

June 1, 2010

## **ICBA Regulatory Alert**

### **Regulation E (Electronic Fund Transfers Act)**

### **Overdraft Services Rules**

On November 12, 2009, the Federal Reserve Board published changes to Regulation E (Electronic Fund Transfers Act) to give consumers greater choice regarding their bank's payment of overdrafts for ATM and one-time debit card transactions. Under the rule, financial institutions may not charge consumers (both existing and new account holders) a fee for paying overdrafts unless the consumer affirmatively consents, or opts in to overdraft coverage for these transactions. The new rule does not apply to checks, ACH debits and other debit transactions creating overdrafts.

Clarifications to the rule were issued on May 28, 2010.

#### **Definitions**

- *One-time debit card transactions* – Include signature and PIN transactions at the point-of-sale, in an online transaction, or in a telephone transaction.
- *Overdraft Services* – A service under which a financial institution assesses a fee or charge on a consumer's account held by the bank for paying a transaction when the consumer has insufficient or unavailable funds in the account. This excludes lines of credit, including securities- and commodities-related lines of credit, and automated account transfers (or "sweeps").

#### **Consumer Choice (Opt-in)**

- Banks should provide consumers a separate disclosure and consent notice in writing, or if the consumer agrees, electronically, containing:
  - A description of the bank's overdraft service and the types of transactions that may incur a fee, including ATM and one-time debit card transactions.
  - The dollar amount of any fees.
  - A description of dollar thresholds and daily fee limits.
  - Disclosure of opt-in rights and methods (mail, telephone, electronically) consumers may consent to the service.
  - A description of all overdraft services offered by the institution, such as credit lines and transfers from another account.
  - Duration and revocation of the opt-in.
- Existing customers
  - Notices must be sent to consumers giving them to opt in to the service by July 1, 2010.
  - Effective Aug. 15, 2010, banks cannot assess a charge for existing customers unless the consumer has opted in to the service.

- New customers
  - Effective July 1, 2010, banks must provide notice to the consumer and obtain consent at account opening before assessing overdraft fees on ATM and one-time debit card transactions.
- Banks must provide consumers an ongoing ability to revoke their opt-in consent.
- Banks must provide consumers confirmation of the opt-in election by mailing or delivering a letter or notice acknowledging the opt-in election. The confirmation must include a statement informing the consumer of the ability to revoke the opt-in at any time.

### **Prohibitions**

- The rule prohibits institutions from tying the payment of overdrafts for checks and other transactions to the consumer's decision to opt in to the overdraft service for ATM and one-time debit card transactions.
- The rule requires institutions to provide consumers who do not opt in with the same account terms, conditions and features, including price, as provided to consumers who do opt in. The rule does not prohibit an institution from offering limited-feature bank accounts designed to comply with state basic banking laws or designed for consumers who are not eligible for a regular account because of their credit or checking account history. A consumer that is eligible for a regular account, which includes the payment of overdrafts, may not be offered a limited-feature account because the consumer declines to opt in.
- The rule prohibits institutions from charging a fee on ATM and one-time debit card transactions if the consumer does not provide consent (opt in), even when there is reasonable belief at the time of authorization of sufficient funds to cover the transaction.
- Daily or sustained overdraft, negative balance or similar fees or charges are NOT permitted if the consumer has not opted in to the payment of overdrafts related solely to ATM and debit card transactions. These fees or charges are permitted if an overdraft is attributable in whole or in part to a check, ACH, or other type of transaction not subject to the prohibition.

### **Compliance**

- Banks comply with the rule when they adapt systems to identify debit card transactions as either one-time or recurring. Banks may rely on the transaction's coding by merchants, other institutions, and other third parties, as a one-time or a preauthorized or recurring debit card transaction.
- Reasonable procedures must be in place to ensure that overdraft fees are assessed only after the confirmation is mailed or delivered to the consumer.
- Model Form A-9:
  - may be modified to include only the methods offered to consumers for affirmatively consenting to the service. For example, institutions only permitting consumers to opt-in telephonically or electronically do not need to include the tear-off portion of the Form.
  - may include a signature line or check box indicating that the consumer declines to opt in.
  - may use any reasonable method – printed name and account number, bar code or other tracking information -- to identify the account for which the consumer submits the opt-in notice.

The mandatory compliance date is July 1, 2010.

