is attributable solely to check, ACH or other transactions not subject to the fee prohibition. Industry commenters supported the proposed clarification as consistent with the final rule. However, these commenters objected to the proposed examples, arguing that because institutions generally do not have a posting order policy for deposits, the examples should not address deposit allocation.

The final rule adopts the proposed clarification substantively as proposed. However, the rule also adds a new comment 17(b)-9.iii containing an alternative approach for compliance with the fee prohibition in § 205.17(b)(1) that does not require the institution to consider allocation of deposits to debits. This approach, discussed in more detail below, facilitates compliance for institutions that do not have deposit allocation policies, while potentially resulting in fewer fees for consumers.

Under the Regulation E final rule, consumers who do not opt in may not be assessed overdraft fees for paying ATM or one-time debit card transactions, including daily or sustained overdraft, negative balance, or similar fees or charges. Consumers who

do not opt in may reasonably expect not to incur per-item overdraft fees for ATM and one-time debit card transactions, even if such transactions overdraw their accounts. Similarly, such consumers would reasonably expect not to incur daily or sustained overdraft, negative balance, or similar fees or charges due to these transactions. Comment 17(b)-9.i explains that if a consumer has not opted into the institution's overdraft service for ATM and one-time debit card transactions, the fee prohibition in § 205.17(b)(1) applies to all overdraft fees or charges for paying those transactions, including but not limited to daily or sustained overdraft, negative balance, or similar fees or charges. Thus, where a consumer's negative balance is attributable solely to an ATM or one-time debit card transaction, the rule prohibits the assessment of such sustained overdraft fees if the consumer has not opted in. For example, if a consumer who has not opted in has a \$50 account balance, and the institution nonetheless pays a \$60 debit card transaction (and no other transactions occur), the institution may not charge any overdraft fees, including a daily or sustained overdraft, negative balance, or similar fee or charge, for paying that debit card transaction.

The Regulation E final rule applies solely to overdraft fees imposed in connection with ATM and one-time debit card transactions. It does not apply to overdraft fees imposed in connection with other types of transactions, including check, ACH, and recurring debit card transactions. As a result, the rule does not prohibit institutions from imposing daily or sustained overdraft, negative balance, or similar fees or charges associated with paying overdrafts for transactions not covered by the final rule. For example, where a consumer has a \$50 account balance, and the institution pays a \$60 check, the rule does not prohibit the institution from charging a per-item overdraft fee, as

well as a daily or sustained, negative balance, or similar fee or charge if a negative balance remains outstanding.

Comment 17(b)-9.i clarifies that where the consumer's negative balance is attributable in part to a check, ACH, or other type of transaction not subject to the fee prohibition in § 205.17(b)(1), and in part to an ATM or one-time debit card transaction, an institution is not prohibited from assessing a daily or sustained overdraft, negative balance, or similar fee or charge, even if a consumer has not opted in.

The Board believes this result is consistent with the general scope of the Regulation E final rule, which prohibits fees only with respect to ATM and one-time debit card transactions. For example, if a consumer has a \$50 account balance, and the institution posts a one-time debit card transaction of \$60 and a check transaction of \$40 that same day, the institution may charge a per-item fee for the check overdraft (but cannot assess any overdraft fees for the debit card transaction if the consumer has not opted in). Using the same example, the Board believes the institution may also charge a sustained overdraft fee when permitted by the account agreement because the consumer's negative balance is attributable in part to the \$40 check, assuming no other transactions occur or deposits are made to the account.

The comment also provides guidance on the date on which such a fee may be assessed. Specifically, comment 17(b)-9.i states that the date is based on the date on which the check, ACH, or other type of transaction not subject to the fee prohibition is paid into overdraft. Because the rule does not cover checks, ACH, or recurring debit card transactions, the Board believes institutions may charge per-item overdraft fees, or sustained or other similar fees. Nonetheless, the Board believes it is appropriate to base

the date on which fees may be charged on the date that the transaction not subject to the rule is paid.

