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## 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; official staff commentary.

**SUMMARY:** The Board is amending Regulation E, which implements the Electronic Fund Transfer Act, and the official staff commentary to the regulation, which interprets the requirements of Regulation E. The final rule 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.

**DATES:** The rule is effective January 19, 2010, with a mandatory compliance date of July 1, 2010.

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

#### SUPPLEMENTARY INFORMATION:

##### I. Statutory Background

The Electronic Fund Transfer Act (15 U.S.C. 1693 *et seq.*) (EFTA or Act), enacted in 1978, provides a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer (EFT) systems. The EFTA is

implemented by the Board's Regulation E (12 CFR part 205). Examples of the types of transactions covered by the Act and regulation include transfers initiated through an ATM, point-of-sale (POS) terminal, automated clearinghouse (ACH), telephone bill-payment plan, or remote banking service. The Act and regulation provide for the disclosure of terms and conditions of an EFT service; documentation of EFTs by means of terminal receipts and periodic statements; limitations on consumer liability for unauthorized transfers; procedures for error resolution; certain rights related to preauthorized EFTs; and restrictions on the unsolicited issuance of access devices.

The official staff commentary (12 CFR part 205 (Supp. I)) interprets the requirements of Regulation E to facilitate compliance and provides protection from liability under Sections 915 and 916 of the EFTA for financial institutions and other persons subject to the Act who act in conformity with the Board's official interpretations. 15 U.S.C. 1693m(d)(1). The commentary is updated periodically to address significant questions that arise.

##### II. Background on Overdraft Services

###### *Historical Overview of Overdraft Services*

Historically, if a consumer tried to make a payment using a check that would overdraw his or her deposit account, the consumer's financial institution used its discretion on an ad hoc basis to determine whether to pay the overdraft. If an overdraft was paid, the institution usually imposed a fee on the consumer's account. In recent years, many institutions have automated the overdraft payment process, which reduces costs and ensures consistent treatment of consumers.<sup>1</sup> Automation is used to apply specific criteria for determining whether to honor overdrafts and to set limits on the amount of coverage provided.

<sup>1</sup> According to the FDIC's Study of Bank Overdraft Programs, nearly 70 percent of banks surveyed implemented their automated overdraft program after 2001. See *FDIC Study of Bank Overdraft Programs* at 8 (November 2008) (*FDIC Study*) (available at: [http://www.fdic.gov/bank/analytical/overdraft/FDIC138\\_Report\\_FinalTOC.pdf](http://www.fdic.gov/bank/analytical/overdraft/FDIC138_Report_FinalTOC.pdf)). ATM and POS overdrafts arose from automated overdraft programs.

Overdraft services vary among institutions but often share certain common characteristics. In most cases, consumers that meet a depository institution's criteria are automatically enrolled in overdraft services. While institutions generally do not underwrite on an individual account basis when enrolling the consumer in an overdraft service, most institutions review individual accounts periodically to determine whether the consumer continues to qualify for the service and the amount of overdraft coverage provided. Most institutions disclose that the payment of overdrafts is discretionary, and that the institution has no legal obligation to pay any overdraft. Many institutions offer their customers alternative overdraft protection plans, such as a link to a savings account or an overdraft line of credit. These programs, for which the consumer must qualify and enroll, are distinguishable from the financial institution's overdraft service.

In the past, institutions generally provided overdraft coverage only for check transactions. In recent years, however, the service has been extended to cover overdrafts resulting from non-check transactions, including ATM withdrawals, debit card transactions at POS, on-line transactions, preauthorized transfers, and ACH transactions.<sup>2</sup> Generally, institutions charge a flat fee each time an overdraft is paid, although some larger institutions have a tiered fee structure and charge higher fees as the number of overdrafts increases. Institutions commonly charge the same amount for paying check and ACH overdrafts as they would if they returned the item unpaid. Some institutions also impose a fee for each day the account remains overdrawn.

According to a recent report from the Government Accountability Office (GAO), the average cost of overdraft and insufficient funds fees was just over \$26 per item in 2007.<sup>3</sup> The GAO also

<sup>2</sup> Eighty-one percent of banks surveyed that operate automated overdraft programs now allow overdrafts to be paid at ATMs and POS debit card terminals. See *FDIC Study* at 10.

<sup>3</sup> See *Bank Fees: Federal Banking Regulators Could Better Ensure That Consumers Have Required Disclosure Documents Prior to Opening Checking or Savings Accounts*, GAO Report 08-281, at 14 (January 2008) (*GAO Report*). See also "Consumer Overdraft Fees Increase During Recession: First-Time Phenomenon," Press release, Moebs Services (July 15, 2009) (*Moebs 2009 Pricing*).  
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reported that large institutions on average charged between \$4 and \$5 more for overdraft and insufficient fund fees compared to smaller institutions.<sup>4</sup>

#### *Industry and Consumer Advocate Perspectives*

From the industry's perspective, automated overdraft services enable institutions to reduce the cost of manually reviewing individual items, and also ensure that all consumers are treated consistently with respect to overdraft payment decisions. Industry representatives observe that overdraft services provide access to funds in urgent situations and prevent embarrassment and inconvenience at the point-of-sale.<sup>5</sup> Some industry representatives have indicated that a majority of debit transactions that are authorized into overdraft later settle into good funds, without fees being assessed on the consumer's account.

In contrast, consumer advocates assert that overdraft transactions are a high-cost form of lending that trap low- and moderate-income consumers into paying high fees. Consumer advocates also state that consumers are often enrolled in overdraft services automatically without their consent. In addition, consumer advocates believe that by honoring overdrafts, institutions encourage consumer reliance on the service and therefore, consumers incur greater costs in the long run than they would if the transactions were not honored. Consumer advocates have noted, for example, that historically, institutions declined a consumer's request for an ATM withdrawal or debit card transaction if the consumer did not have sufficient funds in his or her account. Today, however, institutions are more likely to cover those overdrafts and assess a fee on the consumer's account for doing so. According to consumer advocates, this practice can be particularly costly in connection with debit card overdrafts because the

dollar amount of the fee is likely to considerably exceed the dollar amount of the overdraft.<sup>6</sup> In addition, multiple fees may be assessed in a single day for a series of small-dollar transactions. Because of these costs, consumer advocates contend that most consumers would prefer that their bank decline ATM or debit card transactions if the transactions would overdraw their account.<sup>7</sup>

#### *Previous Agency Actions*

In February 2005, the Board, along with the other federal banking agencies, issued guidance on overdraft protection programs in response to the increased availability and customer use of overdraft protection services (Joint Guidance).<sup>8</sup> The Joint Guidance addresses three primary areas—safety and soundness considerations, legal risks, and best practices.<sup>9</sup> The best practices described in the Joint Guidance address the marketing and communications that accompany the offering of overdraft services, as well as the disclosure and operation of program features, including the provision of consumer choice to opt out of the overdraft service.

In May 2005, the Board revised Regulation DD and the staff commentary pursuant to its authority under the Truth in Savings Act (TISA) to provide uniformity and improve the adequacy of disclosures provided to consumers about overdraft and returned-item fees.<sup>10</sup> The 2005 Regulation DD

revisions also addressed concerns about institutions' marketing of overdraft services.

#### *May 2008 FTC Act and Regulation DD Proposals; January 2009 Regulation DD Final Rule*

In May 2008, the Board, along with the OTS and the NCUA (collectively, the Agencies), proposed to exercise their authority under the Federal Trade Commission Act (FTC Act) to prohibit institutions from assessing any fees on a consumer's account in connection with an overdraft service, unless the consumer was given notice and the right to opt out of the service, and the consumer did not opt out.<sup>11</sup> The proposed opt-out right would have applied to overdrafts resulting from all methods of payment, including checks, ACH transactions, ATM withdrawals, recurring payments, and POS debit card transactions. The proposed rule was intended to ensure that consumers understand overdraft services and have the choice to avoid the associated costs where such services do not meet their needs.

The Board concurrently issued a proposal under Regulation DD (Truth in Savings), which set forth requirements on the delivery of the opt-out notice, as well as a model opt-out form.<sup>12</sup> The Regulation DD proposal required all institutions to provide aggregate totals for overdraft fees and for returned item fees for the periodic statement period and the year-to-date. The Regulation DD proposal also addressed account balance disclosures provided to consumers through automated systems, such as ATMs and on-line banking services. In January 2009, the Board published the revisions to Regulation DD in final form addressing the aggregate fee and balance disclosures, with an effective date of January 1, 2010.<sup>13</sup>

Based on the Board's review of comments received with respect to the 2008 FTC Act and Regulation DD proposals, the results of consumer testing, and its own analysis, the Board concluded that concerns about consumer choice regarding overdraft services should be addressed under the EFTA and Regulation E. First, participants in consumer testing indicated that they would prefer to have their checks paid into overdraft, because those transactions represented important bills. In contrast, consumer testing indicated that many participants would prefer to have ATM withdrawals and debit card transactions declined if

*Survey Press Release* (available at: <http://www.moebis.com/AboutUs/Pressreleases/tabid/58/ctl/Details/mid/380/ItemID/65/Default.aspx>) (reporting an average overdraft fee of \$26).

<sup>4</sup> See *GAO Bank Fees Report* at 16. Another recent survey suggests that the cost difference in overdraft fees between small and large institutions may be larger than reported by the GAO, however. See *Moebis 2009 Pricing Survey Press Release* (reporting that banks with more than \$50 billion in assets charged on average \$35 per overdrawn check compared to \$26 for all institutions).

<sup>5</sup> See *ABA Survey: More Consumers Avoid Overdraft Fees*, Press Release, American Bankers Association (Sept. 9, 2009) (*ABA Survey*) (available at: <http://www.aba.com/Pressrssl/090909ConsumerSurveyOverdraftFees.htm>) (reporting survey results indicating that of those consumers who had paid an overdraft fee in the past 12 months, 96 percent wanted the payment covered).

<sup>6</sup> See, e.g., *Overdraft Protection: Fair Practices for Consumers: Hearing before the House Subcomm. on Financial Institutions and Consumer Credit, House Comm. on Financial Services*, 110th Cong., at 72 (2007) (*Overdraft Protection Hearing*) (available at: [http://www.house.gov/apps/list/hearing/financialsvcs\\_dem/hr0705072.shtml](http://www.house.gov/apps/list/hearing/financialsvcs_dem/hr0705072.shtml)) (testimony noting that as recently as 2004, 80 percent of banks still declined ATM and debit card transactions without charging a fee when account holders did not have sufficient funds in their account).

<sup>7</sup> See Leslie Parrish, *Consumers Want Informed Choice on Overdraft Fees and Banking Options*, Ctr. for Responsible Lending (April 16, 2008) (available at: <http://www.responsiblelending.org/overdraft-loans/research-analysis/final-caravan-survey-4-16-08.pdf>) (reporting the results of a survey indicating that 80 percent of consumers would prefer that a debit card transaction be declined if a \$5 purchase would result in an overdraft and an accompanying \$34 fee); Consumers Union, *Financial Regulation Poll* (February 13, 2009) (*Consumers Union Poll*) (available at: [http://www.federalreserve.gov/SECRS/2009/March/20090317/R-1343/R-1343\\_031209\\_12532\\_455058226232\\_1.pdf](http://www.federalreserve.gov/SECRS/2009/March/20090317/R-1343/R-1343_031209_12532_455058226232_1.pdf)) (65% of consumers would prefer that an ATM or debit card transaction be denied if it would result in an overdraft).

<sup>8</sup> See Interagency Guidance on Overdraft Protection Programs, 70 FR 9127, Feb. 24, 2005.

<sup>9</sup> The Office of Thrift Supervision (OTS) issued separate guidance that focuses on safety and soundness considerations and best practices. OTS Guidance on Overdraft Protection Programs, 70 FR 8428, Feb. 18, 2005.

<sup>10</sup> 70 FR 29582, May 24, 2005.

<sup>11</sup> 73 FR 28904, May 19, 2008

<sup>12</sup> 73 FR 28730, May 19, 2008.

<sup>13</sup> 74 FR 5584, January 29, 2009.

they had insufficient funds, rather than incur an overdraft fee, because those transactions tend to be more discretionary in nature.

Second, a consumer will generally be charged the same fee by the financial institution whether or not a check is paid; yet, if the institution covers an overdrawn check, the consumer may avoid other adverse consequences, such as the imposition of additional merchant returned item fees.<sup>14</sup> For ATM and one-time debit card transactions, however, if the transaction is declined because the consumer's account contains insufficient funds, the consumer would not incur any merchant returned item fees and would avoid any fees assessed by the financial institution.

Third, consumer testing indicated that many consumers are unaware that they can incur overdrafts at the ATM or at POS, and that they believe instead that their transactions will be declined.<sup>15</sup> Consequently, consumers may overdraw their accounts based on the erroneous belief that a transaction would be paid only if the consumer has sufficient funds in the account to cover it.

Finally, the Board believed it was appropriate to focus the proposal on ATM and one-time debit card transactions because these transactions have been a key driver behind the growth in the volume and cost of overdraft fees—particularly POS/debit overdraft transactions, which according to one study accounted for 41% of surveyed institutions' insufficient funds transactions.<sup>16</sup> With respect to debit card transactions in particular, the amount of fees assessed may substantially exceed the amount overdrawn.<sup>17</sup> Given the costs associated with overdraft services in these circumstances, consumers may prefer to have these transactions declined.

Accordingly, the Board published a revised proposal in January 2009 to amend Regulation E and the official staff commentary accompanying the regulation.<sup>18</sup>

<sup>14</sup> According to one survey, the average merchant fee for a returned check is \$25. See "National Survey Reveals Retail Merchants' Bad-Check Fees Double Consumer Penalties for Overdrafts," Press release, Moeb's Services (July 28, 2009) (available at: <http://www.moeb's.com/AboutUs/Pressreleases/tabid/58/ctl/Details/mid/380/ItemID/66/Default.aspx>). See also *FDIC Study* at 16 n.18.

<sup>15</sup> See also *Consumers Union Poll* at 9 (48% of consumers polled incorrectly thought ATM transaction would be declined if they attempted to overdraw).

<sup>16</sup> *FDIC Study* at 78–79.

<sup>17</sup> See *Overdraft Protection Hearing* at 72 (stating that consumers pay \$1.94 in fees for every one dollar borrowed to cover a debit card POS overdraft).

<sup>18</sup> 74 FR 5212, January 29, 2009.

### III. The Board's Proposed Revisions to Regulation E

#### *Summary of Proposal*

The January 2009 Regulation E proposal was 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.<sup>19</sup> The proposal established a consumer's right to opt out of, or into, an institution's payment of overdrafts with respect to ATM withdrawals and one-time debit card transactions. The proposal also addressed debit holds placed by an institution on a consumer's funds in an amount exceeding the actual transaction amount.

The Board proposed two alternative approaches for giving consumers a choice regarding an institution's payment of overdrafts for ATM and one-time debit card transactions. The first approach would prohibit account-holding financial institutions from assessing overdraft fees or charges on a consumer's account for paying an overdraft on an ATM withdrawal or one-time debit card transaction (whether at POS, on-line or by telephone), unless the consumer is given notice and a reasonable opportunity to opt out of the institution's overdraft service in connection with those transactions, and the consumer does not opt out. Under this approach, the opt-out notice would be provided to the consumer at account opening (or any time before any overdraft fees are assessed) and again in each periodic statement cycle in which the institution assesses a fee or charge to the consumer's account for paying an overdraft.

The second approach would prohibit an account-holding financial institution from assessing any fees on a consumer's account for paying an ATM withdrawal or one-time debit card transaction that overdraws the account, unless the consumer is provided notice and a reasonable opportunity to opt in, or affirmatively consent, to the service, and the consumer opts in. Under this approach, opt-in notices would not have to be provided again to consumers who opt in when the financial institution pays overdrafts on these transactions and assesses a fee on the consumer's account. The proposed opt-in rule would apply to all consumers, including accounts existing prior to the mandatory compliance date. However, the Board

<sup>19</sup> *Id.*

solicited comment on a hybrid approach that would apply an opt-out to existing accounts and an opt-in to accounts opened on or after the mandatory compliance date.

