The Banking Law Journal

VOLUME 127 NUMBER 4 APRIL 2010

THE BANKING LAW JOURNAL (ISSN 0005 5506) is published ten times a year by A.S. Pratt & Sons, 805 Fifteenth Street, NW., Third Floor, Washington, DC 20005-2207. Application to mail at Periodicals postage rates is pending at Washington, D.C. and at additional mailing offices.
POSTMASTER: Send address changes to THE BANKING LAW JOURNAL, A.S. Pratt & Sons, 805 Fifteenth Street, NW., Third Floor, Washington, DC 20005-2207.

Amendment to Electronic Fund Transfer Act Restricts Overdraft Fees with Mandatory Compliance Date of July 1, 2010

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The authors explain the new amendment to the Electronic Fund Transfer Act that limits the ability of a financial institution to assess an overdraft fee for paying automated teller machine and one time debit card transactions that overdraw a consumer's account.

The Federal Reserve Board (the "Board") has recently amended Regulation E[1] as well as the official staff commentary for Regulation E, which is the implementing regulation for the Electronic Fund Transfer Act[2] ("EFTA") (the "Amendment").[3] The Amendment limits the ability of a financial institution to assess an overdraft fee 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 these transactions. The institution may decline the transaction or, alternatively, pay the overdraft at its discretion, but without the consumer's affirmative consent may not assess a fee for doing so. Specifically, the Amendment requires financial institutions to provide consumers with a written notice describing the institution's overdraft protec-

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Published in the April 2010 issue of *The Banking Law Journal.*

tion service, and separately, provide written confirmation of the consumer's consent to the fee assessment policy together with notice that the consumer may also revoke that consent. Failure to comply with the Amendment gives rise to a private right of action for violation of the EFTA and Regulation E which carries with it civil penalties.

The Amendment is intended to assist consumers in understanding how overdraft services provided by their institutions operate and to ensure that consumers have 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 Amendment becomes effective as to new accounts on July 1, 2010. Financial institutions must bring existing accounts (opened prior to July 1, 2010) into compliance by August 15, 2010.

COMPLIANCE WITH AMENDMENT

The Amendment generally prohibits a financial institution from assessing a fee on a consumer's account for paying an ATM transaction or a one time debit card transaction that results in an overdraft on the account, unless the institution provides the consumer with a notice explaining the institution's overdraft service for such transactions and the consumer affirmatively consents, or opts in, to the service. The Amendment applies to all transactions originating at an ATM (such as bill payments and balance transfers) and not just withdrawals. The Amendment does not apply to other types of transactions such as checks, ACH transactions, and recurring debit card transactions.[4]

The Board noted that many of the industry comments received in response to the proposed amendment objected generally to the differentiation between one time debit card transactions and recurring debit card transactions (such as automatic bill payments) and stated that many in the industry did not have technology in place to distinguish between these types of transactions and, thus, implementing the change would be costly. Likewise, industry commentators noted that even if their systems could differentiate between one time and recurring transactions, the differentiation is not reliable because it is dependent upon merchant coding with respect to the na-

ture of the transaction. As a result, the Board adopted a safe harbor in new comment 17(b)-1.ii pursuant to which the financial institution is deemed to have complied with the Amendment if it adapts its systems to differentiate between one time and recurring debit transactions. If so, the institution may then rely on the coding of those transactions by the merchants even if they are coded incorrectly.

Programs whereby the institution pays overdrafts (at its discretion) for a single monthly fee without imposing an overdraft fee on a per item or per occurrence basis are still subject to the restrictions in the Amendment and the institution must provide consumers with the choice to opt into the institution's payment of ATM and debt card overdrafts.