Proposed comment 17(b)-9.ii included three examples illustrating how fees may be applied when a negative balance is attributable in part to a check, ACH, or other type of transaction not subject to the fee prohibition in § 205.17(b)(1). The first example demonstrated the general application of the rule. The second example addressed the circumstance where a consumer with an outstanding negative balance makes a deposit that reduces the amount of the negative balance, but does not bring the account current. The third example demonstrated how to determine the date when fees may apply when the check, ACH, or other type of transaction is paid on a different date than the ATM or one-time debit card transaction that overdraws the account.

The proposed examples set out certain assumptions in order to provide clear guidance. Among the assumptions made were that the institution posts ATM and debit card transactions before it posts other transactions, and that it allocates deposits to debits in the same order in which it posts debits. Thus, the examples assumed that deposits made to the account are allocated first to debit card transactions, then to checks. However, the rule does not require transactions to be posted or deposits to be allocated in the manner set forth in the example. Institutions may post transactions or allocate deposits as permitted by applicable law.

As noted above, industry commenters argued that the assumption relating to deposit allocation order, as well as the example in proposed comment 17(b)-9.ii(b) that takes the allocation of deposits into account, should be eliminated. These commenters argued that institutions generally do not have a posting order policy for deposits. Instead,

commenters stated that the examples should permit sustained fees to be charged once the consumer has overdrawn the account (when permitted by the account agreement), until such time the account is brought current.

The final rule prohibits overdraft fees with respect to ATM and one-time debit card transactions if the consumer has not opted in. Therefore, institutions must be able to determine whether a negative balance is attributable solely to these types of transactions, or to transactions on which overdraft fees are permitted. This inquiry is not a static one, however; when the amount of the negative balance is reduced by a deposit but not eliminated, institutions must be able to determine whether they can continue charging fees and still comply with the fee prohibition. Otherwise, if a small-dollar check overdraft occurs at the same time as a larger ATM or one-time debit card overdraft, a consumer would potentially be subject to sustained overdraft fees on the small-dollar check for an extended period of time, even where a deposit would have been sufficient to pay off the amount of the check. The examples demonstrate how an institution can make a determination about the permissibility of charging overdraft fees on an ongoing basis, and are adopted generally as proposed.

The Board recognizes, however, that many institutions do not have specific deposit allocation policies or practices. Accordingly, the commentary to the final rule includes an alternative approach that institutions may use to comply with the fee prohibition in § 205.17(b)(1) that does not require an institution to consider the allocation of deposits. Specifically, comment 17(b)-9.iii provides that, where a consumer has not opted into the payment of ATM or one-time debit card transaction overdrafts, an institution may comply with § 205.17(b)(1) by not assessing daily or sustained overdraft,

negative balance, or similar fees or charges unless a consumer's negative balance is attributable solely to checks, ACH or other types of transactions not subject to the fee prohibition, while that negative balance remains outstanding. Under this approach, the institution would not have to consider how to allocate subsequent deposits that reduce but do not eliminate the negative balance. For example, if a consumer has a negative balance of \$30, of which \$10 is attributable to a one-time debit card transaction, an institution complies with § 205.17(b)(1) if it does not assess a sustained overdraft fee while that negative balance remains outstanding. The Board believes such an approach will facilitate compliance for institutions. In addition, this approach may result in fewer fees for consumers, because institutions would not assess fees while that negative balance is outstanding even if they would otherwise be permitted to under the examples in comment 17(b)-9.ii.

Some industry commenters requested additional time to implement the clarifications in proposed comment 17(b)-9. The Board recognizes that programming systems to conform to the final rule may raise operational and cost concerns, and could be challenging to implement by July 1, 2010. However, the Board believes that by adopting the alternative approach set forth in comment 17(b)-9.iii, many institutions will be able to comply by July 1, 2010. As explained above, the final rule only permits daily or sustained, negative balance, or similar overdraft fees or charges where the negative balance is attributable in whole or in part to a type of transaction not subject to the fee prohibition.

17(b)(3)—Same account terms, conditions, and features

Comment 17(b)(3)-2 provides guidance on limited-feature deposit account products in light of the requirement under § 205.17(b)(3) to offer consumers the same account terms, conditions, and features regardless of their opt-in choice. This comment inadvertently included an incorrect cross-reference. The proposal revises the comment to omit the cross-reference. No comments were received on the revision, which is adopted as proposed.