The proposal provided two alternatives for implementing the consumer's choice for both the opt-out and opt-in approaches. Under one alternative, the proposal would require an institution to provide consumers who do not opt in an account that has the same terms, conditions, or features that are provided to consumers who elect to have overdraft coverage for ATM withdrawals and one-time debit card transactions, except for features that limit the institution's payment of such overdrafts. Under the second alternative, institutions could vary the terms, conditions, or features of the account that does not permit the payment of ATM and one-time debit card overdrafts, provided that the differences are not so substantial that they would discourage a reasonable consumer from exercising his or her right to opt out of the payment of such overdrafts (or compel a reasonable consumer to opt in).

Further, the Board proposed to permit, or alternatively to prohibit, (1) conditioning the payment of checks, ACH transactions, or other types of transactions that overdraw the consumer's account on the consumer not opting out of (or opting into) the institution's overdraft service with respect to ATM and one-time debit card transactions, or (2) declining to pay checks, ACH transactions, or other types of transactions that overdraw the consumer's account because the consumer has opted out of (or not opted into) the institution's overdraft service for ATM and one-time debit card transactions. To facilitate compliance, the proposal provided model forms that institutions could use to satisfy their disclosure obligations.

The Board also proposed to prohibit institutions from assessing an overdraft fee where the overdraft would not have occurred but for a debit hold placed on funds in an amount that exceeds the actual transaction amount and where the merchant can determine the actual transaction amount within a short period of time after authorization of the transaction.

#### *Overview of Public Comments*

The Board received over 20,700 comment letters on the proposal, including approximately 16,000 form letters. The majority of the comment letters were submitted by individual consumers. The remaining comment letters were submitted by banks, savings

associations, credit unions, industry trade associations, industry processors and vendors, consumer advocates, members of Congress, other federal banking agencies, state and local governments and regulators, and others. Many commenters reiterated comments made in response to the 2008 FTC Act proposal.<sup>20</sup>

Some consumer advocates, federal and state regulators, and others generally expressed support for the more narrowly tailored approach under Regulation E. However, some other consumer advocates urged the Board to reconsider using its authority under the FTC Act to provide, at a minimum, the right to opt out of the payment of overdrafts with respect to checks, ACH, and recurring debit card transactions.

Industry commenters generally supported the Board's decision to issue a proposal under Regulation E, rather than pursuant to the FTC Act. Many industry commenters argued that consumers derive substantial benefits from overdraft services, and expressed concern about the operational feasibility of limiting the opt-out, or opt-in, right only to overdrafts paid in connection with ATM withdrawals and one-time debit card transactions.

In response to the proposed opt-out and opt-in alternatives, consumer advocates, members of Congress, federal and state regulators, and the overwhelming majority of individual consumers who commented urged the Board to adopt the proposed opt-in approach. These commenters argued that the harm to consumers from overdraft fees outweigh any benefits. Further, these commenters maintained that most consumers would prefer to have an ATM or one-time debit card transaction declined, rather than trigger one or more overdraft fees. These commenters also stated that an opt-in should apply to *all* account holders.

In contrast, the majority of industry commenters favored the proposed opt-out approach. These commenters maintained that an opt-out regime would more effectively provide consumers the benefits of overdraft services while causing fewer disruptions to consumers and other participants in the banking system. Further, these commenters argued that any opt-in requirement should apply only to *new* accounts.

Consumer advocates and federal and state banking regulators supported the proposed prohibition on 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 withdrawals and one-time debit card transactions. These commenters stated that consumers would otherwise feel compelled to opt into the institution's overdraft service in order to have check and ACH overdrafts paid. For similar reasons, these commenters argued that institutions should be required to provide consumers who do not opt into the institution's overdraft service for ATM and one-time debit card transactions an account with identical terms, conditions and features as an account provided to consumers who do opt in. In contrast, industry commenters supported the alternative permitting conditioning the opt-in, because it would be costly to implement a system that pays overdrafts for certain types of transactions but not others. These commenters also urged the Board to permit institutions to vary the account terms, conditions, and features for consumers who do not opt in.

Consumer group commenters stated that the Board should not provide any exceptions to the prohibition on fees, even if overdrafts are inadvertently paid due to delays in transaction processing and settlement. Industry commenters, on the contrary, supported the proposed exceptions. Many industry commenters urged the Board to provide for additional exceptions for transactions for which authorization is not requested at the time of the transaction.

#### *Consumer Testing*

Following the January 2009 proposal, the Board engaged a testing consultant, Macro International, Inc. (Macro), to revise and test the proposed model opt-out notice and the newly proposed opt-in notice. Four additional rounds of interviews were conducted with a diverse group of consumers between May and September 2009. Testing was conducted at various locations across the United States. The findings from each round of interviews were incorporated in revisions to the model forms for the following round of testing.

In general, after reviewing the model disclosures, testing participants understood the concept of overdraft coverage, and that they would be charged fees if their institution paid their overdrafts. Consistent with previous testing efforts undertaken in connection with the 2008 FTC Act proposal, participants generally indicated that they would want their checks paid into overdraft. The majority of participants also indicated that they would prefer an opt-in over an opt-out even if they would choose to have ATM

and one-time debit card transactions paid.<sup>21</sup>

#### **IV. Summary of Final Rule**

The Board is adopting a final rule under Regulation E and the official staff commentary to assist consumers in understanding how overdraft services provided by their 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 following is a summary of the final rule and related commentary provisions. The revisions are discussed in greater detail in the section-by-section analysis below.

#### *Opt-In Approach*

The final rule requires institutions to provide consumers with the right to opt in, or affirmatively consent, to the institution's 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 opt-in requirement applies to both existing and new accounts. Based on comments received and consumer testing efforts, the final rule adopts a revised model form that institutions may use to satisfy the notice requirement.

The final rule also prohibits 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. Institutions are also prohibited from declining to pay check, ACH transactions, 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. 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 final rule does not adopt the proposed exception to the fee

<sup>21</sup> See *Design and Testing of Overdraft Notices: Phase Two*, Macro International, October 12, 2009.

<sup>20</sup> 74 FR at 5214.

prohibition for transactions authorized on an institution's reasonable belief that the consumer's account has sufficient funds to cover the transaction. The final rule also does not adopt the proposed exception for transactions where a merchant or other payee presents a debit card transaction by paper-based means, rather than electronically using a card terminal, and the institution has not previously authorized the transaction.

#### Debit Holds

The Board is not adopting the proposed provisions on debit holds. The proposal put the obligation on financial institutions to address concerns about overdrafts caused by debit holds. However, upon further consideration, the Board believes that a more comprehensive approach that involves financial institutions, card networks, and merchants may be required to effectively address these problems. The Board will continue to monitor developments with respect to debit holds and assess whether to take further action.

#### V. Legal Authority

The Board is adopting the final rule pursuant to its authority under Sections 904(a) and 904(c) of the EFTA (15 U.S.C. 1693b). Section 904(a) of the EFTA authorizes the Board to prescribe regulations necessary to carry out the purposes of the title. The express purposes of the EFTA are to establish "the rights, liabilities, and responsibilities of participants in electronic fund transfer systems" and to provide "individual consumer rights." See EFTA Section 902(b); 15 U.S.C. 1693. In addition, Section 904(c) of the EFTA provides that regulations prescribed by the Board may contain any classifications, differentiations, or other provisions, and may provide for such adjustments or exceptions for any class of electronic fund transfers, that the Board deems necessary or proper to effectuate the purposes of the title, to prevent circumvention or evasion, or to facilitate compliance.

The legislative history of the EFTA makes clear that the Board has broad regulatory authority. According to the Senate Report, regulations are "essential to the act's effectiveness" and "[permit] the Board to modify the act's requirements to suit the characteristics of individual EFT services. Moreover, since no one can foresee EFT developments in the future, regulations would keep pace with new services and

assure that the act's basic protections continue to apply."<sup>22</sup>

The final opt-in rule is intended to carry out the express purposes of the EFTA by: (a) Establishing notice requirements to help consumers better understand the cost of overdraft services for certain EFTs; and (b) providing consumers with a choice as to whether they want overdraft services for ATM and one-time debit card transactions in light of the costs associated with those services. The final opt-in rule's prohibition on conditioning the opt-in and limitations on how the opt-in may be implemented have been designed to prevent circumvention or evasion of the requirement to provide the consumer with meaningful choice regarding overdraft services. The final rule does not require financial institutions to pay overdrafts on checks, and does permit them to offer consumers a choice regarding overdraft services for checks.

The disclosures implementing the opt-in requirement are issued pursuant to the Board's authority under Sections 904(b) and 905 of the EFTA. 15 U.S.C. 1693b(b) and 1693c.

#### VI. Section-by-Section Analysis

##### Section 205.12 Relation to Other Laws

Section 205.12(a) explains the relationship between Regulation E and Regulation Z when an access device permits a consumer to obtain an extension of credit incident to an EFT. In general, Regulation E governs the issuance of access devices and the addition of an EFT service to an accepted credit card, and Regulation Z governs the issuance of a combined credit card and access device and the addition of a credit feature to an accepted credit card. See § 205.12(a). The final rule is adopted substantially as proposed to clarify that both the issuance of an access device with an overdraft service and the addition of an overdraft service to an accepted access device are governed by Regulation E.

Currently, § 205.12(a)(1)(ii) states that the EFTA and Regulation E govern the "issuance of an access device that permits credit extensions (under a preexisting agreement between a consumer and a financial institution) only when the consumer's account is overdrawn or to maintain a specified minimum balance in the consumer's account." As the Board stated in the original March 1979 final rule, this provision (originally in § 205.4(c)) was intended to clarify that Regulation E, rather than Regulation Z, applies to the issuance of "access devices that are also

credit cards solely by virtue of their capacity to access an existing overdraft credit line attached to the consumer's account." 61 FR 18468, 18472, March 28, 1979.

When the rule was originally adopted, the primary means of covering overdrafts incurred in connection with EFTs was through an overdraft line of credit linked to a debit card or other access device. Today, however, consumers are more likely to have these overdrafts covered by their institution's overdraft service, rather than by a separate overdraft line of credit. Commenters generally agreed with the proposed rule and commentary. Some consumer advocates, however, argued that overdraft services should be subject to TILA and Regulation Z.

In the final rule, the Board is amending § 205.12(a)(1)(ii) substantially as proposed, with non-substantive edits for clarity, to provide that Regulation E governs the issuance of an access device that permits extensions of funds under an overdraft service (as defined below under § 205.17). New § 205.12(a)(1)(iii) provides that Regulation E also covers the addition of an overdraft service to a previously accepted access device. See also comment 12(a)-2. Comment 12(a)-3 clarifies that the addition of an overdraft service to an accepted access device does not constitute the addition of a credit feature under Regulation Z.

In addition, the Board is amending § 205.12(a)(1)(i) as proposed, to conform the regulation to reflect the January 2009 redesignation of the definition of the term "accepted credit card" under Regulation Z. See 12 CFR 226.12, comment 226.12-2. Finally, current § 205.12(a)(1)(iii), which provides that Regulation E's liability limits and error resolution rules also apply to extensions of credit under an overdraft line of credit, is redesignated as § 205.12(a)(1)(iv) and revised, as proposed, to include a reference to overdraft services.

##### Section 205.17 Requirements for Overdraft Services

To ensure consumers are given a meaningful choice regarding overdraft services, § 205.17 requires institutions to provide consumers with the right to opt in, or affirmatively consent, to the institution's 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 also prescribes how the consumer's opt-in choice must be implemented. The

<sup>22</sup> S. Rep. No. 95-1273, 95th Cong., 2d Sess., at 26 (Oct. 4, 1978).

opt-in requirement applies to all consumers, including account holders who opened accounts prior to the mandatory compliance date of July 1, 2010.

#### Background

Consumers are often enrolled in overdraft services automatically without their consent. Thus, in the February 2005 Joint Guidance on overdraft protection services, the Board and the other federal banking agencies recommended as a best practice that institutions obtain a consumer's affirmative consent to receive overdraft protection. Alternatively, the Joint Guidance stated that where overdraft protection is provided automatically, institutions should provide consumers the opportunity to opt out of the overdraft program and provide consumers with a clear disclosure of this option.<sup>23</sup>

Although many institutions provide consumers the right to opt out of overdraft services, this practice is not uniform across all institutions.<sup>24</sup> Even where an opt-out right is provided, institutions may not clearly disclose this right to consumers, or may make it difficult for consumers to exercise this right. For example, some institutions may disclose the opt-out right in a clause in their deposit agreement, which many consumers may not notice or may not consider relevant because they do not expect to overdraw their accounts. In other cases, the opt-out provisions may not be written in clearly understandable language.

In the January 2009 Regulation E proposal, the Board proposed to provide consumers with the right to opt out of, or in the alternative, opt into the payment of overdrafts with respect to their ATM withdrawals and one-time debit card transactions. The Board proposed to apply the new rules to both existing and new accounts, but solicited comment on a hybrid approach which would permit institutions to offer an opt-out to existing accounts.

Consumer advocates, members of Congress, federal and state regulators, and the overwhelming majority of

individual consumers who commented urged the Board to adopt the proposed opt-in alternative that would require institutions to obtain a consumer's affirmative consent before fees could be charged for paying an overdraft. These commenters argued that any benefit from permitting ATM and debit card overdrafts to be paid without prior consumer consent was far outweighed by the harm to consumers stemming from overdraft fees, which may be significantly higher than the transactions causing the overdraft. Further, these commenters maintained that most consumers would prefer to have an ATM or one-time debit card transaction declined rather than pay one or more overdraft fees.

In contrast, the majority of industry commenters favored the proposed opt-out approach. These commenters contended that an opt-out regime would provide consumers the benefits of overdraft services while causing fewer disruptions to consumers and other participants in the banking system. Industry commenters also remained concerned about the operational feasibility and costs of an opt-in. For the following reasons, the Board adopts an opt-in approach in the final rule.

#### Discussion

Due to various factors such as consumer inertia and the difficulty in anticipating future costs, consumers may end up with suboptimal outcomes even when given a choice. As some studies have suggested, consumers are likely to adhere to the established default rule, that is, the outcome that would apply if the consumer takes no action.<sup>25</sup> Under an opt-out rule, consumers would default to having their financial institution's automatic overdraft coverage, resulting in some consumers incurring overdraft fees even if their preferred course would be for ATM and debit card transactions to be declined. The opposite would be true with an opt-in rule. Specifically, consumers could avoid fees for a service they did not request.

The Board believes that, on balance, an opt-in rule creates the optimal result for consumers with respect to ATM and

one-time debit card transactions. First, the cost to consumers of overdraft fees assessed in connection with ATM and debit card overdrafts is significant.<sup>26</sup> For one-time debit card transactions in particular, the amount of the fee assessed may substantially exceed the amount overdrawn.<sup>27</sup> If the consumer incurs multiple debit card overdrafts in one day, fees may accrue into the hundreds of dollars. Many consumers may prefer such transactions not to be paid.

Second, an opt-in rule that is limited to ATM and one-time debit card transactions may result in fewer adverse consequences for consumers than a rule applicable to a broader range of transactions. While a check or ACH transaction that is returned for insufficient funds might cause the consumer to incur a merchant fee for the returned item, in addition to an insufficient funds fee assessed by the consumer's financial institution, a declined ATM or debit card transaction does not result in any fees to the consumer.

Third, available research indicates that the large majority of overdraft fees are paid by a small portion of consumers who frequently overdraw their accounts.<sup>28</sup> These consumers may have difficulty both repaying overdraft fees and bringing their account current, which may in turn cause them to incur additional overdraft fees. An opt-in approach could therefore best prevent these consumers from entering into a harmful cycle of repeated overdrafts.