MANDATORY NOTICE PROVISIONS

The Amendment requires financial institutions to provide notice of their overdraft charges in writing (or if the consumer agrees, electronically). The notice must be segregated from all other information, and describe the following:

- The financial institution's overdraft service and the types of transactions for which an overdraft fee may be imposed, including ATM and one time debit card transactions;
- The dollar amount of any fees or charges assessed by the financial institution for paying an ATM or one time debit card transaction, including any daily or other overdraft fees. If the amount of the fee is determined on the basis of the number of times the consumer has overdrawn the account, the amount of the overdraft, or other factors, the institution must disclose the maximum fee that may be imposed;
- The maximum number of overdraft fees or charges that may be assessed per day, or, that there is no limit;
- The consumer's right to consent to the payment of overdrafts for ATM and one time debit card transactions and the methods by which the consumer may consent; and
- If the institution offers a line of credit subject to the Board's Regulation

Z (12 C.F.R. Part 226) or a service that transfers funds from another account of the consumer held at the institution to cover overdrafts, the institution must state that fact.

To assist financial institutions in complying with the new notice requirements, the Board has issued a model consent form, contained in Appendix A-9 of Regulation E. The Amendment requires that institutions use a consent form that is "substantially similar" to Model Form A-9.

PERMITTED MODIFICATIONS TO MANDATORY NOTICE PROVISIONS

In addition to the required disclosures, set forth above, the notice may indicate that the consumer has the right to opt into, or opt out of, the payment of overdrafts under the institution's overdraft service for other types of transactions and disclose that returned item fees and additional merchant fees may apply. The institution may also disclose the consumer's right to revoke consent. For notices provided to consumers with existing accounts (accounts opened prior to July 1, 2010), the financial institution may state that after August 15, 2010, the financial institution will not authorize and pay overdrafts for the ATM and one time debit transactions unless the consumer requests the overdraft service.

CONSUMER'S CONSENT AND RIGHT TO REVOCATION

A consumer may consent to the financial institution's overdraft service at any time in the manner described in the notice. The financial institution must provide the consumer with a "reasonable opportunity" to consent and the comments to the Amendment provide four examples of what types of methods constitute such a reasonable opportunity:

- Provision of a written form that the consumer can complete and mail;
- It is not required that the financial institution provide a toll free telephone number as a method to opt-in, but doing so is an example of a

reasonable method for opting in;

- Provision of a form that can be accessed and processed via the institution's Web site, where the consumer may click on a check box to provide consent and confirm that choice by clicking on a button affirming that consent (the institution must provide the specific web address where the form is located and not just the institution's home page); and
- Provision of a form that the consumer can complete and submit in person at a branch or office.

The Board has likewise provided some examples of what will *not* constitute proper affirmative consent:

- Including preprinted language about the overdraft service in an account disclosure provided with a signature card or contract that the consumer must sign to open the account and that acknowledges the consumer's acceptance of the account terms; or
- Provision of a signature card with a preselected check box indicating that the consumer is requesting this service.

If two or more consumers jointly hold an account, the financial institution must treat the consent of any of the joint consumers as the consent for that account.

Once the consumer consents to a financial institution's overdraft service, the financial institution is required to provide the consumer with a confirmation of the consumer's consent in writing (or electronically if the consumer agrees) before the financial institution may assess any overdraft fee for ATM or one time debit card transactions. The Board noted that this requirement is satisfied if the institution provides the consumer with a copy of the completed opt-in form or sends a letter or other document to the consumer acknowledging that the consumer has elected to opt into the service.

The consumer's consent — once confirmed — remains effective until it is revoked, or alternatively, until the financial institution terminates the overdraft service. The confirmation must include a statement informing the consumer of the right to revoke such consent. A consumer may revoke con-

sent at any time in the same manner the consumer provided consent. If two or more consumers jointly hold an account, the financial institution must treat the revocation of consent by either of the joint consumers as revocation of consent for that account. The Amendment requires that a financial institution implement a consumer's revocation of consent "as soon as reasonably practicable." However, a consumer's revocation of consent does not require the financial institution to waive or reverse any overdraft fees assessed on the account prior to the financial institution's implementation of the revocation request.