17(d)—Content and format

The Board did not propose revisions to § 205.17(d) and the related commentary regarding content and format of the opt-in notice. However, many industry commenters asked the Board to add commentary to clarify certain aspects of Model Form A-9, particularly because § 205.17(d) requires institutions to use an opt-in notice that is substantially similar to the model form and that contains any applicable content required by § 205.17(d). The Board is adding new comments 17(d)-3 through 17(d)-5 to address a number of these questions. In particular, several commenters had questions about modifications to the tear-off form on Model Form A-9.

Section 205.17(d)(4) requires that the opt-in notice include the methods by which the consumer may consent to the overdraft service for ATM and one-time debit card transactions. New comment 17(d)-3 explains that institutions may tailor Model Form A-9 to the methods offered by the institution. The comment explains that an institution need not provide the tear-off portion of Model Form A-9, for example, if it is only permitting consumers to opt in telephonically or electronically.

In the **SUPPLEMENTARY INFORMATION** to the Regulation E final rule, the Board stated that institutions may, but are not required, to provide a signature line or check box where the consumer can indicate that they decline to opt in (as shown in the model form). Several industry commenters requested that the Board include this statement as a comment. For clarity, the statement has been included in comment 17(d)-3.

New comment 17(d)-4 states an institution may use any reasonable method to identify the account for which the consumer submits the opt-in notice. For example, the institution may include a line for a printed name and an account number, as shown in Model Form A-9. Or, the institution may print a bar code or use other tracking information. (The comment cross-references comment 17(b)-6, which describes how an institution obtains a consumer's affirmative consent.)

Section § 205.17(d)(5) requires institutions that offer a line of credit subject to the Board's Regulation Z or a service that transfers funds from another account of the consumer held at the institution to cover overdrafts to state that fact in the opt-in notice. Because Model Form A-9 includes only a reference to a transfer from a savings account, two commenters suggested that the Board clarify the § 205.17(d)(5) requirement. Section 205.17(d) states that the notice required by § 205.17(b)(1)(i) must "include all applicable items in this paragraph." Thus, if an institution offers both a line of credit subject to the Board's Regulation Z and a service that transfers funds from another account of the consumer held at the institution to cover overdrafts, the institution must state in its opt-in notice that both alternative plans are offered. If the institution offers one, but not the other, it must state in its opt-in notice the alternative plan that it offers. If the institution

does not offer either plan, it should omit the reference to the alternative plans. For clarity, the Board is addressing the issue in a new comment 17(d)-5.

Marketing of opt-ins

Commenters also raised questions about how institutions may communicate with their customers about consumers' opt-in choices. Some institutions have asked whether they may provide supplemental materials with the opt-in notices that describe their overdraft services. In footnote 39 to the Regulation E final rule, the Board explained that institutions may provide consumers other information about their overdraft services and other overdraft protection plans in a separate document outside of the opt-in notice. See 74 FR at 59047. However, to the extent such additional materials promote the payment of overdrafts under Regulation DD, they may be subject to additional disclosure requirements under 12 CFR § 230.11(b). The Board also notes that the opt-in notice may be combined with other materials (e.g., in the same mailing), but that the rule requires the notice to be segregated from all other information. See § 205.17(b)(1)(i).

Industry commenters also asked whether opt-ins for multiple accounts may be obtained on one consent form (or in the course of obtaining opt-ins through any other method, such as over the phone or on-line). Any determination as to whether an opt-in has been obtained from a consumer in compliance with the rule depends on the facts and circumstances. However, whether or not a single form is used to obtain consumers' opt-ins, a separate opt-in decision must be made for each account, and the choices must be presented in a clear and readily understandable manner. Thus, a statement on the form that the consumer's signature acts as an opt-in for all of the consumer's accounts is not permissible under the final rule.