Fourth, many consumers may not be aware that they are able to overdraft at an ATM or POS. Debit cards have been promoted as budgeting tools, and a means for consumers to pay for goods and services without incurring additional debt. Additionally, the ability

<sup>26</sup> According to the *FDIC Study*, the median dollar amount for debit card transactions resulting in an overdraft is \$20. See *FDIC Study* at 78–79. This compares to the average cost of overdraft and insufficient funds fees of over \$26 per item in 2007, as reported by the GAO Report. *GAO Report* at 14. See also *FDIC Study* at 15, 18 (reporting a median per item overdraft fee of \$27 for banks surveyed). The *FDIC Study* also reported that POS/debit overdraft transactions accounted for the largest share of all surveyed institutions' insufficient funds transactions (41.0%). *FDIC Study* at 78–79.

<sup>27</sup> Eric Halperin, Lisa James and Peter Smith, *Debit Card Danger: Banks Offer Little Warning and Few Choices as Customers Pay a High Price for Debit Card Overdrafts*, Ctr. for Responsible Lending at 8 (Jan. 25, 2007) (estimating that the median amount by which a consumer overdraws his or her account for a debit card purchase is \$17, and that consumers pay \$1.94 in fees for every one dollar borrowed to cover a debit card POS overdraft).

<sup>28</sup> Seventy-five percent of consumers did not overdraw their accounts at all during the survey year; consumers who overdraw their accounts five or more times per year paid 93% of all overdraft fees. See *FDIC Study* at iv.

<sup>23</sup> 70 FR at 9132. The OTS made similar recommendations in its separate guidance. See 70 FR at 8431.

<sup>24</sup> According to the *FDIC's Study of Bank Overdraft Programs*, 75.1% of institutions surveyed permit consumers to opt out of their automated overdraft program, while 11.1% of institutions require consumers to opt in. According to the *FDIC*, banks that do not promote automated programs were less likely to give consumers either the option to opt in or to opt out of the automated overdraft program. See *FDIC Study* at 27. See also *Moeb's 2009 Pricing Survey Press Release* (reporting that 86% of institutions that offer overdraft services allow the consumer to opt out).

<sup>25</sup> See, e.g., Brigette Madrian and Dennis Shea, "The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior," 116 *Quarterly Journal of Economics* 1149 (2001); Gabriel D. Carroll, James J. Choi et al., "Optimal Defaults and Active Decisions," *Quarterly Journal of Economics* (forthcoming November 2009) (both studies of automatic enrollment in 401(k) savings plans indicating a significant increase in employee participation if the default rule provides that a consumer is automatically enrolled in the plan unless they opt out, instead of requiring employees to affirmatively agree to participate in the plan).

to overdraft at an ATM or POS is a relatively recent development. Consequently, consumers may unintentionally overdraw their account based on the erroneous belief that a transaction would be paid only if the consumer has sufficient funds in the account to cover it. With an opt-in approach, consumers who do not opt in will be less likely to incur unanticipated overdraft fees.

Finally, the opt-in approach is consistent with consumer preference, as indicated by the Board's consumer testing. Continued consumer testing after the publication of the January 2009 proposal was consistent with prior testing efforts, with many participants stating that they would prefer to have ATM withdrawals and debit card transactions declined if they had insufficient funds, rather than incur an overdraft fee. Similarly, an overwhelming majority of consumer commenters also expressed their preference for an opt-in approach.

The Board recognizes that, for some consumers, coverage of occasional overdrafts and paying occasional overdraft fees may be preferable to having transactions declined. Such consumers could be precluded from completing important transactions when there are insufficient funds in the consumer's account if the consumer has not opted in and the consumer does not have another means of payment.

Some industry representatives commented that a majority of debit card transactions authorized into overdraft later settle into good funds. In advocating an opt-out approach, these commenters argued that a consumer's failure to opt in would result in declined transactions even when, a majority of the time, the consumer would not have been assessed overdraft fees on his or her account.

While an opt-in approach may result in the denial of some transactions which would otherwise have settled into good funds, the Board notes that the overall impact of the final rule on the number of declined transactions is difficult to quantify, as it depends on a number of factors. This includes an institution's processing procedures, such as whether credits are processed before debits, and funds availability policies. Because direct deposits pose little risk of failing to clear, as compared to a deposited check, institutions may also authorize transactions based on pending amounts. As more institutions shift towards real-time clearing, there will be less lag time between transaction authorization and clearing. For customer service reasons, financial institutions also have an incentive to minimize the circumstances

under which transactions are declined. Moreover, the effect may be limited, as the consumer could choose to opt into overdraft coverage after the first declined transaction.

Industry commenters also argued that overdraft fees—which constitute a significant percentage of financial institutions' deposit service charges—subsidize other checking account features consumers enjoy, such as maintenance fee-free checking accounts, or free on-line bill payment. Because an opt-in requirement would likely result in reduced overdraft fee income, these commenters argued that an opt-in rule would result in either higher fees or a reduction in account features or bank services for all consumers.

To the extent institutions adjust their pricing policies to respond to the potential loss of income from overdraft fees, some consumers may experience increases in certain upfront costs as a result of the final opt-in rule. Nonetheless, the Board believes that giving consumers the choice to avoid the high cost of overdraft fees, and the increased transparency in overdraft pricing that would result from an opt-in rule, outweigh the potential increase in upfront costs. In addition, some consumers will continue to be able to avoid monthly maintenance or other account fees as a result of meeting minimum balance requirements or having other product relationships with the bank.

The Board also solicited comment on a hybrid approach consisting of an opt-out rule for existing accounts and an opt-in rule for new accounts. Under this approach, an institution could continue to pay overdrafts (and assess fees) for ATM withdrawals and one-time debit card transactions for existing account holders who have not opted out, but would be prohibited from assessing fees or charges for paying such overdrafts on new account holders who have not affirmatively consented to the institution's overdraft service. The final rule applies the opt-in approach to *all* consumers.

Industry commenters preferred the hybrid approach to an opt-in approach for existing accounts, stating that some consumers may overlook the opt-in notice, but nonetheless prefer to have their overdrafts covered. In such cases, these consumers may be confused or angry when a transaction they expect to go through is denied after the effective date. In contrast, consumer group commenters stated that existing account holders should receive the same opt-in protections as new customers, because customer turnover is very low from year to year.

The final rule provides an opt-in right for both new and existing accounts. The Board believes it is appropriate to apply the opt-in approach to existing accounts for several reasons. First, the annual consumer account attrition rate is low. One report estimates that only 14% of financial institution customers leave their institutions each year.<sup>29</sup> Thus, application of the opt-in rule only to new customers would mean that a significant number of consumers would not receive the protections provided by an opt-in. In addition, consumers who have an existing account, and then open a new account after the rule's mandatory compliance date, would receive inconsistent treatment with regard to their accounts, which could lead to consumer confusion. Further, a hybrid approach would require institutions to maintain two systems over time for new and existing accounts, which could be costly for some institutions. While some consumers with existing accounts may be surprised if, contrary to their expectations, their ATM and one-time debit card transactions are not paid into overdraft, these customers would subsequently be able to opt in. For those consumers who are unaware that they can overdraft at an ATM or at point-of-sale, however, an opt-in rule would have little impact on their expectations with respect to the coverage currently provided to them. Timing requirements for new and existing accounts are described in the discussion of § 205.17(c) below.

#### A. Definition—§ 205.17(a)

Proposed § 205.17(a) defined "overdraft service" to mean 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. The term was intended to cover circumstances when an institution assesses a fee for paying an overdraft pursuant to any automated program or service, whether promoted or not, or as a non-automated, ad hoc accommodation. The proposed definition excluded an institution's payment of overdrafts pursuant to a line of credit subject to the Board's Regulation Z, including transfers from a credit card account, a home equity line of credit, or an overdraft line of credit. The proposed definition also excluded overdrafts paid pursuant to a service

<sup>29</sup> Celent, "Customer Attrition in Retail Banking: the US, Canada, the UK, and France," Press Release (Jan. 2, 2003) (available at: <http://reports.celent.com/PressReleases/20030102/CustomerAttrition.htm>).

that transfers funds from another account of the consumer (including any account that may be jointly held by the consumer and another person) held at the institution. These methods of covering overdrafts were excluded because they require the express agreement of the consumer. Commenters generally supported proposed § 205.17(a). Accordingly, the Board is adopting § 205.17(a) with one modification.

The final rule includes a new § 205.17(a)(3) to address a suggestion that the Board revise the definition of “overdraft services” to also exclude credit secured by margin securities in brokerage accounts extended by Securities and Exchange Commission-registered broker-dealers. Margin credit is exempt from the requirements of TILA and Regulation Z in recognition that similar substantive consumer protections already apply to such credit through federal securities law. *See* 15 U.S.C. 1603(2); 12 CFR 226.3(d). Also, margin credit is typically offered pursuant to a written agreement between a consumer and a broker. Accordingly, final § 205.17(a)(3) clarifies that the term “overdraft services” does not include a line of credit or other transaction exempt from Regulation Z pursuant to 12 CFR 226.3(d).

#### B. Opt-In Requirement—§ 205.17(b)

For the reasons discussed above, the Board is adopting an opt-in rule. The general rule is implemented in § 205.17(b).

##### 17(b)(1) General Rule and Scope of Opt-In

Proposed § 205.17(b)(1) set forth the general rule prohibiting an account-holding institution from assessing a fee or charge on a consumer’s account held at the institution for paying an ATM withdrawal or a one-time debit card transaction pursuant to the institution’s overdraft service, unless the consumer is provided with a notice explaining the institution’s overdraft service for such transactions and a reasonable opportunity to affirmatively consent, or opt in, to the service, and the consumer affirmatively consents, or opts in, to the service. If the consumer opts in, the institution would be required to provide written confirmation of the consumer’s consent.

The proposed opt-in applied to any ATM withdrawal, including withdrawals made at proprietary or foreign ATMs. The proposed opt-in also applied to any one-time debit card transaction, regardless of whether the consumer uses a debit card at a point-

of-sale (for example, at a merchant or a store), in an on-line transaction, or in a telephone transaction.<sup>30</sup>

In the final rule, the Board adopts the opt-in approach and scope generally as proposed, with modifications to enhance the consumer’s right to revoke consent, and certain additional clarifications. The opt-in rule applies to all accounts covered by Regulation E, including payroll card accounts, to the extent overdraft fees may be imposed for ATM or one-time debit card transactions.

Several commenters requested that the Board clarify the kinds of ATM transactions that are subject to the rule. The Board understands that consumers use ATMs not only for withdrawing cash, but also for inter-account transfers, bill payments, and even postage stamp purchases. Therefore, the Board believes the opt-in rule should apply to all transactions originating at an ATM, and not just withdrawals. Accordingly, the final rule has been revised, as applicable, to apply to “ATM transactions” more generally, in addition to one-time debit card transactions as proposed.” *See, e.g.,* § 205.17(b)(1).

The final rule does not apply to other types of transactions, including check transactions and recurring debits. As discussed above with respect to checks, the payment of overdrafts for these transactions may enable consumers to avoid other adverse consequences that could result if such items are returned unpaid, such as returned item fees charged by the merchant. Consumers may also be more likely to use checks, ACH and recurring debit card transactions to pay for significant household expenses, such as utilities and rent. In the Board’s consumer testing, participants generally indicated that they were more likely to pay important bills using checks, ACH, and recurring debits, and to use debit cards on a one-time basis for their discretionary purchases.

The opt-in requirement also does not apply to ACH transactions. For example, if the consumer provides his or her checking account number to authorize an ACH transfer on-line or by telephone, the institution would be permitted to pay the item if it overdraws the consumer’s account and to assess a fee for doing so, even if the consumer has not opted into the payment of overdrafts for ATM or one-time debit card transactions. Like checks and recurring debits, consumers may use ACH transactions to pay for significant

household expenses. The Board notes that in many cases, ACH transactions serve as a replacement for check transactions, such as where a check is converted to a one-time ACH debit to the consumer’s account. In addition, consumers could avoid merchant returned item fees if ACH transactions are paid into overdraft.

Several commenters requested that the Board explicitly exclude decoupled debit transactions from the scope of transactions covered by the final rule. Decoupled debit cards are debit cards offered by institutions other than the account-holding institution that consumers use as they would any other debit card. Transactions for these cards originate as debit card transactions paid by the card issuer, but are received and processed by the account-holding institution as ACH transactions. The final rule prohibits a financial institution that holds a consumer’s account from assessing a fee for paying an ATM or one-time debit card transaction. Accordingly, overdraft fees charged by the account-holding financial institution for a decoupled debit transaction processed via ACH are not generally subject to the opt-in requirement of the final rule. For clarity, new comment 17(b)–1.i states that § 205.17(b)(1) applies to ATM and one-time debit card transactions made with a debit card issued by or on behalf of the account-holding institution.<sup>31</sup>

Industry commenters generally objected to the proposed rule’s differentiation between one-time debit card transactions and recurring debit card transactions. These commenters stated that they currently do not have technology in place to distinguish between these types of transactions, and that such a change would be difficult and costly to implement. In addition, they stated that the proposed rule could lead to consumer confusion as to how transactions will be treated, because some consumers may pay their bills on a transaction-by-transaction basis using a debit card number each time a bill is due rather than establishing payment as a recurring debit.

The Board recognizes that applying the opt-in rule to one-time debit card transactions will result in some bill payments being declined if the consumer does not opt-in, to the extent consumers pay bills on a transaction-by-transaction basis using a debit card number. Nonetheless, the Board

<sup>30</sup> For clarity, this has been added as comment 17(b)–1.iii.

<sup>31</sup> The Board understands that currently, issuers of decoupled debit cards do not assess consumers overdraft fees because they do not seek authorization from the account-holding institution and do not know the consumer’s balance before paying the transaction.



believes that the rule as adopted will address the majority of bill payments that consumers would prefer to have paid, because recurring debit card transactions are established primarily for bill payments, while one-time debit card transactions tend to be discretionary purchases. The Board also believes that this approach provides a bright-line approach that will facilitate compliance.

Industry commenters also argued that, even if their systems could differentiate between one-time and recurring transactions, such differentiation cannot be done reliably because merchants may not correctly code transactions as one-time or recurring. The Board recognizes that institutions cannot fully implement a consumer's choice without proper coding of the transaction by the merchant. Thus, the Board is adopting a safe harbor in new comment 17(b)-1.ii to explain that 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 as a one-time or recurring debit card transaction.

Several industry commenters stated that the rule and model language should focus on the "authorization" of ATM and one-time debit card transactions, rather than "payment" of such transactions. The final rule generally retains the language regarding "payment" of ATM and one-time debit card transactions as proposed. While an institution decides whether or not to authorize an overdraft, fees are typically charged for the institution's payment of the transaction. Additionally, in some instances, transactions are not submitted for authorization before the transaction is presented for payment (for example, where a transaction is below the floor limits established by card network rules requiring authorization). As discussed below, the final rule does not provide an exception allowing overdraft fees to be charged for payment of a transaction that overdraws the consumer's account where authorization was not requested by the merchant or other party. Moreover, some transactions that are authorized into overdraft settle into good funds and do not result in overdraft fees.

However, the final rule and commentary include the word "authorize" where necessary for accuracy. For example, § 205.17(b)(4) provides an exception to financial institutions that have a policy and practice of declining to "authorize and pay" any ATM or one-time debit card

transactions under certain conditions. In addition, as discussed below, the model form has been revised to include the term "authorization" in certain places.

Comment 17(b)-2, renumbered from proposed comment 17(b)-1, is adopted substantially as proposed to clarify that a financial institution may pay overdrafts for ATM and one-time debit card transactions even if a consumer has not affirmatively consented or opted in to the institution's overdraft service. However, if the consumer has not opted into the service, the financial institution is prohibited from assessing a fee or charge for paying the overdraft. The comment also clarifies that the rule does not limit the institution's ability to debit the consumer's account for the amount of the overdraft, provided that the institution is permitted to do so by applicable law.