NO CONTRACTUAL OBLIGATION TO PAY ALL OVERDRAFTS

Some industry commentators expressed concern regarding the Amendment on the basis that the notice and opt-in procedure could cause consumers to believe that the opt-in created a contractual right to payment of overdrafts. The Board adopted comment 17(b)-3 to clarify that Section 205.17 does not require an institution to authorize or pay any overdrafts on an ATM or one time debit card transaction even if a consumer affirmatively consents to the overdraft service for such transactions. The model form adopted by the Board also contains discretionary language in this regard.

CAVEATS

"Steering" Is Prohibited

Financial institutions may not steer consumers who do not opt into the overdraft service to an account with fewer features than the one for which the consumer initially applied. The Amendment provides that financial institutions must provide consumers who do not consent to the overdraft service with the same account terms, conditions, and features that it provides to consumers who do consent, except for the overdrafts for ATM and one time debit card transactions. In other words, a consumer who applies, and is otherwise eligible, for a particular deposit account product may not be provided an account with more limited features simply because the consumer has declined to opt into the overdraft service.

The Board, however, clarifies in new comment 17(b)(3)-2 that these provisions are not intended to interfere with state basic banking laws or other limited-feature bank accounts marketed to consumers who have historically had difficulty entering or remaining in the banking system. The new comment explains that the Amendment does not prohibit institutions from offering limited feature deposit account products, provided that the consumer is not required to open an account with such limited features simply because the consumer did not opt into the overdraft service.

"Conditioning" Is Prohibited

Financial institutions are also prohibited from conditioning the payment of overdrafts for other types of transactions, such as checks, ACH transactions, recurring debits 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. Likewise, institutions are also prohibited from declining to pay check, ACH transactions, recurring debits or other types of transactions that overdraw the consumer's account because the consumer has not opted into the institution's overdraft service for ATM and one time debit card transactions.

EXCEPTIONS

The Amendment does not apply to an institution that has a practice of declining to 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. Financial institutions may apply this exception on an account-by-account basis.

CIVIL LIABILITY FOR FAILURE TO COMPLY WITH THE EFTA

Failure to comply with the Amendment gives rise to a private right of action implicating the civil penalties set forth in 15 U.S.C. § 1693m of the EFTA.[5] Specifically, individual consumers may recover actual damages incurred or a statutory penalty of not less than $100 or greater than $1,000 plus

reasonable attorneys' fees incurred. With respect to class actions, the class may be awarded "such amount as the court may allow" except that: (1) "as to each member of the class no minimum recovery shall be applicable;" and (2) the total recovery "in any class action or series of class actions arising out of the same failure to comply" "shall not be more than the lesser of $500,000 or 1 percent of the net worth of the defendant." Likewise, reasonable attorneys' fees may also be awarded in connection with a successful class action.

NOTES

[1] 12 C.F.R. § 205.

[2] 15 U.S.C. § 1693 *et. seq*.

[3] The amendment is codified at 12 C.F.R. § 205.17. The Board commentary can be found at Electronic Fund Transfer Act, 74 Fed. Reg. 59,033, 59,041 (November 17, 2009) (to be codified at 12 C.F.R. pt. 205).

[4] The Board determined that the payment of overdrafts for check transactions and recurring debit transactions may enable consumers to avoid other adverse consequences that could result if the items are returned unpaid, such as returned item fees charged by the merchant. *See* Electronic Fund Transfer Act, 74 Fed. Reg. 59,033, 59,041 (November 17, 2009) (to be codified at 12 C.F.R. pt. 205). The Board also determined through consumer testing that consumers are more likely to use checks and recurring debit card transactions to pay for important bills such as utilities and rent and to use debit cards on a one-time basis for discretionary purchases. *See id*.

[5] *See* 15 U.S.C. §1693m(a).