In addition, consumer group commenters expressed concern regarding certain marketing tactics that may be used by institutions to provide the required opt-in notices and to obtain consumers' opt-ins. For example, one commenter raised concerns that institutions may be using Short Message Service ("SMS") text messages as a means to provide the opt-in notice. Under the Regulation E final rule, the opt-in notice must be in a form substantially similar to Model Form A-9 and include all of the information specified in the rule. The notice must also be clear and readily understandable, and in a form the consumer may keep. The font size, screen size and character limitations inherent in SMS text messaging raise significant doubts about the ability of SMS text messages to satisfy the Regulation E disclosure requirements.

The Board shares commenters' concerns about the marketing of overdraft services, and is continuing to monitor how institutions are marketing opt-ins. The Board notes that under Regulation DD, advertisements may not be misleading or inaccurate. See 12 CFR § 230.8(a). Similarly, institutions must not market their overdraft services in a manner that constitutes an unfair or deceptive practice within the meaning of the Federal Trade Commission Act, 15 U.S.C. 41 et seq.

The Board also reminds institutions that the 2005 Joint Guidance on Overdraft Protection Programs,⁴ discussed in the Regulation E final rule, provides guidance on marketing and communication of overdraft services, as well as guidance regarding the disclosure and operation of program features. In addition to these best practices, the Joint Guidance addresses safety and soundness considerations and legal risks related to offering overdraft services to consumers. While certain aspects of the Joint Guidance

⁴ See Interagency Guidance on Overdraft Protection Programs, 70 FR 9127, Feb. 24 2005.

have been superseded by subsequent regulatory changes, institutions should consider other aspects of the Joint Guidance that have not been addressed in regulations.

IV. Regulatory Analysis

Sections VII and VIII of the **SUPPLEMENTARY INFORMATION** to the Regulation E final rule set forth the Board’s analyses under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) and the Paperwork Reduction Act of 1995 (44 U.S.C. 3506; 5 CFR part 1320 Appendix A.1). See 74 FR 59050-59052. Because the final amendments are clarifications and do not alter the substance of the analyses and determinations accompanying the Regulation E final rule, the Board continues to rely on those analyses and determinations for purposes of this rulemaking.

PART 205—ELECTRONIC FUND TRANSFERS (REGULATION E)

1. The authority citation for part 205 continues to read as follows:

Authority: 15 U.S.C. 1693b

2. Section 205.17 is amended by deleting paragraph (b)(4), and revising paragraph (b)(1) to read as follows:

(b) Opt-in requirement. (1) General. Except as provided under paragraph (c) of this section, a financial institution holding a consumer’s account shall not assess a fee or charge on a consumer’s account for paying an ATM or one-time debit card transaction pursuant to the institution’s overdraft service, unless the institution:

3. In Supplement I to part 205,
 - a. In Section 205.17(a), paragraph 1. is revised.

- b. In Section 205.17(b), paragraph 7. is revised.
- c. In Section 205.17(b), new paragraphs 1.iv., 8. and 9. are added.
- d. In Section 205.17(b)(3), paragraph 2. is revised.
- e. In Section 205.17(b)(4), paragraph 1. is deleted.
- f. In Section 205.17(c), paragraph 2. is revised.
- g. In Section 205.17(d), new paragraphs 3. through 5. are added.

Supplement I to Part 205—Official Staff Interpretations

Section 205.17(a)—Requirements for Overdraft Services

17(a) Definition

1. Exempt securities- and commodities-related lines of credit. The definition of “overdraft service” does not include the payment of transactions in a securities or commodities account pursuant to which credit is extended by a broker-dealer registered with the Securities and Exchange Commission or the Commodity Futures Trading Commission.

17(b) Opt-in requirement

1. Scope.

iv. Application of fee prohibition. The prohibition on assessing overdraft fees under § 205.17(b)(1) applies to all institutions. For example, the prohibition applies to an institution that has a policy and practice of declining to authorize and pay any 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. However, the institution is not required to comply with §§ 205.17(b)(1)(i)-(iv), including the notice and opt-in requirements, if it does not assess overdraft fees for paying ATM or one-time debit card transactions that overdraw the consumer's account. Assume an institution does not provide an opt-in notice, but authorizes an ATM or one-time debit card transaction on the reasonable belief that the consumer has sufficient funds in the account to cover the transaction. If, at settlement, the consumer has insufficient funds in the account (for example, due to intervening transactions that post to the consumer's account), the institution is not permitted to assess an overdraft fee or charge for paying that transaction.