Some industry commenters expressed concern that consumers will believe that an opt-in creates a contractual right to payment of overdrafts. The Board adopts comment 17(b)-3, renumbered from proposed comment 17(b)-2, substantially as proposed, to clarify that § 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 institution's overdraft service for such transactions. Additionally, as discussed below, the model form adopted by the Board contains language describing the discretionary nature of an opt-in.

A few commenters recommended that the Board define "overdraft fee" to exclude fees assessed on accounts that maintain a negative balance for an extended period (often referred to as "sustained" overdraft fees). The Board believes, however, that any fee charged on an account for an overdraft should be subject to the rule, including but not limited to a per item, per occurrence, daily, sustained overdraft, or negative balance fee. A consumer who inadvertently overdraws his or her account may not learn about the overdraft until several days after the occurrence of the overdraft and so may unknowingly accrue additional fees. Therefore, the Board believes all overdraft fees should be within the scope of the rule.

A few commenters suggested the possibility that financial 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 Board 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.

#### 17(b)(1)(i) Notice Requirements

Proposed § 205.17(b)(1)(i) stated the institution must provide a consumer a notice explaining the institution's overdraft service for ATM withdrawals and one-time debit card transactions that is segregated from all other information, including other account disclosures. Proposed § 205.17(b)(1)(i) also provided that the notice may not contain any information that is not specified or otherwise permitted by § 205.17(d). For clarity, the final rule moves this portion of the requirement to § 205.17(d).

Some industry commenters argued that the notice does not need to be segregated from other account-opening disclosures, and urged the Board to provide institutions with flexibility concerning placement of the notice. Consumer group commenters supported the segregation requirement, arguing that segregation of the notice is essential to providing consumers a meaningful way to consent and thus to providing meaningful choice.

To ensure that the consumer is able to make an informed choice when opting into overdraft services for ATM and one-time debit card transactions, and that the terms of the overdraft service are not obscured by other account information, the final rule retains a segregation requirement. In addition, as discussed below, the final rule requires that the method for providing consent, such as a signature line or check box, must be separate from other types of consents. These requirements are intended to ensure that opt-in information is not buried or obscured within other account documents and overlooked by the consumer. Otherwise, institutions could include information about the overdraft service in preprinted language in an account-opening disclosure, and a consumer might inadvertently consent to the institution's overdraft service by signing a signature card or other account-opening document on the cover page acknowledging acceptance of the account terms. The final rule also requires that notice be provided in writing, or if the consumer agrees, electronically.<sup>32</sup>

<sup>32</sup> Because the disclosures are not required to be in written form, electronic disclosures made under this section are not subject to compliance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (15 U.S.C. 7001 *et seq.*), which only applies when information is required to be provided to a consumer in writing. The notice is,

Several consumer advocates argued that, even with an opt-in, the Board should require subsequent notice of the right to opt in, and to revoke the opt-in, on consumers' periodic statements, similar to the proposed subsequent notice requirements with respect to the opt-out. The final rule does not require subsequent notices, as the Board believes such a requirement is unnecessary when the consumer has affirmatively elected to enroll in the overdraft service and, as discussed below, receives a record of their right to revoke their opt-in.

#### 17(b)(1)(ii) Reasonable Opportunity To Opt In

Proposed § 205.17(b)(1)(ii) stated that an 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. Proposed comment 17(b)-3 contained three examples illustrating what constitutes a reasonable opportunity to affirmatively consent, including reasonable method(s) to provide affirmative consent. In addition, proposed comment 17(b)-4 provided guidance on obtaining a consumer's opt-in at account opening.

Some industry commenters urged the Board to provide flexibility in how an opt-in could be provided, while consumer advocates and an association of state banking supervisors argued that consumers should be permitted a variety of methods to revoke an opt-in. Several industry commenters suggested that the methods for making and revoking a choice should be consistent. The final rule adopts § 205.17(b)(1)(ii) substantially as proposed, but revises the related proposed commentary to provide further guidance on obtaining a consumer's affirmative consent. As discussed below, final § 205.17(f) has been revised to address a consumer's ability to revoke consent.

Final comment 17(b)-4, renumbered from 17(b)-3, has been revised to explain that a financial institution provides a consumer with a reasonable opportunity to provide affirmative consent when, among other things, it provides reasonable methods by which the consumer may affirmatively consent. The comment provides four examples of such reasonable methods.

First, proposed comment 17(b)-3.i included providing a written form that the consumer can complete and mail.

however, subject to Regulation E's general requirement that disclosures be clear and readily understandable and in a form the consumer may keep. See 12 CFR § 205.4(a)(1).

The comment, renumbered as comment 17(b)-4.i, is adopted as proposed.

Proposed comment 17(b)-3.ii provided that an institution could also provide a toll-free telephone number that the consumer may call to provide affirmative consent. On the analogous proposed opt-out provision, the Board requested comment on whether the Board should require institutions to provide a toll-free telephone number. For cost and other reasons, industry commenters generally urged the Board not to require a toll-free telephone number in the opt-out context, while consumer advocates generally argued that a toll-free telephone number should be required.

Throughout the Board's consumer testing, participants consistently stated they would prefer to make a telephone call to obtain information about their overdraft choices. Under an opt-out regime, requiring a toll-free number could help reduce barriers to consumers exercising their opt-out choice. Under an opt-in regime, however, institutions have an incentive to make it easy for consumers to opt in. Thus, the final commentary, renumbered as comment 17(b)-4.ii, provides offering a readily available telephone number as an example of a reasonable method for opting in, but does not require a toll-free telephone number.

The Board's final rule also revises the proposed commentary on opting in on-line. Proposed 17(b)-3.iii illustrated that an institution may provide an electronic means for the consumer to affirmatively consent, such as a form that can be accessed and processed at an Internet Web site, provided that the institution directs the consumer to the specific Web site address where the form is located, rather than solely referring to the institution's home page. The final comment, as revised, does not include a requirement that institutions direct consumers to a specific Web site address because institutions have an incentive to facilitate consumer opt-ins. Rather, the focus of the comment is on the appropriate means of obtaining affirmative consent on-line. Therefore, the final comment, renumbered as comment 17(b)-4.iii, provides, by way of example, that the institution could provide a form that can be accessed and processed at its 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.

Because consumers often open accounts in person, the final rule includes a new example in comment 17(b)-4.iv, which provides that the institution could provide a form that the

consumer can fill out and present in person at a branch or office to provide affirmative consent. See also comment 17(b)-5, discussed below.

Proposed comment 17(b)-4 stated that an institution may provide an opt-in notice prior to or at account opening and require the consumer to decide whether to opt into the payment of ATM withdrawals or one-time debit card transactions pursuant to the institution's overdraft service as a necessary step to opening an account. As an example, the proposed comment stated that institution could require the consumer prior to or at account-opening to choose between an account that does not permit the payment of ATM withdrawals or one-time debit card transactions pursuant to the institution's overdraft service and an account that permits the payment of such overdrafts.

Industry commenters generally supported this proposed comment. Some consumer group commenters supported the proposed comment but expressed concern that institutions may attempt to steer consumers into the opt-in account. For operational reasons, an institution may not want to set up an account for the consumer with overdraft services, only to have to implement the consumer's opt-in a short time later (if the consumer does not opt in concurrent with account-opening but decides to opt in shortly thereafter). Therefore, the Board adopts this comment generally as proposed, renumbered as comment 17(b)-5, but with an additional example to clarify that an institution is not required to implement a consumer's opt-in choice by establishing a second account, but could instead implement the consent at the account level (for example, through coding that indicates whether or not the consumer opts in).

The institution could require the consumer, at account opening, to sign or check a box on a form (consistent with comment 17(b)-6, discussed below) indicating whether or not the consumer affirmatively consents at account opening. To facilitate consumer understanding, an institution may, but is not required, to provide a signature line or check box where the consumer can indicate that they decline to opt in. See Model Form A-9. Nonetheless, if the consumer does not check any box or provide a signature, the institution must assume that the consumer does not opt in. To address potential steering concerns, the Board has added guidance in the commentary, as discussed below.

#### 17(b)(1)(iii) and (iv) Affirmative Consent; Written Confirmation

Proposed § 205.17(b)(1)(iii) stated that the financial institution must obtain the

consumer's affirmative consent to the institution's overdraft service, and must provide the consumer with written confirmation documenting the consumer's choice. For clarity, the final rule bifurcates these two requirements and incorporates the disclosure of the right to revoke consent into the written confirmation requirement. The final rule also adds commentary providing further guidance on obtaining affirmative consent and providing written confirmation.

Section § 205.17(b)(1)(iii) of the final rule requires the institution to obtain the consumer's affirmative consent, or opt-in, to the institution's payment of ATM or one-time debit card transactions pursuant to the institution's overdraft service. To address concerns that a consumer might inadvertently consent to an institution's overdraft service, new comment 17(b)-6 provides examples of ways in which a consumer's affirmative consent is or is not obtained. Specifically, comment 17(b)-6 clarifies that a financial institution does not obtain a consumer's affirmative consent by 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. Nor does an institution obtain a consumer's affirmative consent by providing a signature card that contains a pre-selected check box indicating that the consumer is requesting the service. The Board is concerned that these methods of obtaining an opt-in may not reflect an informed, affirmative choice by the consumer. The institution could, however, provide a blank signature line or check box that the consumer could sign or select to indicate affirmative consent. Comment 17(b)-6 also states that such consents comply with the rule when they are obtained separately from other consents or acknowledgements; that is, the consent must be used solely to indicate the consumer's choice whether to opt into overdraft services, and not for other purposes such as to obtain consents for a financial institution's bill payment service.

The final rule also requires that the institution provide the consumer with confirmation of the consumer's consent in writing, or if the consumer agrees, electronically. For clarity, the final rule includes this requirement as a new § 205.17(b)(1)(iv). Industry commenters opposed the requirement that consumers receive written confirmation of their opt-in choice, stating that other protective mechanisms are already in place in the rule, and questioning the

benefit of the written confirmation compared to the cost of providing the confirmation. Consumer advocates supported the requirement, stating that written confirmation is essential to the rule's effectiveness.

The Board believes that written confirmation will help ensure that a consumer intended to opt into the overdraft service by providing the consumer with a written record of his or her choice. This is particularly important when a consumer opts in by telephone. New comment 17(b)(1)-7 permits an institution to comply with the 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 final rule permits the confirmation to be provided electronically, if the consumer agrees.

Section 205.17(b)(1)(iv) also requires the written confirmation to include a statement informing the consumer of the right to revoke consent. To the extent an institution complies with § 205.17(b)(1)(iv) by providing a copy of the opt-in notice to the consumer, the institution may include a statement about the right to revoke in the opt-in notice. *See also* § 205.17(d)(6).

#### 17(b)(2) Conditioning Payment of Overdrafts on Consumer's Affirmative Consent

Proposed § 205.17(b)(2) contained two approaches to how an institution may offer the opt-in. Under one approach, an institution would be prohibited from conditioning the payment of any overdrafts for checks, ACH transactions, or other types of transactions on the consumer affirmatively consenting to the institution's payment of overdrafts for ATM withdrawals and one-time debit card transactions. The institution is also prohibited from declining to pay checks, ACH transactions, or other types of transactions because the consumer has not also affirmatively consented to the institution's overdraft service for ATM and one-time debit card transactions. Collectively, these practices are referred to as "conditioning" the consumer's opt-in.

In light of the operational issues associated with a bifurcated opt-in, the alternative proposed approach would have expressly permitted institutions to condition the consumer's opt-in. The Board also sought comment on other approaches that might be more effective, or that would sufficiently balance concerns about consumers being effectively compelled to opt in against the operational difficulties of

implementing the proposed prohibition. In the final rule, the Board adopts the first approach prohibiting conditioning the opt-in. In light of consumer preference to have their checks paid, the prohibition on conditioning is intended to ensure consumers have a meaningful opt-in choice regarding overdraft services for ATM and one-time debit card transactions.

Consumer advocates and federal and state banking regulators supported a prohibition on conditioning the opt-in right, arguing that any kind of conditioning would compel consumers to opt in, because consumers prefer to have their check and ACH overdrafts paid.

Industry commenters supported the approach that permitted conditioning of the opt-in right, for several reasons. First, these commenters argued that permitting conditioning would be easier for compliance and for consumer understanding. In addition, many commenters stated that processors do not currently have the technology to distinguish between paying overdrafts for some, but not all, payment channels, and that permitting conditioning would significantly mitigate technology and implementation costs. Specifically, industry commenters stated that most systems today could either pay overdrafts for all transaction types or pay overdrafts for none, but were not set up to pay overdrafts for certain transaction types (e.g., checks and ACH), but not others (e.g., ATM and POS debit card transactions). Some industry commenters also asserted that most systems today are unable to readily differentiate between POS debit card transactions and other types of debit card transactions, such as preauthorized transfers. Some commenters argued that implementation costs would lead some institutions, particularly community banks, to stop offering overdraft services altogether. However, other industry commenters stated that they could develop the technology with sufficient lead-time for mandatory compliance with the rule, for example, by providing an implementation period of 12 to 24 months.

Although the Board acknowledges the operational concerns raised by industry commenters, the Board's consumer testing shows that many consumers would prefer that their account-holding financial institution cover overdrafts by check, ACH, or automatic bill pay. If conditioning were permitted, these consumers may feel compelled to opt into an institution's overdraft service for ATM and one-time debit card transactions in order to minimize the risk that checks and other important

bills would be returned unpaid. This could deprive consumers of a meaningful choice with respect to overdraft coverage for ATM and one-time debit card transactions. Thus, the final rule prohibits conditioning the opt-in right.<sup>33</sup>

Similarly, as discussed in the proposal, institutions could also use discretion regarding the payment of overdrafts in such a manner as to prevent consumers from exercising a meaningful choice regarding overdraft services. Thus, comment 17(b)(2)–1 clarifies that the final rule generally requires an institution to apply the same criteria for deciding when to pay overdrafts for checks, ACH transactions, and other types of transactions, whether or not the consumer has affirmatively consented to the institution's overdraft service with respect to ATM and one-time debit card overdrafts. For example, if an institution's internal criteria would lead the institution to pay a check overdraft if the consumer had affirmatively consented to the institution's overdraft service for ATM and one-time debit card transactions, it must also apply the same criteria in a consistent manner in determining whether to pay the check overdraft if the consumer has not opted in.

The Board recognizes that by prohibiting conditioning, many institutions will be required to reprogram systems to differentiate ATM and one-time debit card transactions from other transactions. Nonetheless, the Board believes that the consumer benefits provided by the prohibition on conditioning outweigh the associated costs. As discussed above, from a consumer's perspective, any benefits from overdrawing the consumer's account for ATM and one-time debit card transactions may be substantially outweighed by the costs associated with the overdraft.

A few industry commenters suggested that the Board may not have the authority under Regulation E to prohibit institutions from declining checks or other items not subject the EFTA because the consumer has not also affirmatively consented to the institution's overdraft service. The Board disagrees. Comment 17(b)(2)–2

clarifies that the prohibition on conditioning does not require the institution to pay overdrafts on checks, ACH transactions, or other types of transactions in all circumstances. *See also* comment 17(b)–3. Rather, the provision simply prohibits institutions from circumventing the opt-in requirement of the final rule by prohibiting institutions from considering the consumer's decision not to opt in when deciding whether to pay overdrafts for checks, ACH, or other types of transactions. The Board believes the prohibition adopted under the final rule is necessary to preserve consumer choice with respect to ATM and one-time debit card transactions, and to prevent circumvention or evasion of the final rule. Accordingly, the prohibition on conditioning falls within the scope of the Board's authority under Sections 904(a) and 904(c) of the EFTA, as discussed in Part V above.

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

The Board proposed two alternatives under § 205.17(b)(3) to address how financial institutions would be permitted to implement the consumer's opt-in. Under the first alternative, an institution would be required to provide consumers who do not affirmatively consent to the institution's overdraft service for ATM withdrawals and one-time debit card transactions an account with the same terms, conditions, and features that it provides to consumers who affirmatively consent, except for the features that limit the institution's payment of such overdrafts. Under the second alternative, an institution would be permitted to vary the terms, conditions, or features of the “no opt-in” account only if the differences in the terms, conditions, or features are not so substantial as to effectively compel a reasonable consumer to affirmatively consent to the institution's payment of overdrafts on ATM withdrawals and one-time debit card transactions.

Consumer advocates and federal officials supported the alternative requiring identical account terms, conditions, and features regardless of the consumer's opt-in choice. In addition to providing a clear standard for institutions to follow, these commenters argued that, if variations were allowed, it could be difficult to prohibit institutions from creating terms and conditions that would effectively compel consumers to opt in.

Most industry commenters generally, but not uniformly, urged the Board to permit institutions to vary the terms, conditions, or features of the account, including pricing decisions. These

commenters stated that institutions need flexibility in order to manage risk and to design products meeting the distinct needs of the customers who do not opt in. These commenters also maintained that pricing and features on an account are inextricably linked. Both consumer group commenters and industry commenters alike expressed concern that the “reasonable consumer” standard in the alternative permitting variations was too ambiguous.

In the final rule, the Board adopts the first alternative prohibiting institutions from varying account terms, conditions, and features for consumers who do not opt in, substantially as proposed, and adds commentary to provide further guidance. The rule has been revised to clarify that the account terms, conditions and features must be the same, except for the overdraft service for ATM and one-time debit card transactions.<sup>34</sup> The Board believes some institutions could otherwise effectively compel the consumer to provide affirmative consent to the institution's payment of overdrafts for ATM and one-time debit card transactions by providing consumers who do not opt in with less favorable terms, conditions, or features than consumers who do opt in. For example, an institution could provide an opt-in account with no monthly fee to consumers who opt in, but an account that assesses a monthly maintenance fee to consumers who do not opt in. Behavioral research suggests that consumers may choose the “free” opt-in account, even though the costs for overdrawing the account could end up being substantially higher than the monthly maintenance fee, because they may optimistically assume they will not overdraw the account and as a result, incur overdraft fees.<sup>35</sup> In addition, consumers may prefer the possibility of paying an overdraft to the certainty of paying a monthly maintenance fee, even if the overdraft fee costs are higher than the monthly fee costs.

The proposed rule included fees and interest rates as examples of terms that could not be varied. However, because the rule is intended to be a broad prohibition, not limited to price differences, the Board is adding new comment 17(b)(3)–1 to provide a non-exclusive list of examples of terms, conditions, or features that cannot be

<sup>33</sup> Currently, some institutions offer customers an account feature whereby an institution, for a single monthly fee, may pay the consumer's overdrafts (at its discretion) without imposing an overdraft fee on a per item or per occurrence basis. An account with such a feature would be still subject to the restrictions of § 205.17(b)(2) and thus must provide consumers the choice to opt into the institution's payment of ATM and debit card overdrafts. The account would also be subject to the restrictions on variations in terms under § 205.17(b)(3), discussed below.

<sup>34</sup> The heading has been revised to “Same Account Terms, Conditions, and Features” to more accurately describe the final rule.

<sup>35</sup> This behavior is commonly referred to as “hyperbolic discounting.” *See, e.g.* Shane Frederick, *et al.*, *Time Discounting and Time Preference: A Critical Review*, 40 *J. Econ. Literature* 351, 366–67 (2002) (reviewing the literature on hyperbolic discounting).

varied. These examples include fees and interest rates, minimum balance requirements, account features, such as on-line bill payment services, and the type of ATM or debit card provided to the account holder.

Some industry commenters suggested that an appropriate variation in features might be to provide consumers who do not opt in with a card that has PIN-debit functionality but not signature-debit functionality.<sup>36</sup> Nonetheless, PIN debit is available at far fewer merchant locations than signature debit.<sup>37</sup> Consequently, if institutions were permitted to offer PIN-debit cards to consumers who do not opt in, consumers could feel compelled to choose the opt-in account in order to obtain a debit card with more functionality.

Section 205.17(b)(3) is 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. New comment 17(b)(3)-2 explains that § 205.17(b)(3) does not prohibit institutions from offering deposit account products with limited features, provided that the consumer is not required to open such an account because the consumer did not opt in. For example, institutions are not prohibited from offering a checking account designed to comply with state basic banking laws or designed for consumers who are not eligible for a full-service or other particular checking account because of their credit or other checking account history, which may include features limiting the payment of overdrafts. To the extent these more limited products permit the consumer to overdraft at ATMs or via a one-time debit card transaction, the consumer must be provided an opt-in under the final rule.<sup>38</sup>

Nonetheless, institutions may not steer consumers who do not opt into an account with fewer features than the account for which the consumer initially applied. Comment 17(b)(3)-2

explains that a consumer who applies, and is otherwise eligible, for a particular deposit account product may not be provided an account with more limited features because the consumer has declined to opt in.

As discussed in the proposal, some institutions may choose to implement a consumer's affirmative consent at the account level (for example, by setting up account coding that indicates whether or not the consumer has opted in). Other institutions, for operational reasons, may prefer to implement the consumer's choice via a back-room process by opening a different account for consumers who have not provided affirmative consent to the institution's overdraft service for ATM and one-time debit card transactions. The final rule permits both approaches.

#### 17(b)(4) Exception to the Notice and Opt-In Requirements

Proposed § 205.17(b)(4) created an exception to the notice and opt-in requirement for institutions that have a policy and practice of declining to pay any ATM withdrawals or one-time debit card transactions for which authorization is requested, when the institution has a reasonable belief that the consumer's account does not have sufficient funds available to cover the transaction at the time of the authorization request. Both consumer group and industry commenters generally supported this proposed exception.

Section 205.17(b)(4) is modified from the proposal for clarity. The final rule provides that the requirements of § 205.17(b)(1) do not apply to institutions that have 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.

A few industry commenters suggested that the Board clarify that the exception should be applied at the account level, rather than at the institution level, in the event that only some of the institution's products or business lines qualify for the exception. Section 205.17(b)(4) of the final rule provides that financial institutions may apply the exception on an account-by-account basis. New comment 17(b)(4)-1 explains that if a financial institution has a policy and practice of declining to authorize and pay any ATM or one-time debit card transactions with respect to one type of deposit account offered by the institution, 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, that account is not subject to § 205.17(b)(1), even if other accounts that the institution offers are subject to the rule. For example, if the institution offers three types of checking accounts, and the institution has such a policy and practice with respect to only one of the three types of accounts, that one type of account is not subject to the notice requirement. However, the other two types of accounts offered by the institution remain subject to the notice requirement.

#### 17(b)(5) Exceptions to the Fee Prohibition

In some circumstances, an institution may be unable to avoid paying a transaction that overdraws a consumer's account. This can occur, for example, when a debit card transaction is authorized, but intervening transactions reduce the funds in the checking account before the debit card transaction clears. Under network rules, the institution is required to pay the transaction.

The Board proposed two limited exceptions to the fee prohibition under § 205.17(b)(5) to allow institutions to assess a fee or charge for paying an ATM or debit card overdraft even if the consumer has not affirmatively consented to the overdraft service. Under the first exception, an institution would be permitted to assess an overdraft fee or charge, notwithstanding the absence of the consumer's affirmative consent, if the institution has a reasonable belief that there are sufficient funds available in the consumer's account at the time it authorizes an ATM or one-time debit card transaction. Under the second exception, an institution would be permitted to assess an overdraft fee or charge, notwithstanding the absence of the consumer's affirmative consent, where a merchant or payee presents a debit card transaction for payment by paper-based means, rather than electronically using a card terminal, and the institution has not previously authorized the transaction. Proposed comments 17(b)(5)-1 through -3 contained examples illustrating the proposed exceptions for the opt-in approach.

Consumer group commenters stated that the Board should not provide any exceptions to the prohibition on fees, even if overdrafts are inadvertently paid due to delays in transaction processing and settlement, notwithstanding the consumer's declining to opt in. They argued that consumers who do not opt

<sup>36</sup> With signature debit transactions, the merchant first obtains authorization, but may not submit the transaction for payment at a later time; thus, intervening transactions may cause the consumer to overdraw his or her account. PIN debit transactions are a part of a single message system with authorization and submission of the transaction occurring on a near-real-time basis, thus reducing the likelihood of overdrafts caused by intervening transactions.

<sup>37</sup> See, e.g., Fumiko Hayashi, Richard J. Sullivan, and Stuart E. Weiner, *A Guide to the ATM and Debit Card Industry: 2006 Update*, Federal Reserve Bank of Kansas City (2006) at 11.

<sup>38</sup> If these products do not permit overdrafts, the products are excluded from the requirements of § 205.17(b)(1) by § 205.17(b)(4), discussed below.

in expect that they will not be charged overdraft fees for ATM or one-time debit card transactions. Instead, these commenters contended that institutions, card processors, and merchants should resolve operational issues among themselves. Industry commenters, on the contrary, supported the proposed exceptions. Many industry commenters urged the Board to provide additional exceptions for transactions not submitted for authorization at the time of the transaction, such as for transactions that are not submitted because they are below the floor limits established by card network rules requiring authorization. These commenters argued that systems currently do not identify whether authorization was previously sought for a particular transaction. Some of these commenters suggested that consumers could be adequately protected through disclosures at the merchant stating that transactions are not submitted for authorization below a particular dollar amount. Many industry commenters also urged the Board to broaden the rule to permit fees to be assessed if an overdraft was paid when the institution used a stand-in processor to authorize the transaction, because the card network was temporarily off-line.

The final rule does not adopt the proposed exceptions to the prohibition on fees. The Board believes that consumers who make the choice not to opt in may reasonably expect an ATM or one-time debit card transaction to be declined if there are insufficient funds in their account, and that they will not be charged overdraft fees. Adopting exceptions to the prohibition on fees would undermine the consumer's ability to understand the institution's overdraft practices and make an informed choice.

The Board recognizes that financial institutions and consumers have imperfect information as to the balance in the account at the time of the transaction. Financial institutions face operational limitations in processing transactions, and in tracking the consumer's actual balance, because transactions may not be processed in real-time. Similarly, even if a consumer checked his or her balance prior to a transaction, the balance may not be updated, so the consumer may inadvertently overdraw his or her account on the belief funds are available. On balance, the Board believes financial institutions are in a better position to mitigate the information gap by developing improved processing and updating systems, as they have in recent years,

and as the Board expects they will continue to do over time.

The rule does not, however, prohibit financial institutions from paying overdrafts for ATM and one-time debit card transactions even if a consumer has not affirmatively consented or opted in to the institution's overdraft service, so long as a fee is not imposed. For example, under network rules, financial institutions must pay authorized debit card transactions, even if at settlement intervening transactions by the consumer have reduced the consumer's available balance below the authorized amount of the transaction. To address any safety and soundness concerns, and as discussed above, institutions may debit the consumer's account for the amount of the overdraft, provided that the institution is permitted to do so by applicable law. *See* comment 17(b)-2.

#### C. Timing—§ 205.17(c)

Proposed § 205.17(c) would generally require that a financial institution provide an opt-in notice to the consumer about the institution's overdraft service before the institution assessed any fee or charge on the consumer's account for paying an ATM withdrawal or one-time debit card transaction pursuant to the institution's overdraft service. However, once a consumer has opted in, financial institutions would not be required to provide a notice regarding the institution's overdraft service following the assessment of any overdraft fees or charges to the consumer's account. The proposed provision would apply differently depending on when the account is opened. For new accounts opened on or after the effective date of the final rule, the opt-in notice would have to be provided (and consent obtained) prior to the assessment of any fee or charge on the consumer's account for paying an ATM withdrawal or one-time debit card transaction pursuant to the institution's overdraft service. For existing accounts, the proposed rule would permit institutions to either provide an opt-in notice to all of its account holders on or with the first periodic statement sent after the effective date of the final rule, or following the first assessment of an overdraft fee or charge to the consumer's account on or after the effective date of the final rule. Further, under proposed § 205.17(g), if an existing account holder had not affirmatively consented to the service within 60 days after the institution sent the opt-in notice, the institution would have to cease assessing any fees or charges on the consumer's account for paying such overdrafts, unless permitted by one of

the exceptions in proposed § 205.17(b)(5).

Most comments focused on whether existing account holders should be subject to the opt-in rule, or should be subject to a separate opt-out rule. These comments, and the Board's decision to provide an opt-in right, are discussed above.

The final rule provides an opt-in right for new and existing accounts, but modified from the proposal. As discussed below, the final rule sets an effective date of January 19, 2010, with a mandatory compliance date of July 1, 2010. The proposed timing provisions of the rule have been consolidated for clarity into final § 205.17(c)(1) with respect to existing account holders, and final § 205.17(c)(2) with respect to new account holders.

For accounts opened prior to July 1, 2010, final § 205.17(c)(1) states that the financial institution must not assess any fees or charges on a consumer's account on or after August 15, 2010 for paying an ATM or one-time debit card transaction pursuant to the overdraft service, unless the institution has complied with § 205.17(b)(1) and obtained the consumer's affirmative consent. For accounts opened on or after July 1, 2010, § 205.17(c)(2) states that the financial institution must comply with § 205.17(b)(1) and obtain the consumer's affirmative consent before the institution assesses any fee or charge on the consumer's account for paying an ATM or one-time debit card transaction pursuant to the institution's overdraft service.

Consumer group commenters objected to the proposed rule permitting the opt-in notice for existing account holders following the first assessment of an overdraft fee on or after the effective date, because it would effectively allow institutions to collect one overdraft fee notwithstanding the consumer's preference. The final rule addresses this concern by providing a specific date after which overdraft fees may no longer be charged.

As revised, the final rule will result in consistent treatment of all existing account holders. Otherwise, some consumers might not receive an opt-in notice until a later date, and thus might not be provided an opportunity to make a choice regarding the institution's overdraft service, until some period of time after other consumers receive the notice. Including a specific date after which fees may no longer be charged provides a bright-line rule that is beneficial to consumers and facilitates ease of compliance by institutions, rather than requiring institutions to track when notices have been mailed or

delivered, and consents received, on a staggered basis.

The Board believes that establishing an August 15, 2010 date after which existing account holders may no longer be charged overdraft fees without consent is appropriate, as it provides those consumers adequate time to research available options, and, for example, apply for an overdraft line of credit or establish a savings account to which their checking account could be linked. Of course, if an existing account holder contacts his or her financial institution in response to the opt-in notice before August 15, 2010 to express a desire *not* to opt in, the Board expects that the institution would honor the consumer's choice at that time.

Industry commenters suggested that the proposed timing provisions be revised to permit financial institutions to obtain opt-ins prior to the effective date, and apart from (rather than on or with) the periodic statement. Comment 17(c)–1 explains that financial institutions may provide the notice and obtain the consumer's affirmative consent prior to the mandatory compliance date, provided that the financial institution complies with all of the requirements of this section, including the prohibitions on conditioning the opt-in and on varying account terms. However, notice for existing accounts is not required where, prior to the effective date, an institution had offered customers an opt-in, and a customer had *not* affirmatively consented to the service.

For either new or existing account holders, the final rules do not permit institutions to retroactively apply affirmative consents to overdrafts that are paid before the consent is provided. For example, if a consumer overdraws his or her account, the rule does not permit an institution to obtain the consumer's affirmative consent one week later and apply that consent to the prior overdraft. To clarify the application of the timing rules, new comment 17(c)–2 states that fees or charges for ATM and one-time debit card overdrafts may be assessed only for overdrafts paid by the institution on or after the date the financial institution receives the consumer's affirmative consent to the institution's overdraft service.