7. Confirmation. A financial institution may comply with the requirement in § 205.17(b)(1)(iv) to provide confirmation of the consumer's affirmative consent by mailing or delivering to the consumer a copy of the consumer's completed opt-in notice, or by mailing or delivering a letter or notice to the consumer acknowledging that the consumer has elected to opt into the institution's service. The confirmation, which must be provided in writing, or electronically if the consumer agrees, must include a statement informing the consumer of the right to revoke the opt-in at any time. See § 205.17(d)(6), which permits institutions to include the revocation statement on the initial opt-in notice. An institution complies with the confirmation requirement if it has adopted reasonable procedures designed to ensure that overdraft fees are assessed only in connection with transactions paid after the confirmation has been mailed or delivered to the consumer.

8. Outstanding Negative Balance. If a fee or charge is based on the amount of

the outstanding negative balance, an institution is prohibited from assessing any such fee if the negative balance is solely attributable to an ATM or one-time debit card transaction, unless the consumer has opted into the institution's overdraft service for ATM or one-time debit card transactions. However, the rule does not prohibit an institution from assessing such a fee if the negative balance is attributable in whole or in part to a check, ACH, or other type of transaction not subject to the prohibition on assessing overdraft fees in § 205.17(b)(1).

9. Daily or Sustained Overdraft, Negative Balance, or Similar Fee or Charge

i. Daily or sustained overdraft, negative balance, or similar fees or charges. If a consumer has not opted into the institution's overdraft service for ATM or one-time debit card transactions, the fee prohibition in § 205.17(b)(1) applies to all overdraft fees or charges for paying those transactions, including but not limited to daily or sustained overdraft, negative balance, or similar fees or charges. Thus, where a consumer's negative balance is solely attributable to an ATM or one-time debit card transaction, the rule prohibits the assessment of such fees unless the consumer has opted in. However, the rule does not prohibit an institution from assessing daily or sustained overdraft, negative balance, or similar fees or charges if a negative balance is attributable in whole or in part to a check, ACH, or other type of transaction not subject to the fee prohibition. When the negative balance is attributable in part to an ATM or one-time debit card transaction, and in part to a check, ACH, or other type of transaction not subject to the fee prohibition, the date on which such a fee may be assessed is based on the date on which the check, ACH, or other type of transaction is paid into overdraft.

ii. Examples. The following examples illustrate how an institution complies with the fee prohibition. For each example, assume the following: (a) the consumer has not opted into the payment of ATM or one-time debit card overdrafts; (b) these transactions are paid into overdraft because the amount of the transaction at settlement exceeded the amount authorized or the amount was not submitted for authorization; (c) under the account agreement, the institution may charge a per-item fee of \$20 for each overdraft, and a one-time sustained overdraft fee of \$20 on the fifth consecutive day the consumer's account remains overdrawn; (d) the institution posts ATM and debit card transactions before other transactions; and (e) the institution allocates deposits to account debits in the same order in which it posts debits.

a. Assume that a consumer has a \$50 account balance on March 1. That day, the institution posts a one-time debit card transaction of \$60 and a check transaction of \$40. The institution charges an overdraft fee of \$20 for the check overdraft but cannot assess an overdraft fee for the debit card transaction. At the end of the day, the consumer has an account balance of negative \$70. The consumer does not make any deposits to the account, and no other transactions occur between March 2 and March 6. Because the consumer's negative balance is attributable in part to the \$40 check (and associated overdraft fee), the institution may charge a sustained overdraft fee on March 6 in connection with the check.

b. Same facts as in a., except that on March 3, the consumer deposits \$40 in the account. The institution allocates the \$40 to the debit card transaction first, consistent with its posting order policy. At the end of the day on March 3, the consumer has an account balance of negative \$30, which is attributable to the check transaction (and

associated overdraft fee). The consumer does not make any further deposits to the account, and no other transactions occur between March 4 and March 6. Because the remaining negative balance is attributable to the March 1 check transaction, the institution may charge a sustained overdraft fee on March 6 in connection with the check.