#### D. Content and Format—§ 205.17(d)

Proposed § 205.17(d) set forth content requirements for the notice that must be provided to the consumer before the consumer may affirmatively consent to the institution's overdraft service. In addition, proposed § 205.17(d) would require that the opt-in notice be in a

form substantially similar to Model Form A–9 in Appendix A. The Board requested comment regarding whether the rule should permit or require any other information to be included in the opt-in notice.

Consumer advocates generally supported the proposed content and model opt-in form, but suggested the Board revise the form to include additional cost information. Industry commenters provided a variety of suggestions that, in their view, would clarify or improve the model disclosure. In particular, commenters suggested that the form be revised to be shorter and clearer. In other cases, however, commenters suggested various additions to the model form to provide more information regarding an institution's overdraft policies and practices, such as language regarding the exceptions permitting fees to be charged in some circumstances without a consumer's opt-in.

The Board is adopting § 205.17(d), but with modified content and format requirements based on the comments received, consumer testing, and the Board's further consideration. Under the final rule, the opt-in notice required by § 205.17(b)(1)(i) may not contain any information that is not specified or otherwise permitted by § 205.17(d) and must be in a form substantially similar to Model Form A–9.<sup>39</sup> The final rule also substantially revises Model Form A–9. Overall, the final model form was edited to make it shorter and clearer to consumers, including by emphasizing certain information critical to understanding the overdraft service.

Proposed § 205.17(d)(1) stated that the institution must provide a general description of the financial institution's overdraft services and the types of EFTs for which an overdraft fee may be imposed, including ATM withdrawals and one-time debit card transactions. Consumer testing participants generally were not aware that financial institutions provide overdraft services, and many did not understand that overdraft services could be provided automatically with an account. Others confused overdraft services with other overdraft alternatives provided by their institution, such as a link to a savings account or an overdraft line of credit. The Board tested a number of ways to address this misconception in the model form, and found that consumers best understood the concept of overdraft services as distinct from other forms of overdraft coverage when it was framed

as an institution's "standard overdraft practices." Testing also indicated that placing the discussion of applicable alternatives in the introductory paragraph helped improve participants' comprehension.

Proposed comment 17(d)–2 permitted a financial institution to include language describing other types of transactions not subject to the opt-in right, or subject to a separate opt-out right. In the final rule, the Board is revising § 205.17(d)(1) to require a brief description of the institution's overdraft service and the types of transactions for which a fee or charge for paying an overdraft may be imposed. The language in proposed comment 17(d)–2 has been revised and adopted in comment 17(d)–1 as an illustration of the application of § 205.17(d)(1).

Because the final rule prohibits conditioning pursuant to § 205.17(b)(2), the Board believes that consumers should be informed that different transaction types will be treated differently so they can make an informed choice about whether or not to opt into an institution's overdraft service for ATM and one-time debit card transactions. Consumer testing showed consumers need to understand how checks and other transactions will be treated to make such a choice.

Proposed comment 17(d)–2 also permitted an institution to indicate that it pays overdrafts at its discretion, and to briefly describe the benefits of the institution's payment of overdrafts on ATM or one-time debit card transactions. Some commenters suggested that the Board provide model language to describe the consequences of declining to opt in. Similarly, some commenters expressed concern that the form as proposed implied that by consenting to the institution's overdraft service, the consumer's overdrafts would be covered in all cases. Upon further consideration, the Board believes that these elements of an institution's policy are already encompassed by the requirement in § 205.17(d)(1) to disclose a general description of the institution's overdraft services. Thus, as described above, final comment 17(d)–1 illustrates the application of § 205.17(d)(1). Additional optional language that may be included in the model form has been adopted in new § 205.17(d)(6).

Industry commenters also contended that the form should contain language stating that overdrafts may be paid regardless of the consumer's opt-in decision, due to technical requirements and under the exceptions proposed under § 205.17(b)(5). Commenters provided various suggestions for how to

<sup>39</sup>Institutions may provide other information about their overdraft services and other overdraft protection plans in a separate document.

convey information about the exceptions to consumers. Because the final rule does not adopt the proposed exceptions, adding this language is not necessary.

Proposed § 205.17(d)(2) stated that the initial notice must include information about the dollar amount of any fees or charges assessed on the consumer's account for paying an ATM withdrawal or a one-time debit card transaction pursuant to the institution's overdraft service. Some institutions may vary the fee amount that may be imposed based upon the number of times the consumer has overdrawn his or her account, the amount of the overdraft, or other factors. Under these circumstances, the proposed rule would have required the institution to disclose the maximum fee that may be imposed or a range of fees. The Board is adopting § 205.17(d)(2) generally as proposed, but is removing the reference to the range of fees. Institutions that waive the first fee could include a range from \$0 to their maximum fee, which could lead consumers to believe that they may overdraw their account free of charge more than once. To address tiered overdraft fees, comment 17(d)-2, as adopted, provides that the institution may indicate that the consumer may be assessed a fee "up to" the maximum fee. In addition, to ensure that consumers understand the full array of fees that may be charged, the comment explains that the financial institution must also disclose all applicable overdraft fees, including but not limited to per item or per transaction fees, daily fees, sustained overdraft, and negative balance fees. Comment 17(d)-2.ii provides an example illustrating a sustained overdraft fee. The comment is intended to illustrate that *all* types of fees for paying an overdraft must be disclosed, regardless of how the fee is labeled by the institution.

Some consumer group commenters recommended that the fees section be moved up on the notice. However, participants in consumer testing generally identified the dollar amount of fees, even when located near the bottom of the notice. To ensure that consumers view the fees attributable to use of the overdraft service, regardless of the placement of that section in the notice, final Model Form A-9 displays the dollar amount of the fees in bold font.

Proposed § 205.17(d)(3) stated that institutions must disclose any daily limits on the amount of overdraft fees or charges that may be assessed. If the institution does not limit the amount of fees that can be imposed, it would have to disclose this fact. The Board adopts the rule, as modified, to require

disclosure of any daily limits on the *number* of overdraft fees or charges (or, that there are no limits). Because some overdraft charges may be assessed as a percentage, the total dollar limit may be difficult to calculate with any certainty. The Board believes the same purpose is achieved by specifying the number limits.

Some consumer group commenters suggested requiring the disclosure of minimum overdraft amounts that could trigger fees to alert consumers that they will be charged overdraft fees even on small dollar transactions. However, consumer testing demonstrated that consumers understood this concept without a specific statement to this effect. Therefore, this additional language is not required or included in Model Form A-9.

Section 205.17(d)(4), which is adopted generally as proposed, requires institutions to inform consumers of the right to affirmatively consent to the institution's payment of overdrafts for ATM and one-time debit card transactions, including the method(s) that the consumer may use to consent to the service.

Proposed § 205.17(d)(5) provided that institutions must state whether they offer any alternatives for the payment of overdrafts. Specifically, if an institution offered an overdraft line of credit or a service that transfers funds from another account of the consumer held at the institution to cover the overdraft (including an account held jointly with another consumer), the institution would have to state that fact, and how to obtain more information. Under the proposal, institutions were permitted, but not required, to list any additional alternatives they may offer to overdraft services. This provision incorporated a recommendation from the February 2005 Joint Guidance that institutions should inform consumers generally of other overdraft services and credit products, if any, that are available when describing their overdraft service.<sup>40</sup> The Board adopts § 205.17(d)(5) substantially as proposed.

Participants in consumer testing generally understood that they would have to qualify for an overdraft line of credit, without a reference in the notice to any qualification requirements as urged by some industry commenters. In addition, participants generally understood that they could contact the bank through the methods listed at the bottom of the model form without any reference to how to obtain more information beyond a statement at the top of the form that the consumer

should ask about the alternatives. Thus, in an effort to eliminate unnecessary language in the model form, final § 205.17(d)(5) and Model Form A-9 delete the proposed language in the notice requiring the bank to specify how consumers can obtain more information about any alternatives to overdraft services.

Some consumer group commenters argued that the Board should revise Model Form A-9 to state that these alternatives "are less costly" than an overdraft service. Depending on the financial institution's current and future practices, the amount of time a consumer is overdrawn, and other factors, however, it may not be accurate to say that these alternatives are less expensive than overdraft coverage in all cases. Thus, the final model form includes a statement that overdraft alternatives "may be less expensive" than an institution's standard overdraft practices.

Consumer group commenters also suggested amending the model form to include additional information about the costs of alternatives to the overdraft service, including a chart containing costs and sample effective APRs associated with charges, based on the average amount overdrawn and different payoff times. Including such a chart in the opt-in form would make the form lengthy, could confuse consumers, and could undermine the purpose of the form, which is to provide consumers with a choice about opting into the institution's overdraft service in a clear and readily understandable way. While some participants in consumer testing stated that having more information in the form about the alternatives would be helpful, others stated they would prefer to call for more information. The Board also believes that requiring disclosure of costs expressed in dollars is a more effective means of alerting consumers to the costs of the overdraft service. Consumer testing in the credit card context demonstrated that costs expressed in dollars were better understood and more meaningful than costs expressed as an effective APR.

New § 205.17(d)(6) provides that a financial institution may include language in the notice describing other types of transactions that are not subject to the opt-in right, or are subject to a separate opt-in or opt-out right. For example, the institution may indicate that the consumer has the right to opt out of payment of overdrafts for check transactions, ACH transactions, or automatic bill payments, and if so, may disclose the returned item fee and that additional merchant fees may apply. The notice may provide a means for the

<sup>40</sup> See 70 FR at 9131.



consumer to exercise this choice. An institution may also disclose the consumer's right to revoke consent. The rule also clarifies that for existing accounts, the institution may revise the statement describing the institution's overdraft service with respect to ATM and one-time debit card transactions to state that "After August 15, 2010, we will not authorize and pay overdrafts for the following types of transactions unless you ask us to (see below)." However, the rule states that the additional content may not be more prominent than any required language under § 205.17(d)(1). Consumer testing indicated that emphasizing certain language as shown in Model Form A-9 substantially enhanced consumer understanding, and the Board is concerned that any additional information provided not diminish that understanding.

#### E. Additional Provisions Addressing Consumer Opt-In Right—§ 205.17(e)–(g)

*Joint accounts.* Proposed § 205.17(e) provided that a financial institution must treat affirmative consent provided by any joint consumer of an account as affirmative consent for the account from all of the joint consumers. Commenters generally supported the proposal. The Board is adopting § 205.17(e) substantially as proposed, with an additional clarification that the financial institution must also treat a revocation of affirmative consent by any of the joint consumers as revocation of consent for that account.

The final rule is adopted in recognition that it may not be operationally feasible for an institution to determine which account holder is responsible for a particular transaction and then make an authorization decision based on whether the consumer has affirmatively consented to the institution's overdraft service. Thus, for practical reasons, if one joint consumer opts in to the institution's overdraft service, the institution must treat the consent as applying to all overdrafts involving an ATM or debit card transaction for that account. Likewise, the Board believes the same principles should apply to revocation of the consent and revises § 205.17(e) accordingly.

*Continuing right to opt-in or to revoke the opt-in.* Proposed § 205.17(f) provided that a consumer may affirmatively consent to a financial institution's overdraft service at any time in the manner described in the opt-in notice. This provision would allow consumers to decide later in the account relationship that they wish to have

overdrafts paid for ATM withdrawals and one-time debit card transactions.

Section 205.17(f) is adopted generally as proposed, but with certain additions to address the consumer's right to revoke his or her consent. Just as a consumer must be provided a reasonable opportunity to opt in, the consumer should be provided the same reasonable opportunity to revoke the opt-in. Thus, the final rule requires financial institutions to permit the consumer to revoke his or her consent at any time in the manner made available to consumers for providing consent. The final rule also states that the financial institution must implement the consumer's revocation of consent as soon as reasonably practicable after receiving the request.

The Board is not prescribing a specific period of time within which the creditor must honor the consumer's revocation request because the appropriate time period may depend on a number of variables, including the method used by the consumer to communicate the revocation request (for example, in writing or orally) and the channel by which the request is received (for example, if a consumer sends a written request to an address specifically designated to receive consumer opt-in and revocation requests).

The final rule also adds a new comment 17(f)–1 to clarify that revocation does not require the financial institution to waive or reverse any overdraft fees assessed on the consumer's account prior to the institution's implementation of the consumer's revocation request.

*Duration and revocation of opt-in.* Proposed § 205.17(h) provided that a consumer's affirmative consent to the institution's overdraft service is generally effective until revoked by the consumer. The rule also provided that an institution may also terminate the consumer's access to the overdraft service for any reason, for example, if the institution determines that there is excessive usage of the service by the consumer. Final § 205.17(g), renumbered from the proposal, is adopted as proposed.

*Real-time opt-in.* Although not addressed in the Board's proposal, some industry commenters urged the Board to allow institutions to offer the consumer the ability to opt into the institution's overdraft service on a transaction-by-transaction basis, if a transaction-level opt-in becomes technologically feasible (a "real-time" opt-in). Consumer group commenters urged the Board to require institutions to provide real-time disclosure and opt-in for ATM and debit card transactions.

Real-time opt-ins offer potential benefits and drawbacks to consumers. A real-time opt-in may provide relief to consumers who may need access to funds in an emergency when they have no alternative forms of payments available and where technology makes a real-time opt-in feasible. However, consumers who make decisions in real-time may not be provided all essential information necessary to make informed decisions about whether to incur a fee by proceeding with a transaction that overdraws their accounts.

The Board does not believe that it is technologically feasible to provide real-time opt-ins at many locations at this time, particularly at non-proprietary ATMs and merchant POS terminals. Thus, the Board is not addressing real-time notices in the final rule. The Board will continue to monitor developments in real-time notice capability and assess whether such notice would enhance consumer protection.

#### Section 205.19 Debit Holds

##### Debit Holds

The Board proposed to prohibit institutions from assessing an overdraft fee where the overdraft would not have occurred but for a debit hold placed on funds in an amount that exceeds the actual transaction amount and where the merchant could determine the actual transaction amount within a short period of time after authorization of the transaction (for example, fuel purchases at a gas station). The prohibition would not have applied if the institution adopted procedures designed to release the hold within a reasonable period of time.

Consumer group commenters supported the Board's proposal to address debit holds, although some consumer group commenters objected to the proposed safe harbor as inappropriately permitting overdraft fees to be charged. Industry commenters raised a number of concerns about the operational feasibility of implementing the revised proposal. In addition, industry commenters stated that the revised rule would be unworkable unless the Board addressed how merchants and payment processors submit and process payments. While these commenters supported a safe harbor, they argued that the proposed safe harbor was too vague and that smaller institutions, which are more likely to batch-process transactions outside the safe harbor window, would be disproportionately impacted.

The Board is persuaded that addressing overdrafts caused by debit holds raises significant operational

issues and that a solution may require the participation of various parties, including merchants, payment processors, and card networks, as well as financial institutions. The final rule does not include the provision on debit holds. The Board will continue to monitor developments with respect to debit holds and assess whether to take further action.

#### Other Consumer Protections for Overdraft Services

Some consumer advocates raised additional concerns related to overdrafts not addressed in the Board's proposal. The Board recognizes that additional consumer protections may be appropriate with respect to overdraft services, for example, rules to address transaction posting order. Therefore, the Board is continuing to assess whether additional regulatory action relating to overdraft services is needed.

#### Effective Date

The Board solicited comment on an appropriate implementation period for the proposed rule. Consumer group commenters, members of Congress, an association of state banking regulators urged the Board to adopt an implementation period ranging from 60 days to 12 months, in light of the harms posed to consumers by overdraft fees. Industry commenters, citing required technology upgrades and personnel training, as well as the burdens of implementing other recent and ongoing regulatory requirements, urged the Board to provide an implementation period of 12 to 24 months.

The final rule sets an effective date of January 19, 2010, with a mandatory compliance date of July 1, 2010. As noted above, for accounts opened prior to July 1, 2010, the financial institution may not assess any fees or charges on a consumer's account on or after August 15, 2010 for paying an ATM or one-time debit card transaction pursuant to the overdraft service, unless the institution has complied with § 205.17(b)(1) and obtains the consumer's affirmative consent. For accounts opened on or after July 1, 2010, the financial institution must comply with § 205.17(b)(1) and obtain the consumer's affirmative consent before the institution assesses any fee or charge on the consumer's account for paying an ATM or one-time debit card transaction pursuant to the institution's overdraft service. The Board believes that this time frame best balances the significant consumer protection interests addressed by this rule against industry's need to make systems changes to comply with the final rule. Smaller institutions in

particular need time to come into compliance because they have fewer resources to devote to the substantial systems changes required by the final rule. Without sufficient time to implement the substantive requirements of the final rule, institutions may cease offering overdraft services for all transaction types, including the check transactions that consumers have indicated they would prefer to be paid.

#### VII. Final Regulatory Flexibility Analysis

In accordance with Section 3(a) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA), the Board is publishing a final regulatory flexibility analysis for the final amendments to Regulation E. The RFA requires an agency either to provide a final regulatory flexibility analysis with a final rule or certify that the final rule will not have a significant economic impact on a substantial number of small entities. An entity is considered "small" if it has \$175 million or less in assets for banks and other depository institutions.<sup>41</sup>

The Board stated in the January 2009 proposal its belief that the proposal was likely to have a significant economic impact on a substantial number of small entities. Based on comments received, the Board's own analysis, and for the reasons stated below, the Board believes that the final rule will have a significant economic impact on a substantial number of small entities.

1. *Statement of the need for, and objectives of, the proposed rule.* The Board is adopting revisions to Regulation E to prohibit financial institutions that hold a consumer's account from assessing a fee or charge for paying ATM and one-time debit card transactions pursuant to the institution's overdraft service, unless the consumer affirmatively consents to the service for such transactions. The reasoning for the rule is set forth in the **SUPPLEMENTARY INFORMATION** above.

The EFTA was enacted to provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer systems. The primary objective of the EFTA is the provision of individual consumer rights. 15 U.S.C. 1693. The EFTA authorizes the Board to prescribe regulations to carry out the purpose and provisions of the statute. 15 U.S.C. 1693b(a). The Act expressly states that the Board's regulations may contain "such classifications, differentiations, or

other provisions, \* \* \* as, in the judgment of the Board, are necessary or proper to effectuate the purposes of [the Act], to prevent circumvention or evasion [of the Act], or to facilitate compliance [with the Act]." 15 U.S.C. 1693b(c).

The Board believes that the revisions to Regulation E discussed above are within Congress's broad grant of authority to the Board to adopt provisions that carry out the purposes of the statute. These revisions facilitate a consumer's ability to avoid overdrawing his or her account in connection with an electronic fund transfer requested by the consumer.

2. *Summary of issues raised by comments in response to the initial regulatory flexibility analysis.* The Board reviewed comments submitted by various entities in order to ascertain the economic impact of the proposals on small entities. Many industry commenters expressed general concern about the compliance burden of the proposed amendments on institutions offering overdraft services, including small entities. They expressed concern that the proposals, if adopted, would be costly to implement, would not provide institutions sufficient flexibility, and could result in higher prices for consumers. Many of the issues raised by commenters do not apply uniquely to small entities and are addressed in Part VI. Section-by-Section Analysis regarding specific provisions. One commenter representing community banks stated that the rule could be sufficiently burdensome on small institutions that they may cease to offer overdraft services entirely, which could impact their competitiveness with respect to larger institutions that may be able to implement the rule more quickly.

3. *Description of small entities affected by the final rule.* As of June 30, 2009, there were 11,598 depository institutions with assets of \$175 million or less. The final rule would affect those institutions that permit overdrafts at an ATM or via a one-time debit card transaction. According to the FDIC Study, approximately 30% of institutions surveyed with assets of \$250 million or less operate automated overdraft programs. Using this figure as a proxy for small institutions, approximately 3,479 small entities would be affected by the final rule.

Under the final rule, account-holding institutions are required to obtain the consumer's affirmative consent to the institution's overdraft service before assessing overdraft fees for ATM and one-time debit card transactions. According to the FDIC Study, 75.1

<sup>41</sup> U.S. Small Business Association, *Table of Small Business Size Standards Matched to North American Industry Classification System Codes*, available at [http://www.sba.gov/idc/groups/public/documents/sba\\_homepage/serv\\_sstd\\_tablepdf.pdf](http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf).

percent of banks with an automated overdraft program currently provide some form of an opt-out right to consumers, and 11.1 percent provide an opt-in right.<sup>42</sup> Nonetheless, even institutions that already have an opt-out or an opt-in process in place will have to reprogram their systems to provide the notices required by the final rule.

4. *Reporting, recordkeeping and compliance requirements.* The compliance requirements of this final rule are described above in Part VI. Section-by-Section Analysis. The precise effect of the revisions to Regulation E on small entities is unknown. The final rule prohibits institutions from conditioning the consumer's affirmative consent to the payment of checks, ACH and other transactions on the consumer also opting into the payment of ATM and one-time debit card transactions. Thus, institutions will also have to reprogram their systems to differentiate between overdrafts for different transaction types. As some industry commenters noted, many systems are not currently set up to pay overdrafts for certain transaction types (e.g., checks, ACH and recurring debit card transactions), but not others (e.g., ATM and one-time debit card transactions).

The Board is aware that some small institutions do not pay overdrafts at ATMs or for one-time debit card transactions.<sup>43</sup> Some institutions are already providing customers a method to opt into their overdraft service. These institutions will need to conform their opt-in procedures to the final rule. Also, those institutions that currently provide a form of opt-out or opt-in notice will need to review and revise this disclosure to conform to the final rule's requirements. The Board sought to reduce the burden on small entities, where possible, by adopting a model form that can be used to ease compliance with the final rule.

5. *Steps taken to minimize the economic impact on small entities.* As previously noted, the final rule implements the Board's mandate to prescribe regulations that carry out the purposes of the EFTA. The Board seeks in this final rule to balance the benefits to consumers of an opt-in approach against the additional burdens on account-holding institutions subject to Regulation E. To that end, and as discussed above in Part VI. Section-by-Section Analysis, consumer testing was

conducted in order to assess the effectiveness of the proposed revisions to Regulation E. In this manner, the Board has sought to avoid imposing additional regulatory requirements unless these proposed revisions would be beneficial to consumer understanding of overdraft services. The factual, policy, and legal reasons for selecting the alternatives adopted and why each one of the other significant alternatives was not accepted, are described above in Part VI. Section-by-Section Analysis.

The Board has sought to reduce the burden on small entities, where possible, by adopting a model form that can be used to ease compliance with the final rule, which has been revised and simplified from the proposed model form. The Board has also sought to reduce the burden on small entities, where possible, by providing a safe harbor to institutions permitting them to rely upon a merchant, other institution, or other third party's coding of a transaction as a one-time debit card transaction or a recurring debit card transaction, to the extent that the institution complies with the rule by maintaining reasonable procedures to identify transactions as either one-time or recurring debit card transactions. The Board believes that these modifications from the proposal minimize the significant economic impact on small entities while still meeting the stated objectives of Regulation E.

6. *Other federal rules.* The Board has not identified any federal rules that duplicate, overlap, or conflict with the revisions to Regulation E.

#### VIII. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3506; 5 CFR 1320 Appendix A.1), the Board reviewed the final rule under the authority delegated to the Board by the Office of Management and Budget (OMB). The collection of information that is subject to the PRA by this final rule is found in 12 CFR part 205. The Federal Reserve may not conduct or sponsor, and an organization is not required to respond to, this information collection unless the information collection displays a currently valid OMB control number. The OMB control number is 7100-0200.

This information collection is required to provide benefits for consumers and is mandatory (15 U.S.C. 1693 *et seq.*). Since the Board does not collect any information, no issue of confidentiality arises. The respondents/recordkeepers are for-profit financial institutions, including small businesses. Institutions are required to retain

records for 24 months, but this regulation does not specify types of records that must be retained.

The EFTA and Regulation E are designed to ensure adequate disclosure of basic terms, costs, and rights relating to electronic fund transfer (EFT) services debiting or crediting a consumer's account. The disclosures required by the EFTA and Regulation E are triggered by certain specified events. The disclosures inform consumers about the terms of the electronic fund transfer service, activity on the account, potential liability for unauthorized transfers, and the process for resolving errors. To ease institutions' burden and cost of complying with the disclosure requirements of Regulation E (particularly for small entities), the Board publishes model forms and disclosure clauses.

Regulation E applies to all financial institutions, not just state member banks. In addition, certain provisions in Regulation E apply to entities that are not financial institutions, including those that act as service providers or ATM operators, as well as merchants and other payees that engage in electronic check conversion transactions, the electronic collection of returned item fees, or preauthorized transfers. The Federal Reserve accounts for the paperwork burden associated with Regulation E only for the financial institutions it supervises<sup>44</sup> and that meet the criteria set forth in the regulation. Other federal agencies account for the paperwork burden imposed on the entities for which they have regulatory enforcement authority.

As mentioned in the **SUPPLEMENTARY INFORMATION** above, the final rule (§ 205.17) would prohibit account-holding financial institutions from assessing a fee or charge for paying ATM and one-time debit card transactions pursuant to the institution's overdraft service, unless the consumer is given the right to affirmatively consent, or opt in to the service, and the consumer opts in.

The Federal Reserve estimates that, to comply with the opt-in notice requirement, 1,205 respondents regulated by the Federal Reserve would take, on average, 16 hours (two business days) to revise and update initial disclosures (§ 205.7(b)) for new customers. The Federal Reserve

<sup>44</sup> State member banks, branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured state branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and Edge and agreement corporations, organizations operating under section 25 or 25(a) of the Federal Reserve Act.

<sup>42</sup> See *FDIC Study* at 27.

<sup>43</sup> *Id.* at 10 (reporting that 81 percent of institutions surveyed that operate automated programs provide overdraft services for ATM and POS/debit card transactions).

estimates that 1,205 respondents regulated by the Federal Reserve would take, on average, 16 hours (two business days) to prepare and send new opt-in notices to existing customers.

The Federal Reserve estimates the total annual one-time burden for respondents to be 38,560 hours and believes that, on a continuing basis, there would be no additional increase in burden as the disclosure would be sufficiently accounted for once incorporated into the current initial account disclosure (§ 205.7(b)). This would increase the total annual burden to 98,462 hours for Federal Reserve-regulated financial institutions that are required to comply with Regulation E. To ease the burden of compliance a model form that institutions may use is available in Appendix A (See Model Form A-9).

The Federal Reserve estimates that on average 5,136,693 consumers would spend as much as 5 minutes reviewing and responding to an opt-in notice. This would increase the total annual burden for this information collection by 428,058 hours.

Overall, the estimated annual burden for Regulation E would increase by 466,618 hours, from 59,902 hours to 526,520 hours.

The other federal financial agencies are responsible for estimating and reporting to OMB the total paperwork burden for the institutions for which they have administrative enforcement authority. They may, but are not required to, use the Federal Reserve's burden estimation methodology. Using the Federal Reserve's method, the total estimated annual burden for all financial institutions subject to Regulation E, including Federal Reserve-supervised institutions, would be approximately 853,059 hours.<sup>45</sup> The above estimates represent an average across all respondents and reflect variations between institutions based on their size, complexity, and practices. All covered institutions, including depository institutions (of which there are approximately 17,200), potentially are affected by this collection of information, and thus are respondents for purposes of the PRA. The final rule will impose a one-time increase in the estimated annual burden for such institutions by 550,400 hours to 1,403,459 hours.

The Federal Reserve has a continuing interest in the public's opinions of our collections of information. At any time, comments regarding the burden estimate, or any other aspect of this

<sup>45</sup> This estimate does not include consumer burden.

collection of information, including suggestions for reducing the burden, may be sent to: Secretary, Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551; and to the Office of Management and Budget, Paperwork Reduction Project (7100-0200), Washington, DC 20503.

#### List of Subjects in 12 CFR Part 205

Consumer protection, Electronic fund transfers, Federal Reserve System, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, the Board amends 12 CFR part 205 as follows:

#### PART 205—ELECTRONIC FUND TRANSFERS (REGULATION E)

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

**Authority:** 15 U.S.C. 1693b.

■ 2. Section 205.12 is amended by revising paragraph (a) to read as follows:

#### § 205.12 Relation to other laws.

(a) *Relation to Truth in Lending.* (1) The Electronic Fund Transfer Act and this part govern—

(i) The addition to an accepted credit card as defined in Regulation Z (12 CFR 226.12, comment 12-2), of the capability to initiate electronic fund transfers;

(ii) The issuance of an access device that permits credit extensions (under a preexisting agreement between a consumer and a financial institution) only when the consumer's account is overdrawn or to maintain a specified minimum balance in the consumer's account, or under an overdraft service, as defined in § 205.17(a);

(iii) The addition of an overdraft service, as defined in § 205.17(a), to an accepted access device; and

(iv) A consumer's liability for an unauthorized electronic fund transfer and the investigation of errors involving an extension of credit that occurs under an agreement between the consumer and a financial institution to extend credit when the consumer's account is overdrawn or to maintain a specified minimum balance in the consumer's account, or under an overdraft service, as defined in § 205.17(a).

(2) The Truth in Lending Act and Regulation Z (12 CFR part 226), which prohibit the unsolicited issuance of credit cards, govern—

(i) The addition of a credit feature to an accepted access device; and

(ii) Except as provided in paragraph (a)(1)(ii) of this section, the issuance of

a credit card that is also an access device.

\* \* \* \* \*

■ 3. Section 205.17 is added to read as follows:

#### § 205.17 Requirements for overdraft services.

(a) *Definition.* For purposes of this section, the term "overdraft service" means 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. The term "overdraft service" does not include any payment of overdrafts pursuant to—

(1) A line of credit subject to the Federal Reserve Board's Regulation Z (12 CFR part 226), including transfers from a credit card account, home equity line of credit, or overdraft line of credit;

(2) A service that transfers funds from another account held individually or jointly by a consumer, such as a savings account; or

(3) A line of credit or other transaction exempt from the Federal Reserve Board's Regulation Z (12 CFR part 226) pursuant to 12 CFR 226.3(d).

(b) *Opt-in requirement.* (1) *General.* Except as provided under paragraphs (b)(4) and (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:

(i) Provides the consumer with a notice in writing, or if the consumer agrees, electronically, segregated from all other information, describing the institution's overdraft service;

(ii) Provides a reasonable opportunity for the consumer to affirmatively consent, or opt in, to the service for ATM and one-time debit card transactions;

(iii) Obtains the consumer's affirmative consent, or opt-in, to the institution's payment of ATM or one-time debit card transactions; and

(iv) Provides the consumer with confirmation of the consumer's consent in writing, or if the consumer agrees, electronically, which includes a statement informing the consumer of the right to revoke such consent.

(2) *Conditioning payment of other overdrafts on consumer's affirmative consent.* A financial institution shall not:

(i) Condition the payment of any overdrafts for checks, ACH transactions, and other types of transactions on the

consumer affirmatively consenting to the institution's payment of ATM and one-time debit card transactions pursuant to the institution's overdraft service; or

(ii) Decline to pay checks, ACH transactions, and other types of transactions that overdraw the consumer's account because the consumer has not affirmatively consented to the institution's overdraft service for ATM and one-time debit card transactions.

(3) *Same account terms, conditions, and features.* A financial institution shall provide to consumers who do not affirmatively consent to the institution's overdraft service for ATM and one-time debit card transactions the same account terms, conditions, and features that it provides to consumers who affirmatively consent, except for the overdraft service for ATM and one-time debit card transactions.

(4) *Exception to the notice and opt-in requirements.* The requirements of § 205.17(b)(1) do not apply 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. Financial institutions may apply this exception on an account-by-account basis.