c. Assume that a consumer has a \$50 account balance on March 1. That day, the institution posts a one-time debit card transaction of \$60. At the end of that day, the consumer has an account balance of negative \$10. The institution may not assess an overdraft fee for the debit card transaction. On March 3, the institution pays a check transaction of \$100 and charges an overdraft fee of \$20. At the end of that day, the consumer has an account balance of negative \$130. The consumer does not make any deposits to the account, and no other transactions occur between March 4 and March 8. Because the consumer's negative balance is attributable in part to the check, the institution may assess a \$20 sustained overdraft fee. However, because the check was paid on March 3, the institution must use March 3 as the start date for determining the date on which the sustained overdraft fee may be assessed. Thus, the institution may charge a \$20 sustained overdraft fee on March 8.

iii. Alternative approach. For a consumer who does not opt into the institution's overdraft service for ATM and one-time debit card transactions, an institution may also comply with the fee prohibition in § 205.17(b)(1) by not assessing daily or sustained overdraft, negative balance, or similar fees or charges unless a consumer's negative balance is attributable solely to check, ACH or other types of transactions not subject to the fee prohibition while that negative balance remains outstanding. In such case, the institution would not have to determine how to allocate subsequent deposits that reduce

but do not eliminate the negative balance. For example, if a consumer has a negative balance of \$30, of which \$10 is attributable to a one-time debit card transaction, an institution complies with the fee prohibition if it does not assess a sustained overdraft fee while that negative balance remains outstanding.

Paragraph 17(b)(3) – Same Account Terms, Conditions, and Features

2. Limited-feature bank accounts. Section 205.17(b)(3) does not prohibit institutions from offering deposit account products with limited features, provided that a consumer is not required to open such an account because the consumer did not opt in. For example, § 205.17(b)(3) does not prohibit an institution from offering a checking account designed to comply with state basic banking laws, or designed for consumers who are not eligible for a checking account because of their credit or checking account history, which may include features limiting the payment of overdrafts. However, a consumer who applies, and is otherwise eligible, for a full-service or other particular deposit account product may not be provided instead with the account with more limited features because the consumer has declined to opt in.

Paragraph 17(c) Timing

2. Permitted fees or charges. Fees or charges for ATM and one-time debit card overdrafts may be assessed only for overdrafts paid on or after the date the financial

institution receives the consumer's affirmative consent to the institution's overdraft service. See also comment 17(b)-7.

Paragraph 17(d) Content and Format

3. Opt-in methods. The opt-in notice must include the methods by which the consumer may consent to the overdraft service for ATM and one-time debit card transactions. Institutions may tailor Model Form A-9 to the methods offered to consumers for affirmatively consenting to the service. For example, an institution need not provide the tear-off portion of Model Form A-9 if it is only permitting consumers to opt-in telephonically or electronically. Institutions may, but are not required, to provide a signature line or check box where the consumer can indicate that he or she declines to opt in.

4. Identification of consumer's account. An institution may use any reasonable method to identify the account for which the consumer submits the opt-in notice. For example, the institution may include a line for a printed name and an account number, as shown in Model Form A-9. Or, the institution may print a bar code or use other tracking information. See also comment 17(b)-6, which describes how an institution obtains a consumer's affirmative consent.

5. Alternative plans for covering overdrafts. If the institution offers both a line of credit subject to the Board's Regulation Z (12 CFR part 226) and a service that transfers funds from another account of the consumer held at the institution to cover overdrafts, the institution must state in its opt-in notice that both alternative plans are offered. For

example, the notice might state “We also offer overdraft protection plans, such as a link to a savings account or to an overdraft line of credit, which may be less expensive than our standard overdraft practices.” If the institution offers one, but not the other, it must state in its opt-in notice the alternative plan that it offers. If the institution does not offer either plan, it should omit the reference to the alternative plans.

By order of the Board of Governors of the Federal Reserve System, May 27, 2010.

Jennifer J. Johnson (signed)

Jennifer J. Johnson
Secretary of the Board