(c) *Timing.* (1) *Existing account holders.* For accounts opened prior to July 1, 2010, the financial institution must not assess any fees or charges on a consumer's account on or after August 15, 2010 for paying an ATM or one-time debit card transaction pursuant to the overdraft service, unless the institution has complied with § 205.17(b)(1) and obtained the consumer's affirmative consent.

(2) *New account holders.* For accounts opened on or after July 1, 2010, the financial institution must comply with § 205.17(b)(1) and obtain the consumer's affirmative consent before the institution assesses any fee or charge on the consumer's account for paying an ATM or one-time debit card transaction pursuant to the institution's overdraft service.

(d) *Content and format.* The notice required by paragraph (b)(1)(i) of this section shall be substantially similar to

Model Form A-9 set forth in Appendix A of this part, include all applicable items in this paragraph, and may not contain any information not specified in or otherwise permitted by this paragraph.

(1) *Overdraft service.* A brief description of the financial institution's overdraft service and the types of transactions for which a fee or charge for paying an overdraft may be imposed, including ATM and one-time debit card transactions.

(2) *Fees imposed.* The dollar amount of any fees or charges assessed by the financial institution for paying an ATM or one-time debit card transaction pursuant to the institution's overdraft service, 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.

(3) *Limits on fees charged.* The maximum number of overdraft fees or charges that may be assessed per day, or, if applicable, that there is no limit.

(4) *Disclosure of opt-in right.* An explanation of the consumer's right to affirmatively consent to the financial institution's payment of overdrafts for ATM and one-time debit card transactions pursuant to the institution's overdraft service, including the methods by which the consumer may consent to the service; and

(5) *Alternative plans for covering overdrafts.* If the institution offers a line of credit subject to the Board's Regulation Z (12 CFR 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. An institution may, but is not required to, list additional alternatives for the payment of overdrafts.

(6) *Permitted modifications and additional content.* If applicable, the institution may modify the content required by § 205.17(d) to 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, such as checks, ACH transactions, or automatic bill payments; to provide a means for the consumer to exercise this choice;

and to disclose the associated returned item fee and that additional merchant fees may apply. The institution may also disclose the consumer's right to revoke consent. For notices provided to consumers who have opened accounts prior to July 1, 2010, the financial institution may describe the institution's overdraft service with respect to ATM and one-time debit card transactions with a statement such as "After August 15, 2010, we will not authorize and pay overdrafts for the following types of transactions unless you ask us to (see below)."

(e) *Joint relationships.* If two or more consumers jointly hold an account, the financial institution shall treat the affirmative consent of any of the joint consumers as affirmative consent for that account. Similarly, the financial institution shall treat a revocation of affirmative consent by any of the joint consumers as revocation of consent for that account.

(f) *Continuing right to opt in or to revoke the opt-in.* A consumer may affirmatively consent to the financial institution's overdraft service at any time in the manner described in the notice required by paragraph (b)(1)(i) of this section. A consumer may also revoke consent at any time in the manner made available to the consumer for providing consent. A financial institution must implement a consumer's revocation of consent as soon as reasonably practicable.

(g) *Duration and revocation of opt-in.* A consumer's affirmative consent to the institution's overdraft service is effective until revoked by the consumer, or unless the financial institution terminates the service.

■ 5. In Appendix A to Part 205, an entry for A-9 is added to the Table of Contents, and Appendix A-9 Model Consent Form for Overdraft Services (§ 205.17) is added to read as follows:

**Appendix A to Part 205—Model Disclosure Clauses and Forms**

**Table of Contents**

\* \* \* \* \*

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

\* \* \* \* \*

BILLING CODE 6210-01-P

## 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 overdrawing 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]: \_\_\_\_\_ ]

- 6. In Supplement I to part 205,
- a. Under Section 205.12 Relation to Other Laws, under 12(a) Relation to truth in lending, paragraph 2. is revised, and paragraph 3. is added.
- b. Section 205.17—Requirements for Overdraft Services is added.

### Supplement I to Part 205—Official Staff Interpretations

\* \* \* \* \*

#### Section 205.12—Relation to Other Laws

##### 12(a) Relation to Truth in Lending

\* \* \* \* \*

2. *Issuance rules.* For access devices that also constitute credit cards, the issuance rules of Regulation E apply if the only credit feature is a preexisting credit line attached to the asset account to cover overdrafts (or to maintain a specified minimum balance) or an overdraft service, as defined in § 205.17(a). Regulation Z (12 CFR part 226) rules apply if there is another type of credit feature; for example, one permitting direct extensions of credit that do not involve the asset account.

3. *Overdraft service.* The addition of an overdraft service, as that term is defined in § 205.17(a), to an accepted access device does not constitute the addition of a credit feature subject to Regulation Z. Instead, the provisions of Regulation E apply, including the liability limitations (§ 205.6) and the requirement to obtain consumer consent to the service before any fees or charges for paying an overdraft may be assessed on the account (§ 205.17).

\* \* \* \* \*

#### Section 205.17—Requirements for Overdraft Services

##### 17(a) Definition

1. *Exempt securities- and commodities-related lines of credit.* Section 205.17(a)(3) does not apply to 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.

i. *Account-holding institutions.* Section 205.17(b) applies to ATM and one-time debit card transactions made with a debit card issued by or on behalf of the account-holding institution. Section 205.17(b) does not apply to ATM and one-time debit card transactions made with a debit card issued by or through a third party unless the debit card is issued on behalf of the account-holding institution.

ii. *Coding of transactions.* 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 as a one-time or a preauthorized or recurring debit card transaction.

iii. *One-time debit card transactions.* The opt-in applies to any one-time debit card transaction, whether the card is used, for

example, at a point-of-sale, in an on-line transaction, or in a telephone transaction.

2. *No affirmative consent.* A financial institution may pay overdrafts for ATM and one-time debit card transactions even if a consumer has not affirmatively consented or opted in to the institution's overdraft service. If the institution pays such an overdraft without the consumer's affirmative consent, however, it may not impose a fee or charge for doing so. These provisions do not limit the institution's ability to debit the consumer's account for the amount overdrawn if the institution is permitted to do so under applicable law.

3. *Overdraft transactions not required to be authorized or paid.* Section 205.17 does not require a financial institution to authorize or pay an overdraft on an ATM or one-time debit card transaction even if the consumer has affirmatively consented to an institution's overdraft service for such transactions.

4. *Reasonable opportunity to provide affirmative consent.* A financial institution provides a consumer with a reasonable opportunity to provide affirmative consent when, among other things, it provides reasonable methods by which the consumer may affirmatively consent. A financial institution provides such reasonable methods, if—

i. *By mail.* The institution provides a form for the consumer to fill out and mail to affirmatively consent to the service.

ii. *By telephone.* The institution provides a readily-available telephone line that consumers may call to provide affirmative consent.

iii. *By electronic means.* The institution provides an electronic means for the consumer to affirmatively consent. For example, the institution could provide a form that can be accessed and processed at its Web site, where the consumer may click on a check box to provide consent and confirm that choice by clicking on a button that affirms the consumer's consent.

iv. *In person.* The institution provides a form for the consumer to complete and present at a branch or office to affirmatively consent to the service.

5. *Implementing opt-in at account-opening.* A financial institution may provide notice regarding the institution's overdraft service prior to or at account-opening. A financial institution may require a consumer, as a necessary step to opening an account, to choose whether or not to opt into the payment of ATM or one-time debit card transactions pursuant to the institution's overdraft service. For example, the institution could require the consumer, at account opening, to sign a signature line or check a box on a form (consistent with comment 17(b)–6) indicating whether or not the consumer affirmatively consents at account opening. If the consumer does not check any box or provide a signature, the institution must assume that the consumer does not opt in. Or, the institution could require the consumer to choose between an account that does not permit the payment of ATM or one-time debit card transactions pursuant to the institution's overdraft service and an account that permits the payment of

such overdrafts, provided that the accounts comply with § 205.17(b)(2) and § 205.17(b)(3).

6. *Affirmative consent required.* A consumer's affirmative consent, or opt-in, to a financial institution's overdraft service must be obtained separately from other consents or acknowledgements obtained by the institution, including a consent to receive disclosures electronically. An institution may obtain a consumer's affirmative consent by providing a blank signature line or check box that the consumer could sign or select to affirmatively consent, provided that the signature line or check box is used solely for purposes of evidencing the consumer's choice whether or not to opt into the overdraft service and not for other purposes. An institution does not obtain a consumer's affirmative consent by 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. Nor does an institution obtain a consumer's affirmative consent by providing a signature card that contains a pre-selected check box indicating that the consumer is requesting the service.

7. *Written confirmation.* A financial institution may comply with the requirement in § 205.17(b)(1)(iv) by providing to the consumer a copy of the consumer's completed opt-in form or by sending a letter or notice to the consumer acknowledging that the consumer has elected to opt into the institution's service. The written confirmation notice must include a statement informing the consumer of his or her right to revoke the opt-in at any time. To the extent the institution complies with the written confirmation requirement by providing a copy of the completed opt-in form, the institution may include the statement about revocation on the initial opt-in notice.

#### Paragraph 17(b)(2)—Conditioning Payment of Other Overdrafts on Consumer's Affirmative Consent

1. *Application of the same criteria.* The prohibitions on conditioning in § 205.17(b)(2) generally require an institution to apply the same criteria for deciding when to pay overdrafts for checks, ACH transactions, and other types of transactions, whether or not the consumer has affirmatively consented to the institution's overdraft service with respect to ATM and one-time debit card overdrafts. For example, if an institution's internal criteria would lead the institution to pay a check overdraft if the consumer had affirmatively consented to the institution's overdraft service for ATM and one-time debit card transactions, it must also apply the same criteria in a consistent manner in determining whether to pay the check overdraft if the consumer has not opted in.

2. *No requirement to pay overdrafts on checks, ACH transactions, or other types of transactions.* The prohibition on conditioning in § 205.17(b)(2) does not require an institution to pay overdrafts on checks, ACH transactions, or other types of transactions in all circumstances. Rather, the rule simply prohibits institutions from considering the consumer's decision not to

opt in when deciding whether to pay overdrafts for checks, ACH transactions, or other types of transactions.

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

1. *Variations in terms, conditions, or features.* A financial institution may not vary the terms, conditions, or features of an account provided to a consumer who does not affirmatively consent to the payment of ATM or one-time debit card transactions pursuant to the institution's overdraft service. This includes, but is not limited to:

- i. Interest rates paid and fees assessed;
- ii. The type of ATM or debit card provided to the consumer. For instance, an institution may not provide consumers who do not opt in a PIN-only card while providing a debit card with both PIN and signature-debit functionality to consumers who opt in;
- iii. Minimum balance requirements; or
- iv. Account features such as on-line bill payment services.

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 (see comment 17(b)(3)-2). 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(b)(4)—Exception to the Notice and Opt-In Requirement

1. *Account-by-account exception.* If a financial institution has a policy and practice of declining to authorize and pay any ATM or one-time debit card transactions with respect to one type of deposit account offered by the institution, 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, that account is not subject to § 205.17(b)(1), even if other accounts that the institution offers are subject to the rule. For example, if the institution offers three types of checking accounts, and the institution has such a policy and practice with respect to only one of the three types of accounts, that one type of account is not subject to the notice requirement. However, the other two types of accounts offered by the institution remain subject to the notice requirement.

17(c) *Timing*

1. *Early compliance.* A financial institution may provide the notice required by § 205(b)(1)(i) and obtain the consumer's affirmative consent to the financial institution's overdraft service for ATM and one-time debit card transactions prior to July 1, 2010, provided that the financial institution complies with all of the requirements of this section.

2. *Permitted fees or charges.* Fees or charges for ATM and one-time debit card overdrafts may be assessed only for overdrafts paid by the institution on or after the date the financial institution receives the consumer's affirmative consent to the institution's overdraft service.

17(d) *Content and Format*

1. *Overdraft service.* The description of the institution's overdraft service should indicate that the consumer has the right to affirmatively consent, or opt into payment of overdrafts for ATM and one-time debit card transactions. The description should also disclose the institution's policies regarding the payment of overdrafts for other transactions, including checks, ACH transactions, and automatic bill payments, provided that this content is not more prominent than the description of the consumer's right to opt into payment of overdrafts for ATM and one-time debit card transactions. As applicable, the institution also should indicate that it pays overdrafts at its discretion, and should briefly explain that if the institution does not authorize and pay an overdraft, it may decline the transaction.

2. *Maximum fee.* If the amount of a fee may vary from transaction to transaction, the financial institution may indicate that the consumer may be assessed a fee "up to" the maximum fee. The financial institution must disclose all applicable overdraft fees, including but not limited to:

- i. Per item or per transaction fees;
- ii. Daily overdraft fees;
- iii. Sustained overdraft fees, where fees are assessed when the consumer has not repaid the amount of the overdraft after some period of time (for example, if an account remains overdrawn for five or more business days); or
- iv. Negative balance fees.

17(f) *Continuing Right To Opt-In or To Revoke the Opt-In*

1. *Fees or charges for overdrafts incurred prior to revocation.* Section 205.17(f)(1) provides that a consumer may revoke his or her prior consent at any time. If a consumer does so, this provision does not require the financial institution to waive or reverse any overdraft fees assessed on the consumer's account prior to the institution's implementation of the consumer's revocation request.

17(g) *Duration of Opt-In.*

1. *Termination of overdraft service.* A financial institution may, for example, terminate the overdraft service when the consumer makes excessive use of the service.

\* \* \* \* \*

By order of the Board of Governors of the Federal Reserve System, November 10, 2009.

**Jennifer J. Johnson,**  
*Secretary of the Board.*

[FR Doc. E9-27474 Filed 11-16-09; 8:45 am]

**BILLING CODE 6210-01-P**

## FEDERAL DEPOSIT INSURANCE CORPORATION

### 12 CFR Part 327

RIN 3064-AD51

#### Prepaid Assessments

**AGENCY:** Federal Deposit Insurance Corporation (FDIC).

**ACTION:** Final rule.

**SUMMARY:** The FDIC is amending its regulations requiring insured institutions to prepay their estimated quarterly risk-based assessments for the fourth quarter of 2009, and for all of 2010, 2011, and 2012. The prepaid assessment for these periods will be collected on December 30, 2009, along with each institution's regular quarterly risk-based deposit insurance assessment for the third quarter of 2009. For purposes of estimating an institution's assessments for the fourth quarter of 2009, and for all of 2010, 2011, and 2012, and calculating the amount that an institution will prepay on December 30, 2009, the institution's assessment rate will be its total base assessment rate in effect on September 30, 2009.<sup>1</sup> On September 29, 2009, the FDIC increased annual assessment rates uniformly by 3 basis points beginning in 2011.<sup>2</sup> As a result, an institution's total base assessment rate for purposes of estimating an institution's assessment for 2011 and 2012 will be increased by an annualized 3 basis points beginning in 2011. Again for purposes of calculating the amount that an institution will prepay on December 30, 2009, an institution's third quarter 2009 assessment base will be increased quarterly at a 5 percent annual growth rate through the end of 2012. The FDIC will begin to draw down an institution's prepaid assessments on March 30, 2010, representing payment for the regular quarterly risk-based assessment for the fourth quarter of 2009.

**DATES:** *Effective Date:* November 17, 2009.

**FOR FURTHER INFORMATION CONTACT:** Robert C. Oshinsky, Senior Financial Economist, Division of Insurance and Research, (202) 898-3813; Donna Saulnier, Manager, Assessment Policy Section, Division of Finance (703) 562-

<sup>1</sup> An institution's risk-based assessment rate may change during a quarter when a new CAMELS rating is transmitted, or a new long-term debt-issuer rating is assigned. 12 CFR 327.4(f). For purposes of calculating an institution's prepaid assessment, the FDIC will use the institution's CAMELS ratings and, where applicable, long-term debt-issuer ratings, and the resulting assessment rate in effect on September 30, 2009.

<sup>2</sup> 74 FR 51063 (Oct. 2, 2009).